JAVIER MARTÍNEZ-TORRÓN*

Freedom of Expression versus Freedom of Religion in the European Court of Human Rights

1. Introduction

There is an essential connection among fundamental freedoms that is often manifested in their mutual strengthening. For example, the churches' right to their internal autonomy, or to acquire legal personality under reasonable conditions, can be argued on grounds of freedom of religion as well as of freedom of association. Likewise, the right to communicate one's religious beliefs by word or by act – e.g., by wearing religious garments in public – is an integral part of religious freedom and is reinforced by freedom of expression.

At other times, however, the relationship between fundamental liberties is not one of mutual support but of open conflict, when different individuals exercise their freedoms in contradictory ways. In recent years, clashes between freedom of expression and freedom of religion have strongly attracted the attention of public opinion. Thus, the violent reactions of some Muslim communities against the publication of satiric cartoons of Prophet Mohammed in Denmark and Norway caused some perplexity and raised deep concern in Western countries. We could mention also the heated social debate about the distinctions between history and fiction raised by the release of the movie *The Da Vinci Code* in spring 2006 (preceded by the novel's world-wide success). More recently, the *mise-en-scène* of the 2006 summer tour of the pop singer Madonna raised indignation in some Christian churches, for she appeared

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A. SAJÓ (ED.), Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World, 233-269.

'hanging' from a huge cross on the stage. In September 2006, some lines of a speech by Pope Benedict XVI in the University of Regensburg, taken out of context, were declared to be utterly insulting to Islam and were used by some Muslim leaders to fuel feelings of wrath against Christians in diverse parts of the world. These and other facts suggest that possible conflicts between freedom of expression and freedom of religion will be an issue of increasing significance in the next years, especially considering that not all religions react in the same way to expressions that are allegedly offensive to them.

Naturally, social and political problems created by tensions between these two fundamental freedoms require a balanced analysis from a juridical perspective. This is not easy for a number of reasons, including the lack of uniformity in national policies and laws, even within the European environment.[1] As in other areas connected with fundamental freedoms, the search for common patterns in Europe seems a reasonable objective. The purpose of this paper[2] is to examine whether the case law of the European Court of Human Rights (hereinafter ECtHR or the (European) Court) can provide some general principles that serve as guidelines for a gradual harmonization of European attitudes with regard to the role that law may or must play in the solution of these types of conflicts.[3]

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[1] For an overview of the law on the relations between religion and freedom of expression in European countries, *see* N. Doe (Ed.), The Portrayal of Religion in Europe: The Media and the Arts (2004).

[2] Some of the ideas mentioned in this paper, and more precisely in Section 2.1, are inspired by J. Martínez-Torrón, *Limitations on Religious Freedom in the Case Law of the European Court of Human Rights*, 19 Emory Int'l L. Rev. 625 (2005).

[3] There is an extensive bibliography on freedom of expression and also on freedom of religion, but it is not common to find a comparative analysis of these two freedoms. Among the recent legal literature on freedom of religion in international law, *see* T. Lindholm, W. C. Durham & B. G. Tahzib-Lie (Eds.), Facilitating Freedom of Religion or Belief: A Deskbook (2004). *See also* L. M. Hammer, The International Human Right to Freedom of Conscience (2001); N. Lerner, Religious Beliefs and International Human Rights (2000); and B. G. Tahzib, Freedom of Religion or Belief: Ensuring Effective International Legal Protection (1995). With special reference to the European Convention on Human Rights, *see* C. Evans, Freedom of Religion under the European Convention on Human Rights (2001); and M. D. Evans, Religious Liberty and International Law in Europe (1997). On freedom of expression and its limits, *see generally* I. Cram, Contested Words: Legal Restrictions on Freedom of Speech in Liberal Democracies (2006); E. Barendt, Freedom of Speech (2005); D. Kretzmer & F. Kershman Hazan (Eds.), Freedom of Speech and Incitement Against Democracy (2000); R. Cohen-Almagor, Speech, Media and Ethics: The Limits of Free Expression, Critical Studies on Freedom of Expression, Freedom of the Press and the Public's Right to Know (2000); I. Loveland, Importing the First Amendment: Freedom of Expression in American, English and European Law (1998). Among the Spanish legal literature on freedom of expression, *see* A. Pizzorusso *et al.* (Eds.), Libertad de manifestación de pensamiento y jurisprudencia constitucional [Freedom of manifestation of thought and constitutional jurisprudence] (2005); A. Catalá, Libertad de expresión e información. La jurisprudencia del Tribunal Europeo de Derechos Humanos y su recepción por el Tribunal Constitucional [Freedom of expression and information. The case law of the

2. The Main Cases Decided by the European Court

It is well known that the European Convention on Human Rights (hereinafter ECHR) protects, in two consecutive articles, freedom of religion (Article 9)[4] and freedom of expression (Article 10).[5] In the last thirteen years, the ECtHR has decided some significant cases on conflicts involving freedom

ECtHR and its reception by the Spanish Constitutional Court] (2001); T. Freixes, Libertades informativas e integración europea [Informative freedoms and European integration] (1996); S. Ripol, Las libertades de información y de comunicación en Europa [Freedom of information and communication in Europe] (1995); J. Bonet, El derecho a la información en el Convenio Europeo de Derechos Humanos [Right to information in the ECHR] (1994). Among the Spanish literature on the European dimension of freedom of religion, *see* J. Martínez-Torrón, *Libertad de expresión y libertad de religión. Comentarios en torno a algunas recientes sentencias del Tribunal Europeo de Derechos Humanos* [Freedom of expression and freedom of religion. Comments on some recent ECtHR decisions], 11 Revista General de Derecho Canónico y Derecho Eclesiástico del Estado 1 (2006); I. Martín Sánchez, La recepción por el Tribunal Constitucional español de la jurisprudencia sobre el CEDH respecto a las libertades de conciencia, religiosa y de enseñanza [The reception of the case law on ECHR by the Spanish Constitutional Court with regard to freedom of conscience, religion and teaching] (2002); J. Martínez-Torrón, *La protección de la libertad religiosa en el sistema del Consejo de Europa* [The protection of religious freedom in the system of the Council of Europe], *in* A. De La Hera & R. Mª Martínez De Codes (Eds.), Proyección nacional e internacional de la Ley Orgánica de Libertad Religiosa 89 (2001). *See also* the papers on Arts. 9 & 10 ECHR, respectively, by A. Torres and R. Bustos *in* J. García Roca & P. Santolaya (Eds.), La Europa de los Derechos. El Convenio Europeo de Derechos Humanos [The Europe of rights. The European Convention on Human Rights] 509-527, 529-563 (2005).

[4] Article 9 – Freedom of thought, conscience and religion.

> 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 for the protection of the rights and freedoms of others.

[5] Article 10 – Freedom of expression.

> 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 rights of others, for preventing the disclosure

of expression and religious issues. The two first cases – *Otto-Preminger-Institut*[6] and *Wingrove*[7] – established some general principles and held, in those particular circumstances, that the protection of the religious feelings of citizens prevailed over some manifestations of freedom of expression that were considered gratuitously offensive to Christian doctrine. More recently, although the Court has reaffirmed those general principles, the outcome of the decisions seems to be more favorable to the protection of freedom of expression. However, it must be taken into account that in some of the recent cases – contrary to what occurred in *Otto-Preminger-Institut* and *Wingrove* – the expressions under scrutiny were not offensive to religious feelings or ideas themselves, but rather to certain persons or institutions.

2.1. *Otto-Preminger-Institut* and *Wingrove*: Audiovisual Works and National Laws on Blasphemy

The *Otto-Preminger-Institut* and *Wingrove* cases involved conflicts between audiovisual works and the national laws on blasphemy in Austria and the United Kingdom, respectively. The facts in both cases offer numerous similarities.

In *Otto-Preminger-Institut*, the work in question was a satiric film entitled *A Council in Heaven* (*Das Liebeskonzil*),[8] based upon a 19th century play, in which God was presented as a senile impotent man prostrated before the devil and Jesus Christ as a mentally retarded person; an erotic relationship between the devil and the Virgin – depicted as a wanton lady – was also insinuated. The film was to be shown in the cinema of the applicant association, in Innsbruck, which was accessible to members of the public after paying a fee; persons under seventeen years were not to be admitted. Nevertheless, after wide advertising of the film, and following a request of the local authorities of the Catholic Church, the public prosecutor instituted criminal proceedings against the manager of the association. Although these criminal proceedings were discontinued, the Austrian courts ordered first the seizure and later the forfeiture of the film, in application of the Austrian law, which punished the act of disparaging or insulting religious persons, objects of veneration, or doctrines.[9]

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of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[6] Otto-Preminger-Institut *v.* Austria, Judgment of 20 September 1994, 1994 ECHR 26.

[7] Wingrove *v*. United Kingdom, Judgment of 25 November 1996, 1996 ECHR 60.

[8] The German title *Das Liebeskonzil* means literally 'The Council of Love,' but in the English version of the ECtHR decision it is translated as 'A Council in Heaven;' in the French text of the decision, more accurately, it is translated as 'Le Concile d'amour' (*cf.* Otto-Preminger-Institut case, *supra* note 6, at Para. 10).

[9] Sec. 118 of the Penal Code reads as follows:

In *Wingrove*, the applicant was the author of a video work of eighteen minutes' duration containing a peculiar interpretation of St. Teresa of Avila's ecstatic visions, in a pornographic setting with homosexual connotations. With an ideological background – if any – clearly weaker than the film in *Otto-Preminger-Institut*, the video did not contain any dialogue, only music (rock) and moving images, which the author himself had described as pornographic in a magazine interview. The author submitted the video to the British Board of Film Classification, which refused to grant the requested classification certificate, with the effect that the video could not be commercially distributed under British law. The reason provided by the Board was that the video violated the existing law of blasphemy. The appellate body responsible for video distribution permits upheld its position. In England, blasphemy is a common law offence that includes language that is contemptuous or ludicrous with regard to Christianity or to the Church of England.[10]

Another similarity between the two cases refers to the applicability of laws on blasphemy. Both Austria and the United Kingdom are countries with an ancient and consistent Christian tradition, with the consequence that their respective laws of blasphemy are applied, in practice, to offences against Christianity but not against other religions. Certainly, it would be surprising to see the Austrian law applied to punish an offence against a non-Christian religion; English courts have even recognized explicitly that inequality.[11] However, the ECtHR, though admitting that fact as an "anomaly

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

The Media Act, in turn, provides that forfeiture can be ordered in addition to any normal sanction under the Penal Code and even when criminal proceedings against a particular person are not possible (*see* Otto-Preminger-Institut case, *supra* note 6, at Paras. 25-28).

[10] In the Wingrove case (*supra* note 7, at Para. 27), the ECtHR stated, quoting the English case of Whitehouse *v.* Gay News Ltd and Lemon [1979] AC 617, HL, at 665, that the law of blasphemy in England was correctly formulated as follows:

> Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible, or the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which the doctrines are advocated and not to the substance of the doctrines themselves.

[11] *See* Wingrove case, *id.*, at Paras. 28-29. In reality, in the UK as well as in Austria, these laws are rarely applied. The Court indicated that in the UK only two prosecutions concerning blasphemy have been brought in the last seventy years. *See id.*, at Para. 57.

[…] in a multidenominational society," declined "to rule in abstracto as to the compatibility of domestic law with the Convention."[12]

Finally, the approach of the ECtHR was also analogous in those two cases. The existence of an interference with the applicants' right to freedom of expression did not raise any doubt, and the Court analyzed the interferences from the same conceptual perspective, stating the following general principles.

Freedom of expression – the Court affirmed,

> […] 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 shock, offend or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.'[13]

Nevertheless, the freedom guaranteed by Article 10 ECHR is not unlimited. Religious beliefs of others are among those limits, and national laws may consider the necessity of preventing or punishing gratuitous attacks on those beliefs. In the words of the Court:

> [A]s is borne out by the wording itself of Article 10 Para. 2 […], whoever exercises the rights and freedoms enshrined in the first paragraph of that Article (Art. 10-1) undertakes 'duties and responsibilities.' Amongst them – in the context of religious opinions and beliefs – may legitimately be included 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. This being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration.[14]

This does not mean, of course, that members of a religion can expect to be free from criticism or hostility, but the state is responsible for ensuring that the rights guaranteed by Article 9 ECHR can be peacefully exercised and that the spirit of tolerance, which is characteristic of a democratic society, is not maliciously violated:

> 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, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the

[12] *Id*., at Para. 50.

[13] Otto-Preminger-Institut case, *supra* note 6, at Para. 49, with explicit reference to Handyside *v.* United Kingdom, Judgment of 7 December 1976, 1976 ECHR 5, at Para. 49, where this doctrine was first enunciated.

[14] Otto-Preminger-Institut case, *id.*, at Para. 49. In similar terms, *see* Wingrove case, *supra* note 7, at Para. 52.

> responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 […] to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them. […]
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> *The respect for the religious feelings of believers as guaranteed in Article 9* [...] *can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society.*[15]

In brief, the Court held that the protection of the religious freedom of others was a legitimate aim that, under Article 10(2) ECHR, justified a limitation on the freedom of expression, provided that the limitative measure could be deemed "necessary in a democratic society."

Two interesting issues are included in this assertion of the Court. One is to what extent Article 9 ECHR guarantees the protection of religious feelings of citizens. Three dissenting judges in *Otto-Preminger-Institut* overtly denied that this protection exists as such, following the letter of Article 9.[16] In my opinion, however, it cannot be denied that some manifestations of freedom of expression, by reason not so much of their substance but of their manner, may amount to a harassment of people who exercise their freedom of religion or belief in a certain way. On the other hand, manifestations of freedom of expression of the sort that were at issue in *Wingrove* and *Otto-Preminger-Institut* certainly do not contribute to create the atmosphere of tolerance and respect that facilitates the actual exercise of freedoms.

The second issue is how to apply to these types of cases the notion of "necessary in a democratic society," which is an indispensable element of legitimate limitations on freedom of expression. To analyze this issue, the Court had to assess the actual social impact of the anti-religious form of expression and, consequently, to determine whether the remedies provided by criminal law were proportionate to the legitimate aim pursued. On those two points, the ECtHR decided to recognize a wide margin of appreciation to the Austrian and British national authorities.[17]

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[15] Otto-Preminger-Institut case, *id.*, at Para. 47 [author's emphasis].

[16] *See* the joint dissenting opinion of Judges Palm, Pekkanen, and Makarczyk, at Para. 6; *see also*, in this regard, M. D. Evans, *supra* note 3, at 335-336.

[17] The doctrine of the margin of appreciation was adopted by the ECtHR to reconcile the roles of the Court and of national authorities in the interpretation of the "necessity" of restrictions on fundamental rights within the context of the ECHR. In brief, that doctrine maintains that, when applying the limitations on individual freedoms permitted by different articles of the ECHR (especially Arts. 8-11), the national authorities of every state must be recognized a reasonable margin of appreciation. The reason is that national authorities, being closer to the respective societies, are in a better position to evaluate the necessity of the restrictive measures adopted and can better appraise the needs of the public interest and interpret the relevant domestic law. That power of appreciation, nevertheless, is not unlimited but goes hand in hand with a

First, the ECtHR affirmed that, as in the case of public morals,[18] it was "not possible to discern throughout Europe a uniform conception of the significance of religion in society," and, therefore, it was impossible "to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others."[19] In consequence, a wider margin of appreciation had to be left to the national authorities, which had a closer contact with that aspect of their societies, subject to such rapid changes.[20] In both cases, the Court could find nothing disproportionate in the restrictive measures adopted by the Austrian and British authorities within their respective legal frameworks. In particular, the Court rejected the applicants' arguments aimed at demonstrating that their respective audiovisual works would have had a limited distribution, among people of legal age who were supposed to be specifically interested in watching them, and accepted the governments' submissions with regard to the actual or potential public impact of the works in question.[21]

'European control' of national authorities' decisions, which are subject to the European Court's supervision. If national authorities are in a better condition to assess the domestic circumstances – factual and legal, the Court is better qualified to interpret the spirit of the Convention and its consequences with respect to the protection of citizens' freedom. *See*, for further details and references, Martínez-Torrón, *supra* note 2, at 599-602.

[18] With respect to the general notion of public morals, the ECtHR has emphasized the changing and local character of that concept. As there is no "uniform European conception of morals," the state's margin of appreciation tends to be broader in this field (*see* Handyside case, *supra* note 13, at Para. 48). In particular, national legislators may enact laws aimed at the protection of "the moral ethos or the moral standards of a society as a whole," and may also adopt measures to safeguard certain social groups, as minors, that may be more "vulnerable," or "in need of special protection for reasons such as lack of maturity, mental disability or state of dependence." (Dudgeon *v.* United Kingdom, Judgment of 22 October 1981, 1981 ECHR 5, at Para. 47).

[19] Otto-Preminger-Institut case, *supra* note 6, at Para. 50.

[20] Wingrove case, *supra* note 7, at Para. 58:

> [A] wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of 'the protection of the rights of others' in relation to attacks on their religious convictions. […] By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the 'necessity' of a 'restriction' intended to protect from such material those whose deepest feelings and convictions would be seriously offended.

[21] In Otto-Preminger-Institut case, *supra* note 6, the film had been widely advertised in an area, Tyrol, with a large Catholic population, with the effect of provoking a violent public discussion

Second, for analogous reasons, the ECtHR declared that an equally wide margin of appreciation had to be recognized with respect to the maintenance and application of the national laws that considered blasphemy a criminal offence.[22] The *Wingrove* decision, in particular, emphasized the increasing tendency, in many European countries, to abolish or to question those laws, as reflected in the fact that they are very rarely applied. It also suggested the Court's lack of confidence in the actual usefulness of criminal remedies to solve those types of conflicts. However, in the absence of a common consensus of European countries, the Court was not prepared to declare that laws on blasphemy were as such incompatible with the Convention.[23]

2.2. *İ.A. v. Turkey*: The Court Sustains a Criminal Sentence for Blasphemy Against Islam[24]

A decade later, the reasoning and principles established in *Otto-Preminger-Institut* and in *Wingrove* were utilized by the ECtHR to justify the conviction of blasphemy imposed by the Turkish courts on the director of a publishing house that had published a book containing offensive affirmations about Islam and Prophet Muhammad. The decision was taken by a very narrow margin – four votes to three – and contrasts with the solutions subsequently adopted by the European Court in similar cases, as we will see.[25]

The applicant was the proprietor and managing director of a publishing house that published, in 1993, a novel entitled The Forbidden Phrases, which conveyed – in a novelistic style – the author's views on some philosophical

in the region (*see* Para. 54). In the Wingrove case, *id.*, a video, once it is in the market, may easily escape from the authorities' control by being copied, lent, rented, sold, or viewed in different homes (*see* Para. 63).

[22] *See* Otto-Preminger-Institut case, *id*., at Para. 49.

[23] Wingrove case, *supra* note 7, at Para. 57:

> [B]lasphemy legislation is still in force in various European countries. It is true that the application of these laws has become increasingly rare and that several States have recently repealed them altogether. In the United Kingdom only two prosecutions concerning blasphemy have been brought in the last seventy years […]. Strong arguments have been advanced in favour of the abolition of blasphemy laws, for example, that such laws may discriminate against different faiths or denominations […] or that legal mechanisms are inadequate to deal with matters of faith or individual belief […]. However, the fact remains that there is as yet not sufficient common ground in the legal and social orders of the Member States of the Council of Europe to conclude that a system whereby a State can impose restrictions on the propagation of material on the basis that it is blasphemous is, in itself, unnecessary in a democratic society and thus incompatible with the Convention.

[24] İ.A. *v.* Turkey, Judgment of 13 September 2005, 2005 ECHR 590.

[25] *See infra* Secs. 2.3.-2.5. of this paper.

and theological issues. Two thousand copies of the book were printed. Five months later, the Istanbul public prosecutor initiated criminal proceedings against the applicant, charging him with the crime of "blasphemy against God, the Religion, the Prophet and the Holy Book."[26] The indictment was based on an expert report on the book, written by the dean of the Faculty of Theology of Marmara University upon the public prosecutor's request.[27] This report harshly criticized the content of the book and the anti-religious view of life that it represented:

> This way of thinking, based on materialism and positivism, leads to atheism in that it renounces faith and divine revelation [...]. Although these passages may be regarded as a polemic in support of the author's philosophical views, it may be observed that they also contain statements that imply a certain element of humiliation, scorn and discredit *vis-à-vis* religion, the Prophet and belief in God according to Islam […]. In the author's view, religious beliefs and opinions are mere obscurities, and ideas based on nature and reason are described as clear-sighted. The author describes religious faith as a 'desert mirage,' a 'primitive idea' and 'desert ecstasy', and religious practices as 'the primitivism of desert life' […].[28]

Among the passages of the book that were cited by the report and considered incriminating by the Turkish courts, we can quote the following:

> […] just think about it, […] all beliefs and all religions are essentially no more than performances. […] The imaginary god, to whom people have become symbolically attached, has never appeared on stage. He has always been made to speak through the curtain. The people have been taken over by pathological imaginary projections. They have been brainwashed by fanciful stories […].
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> […] this divests the imams of all thought and capacity to think and reduces them to the state of a pile of grass […] [regarding the story of the Prophet Abraham's sacrifice] it is clear that we are being duped here […] is God a sadist? […] so the God of Abraham is just as murderous as the God of Muhammad […].

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[26] İ.A. case, *supra* note 24, at Para. 6. At the time, Art. 175 of the Turkish Criminal Code, at Paras. 3-4, provided:

> 3. It shall be an offence punishable by six months' to one year's imprisonment and a heavy fine of 5,000 to 25,000 Turkish liras to blaspheme against God, one of the religions, one of the prophets, one of the sects or one of the holy books […] or to vilify or insult another on account of his religious beliefs or fulfilment of religious duties […].
> 4. The penalty for the offence set out in the third paragraph of this Article shall be doubled where it has been committed by means of a publication (quoted in İ.A. case, *id.*, at Para. 17).

[27] The applicant contested the first report and requested a second opinion. A commission of three professors – the ECtHR does not specify their qualifications – wrote a second report that was also disputed by the applicant, arguing that it was a mere copy of the first report. *Id.*, at Paras. 9-11.

[28] *Id.*, at Para. 7.

> Look at the triangle of fear, inequality and inconsistency in the Koran; it reminds me of an earthworm. God says that all the words are those of his messenger. Some of these words, moreover, were inspired in a surge of exultation, in Aisha's arms. […] God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual relations with a dead person or a live animal.[29]

In 1996, the applicant was convicted of blasphemy and sentenced to two years' imprisonment and a fine. The same court later commuted the sentence to a fine of 3,291,000 Turkish liras (equivalent, at the time, to 16 USD). The Court of Cassation confirmed the sentence in 1997.

The European Court cited,[30] as the basis for its decision, the general principles that inspired the *Otto-Preminger-Institut* and *Wingrove* decisions, discussed above.[31] Then, in a surprisingly short evaluation of the facts for such an important issue – approximately 20 lines of text – the Court declared that the book was "an abusive attack on the Prophet of Islam"[32] and justified the criminal conviction of the applicant. The Court concluded that the Turkish authorities had not overstepped their margin of appreciation when they imposed a limitation on the applicant's freedom of expression. The criminal conviction of the applicant "may reasonably be held to have met a 'pressing social need,'"[33] especially taking into account the proportionality of the limitative measure – the courts did not seize the book and they imposed only a modest monetary penalty on the applicant.[34] Therefore, there had been no violation of Article 10 ECHR, according to the ECtHR (or, more precisely, according to four of the seven judges that composed the deciding Chamber).

The most striking aspect of the *İ.A.* decision is that there was virtually no analysis at all of the factual evidence submitted to the Court, which apparently was satisfied with a brief statement on the "abusive" character of the offensive opinions contained in the book.[35] This was the beginning of a tendency in the

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[29] *Id.*, at Paras. 8 and 13.
[30] *Id.*, at Paras. 23-28.
[31] *See supra* Sec. 2.1. of this paper.
[32] İ.A. case, *supra* note 24, at Para. 29.
[33] *Id.*, at Para. 30.
[34] *Id.*, at Para. 32.
[35] These were the exact words of the Court, *id*., at Para. 29:

> […] the present case concerns not only comments that offend or shock, or a 'provocative' opinion, but also an abusive attack on the Prophet of Islam. Notwithstanding the fact that there is a certain tolerance of criticism of religious doctrine within Turkish society, which is deeply attached to the principle of secularity, believers may legitimately feel themselves to be the object of unwarranted and offensive attacks through the following passages: 'Some of these words were, moreover, inspired in a surge of exultation, in Aisha's arms. [...] God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual intercourse with a dead person or a live animal.'

ECtHR to approach this sort of case following the same rigid scheme. First, a routine reiteration – a mere transcription – of the general principles applicable to the interpretation of Article 10 ECHR and, in particular, to conflicts between freedom of expression and freedom of religion. And second, a brief, vague, and sometimes even careless evaluation of the factual evidence to which the principles must be applied.

This was the reason for the joint dissenting opinion of three of the seven judges that took part in the decision,[36] who began by reiterating the *Handyside* doctrine – so often reproduced in the European Court's case law – on the scope of protection of Article 10 ECHR: it extends also to ideas "that shock, offend or disturb the State or any sector of the population."[37] The judges added: "We consider that these words should not become an incantatory or ritual phrase but should be taken seriously and should inspire the solutions reached by our Court." The dissenting opinion mentioned some aspects of the facts that had been neglected in the Court's assessment, such as: the limited impact of the book on Turkish society; the right to defend atheistic ideas even in a social context dominated by religion; or the fact that the public prosecution had instituted criminal proceedings against the applicant on its own motion and not as the result of any social demand.[38] The opinion also insisted on the "chilling effect" that a criminal sentence – even one imposing a modest monetary penalty – would have on authors and publishers, who may be discouraged, to the detriment of freedom of expression, from expressing ideas "that are not strictly conformist or 'politically (or religiously) correct.'"[39]

Finally, the three dissenting judges referred to the decisions that stated the principles that had been utilized by the Court: *Otto-Preminger-Institut* and *Wingrove*. After distinguishing these cases from the circumstances present in *İ.A.*, they recalled that the two decisions raised much controversy at the time and that perhaps this case law should be "revisited."[40] This latter suggestion is open to debate, but it is undeniable that the *Otto-Preminger-Institut* and *Wingrove* decisions applied their general principles after a detailed analysis of the facts that is totally lacking in *İ.A.*

Indeed, the judicial doctrine elaborated in those two cases has not been revised by the Court. On the contrary, their principles have been extensively quoted and used in several decisions after *İ.A.*, which will be discussed in the next pages. However, they have permitted the ECtHR to reach the opposite conclusion: i.e., to reverse sentences of defamation pronounced by national courts in cases in which certain public expressions were undoubtedly offensive to religion or to some religions. This moves us to consider whether the problem

[36] Judges Costa, Cabral Barretto, and Jungwiert.
[37] *See supra* note 13 and accompanying text.
[38] *See* İ.A case, *supra* note 24, dissenting opinion at Paras. 2, 3 and 5.
[39] *Id.*, dissenting opinion, at Para. 6.
[40] *See id.*, dissenting opinion, at Para. 8.

lies in the principles set down in *Otto-Preminger-Institut* and *Wingrove* or rather in their careless application to factual evidence not properly analyzed, as occurred in *İ.A.*

2.3. *Paturel*: Accusations Against a Catholic Anti-Sect Association[41]

The applicant, Christian Paturel, was the author of a book entitled Sects, Religions and Public Freedoms, in which he strongly criticized a French anti-sect association (the ADFI). This association, in the author's view, was of Catholic orientation and executed the Vatican's policy aimed at harming minority religious movements, which – according to Mr. Paturel – were considered by the Catholic Church dangerous for its position in France. For the author, the fact that the ADFI counted among its members a number of "free thinkers, rationalist atheists and sincere secularists" did not modify substantially the accuracy of his judgment – it was only an expression of the "extreme ability of the Vatican" to orchestrate the behavior of diverse people for the benefit of its own interests.

Mr. Paturel and the publishing company were convicted of defamation; the courts imposed a monetary penalty[42] and ordered the publication of the decision – at the defendants' expense – in two newspapers; the distribution of the book, however, was not prohibited.[43] The French courts took into account in particular five passages of the book. In those passages the author accused the ADFI – and the Catholic Church – of promoting an ideology of exclusion based on hatred, religious discrimination, and the intoxication and manipulation of fools. He referred to the ADFI as having a "Machiavellian inspiration" and compared it to the Inquisition. He also accused the French anti-sect association of utilizing public funds to foster religious hatred, violence, and intolerance.[44] The French courts emphasized that Mr. Paturel's book lacked the characteristics that made defamatory imputations excusable: namely, *bona fides* or good faith, proved by the pursuit of a legitimate aim and absence of personal animosity; in addition, the offensive affirmations had to be based upon rigorous research and use a prudent expression. On the contrary, the French courts held that Mr. Paturel did not provide any "serious

[41] Paturel *v.* France, Judgment of 22 December 2005, 2005 ECHR 913. When this paper was sent to print, only the French version was available.

[42] The penalty was initially 20,000 francs for the author and 10,000 francs for the publishing company. The court of appeals ordered Mr. Paturel to also pay the legal expenses of the plaintiff and consequently raised the total sum to be paid by him to almost 46,000 francs (approximately 7,000 Euros). *See id.*, at Paras. 11 and 14.

[43] *Id*., at Para. 48.

[44] For a detailed account of the incriminating passages of the book, *see id.*, at Para. 10.

or objective element" to corroborate his accusations and that these were expressed in "particularly violent and outrageous terms."[45]

The ECtHR held that the French authorities had violated the applicant's freedom of expression. The European Court began its analysis by reiterating that its role does not consist in replacing the judgments of internal jurisdictions when they use their margin of appreciation[46] to interpret and apply the limitations established by Article 10(2) ECHR. Its function is "to control whether the reasons adduced by the national authorities to justify the interference seem 'relevant and sufficient' and whether the measure under scrutiny is 'proportionate to the legitimate aims pursued.'"[47] In other words, it is the role of the ECtHR to monitor whether national authorities have exceeded the reasonable limits of their margin of appreciation in a given case, taking into account that the guarantee of freedom of expression must be counterbalanced by the protection of other rights included in the European Convention, such as the right to reputation, which is an integral part of the right to privacy enshrined by Article 8 ECHR.[48]

From this starting point, the ECtHR used its previous case law to analyze the arguments proposed by the French courts to justify the penalties imposed on Mr. Paturel.

First, the Court cited the doctrine enunciated in the *Lingens* case, in 1986, to stress that it is necessary to distinguish between expressions that contain value judgments and those that are statements of fact.[49] The truth or falsehood of the former expressions are, by their very nature, less subject to objective confirmation; it is impossible to prove their exactitude. Therefore, to impose upon them a strict burden of proof would infringe the freedom of opinion, which is an essential element of the freedom of expression guaranteed by Article 10 ECHR.[50] This does not mean that freedom of opinion protects any offensive value judgment even when it is totally unconnected to real facts. On the contrary, "even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists

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[45] *Id.*, at Paras. 12-13.

[46] *See supra* note 17.

[47] Paturel case, *supra* note 41, at Para. 29 [author's translation from the French], with specific reference to Chauvy et al. *v.* France, Judgment of 29 June 2004, 2004 ECHR 295, at Para. 70. *See* the original enunciation of this doctrine in Handyside case, *supra* note 13, at Paras. 48-50; Sunday Times *v.* United Kingdom, Judgment of 26 April 1979, 1979 ECHR 1, at Para. 62.

[48] *See* Paturel case, *id.*, at Paras. 29-30, with specific reference to Chauvy case, *id.*, at Para. 70 *in fine*.

[49] *See* Lingens *v.* Austria, Judgment of 8 July 1986, 1986 ECHR 7, at Para. 46, where this distinction was enunciated by the ECtHR for the first time.

[50] *See* Paturel case, *supra* note 41, at Para. 35, with explicit reference to Jerusalem *v.* Austria, Judgment of 27 February 2001, 2001 ECHR 122, at Para. 42.

a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive."[51]

Applying these principles to the case at issue, the ECtHR concluded that the incriminating passages of the book were value judgments rather than statements of fact,[52] and that they conveyed opinions on a subject of high general interest, as the new religious and philosophical movements – also known as 'sects' – were and are the center of a heated public debate in many European countries. On the other hand, the Court did not consider that Mr. Paturel's judgments were totally lacking of any factual basis. Consequently, they should be protected by Article 10 of the European Convention.

Certainly – the ECtHR admitted – the book contained some hostile affirmations. However, as was long established by the Court's case law, "freedom of expression is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, offend or disturb."[53] In addition, the Court reiterated that exceptions to freedom of expression, according to Article 10(2) ECHR, call for a narrow interpretation, especially when the incriminated opinions refer to subjects of general interest and to individuals or associations that openly operate in public life:

> Associations lay themselves open to scrutiny when they enter the arena of public debate and, since they are active in the public domain, they ought to show a higher degree of tolerance to criticism when opponents consider their aims as well as to the means employed in that debate.[54]

Finally, the ECtHR held that, in order to determine the proportionality of the interferences with fundamental rights, it was necessary to take into consideration the nature and the severity of the penalties imposed. In this case, even though the book had not been seized nor its distribution prohibited, the economic sanctions against Mr. Paturel were significant enough to move the Court to affirm, unanimously, that Article 10 ECHR had been violated.[55]

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[51] Paturel case, *id.*, at Para. 36, with explicit reference to De Haes and Gijsels *v.* Belgium, Judgment of 24 February 1997, 1997 ECHR 7, at Para. 47 ; Oberschlick *v.* Austria (no. 2), Judgment of 1 July 1997, 1997 ECHR 38, at Para. 33, and Jerusalem case, *id*., at Para. 43.

[52] This affirmation of the Court was contested by the separate concurring opinion of Judges Costa and Spielman, who considered that some of the incriminating passages of Mr. Paturel's book contained not only value judgments but actual and serious accusations directed toward the ADFI and not supported by clear evidence. Costa and Spielman also stressed that freedom of expression was conceived to guarantee the freedom to spread information, but not just the freedom to offend other people.

[53] Paturel case, *supra* note 41, at Para. 43, with explicit reference to the Handyside case, *supra* note 13, and other subsequent cases.

[54] Paturel case, *id.*, at Para. 46, with explicit reference to Jerusalem case, *supra* note 50, at Paras. 38-39. *See also* some years before, Jersild *v.* Denmark, Judgment of 23 September 1994, 1994 ECHR 33, at Para. 35.

[55] *See* Paturel case, *id.*, at Paras. 47-51, with explicit reference to Sürek *v.* Turkey (no. 1),

2.4. *Giniewski*: A Pontifical Encyclical Censured as Anti-Semitic[56]

Like *Paturel*, the *Giniewski* case was decided by the European Court, unanimously, in favor of the applicant and was related to a public expression against Catholicism that had been considered defamatory by the French courts. This time, however, the offensive statements were directed not against an association of Catholic inspiration, but against some parts of the Catholic doctrine itself, as explained and developed in some writings by the supreme authority of the Catholic Church. The facts were, summarily, the following.

The applicant, Mr. Paul Giniewski, was an Austrian citizen living in France. He described himself as a journalist, sociologist, and historian who sought in his work to promote a rapprochement between Jews and Christians. In 1994 he published a short article in a daily newspaper – *Le Quotidien de Paris* – criticizing the Encyclical *Veritatis Splendor*, written by Pope John Paul II. According to the applicant, the Catholic doctrine on the 'fulfillment' of the Old Testament by the New Testament led to anti-Semitism and paved the way to the extermination that took place in the Nazi concentration camps. The words of the press article suggested a parallelism between the fulfillment (*accomplissement*) of the Old Testament and the accomplishment (*accomplissement*) of the Holocaust. A Catholic association (the AGRIF) initiated criminal proceedings against the applicant, accusing him of racially defamatory statements against the Christian community. The incriminating passages of the article were the following:

> The Catholic Church sets itself up as the sole keeper of divine truth […]. It proclaims clearly the fulfillment of the Old Covenant in the New, and the superiority of the latter […].
>
> […] Many Christians have acknowledged that anti-Judaism and the doctrine of the 'fulfillment' [in French, '*l'accomplissement*'] of the Old Covenant in

Judgment of 8 July 1999, 1999 ECHR 51, at Para. 64, and Chauvy case, *supra* note 47, at Para. 78.

[56] Giniewski *v.* France, Judgment of 31 January 2006, 2006 ECHR 82. A few days before this decision, the ECtHR decided another case in which religion and freedom of expression were connected: Albert-Engelmann-Gesellschaft mbH *v.* Austria, Judgment of 19 January 2006, 2006 ECHR 54. I will not comment on it in detail here, for it did not involve properly a conflict between freedom of expression and freedom of religion, but rather a conflict between freedom of expression and the protection of the reputation of a high-ranking church official who had been strongly criticized by other Catholics in Catholic media. More precisely, the case was related to a letter to the editor – signed by a nonexistent association – published in a Catholic magazine, which contained offensive statements against the Vicar General of the Catholic diocese of Salzburg. The letter accused him of being unfaithful to the Pope and to the Church, with respect to some events that occurred eight years earlier during the process for the appointment of a new Archbishop in Salzburg. The publishing company was convicted of defamation. The ECtHR decided in favor of the applicant – by five votes to two – and did not add anything substantial to the principles that are discussed in this paper.

> the New lead to anti-Semitism and prepared the ground in which the idea and implementation [in French, '*l'accomplissement*'] of Auschwitz took seed.[57]

The applicant was initially convicted, in 1995, of the crime of public defamation against a group of people – namely, the Christian community – by reason of their membership in a religion. The lawsuit subsequently followed a long and complicated judicial itinerary that ended in June 2000 with the acquittal of the criminal charges while the economic penalties derived from the civil action were maintained.

The reasoning of the European Court was simpler than in *Paturel*. A large part of it consisted merely in reiterating, with extensive literal quotations, some general principles established in previous cases, especially *Handyside*, *Otto-Preminger-Institut*, and *Wingrove*.[58] The Court emphasized three fundamental principles:

1) Article 10 ECHR also protects ideas that may be offensive to others.[59]
2) Nevertheless, the exercise of freedom of expression entails some responsibilities, which include the obligation to avoid expressions that are gratuitously offensive to the rights of others.[60]
3) As there is no uniform conception in Europe on the issue of the limitations that may be imposed on freedom of expression on account of the protection of freedom of religion, the margin of appreciation of national authorities in this area tends to be broader, although the ECtHR must ultimately decide whether restrictions on freedom of expression are necessary and proportionate.[61]

After noting that the legal suit against the applicant was brought by a private Catholic association and not by the Catholic hierarchy,[62] the core of the ECtHR's decision was its discrepancy with the French courts with respect to the appreciation of the applicant's offence to Christianity. Where the French courts had seen an accusation of anti-Semitism, and of being partly responsible for the Nazis massacres, directed at Catholics, the European Court could see nothing but the exposition of a thesis on the causes of the persecution of Jews in Europe. According to the Court,

> […] the applicant sought primarily to develop an argument about the scope of a specific doctrine and its possible links with the origins of the Holocaust. In so

[57] The complete text of the article, entitled *The obscurity of error*, is transcribed in the ECtHR's decision. *See* Giniewski case, *id.*, at Para. 23.
[58] *Id.*, at Paras. 43-44.
[59] *See supra* note 13 and accompanying text.
[60] *See supra* note 14 and accompanying text.
[61] *See supra* notes 18-20 and accompanying text.
[62] *See* Giniewski case, *supra* note 56, at Para. 48.

> doing he had made a contribution, which by definition was open to discussion, to a wide-ranging and ongoing debate […], without sparking off any controversy that was gratuitous or detached from the reality of contemporary thought.[63]

The European Court held that the author's text did not contain a gratuitous attack against religious beliefs as such, but rather a reflection on a significant topic of our recent history.[64] The search for the truth is an integral part of freedom of expression;[65] therefore, when an author communicates his opinions on issues of general interest, limitations on freedom of expression must be construed narrowly, for otherwise the threat of a legal sanction would have a deterrent effect and would inhibit the press, or the authors, from freely disseminating their ideas and intervening in public debates on important issues.[66] This principle is applicable also to ideas that may offend or trouble the religious beliefs of others, as far as they do not deny well-established historical facts.[67]

2.5. *Aydin Tatlav*: Freedom of Expression Prevails over a Sentence for Profanation of Islam[68]

This case has its origin in the criminal sentence pronounced by the Turkish courts against Mr. Erdoğan Aydin Tatlav, a journalist who had been convicted of profanation of Islam. The applicant was the author of a book entitled The Reality of Islam, containing a historical study and a critical comment on Islam. The book was first published in 1992. After the fifth edition was published

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[63] *Id.*, at Para. 50.

[64] *Id.*, at Para. 51:

> By considering the detrimental effects of a particular doctrine, the article in question contributed to discussion of the various possible reasons behind the extermination of the Jews in Europe, a question of indisputable public interest in a democratic society. In such matters, restrictions on freedom of expression were to be strictly construed. Although the issue raised in the present case concerns a doctrine upheld by the Catholic Church, and hence a religious matter, an analysis of the article in question shows that it does not contain attacks on religious beliefs as such, but a view which the applicant wishes to express as a journalist and historian. In that connection, the Court considers it essential in a democratic society that a debate on the causes of acts of particular gravity amounting to crimes against humanity should be able to take place freely.

[65] *See id.*, at Para. 51, with specific reference to Chauvy case, *supra* note 47, at Para. 69.

[66] *See* Giniewski case, *id*., at Paras. 51 and 54, with specific reference to Jersild case, *supra* note 54, at Para. 35.

[67] *See* Giniewski case, *id.*, at Para. 52; *see also* Garaudy *v.* France, Decision on the admissibility of 24 June 2003, No. 65831/01.

[68] Aydin Tatlav *v.* Turkey, Judgment of 2 May 2006, 2006 ECHR 518. When this paper was sent to print, only the French version of the case was available.

in 1996, and following a denunciation made by a certain N. K., the public prosecutor instituted criminal proceedings against Mr. Aydin Tatlav, accusing him of profaning a religion according to Article 175 of the Criminal Code.[69] The prosecution cited a number of incriminating passages of the book, among them the following:

> […] the policy of Islam with regard to children is also based on a barbaric violence […] religions show their lack of self-confidence by their tendency to repress free thinking and, in particular, all analysis and criticism with regard to them. […] all these truths express the fact that God does not exist, that the analphabet's conscience has created […] this God who mixes in everything, including the question of determining how many blows must be inflicted to the adulterer, which part of the thief's body must be amputated […].
>
> The founder of Islam sometimes adopts a tolerant attitude and sometimes orders *jihad*. He makes violence his fundamental policy. Allah's paradise promises to men a true parasitic life typical of aristocrats […].[70]

In 1998, the applicant was sentenced to pay a 'heavy' fine [in French, '*amende lourde*'] of 2,640,000 Turkish liras.[71] The Court of Cassation confirmed the decision in 1999.[72]

The ECtHR, in a short decision, held unanimously that the applicant's freedom of expression had been violated. As the basis for its decision, the Court cited the general principles that we have already examined with reference to previous cases.[73] Among them we can mention: freedom of expression as one of the fundamentals of democracy, which protects offensive speech but also implies some 'duties and responsibilities,' including the obligation to avoid 'gratuitously offensive' expressions; and the recognition of a legitimate margin

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[69] At the time of the events, Art. 175 (Paras. 3-4) of the Turkish Criminal Code provided that:

> 3. The person that insults Allah, one of religions, one of the prophets, one of the sects or one of the sacred books, or vilifies or outrages another person by reason of his beliefs, or by reason of the practice of his religious obligations or by reason of his observance of religious prohibitions […] shall be punished with six months to one year imprisonment and with a 'heavy' fine [in French, '*amende lourde*'] of 5,000 to 25,000 Turkish liras.
> 4. The penalty shall be doubled when the incriminating action […] has been committed through publication.

(Author's translation from the original French text of the Aydin Tatlav decision, *id*., at Para. 18; it should be noted that the French translation from Turkish in this case does not coincide exactly with the translation of the same legal text provided in the İ.A. case. *See supra* note 26).

[70] *See* Aydin Tatlav case, *supra* note 68, at Para. 12.

[71] Approximately 10 Euros at the time. The applicant had been initially sentenced to 12 months of imprisonment and a fine of 840,000 Turkish liras, but the sentence was later converted by the same court (the Grand Instance Court of Ankara). The term '*amende lourde*,' used in Turkish criminal law until 2004, meant that the convicted person could be sent to prison if he did not pay the fine. *Id.*, at Para. 14.

[72] *See id.*, at Paras. 14-16.

[73] *Id.*, at Paras. 22-27.

of appreciation to the national authorities when deciding *ad casum* on the necessity of a limitation on free expression, which must be counterbalanced by the European Court's assessment on the proportionality of a specific restrictive measure. The Court, with explicit references to *Otto-Preminger-Institut* and *Wingrove*, discussed above,[74] put a special emphasis on the fact that the absence of a uniform conception of public morals in Europe enlarges the state's margin of appreciation to determine when freedom of expression can be limited by reason of the protection of the freedom of religion of others. However, this cannot be interpreted as conferring on religious people an alleged right to be exempted from any criticism. On the contrary, religions must accept that other people have the right to spread doctrines that reject – and even are hostile to – their beliefs, and the Court must try to reach a balance between the exercise of those two fundamental freedoms.

Applying these principles to the concrete circumstances of the present case, the ECtHR agreed that some passages of Mr. Aydin Tatlav's book contained strong criticism of Islam. However, the Court "did not observe in the incriminating passages an insulting tone aimed directly to believers, or an abusive attack against sacred symbols, namely Islamic, even though Muslims could certainly feel offended, when reading the book, by its caustic comments on their religion."[75] In this same paragraph, the Court made a reference to the controversial decision *İ.A.* v. *Turkey*, discussed above,[76] although not to revisit the Court's doctrine or statements, but just to distinguish the facts in these two cases.

The ECtHR also noted that the book was first published in 1992, but no legal action was brought against it until the fifth edition, which appeared in 1996. Although the legal proceedings resulted in the imposition of a modest fine on the applicant,

> [...] a criminal sentence, especially when it implies the risk of imprisonment,[77] could have a deterrent effect on the authors and publishers with regard to the publication of non-conformist opinions on religion, thus impairing the guarantee of pluralism, which is indispensable for the healthful evolution of a democratic society.[78]

These circumstances moved the Court to affirm that there was no evidence of a "pressing social need" that justified the restriction on the applicant's freedom of expression.[79]

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[74] *See supra* Sec. 2.1. of this paper.
[75] Aydin Tatlav case, *supra* note 68, at Para. 28.
[76] *See supra* Sec. 2.2. of this paper.
[77] *See supra* note 71.
[78] Aydin Tatlav case, *supra* note 68, at Para. 30.
[79] *Id.*, at Para. 31.

2.6. *Gündüz*: Alleged Hate Speech Against Secularism by a Religious Leader[80]

This case was the first one decided after *Otto-Preminger-Institut* and *Wingrove*, and constitutes the reverse of the ECtHR cases we have discussed above. The applicant had been convicted not for expressing offensive ideas about religion but, on the contrary, for expressing certain religious ideas that were considered offensive to non-religious people and to the notion of secular democracy. The basis for his criminal sentence was not defamation but hate speech.

The applicant, Mr. Müslüm Gündüz, was the leader of an Islamic sect – Tarikat Aczmendi – and had been invited by an independent television channel, in June 1995, to take part in a program that discussed the nature and activities of his religious group. Other guests, including some scholars, artists, and state officials, participated in the program, which was broadcast live and lasted about four hours. Mr. Gündüz was asked a number of questions on different aspects of the beliefs of his group, and his answers provoked a prolonged – and sometimes tense – debate with the other participants on certain issues regarding the relation between religion and politics. He expressed with detail and clarity his views contrary to Kemalism, to the notion of secular democracy or to secular institutions such as civil marriage, and in favor of establishing a regime based on Sharia, or Islamic law. These were some of his statements, as transcribed in the ECtHR's decision:

> Kemalism was born recently. It is a religion – that is, it is the name of a religion that has destroyed Islam and taken its place. Kemalism is a religion and secularism has no religion. Being a democrat also means having no religion […].
>
> […] I say that secularism means having no religion. A democrat is a man with no religion. A Kemalist adheres to the Kemalist religion […].
>
> […] what I am saying is that a person who has no connection with religion has no religion. Isn't that so? […] I'm not insulting anyone. I am just saying that anyone calling himself a democrat, secularist or Kemalist has no religion […] Democracy in Turkey is despotic, merciless and impious […]
>
> This secular democratic system is hypocritical […] we do not share democratic values. […]
>
> According to Islam, no distinction can be made between the administration of a State and an individual's beliefs. For example, the running of a province by a governor in accordance with the rules of the Koran is equivalent to a prayer. In other words, manifesting your religion does not only mean joining in prayer or observing Ramadan. […] if [a] person has his wedding night after being married by a council official authorised by the Republic of Turkey, the child born of the union will be a *piç* [bastard]. […]
>
> Of course, that will happen, that will happen […] [to destroy democracy and set up a regime based on sharia].[81]

[80] Gündüz *v.* Turkey, Judgment of 4 December 2003, 2003 ECHR 652.
[81] *Id.*, at Para. 11.

In October 1995, the public prosecutor instituted criminal proceedings against the applicant, accusing him of the crime of incitement to hatred and hostility on the ground of a distinction founded on religion.[82] In April 1996, the National Security Court found the applicant guilty and sentenced him to two years' imprisonment and a fine of 600,000 Turkish liras. Six months later, the sentence was confirmed by the Court of Cassation.[83]

It is worth noting that the European Court, as part of the grounds for its judgment in this case, cited the relevant international instruments dealing with hate speech and all forms of intolerance and discrimination on grounds such as race, religion, and belief.[84] Among them, the Court emphasized Recommendation No. R (97) 20 on Hate Speech, adopted by the Committee of Ministers of the Council of Europe on 30 October 1997, and the General Policy Recommendation No. 7 of the Council of Europe's European Commission against Racism and Intolerance on National Legislation to Combat Racism and Racial Discrimination, of 13 December 2002.

Naturally, the Court also cited the general principles established in its previous case law. Some of them have been discussed in preceding sections of this paper: the significance of freedom of expression for democracy, including the freedom to spread ideas that may be offensive to others; the 'duties and responsibilities' implicit in freedom of expression, which include the need to avoid gratuitous offences to other people's beliefs; and the state's margin of appreciation to evaluate the necessity and the proportionality of limitations on free expression, which must go hand in hand with the European Court's supervision.[85]

In addition, the ECtHR stated, as a general principle specifically applicable to hate speech, that freedom of expression is not aimed at the protection of incitement to hatred, and therefore hate speech is out of the scope of protection of Article 10 ECHR:

> […] it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or

[82] Art. 312, Paras. 2-3 of the Turkish Criminal Code provides:

> 2. A person who incites the people to hatred or hostility on the basis of a distinction between social classes, races, religions, denominations or regions shall, on conviction, be liable to between one and three years' imprisonment and a fine […]. If this incitement endangers public safety, the sentence shall be increased by one-third to one-half.
> 3. The penalties to be imposed on those who have committed the offences defined in the previous paragraph shall be doubled when they have done so by the means listed in Article 311 Para. 2.

This latter article mentions "mass communication of whatever type," "printed papers" and "placards or posters in public places" (*see* Gündüz case, *id.*, at Para. 18).

[83] *Id.*, at Paras. 13-17.

[84] *Id.*, at Paras. 21-24.

[85] *Id.*, at Paras. 37-39.

> justify hatred based on intolerance (including religious intolerance), provided that any 'formalities,' 'conditions,' 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued […]. Furthermore, […] 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.[86]

In its analysis of the factual evidence, the Court attached a particular significance to the fact that the applicants' statements were made in a live television program, in the context of a debate with other guests with opposite views, and on a matter of general interest – the role of religion in a democratic society – "a sphere in which restrictions on freedom of expression are to be strictly construed."[87] For the purposes of its decision, the ECtHR divided the applicant's statements into three categories.[88]

The first category consisted of the assertions in which the applicant demonstrated "an intransigent attitude towards and profound dissatisfaction with contemporary institutions in Turkey, such as the principle of secularism and democracy." In the Court's view, these assertions, however regrettable, "cannot be construed as a call to violence or as hate speech based on religious intolerance."[89]

The second kind of statement was the one in which the applicant called *piç*, or bastard, the children born of a civil marriage and not a religious marriage. The ECtHR was aware that, in Turkish, *piç* is a pejorative term that is used in everyday language as a serious insult or offence and recognized that, in using that word, the applicant could have caused in the Turkish people that adhere to a secular way of life the feeling that they were "attacked in an unwarranted and offensive manner." Nevertheless, the Court, noticing that the Turkish courts did not attach particular importance to that expression, refused to accept that this sole expression was enough to justify the criminal sentence of hate speech, especially taking into account that the applicant was "actively participating in a lively public discussion."[90] This part of the Court's reasoning was strongly contested in the dissenting opinion written by Judge Türmen, the Turkish judge. He insisted on the seriousness of the offensive term '*piç'* – a term that, "as used by the applicant, is clearly hate speech based on religious intolerance," for "[h]ate speech, both at national and international levels, comprises not only racial hatred but also incitement to hatred on religious grounds or other forms of hatred based on intolerance." Furthermore, Türmen remarked that the majority of the Court implicitly accepted that *piç* was hate speech but, when examining the necessity of the restrictive measure, affirmed

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[86] *Id.*, at Paras. 40-41, with explicit references to Sürek case, *supra* note 55, at Para. 62, and Jersild case, *supra* note 54, at Para. 35. *See also id.*, at Para. 51.
[87] *See* Gündüz case, *id.*, at Paras. 43-44.
[88] *Id.*, at Paras. 47-51.
[89] *Id.*, at Para. 48.
[90] *Id.*, at Para. 49.

that the Turkish courts had not given enough weight to that expression. Türmen disagreed with this interpretation of the Turkish courts' decisions and declared his concern "that the present judgment may be interpreted by the outside world to mean that the Court does not grant the same degree of protection to secular values as it does to religious values," something that "is contrary to the letter and spirit of the Convention."[91]

The third category of the applicant's statements comprised those parts of his speech in which he openly campaigned for establishing a Sharia regime in Turkey. The Court recalled its previous doctrine – pronounced in the *Refah Partisi* cases – on the difficulty of reconciling respect for democracy and human rights with the support of a political system based on Sharia, which would sharply contrast with the values of the European Convention on significant issues such as women's rights or the intervention of religion in all aspects of private and public life.[92] However, once again, the ECtHR held that

[91] *Id.*, at dissenting opinion of Judge Türmen.

[92] *Id.*, at Para. 51:

> As regards the relationship between democracy and sharia, the Court reiterates that in *Refah Partisi (the Welfare Party) and Others v. Turkey* […] Para. 123 […] it noted, among other things, that it was difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia. It considered that sharia, which faithfully reflected the dogmas and divine rules laid down by religion, was stable and invariable and clearly diverged from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervened in all spheres of private and public life in accordance with religious precepts. The Court would point out, however, that *Refah Partisi (the Welfare Party) and Others* concerned the dissolution of a political party whose actions seemed to be aimed at introducing sharia in a State party to the Convention and which at the time of its dissolution had had the real potential to seize political power (*id*., at Para. 108). Such a situation is hardly comparable with the one in issue in the instant case.

The references of the Court are to the Grand Chamber decision in the case Refah Partisi (the Welfare Party) and Others *v*. Turkey, Judgment of 13 February 2003, 2003 ECHR 87, which reproduced, with respect to the incompatibility between the ECHR and a Sharia regime, the pronouncements of the Chamber decision of the same case, Refah Partisi (the Welfare Party) and Others *v.* Turkey, Judgment of 31 July 2001, 2001 ECHR 495, at Para. 72. The Refah Partisi case related to the dissolution of a powerful political party, of declared Islamic orientation, by the Turkish Constitutional Court, as a consequence of a series of statements made by some party leaders expressing their intention to establish a Sharia regime in Turkey. The Court examined especially two issues: the possibility to reconcile a Sharia regime based on divine law with the maintenance of the ECHR values, and the responsibility of the party as such for statements made by some party leaders even though the official program of the party did not contain anything explicit on the establishment of a Sharia regime. For a comment on the decision, *see* C. Evans & C. A. Thomas, *Church-State Relations in the European Court of Human Rights*, 2006 BYU L. Rev. 699, at 709-713. For an analysis of the history and role of the Welfare Party in Turkish politics, *see*, from different perspectives, S. Dokupil, *The Separation*

"the mere fact of defending Sharia, without calling for violence to establish it, cannot be regarded as 'hate speech.'"[93]

The Court concluded that, because the applicant's extremist views were already well-known and had been discussed openly in the public arena and counterbalanced with the intervention of the other participants in the program, "the need for the restriction in issue has not been established convincingly."[94] Therefore, the ECtHR declared that the applicant's freedom of expression had been violated and, taking into account that he had been imposed an "extremely harsh" penalty, awarded him 5,000 Euros for non-pecuniary damage.[95]

2.7. *Güzel*: Alleged Hate Speech Against Secularism by a Political Figure[96]

Like *Gündüz*, this case has its origin in a criminal conviction for hate speech as a consequence of a discourse based on the religious ideas of the speaker. The applicant, Mr. Hasan Celal Güzel, was a former minister and member of parliament. He was invited, in June 1998, to give a formal speech at a meeting on human rights, in his capacity as President of the Party of Rebirth (*Parti de la Renaissance*, in the French version of the ECtHR's decision). In his speech, the applicant strongly criticized the government's policy on the prohibition of external religious symbols, and in particular on the Islamic headscarf that Muslim women often wear. According to the Court's translation, these were part of the applicant's words taken into account by the Turkish courts:

> […] they deprive our sisters of all their rights, acting according to a so-called regulation that has been adopted illegally [and] in contradiction with [the applicable law …]. That mentality can imply to treat them as second class citizens by reason of their headscarf, because they cover themselves by reason of their beliefs […]. In Turkey, some people have talked for one year and a half about a false fundamentalism. The State high officials, under the cover of fight against fundamentalism, have initiated a fight against people's clothing, against

of Mosque and State: Islam and Democracy in Modern Turkey, 105 West Virginia L. Rev. 53, at 105-120 (2002); and T. Kucukcan, *State, Islam, and Religious Liberty in Modern Turkey: Reconfiguration of Religion in the Public Sphere*, 2003 BYU L. Rev. 475, at 493-497.

[93] Gündüz case, *supra* note 80, at Para. 51.

[94] *Id*.

[95] *Id.*, at Paras. 52-53, 57.

[96] Güzel *v.* Turkey, Judgment of 27 July 2006, No. 65849/01 [final decision not yet published, only French version of decision available]. Shortly before, the ECtHR decided the interesting case Öllinger *v.* Austria, Judgment of 29 June 2006, 2006 ECHR 665. However, I will not discuss it here, for the implications for freedom of religion were purely hypothetical, marginal, and non-intentional. The case related to the prohibition of a counter-demonstration organized by a member of the Green Party, which was intended to take place at the same time (1 November, All Saints' Day) and in the same place (Salzburg cemetery, in front of the war memorial) as the annual gathering of an association comprised mainly of former members of the SS.

> their beliefs […]. The teachers that deny students access to classes by reason of their headscarves are reactionaries[,] sectarians.[97]

As a result of the criminal proceedings instituted by the public prosecutor, the National Security Court, in November 1998, held the applicant guilty of the crime of incitement to hatred and hostility on the basis of a distinction founded on the membership in a religion, according to Article 312 of the Criminal Code,[98] and sentenced him to one year imprisonment and a fine of 160,000 Turkish liras (less than 1 Euro). The Court of Cassation confirmed the sentence in July 2000. In 2001, in application of a statute, the execution of the prison sentence was suspended by the National Security Court.[99]

In an extremely short decision,[100] the European Court held that the applicant had been the victim of a violation of Article 10 ECHR.[101] In particular, the ECtHR could not accept the arguments by which the government tried to prove that the prosecution and sentence of the applicant was "necessary in a democratic society." In the Court's view, neither the terms used in Mr. Güzel's political discourse nor the context in which the speech was given justified such a restriction on freedom of expression. The applicant was merely criticizing, in a meeting on human rights, the government's policy on a subject of general interest, namely the policy on religious garments. His discourse could not be described as hate speech, for he spoke "in his capacity as politician, in the context of his role as an active person in Turkish political life, and he did not incite to the use of violence or to armed resistance or to insurrection."[102]

2.8. *Murphy*: Prohibition of Religious Advertising[103]

The *Murphy* case related to the prohibition of religious advertising in commercial radio and television in Ireland – more precisely, an advertisement submitted by the pastor of a Christian minority to an independent radio station.[104] The case was decided, unanimously, in favor of the Irish government. Although no actual offence against religious feelings was involved, it deserves a short reference here. The reason is that the Court, relying on the principles

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[97] Güzel case, *id.*, at Para. 8 [author's translation from the French].
[98] *See, in particular*, *supra* note 82.
[99] *See* Güzel case, *supra* note 96, at Paras. 6-15. The applicant also invoked Art. 6 ECHR (right to a fair trial), but this aspect of the decision is less interesting for the purposes of this paper.
[100] The ECtHR hardly even mentioned any general principle, and was satisfied with an explicit reference to its decision in the case Ceylan *v.* Turkey, Judgment of 8 July 1999, 1999 ECHR 44 (a case related to a press article on the state policy with regard to the Kurdish problem) and other subsequent cases. *See* Güzel case, *id.*, at Paras. 16, 24.
[101] *See* Güzel case, *id.*, at Paras. 25-29.
[102] *Id.*, at Para. 27.
[103] Murphy *v.* Ireland, Judgment of 10 July 2003, 2003 ECHR 352.
[104] *See*, for further details, Martínez-Torrón, *supra* note 2, at 630-633.

established in *Otto-Preminger-Institut* and *Wingrove*,[105] held that a possible offence to the religious beliefs of others was a reasonable ground for the limitation on freedom of expression implied in the legal ban on religious advertising.[106] Moreover, the Court affirmed that "the potential impact of the medium of expression concerned is an important factor in the consideration of the proportionality of an interference. […] the audio-visual media have a more immediate and powerful effect than the print media."[107]

3. The Guiding Principles of the European Court's Case Law

As we have seen, the ECtHR has decided cases involving conflicts between freedom of expression and freedom of religion for a relatively extended period of time (1994-2006). Some of the guiding principles of those decisions are specifically related to the connection between these two fundamental freedoms. Others, instead, are just a development of the general principles governing – in the Court's case law – freedom of expression. Although I have referred in due course to these principles, it is worth returning to them in a systematic way, trying to find their internal logic.

First, however, I would like to point out that the principles utilized by the Court to decide on freedom of expression issues – including conflicts with religious freedom – have never been reversed or modified, in spite of suggestions made by some judges in certain controversial cases.[108] The application of the principles to the facts may have certainly changed, as has changed over the years the attention that the Court has paid to the details of the factual evidence – in recent years, the tendency is to analyze the facts more vaguely.[109] This tendency reveals that the Court is probably satisfied with the current general principles and considers that an evolution in its case law – for instance, in favor of a broader protection of freedom of expression – can be achieved merely through a more 'liberal' application of the same principles. The likely reason for this tendency is that the ECtHR's general principles on freedom of expression are based on the notion of balance – in particular, a balance between the national authorities' discretion to impose limitations on freedoms and the necessity to guarantee the freedom to express ideas that may be offensive to others.

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[105] *See supra* Sec. 2.1. of this paper.
[106] *See* Murphy case, *supra* note 103, at Paras. 65-82.
[107] *Id.*, at Para. 69, with explicit reference to Jersild case, *supra* note 54, at Para. 31.
[108] *See supra* note 40 and accompanying text.
[109] *See*, *especially*, *supra* note 35 and accompanying text.

3.1. The *raison d'être* of Freedom of Expression and Freedom of Religion

When attempting to find the logic inherent in the principles that orientate the ECtHR's decisions on conflicts between freedom of expression and freedom of religion, we should begin by trying to identify the *raison d'être* of these two fundamental freedoms within the context of the European Convention on Human Rights, as interpreted by the Court.

The essential purpose of freedom of thought, conscience, and religion seems to be the protection of individual autonomy to provide a personal answer (freedom to believe) to the crucial questions that all human beings face – who are we, where do we come from, where do we go – and to organize one's life accordingly (freedom to act). All answers are considered equally valid from the ECHR's perspective, be they religious or non-religious (agnostic or atheistic).[110] All of them are, in some sense, beliefs – although the term 'believer' is usually applied only to people holding religious beliefs. The implicit assumption is that those crucial questions do not have absolute and indisputable answers – this is why they are 'beliefs' – and therefore every person has the inalienable right to search for his own valid responses.[111] For the same reason, religious or non-religious beliefs are not subject to objective proof, and consequently their validity cannot be assessed in objective terms. The content of beliefs is, as such, irrelevant. All religions or beliefs are accepted as equally valid and worthy of protection, not because they provide 'reasonable' or 'true' answers to vital questions, but because they are the result of a person's legitimate choice, which nobody can substitute. Neutral laws, such as the ECHR, avoid pronouncing any judgment on the value of diverse beliefs or discriminating between them by reason of their mere dogmatic content. The European Court has clearly stated that the protection of this freedom is essential for pluralism, which is in turn inseparable from

[110] Kokkinakis *v.* Greece, Judgment of 25 May 1993, 1993 ECHR 20, at Para. 31:

> […] freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned.

Kokkinakis – a case related to the right to proselytism – was the first decision of the ECtHR based on Art. 9 and the starting point for an increasing series of subsequent decisions on freedom of religion issues. The case has been analyzed in detail by J. Gunn, *Adjudicating Rights of Conscience under the European Convention on Human Rights*, *in* J. van der Vyver & J. Witte (Eds.), Religious Human Rights in Global Perspective: Legal Perspectives 317-330 (1996).

[111] Some religions maintain that every person has not only the right but also the moral obligation to search for the valid answers.

democracy.[112] I would add that repression of freedom of religion or belief is normally considered one of the harshest manifestations of tyranny. The guarantee of freedom of religion or belief entails the elimination of coercion and discrimination on the ground of religion – including, in my view, indirect discrimination by neutral laws[113] – as well as the prohibition of indoctrination by the state.[114]

Naturally, the exercise of freedom of religion or belief often entails the exercise of other fundamental freedoms protected by the European Convention, especially freedom of association and freedom of expression. This overlapping, however, must not lead us to confuse the type of ideas protected by these freedoms, as the European Court has emphasized. In particular, the term 'beliefs,' be they religious or not, denotes, in the meaning of Article 9 ECHR, "views that attain a certain level of cogency, seriousness, cohesion and importance," and "is not synonymous with the words 'opinions' and 'ideas', such as are utilised in Article 10 […] of the Convention, which guarantees freedom of expression."[115]

If we turn now to freedom of expression, as understood in the ECtHR's case law, its essential purpose seems to be, again, the guarantee of pluralism as an indispensable element of democracy, in particular through the protection of every person's right to freely disseminate information or ideas. The implicit notion is that individuals have not only the right to form their own opinion on any subject, but also the right to contribute to public debates in their respective societies. For this reason, the ECtHR remarks that limitations on freedom of expression must be construed narrowly, even with regard to ideas that "offend, shock or disturb."[116] This is especially true when dealing with

[112] *See* Kokkinakis case, *supra* note 110, at Para. 31.

[113] The concept of 'indirect racial discrimination,' as defined by General Policy Recommendation No. 7 of the European Commission against Racism and Intolerance on National Legislation to Combat Racism and Racial Discrimination (13 December 2002), is also applicable to discrimination by reason of religion or belief. Sec. I.1(c) of the Recommendation reads as follows:

> 'indirect racial discrimination' shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification.

On the conflicts between 'neutral laws' and freedom of conscience, *see* J. Martínez-Torrón & R. Navarro-Valls, *The Protection of Religious Freedom in the System of the Council of Europe*, *in* Lindholm *et al*., *supra* note 3, at 230-236.

[114] *See* Kjeldsen, Busk Madsen and Pedersen *v*. Denmark, Judgment of 7 December 1976, 1976 ECHR 6, at Para. 53, commented by Martínez-Torrón & Navarro-Valls, *id*., at 232-233.

[115] Campbell and Cosans *v.* United Kingdom, Judgment of 25 February 1982, 1982 EHCR 1, at Para. 36.

[116] These words come from the decision of Handyside case, *supra* note 13, at Para. 49, and have been repeatedly quoted by the European Court. *See supra* note 13 and accompanying text.

expressions related to matters of general interest – the higher the significance of the issue under discussion, the wider the protection of freedom of speech and the stricter the interpretation of legitimate limitations on it.[117]

In other words, the protection of freedom of expression is inseparable from a reference to the content of the information or the ideas expressed. What deserves to be protected is not just 'expression' understood as a purely formal concept, but rather the expression of a substantive content: information (facts) or opinions (ideas, judgments). This concept is compatible with the understanding that freedom of expression also comprehends the form in which ideas or facts are articulated.[118] Thus, freedom of speech plays a significant role in the formation of a pluralistic social and intellectual debate on a variety of issues, as well as in the search for historical truth.[119] Even more: free discussion is a necessary condition for progress in society.[120] With regard to the substantive data or opinions conveyed, it must be noted that freedom of expression covers a much broader range of subjects than freedom of religion or belief. In addition, contrary to what occurs in the case of religion or belief, the accuracy of some data or opinions can be scrutinized according to objective criteria, as is implicit in the ECtHR's doctrine on the distinction between statements of fact and value judgments.[121]

3.2. Freedom of Religion or Belief as a Legitimate Limitation on Freedom of Expression

It is clear that, according to the ECHR, freedom of expression, which "carries with it duties and responsibilities," may be subject to certain legitimate limitations: "formalities, conditions, restrictions or penalties."[122] As we have seen,[123] the European Court has asked whether the protection of religious feelings of believers or, more precisely, of religious freedom as guaranteed in Article 9 ECHR, is a valid ground for imposing limitations on free speech. The answer is, *in abstracto*, unambiguously affirmative according

[117] *See* Jersild case, *supra* note 54, at Para. 35; Gündüz case, *supra* note 80, at Paras. 43-44; Paturel case, *supra* note 41, at Paras. 32, 37, 42 and 46; Giniewski case, *supra* note 56, at Paras. 50-51 and 54.
[118] *See* Oberschlick *v.* Austria (no. 1), Judgment of 23 May 1991, 1991 ECHR 30, at Para. 57: "Art. 10 […] protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed."
[119] *See* Chauvy case, *supra* note 47, at Para. 69, and Giniewski case, *supra* note 56, at Para. 51.
[120] *See* Otto-Preminger-Institut case, *supra* note 6, at Para. 49.
[121] *See supra* Sec. 2.3. and *infra* Sec. 3.3. of this paper.
[122] Art. 10(2) ECHR.
[123] *See supra* Sec. 2.1. of this paper.

to the principles stated in *Otto-Preminger-Institut* in 1994. These principles have never been overruled and have been repeatedly cited by the Court in subsequent decisions:

> The respect for the religious feelings of believers as guaranteed in Article 9 […] can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society.[124]

It is true that freedom of thought, conscience and religion, as defined by Article 9 ECHR, does not include explicitly a right to the protection of religious feelings of believers, and that granting the national authorities too much room for decision in this area could make the state vulnerable to pressure from groups that are intolerant of criticism of their religion.[125] But it also true that the exercise of freedom of religion or belief – by religious and by non-religious people – requires an atmosphere of tolerance and respect, free from abuses or attacks that may actually inhibit people from expressing their beliefs without intimidation. This is a common feature of all fundamental freedoms. An environment of free discussion and free expression – including the free expression of beliefs – is essential for democracy. Conversely, a climate of verbal aggression or violence is not the most adequate habitat for the exercise of freedoms. In this respect, attacks on religion are not in essence different from attacks on sex, race, or national origin – and let us remember that all of them are included in Article 14 ECHR, which prohibits discrimination. Indeed, the possibility that religion could be a legitimate ground for limitations on freedom of expression was recognized even by the three dissenting judges in *Otto-Preminger-Institut*, who refused to accept that a right to protection of religious feelings could be derived from the right to freedom of religion enshrined in Article 9 ECHR: "tolerance works both ways and the democratic character of a society will be affected if violent and abusive attacks on the reputation of a religious group are allowed."[126]

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[124]Otto-Preminger-Institut case, *supra* note 6, at Para. 47.

[125]*See* C. Evans, *supra* note 3, at 71-72.

[126]Otto-Preminger-Institut case, *supra* note 6, at the joint dissenting opinion of Judges Palm, Pekkanen, and Makarczyk, at Para. 6:

> The Convention does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom of religion, which in effect includes a right to express views critical of the religious opinions of others. Nevertheless, it must be accepted that it may be 'legitimate' for the purpose of Article 10 […] to protect the religious feelings of certain members of society against criticism and abuse to some extent; tolerance works both ways and the democratic character of a society will be affected if violent and abusive attacks on the reputation of a religious group are allowed. Consequently, it must also be accepted that it may be 'necessary

At the same time, we should also bear in mind that every limitation on freedom of expression, irrespective of how legitimate its purpose, must be "necessary in a democratic society" according to Article 10(2) ECHR; i.e., in the ECtHR's view, it must respond to a "pressing social need."[127] In this regard, limitations on free speech based on the protection of religious feelings must be construed strictly. Religions, or religious people, cannot expect to be free from criticism and even hostility from others.[128] Nonetheless, the Court has emphasized that, in this area, a wider margin of appreciation must be recognized to the state to determine the necessity of a restriction of free speech, for there is not, throughout Europe, a uniform notion of the significance of religion in society and, in particular, of the legitimate limitations that may be imposed on freedom of expression on account of religion.[129] Naturally, the Court must not, and cannot, refrain from supervising the national authorities' use of the margin of appreciation. However, its role is not to be a substitute for the national courts, but to evaluate "whether the reasons adduced by the national authorities to justify the interference seem 'relevant and sufficient' and whether the measure under scrutiny is 'proportionate to the legitimate aims pursued.'"[130]

3.3. Legitimate Limitations on Offensive Speech

Turning now to the main criteria utilized by the European Court in its supervisory function, the first one is an expansive interpretation of freedom of expression's protective scope. Democracy demands that the guarantee of free speech extend not only to information or ideas that are "favourably received or regarded as inoffensive […], but also to those that shock, offend or disturb the State or any sector of the population."[131] This includes not only the substantive content of information or opinions, but also the form in which they are expressed,[132] including the aim of provocation.[133] In other words, individuals may freely choose not only to state offensive ideas, but also to use offensive ways to articulate their ideas.

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in a democratic society' to set limits to the public expression of such criticism or abuse.

[127] *See supra* Secs. 2.1. and 2.3. of this paper.
[128] *See* Otto-Preminger-Institut case, *supra* note 6, at Para. 47, quoted in *supra* note 15 of this paper.
[129] *See supra* notes 18-23 and accompanying text.
[130] Paturel case, *supra* note 41, at Para. 29.
[131] *See* Handyside case, *supra* note 13, at Para. 49, and accompanying text.
[132] *See supra* note 118.
[133] Prager and Oberschlick *v.* Austria, Judgment of 26 April 1995, 1995 ECHR 12, at Para. 38: "[…] journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation."

However, as freedom of expression is not absolute and must be reconciled with other freedoms and legal interests, its dimension of 'freedom to offend' may be subject to limitations. In this respect we must distinguish two categories of offensive speech.

The most serious one is hate speech, understood as "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance,"[134] including hatred based on religion.[135] The ECtHR, following the prevailing international trends,[136] has clearly stated that hate speech is not an integral part of the freedom of expression guaranteed by the European Convention of Human Rights. This is more than affirming that hate speech may be subject to legitimate limitations according to Article 10(2) ECHR as interpreted by the states in use of their margin of appreciation. What the Court has declared is that hate speech is in no way protected by Article 10(1) ECHR.[137] This is also the solution adopted by some European countries in which criminal laws establish penalties for the use of hate speech, including hate speech based upon religion.[138]

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[134]Recommendation No. R (97) 20 on "hate speech," adopted on 30 October 1997 by the Committee of Ministers of the Council of Europe, Appendix, Scope.

[135]*See id*., Paras. 4 and 11 of the introduction, which include references to the Vienna Declaration of the Heads of State and Government of the member states of the Council of Europe, adopted on 9 October 1993; and to the Resolution (68) 30 of the Committee of Ministers on Measures to be taken against incitement to racial, national and religious hatred. *See* also Recommendation No. R (97) 21 to member states on the media and the promotion of a culture of tolerance, adopted by the Committee of Ministers of the Council of Europe on 30 October 1997.

[136]*See* the main references to international documents in the Gündüz case, *supra* note 80, at Paras. 21-24.

[137]*See supra* note 86.

[138]*See*, *e.g*., Art. 510, Para. 1 of the Spanish Criminal Code, which establishes a penalty of one to three years imprisonment and a fine for

> [w]hoever incites to discrimination, hatred or violence against groups or associations by reason of racism, anti-Semitism or by other reason related to ideology, religion or belief, family situation, membership to an ethnic or racial community, national origin, sex, sexual orientation, disease or disability.

Art. 130(2) of the German Criminal Code establishes a similar penalty for those responsible for the production or dissemination of writings

> [w]hich incite hatred against segments of the population or a national, racial or religious group, or one characterized by its folk customs, which call for violent or arbitrary measures against them, or which assault the human dignity of others by insulting, maliciously maligning or defaming segments of the population or a previously indicated group.

In Ireland, the Prohibition of Incitement to Hatred Act, 1989, establishes slightly milder penalties for people guilty of incitement to hatred, and defines hate speech as covering "hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion,

The Court treats 'gratuitous offences' less seriously. Implying that they may constitute a breach of the 'duties and responsibilities' that freedom of expression carries with it,[139] the ECtHR has affirmed that they may be subject to legitimate limitations or sanctions by national laws, as a result of the states' margin of appreciation to interpret and apply Article 10(2) ECHR. This principle was established by the Court in *Otto-Preminger-Institut* and *Wingrove*[140] and has been reiterated in other subsequent cases with specific reference to offences to religion.[141]

Naturally, the doctrine of 'gratuitous offences' poses two interpretative difficulties. First is the difficulty of drawing a line between expressions that are only 'gratuitously offensive' and those that constitute hate speech. Second is the question of how to interpret the term 'gratuitous,' considering that the Court has never defined it and has hardly elaborated on this doctrine. The European Court seems to take the meaning of 'gratuitous' for granted – i.e., it implies something that is not necessary or has no cause or justification.[142] However, the precise definition is important because, as we have seen, freedom of expression includes speech that "offends, shocks or disturbs," including the form chosen to express a substantive idea or information.[143] Perhaps the only reasonable way to understand this ambiguous doctrine of the ECtHR – and to reconcile these two apparently contradictory aspects of its case law – is to assume that an expression is 'gratuitously' offensive when it does not transmit properly any substantive idea or information and has insult or verbal aggression as its exclusive goal. In any event, the practical consequence of the ECtHR's doctrine on 'gratuitous offences' is a certain enlargement of the states' margin of appreciation to evaluate when offensive language is unjustifiable and, correspondingly, a wider discretion of the Court to supervise the states' use of their margin of appreciation.[144]

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ethnic or national origins, membership of the travelling community or sexual orientation" (Sec. 1 of the law).

[139] Art. 10(2) ECHR.

[140] *See supra* note 14 and accompanying text. In addition to the national legislations cited by the ECtHR in these two cases and in the cases referred to in the following footnote, we can mention Art. 525 of the Spanish Criminal Code and Art. 166 of the German Criminal Code, which punish conduct that insults or outrages a religion or ideological community. These laws, however, are very rarely applied in practice.

[141] In particular, in the İ.A., Giniewski, and Aydin Tatlav cases. *See supra* Secs. 2.2., 2.4., and 2.5. of this paper.

[142] *Cf.* the relevant definitions provided by Cambridge, Merriam-Webster, or Dictionary.com dictionaries.

[143] *See supra* notes 131-133.

[144] This is even more evident if we consider that, in recent years, the Court tends to perform a simpler analysis of the facts in its decisions. Compare, in this respect, the Otto-Preminger-Institut case, *supra* note 6, and Wingrove case, *supra* note 7, on the one hand, and the İ.A., Giniewski, and Aydin Tatlav cases on the other hand. All of them have been discussed *supra*, in Sec. 2. of this paper.

The possible negative effects that the vagueness of the 'gratuitous offences' doctrine might have on the protection of freedom of expression find a counterbalance, to some extent, in the distinction that the Court has drawn between value judgments and statements of fact.[145] The possibility of imposing a legitimate limitation on freedom of expression is different in these two cases. While the precision or truth of statements of fact is subject to objective scrutiny, value judgments are, by their very nature, subjective and less susceptible to proof. Consequently, limitations or sanctions on false statements of fact may be legitimate, but the same is not applicable to value judgments. Most often, however, offensive speech contains a combination of facts and judgments. The expression of the latter, according to the ECtHR, may be restricted legitimately by national authorities only when they lack any factual basis. This is especially clear with regard to hate speech that is based upon a falsification of well established historical facts.[146] Limitations on offensive value judgments supported by some factual basis must be construed strictly, especially when they discuss themes of general interest.[147]

4. Concluding Remarks

Most of the principles utilized by the European Court to decide cases regarding freedom of expression do not raise particular problems – although their application to the facts has sometimes caused perplexity. There are, however, two interconnected principles that have been more controversial. One is the idea that the protection of religious feelings of the population is an integral part of the right to religious freedom and, therefore, may justify limitations on freedom of expression according to Article 10(2) ECHR (limitations can be justified by the "protection of the reputation or rights of others"). The other is the notion that the state, in use of its legitimate margin of appreciation, may restrict or penalize 'gratuitous offences' to religious feelings.

These two principles pose some important questions with respect to the viability of their use in each particular case. Thus, in the abstract, the protection of religious feelings – not explicitly mentioned by Article 9 ECHR – would be necessary for the guarantee of religious freedom in as far as those feelings are attacked or offended in such a way that the reputation of a religious group is harmed or when there is a danger of an atmosphere of

[145] This distinction, enunciated by the Court in the Lingens case, *supra* note 49, at Para. 46, was applied specifically to offences to religion in the Paturel case, *supra* note 41. *See supra* Sec. 2.3. of this paper.

[146] *See* Garaudy case, *supra* note 67, at Para. 1 (with reference to denial of the Holocaust). *See also* Lehideux and Isorni *v.* France, Judgment of 23 September 1998, 1998 ECHR 90, at Paras. 47, 50 and 53.

[147] *See, especially,* the Paturel and Giniewski cases, discussed *supra*, in Secs. 2.3. and 2.4. of this paper.

intolerance that could inhibit people from freely manifesting their beliefs. In practice, however, it is not easy to appraise whether the seriousness of the offence may have such grave consequences. Similarly, the doctrine of 'gratuitous offences,' as has been formulated by the ECtHR, leaves much space – perhaps too much – for the state's discretion, because the judgment on the lack of cause or justification for a certain (offensive) way of expressing an idea is very subjective. These questions do not have easy answers, as is usually the case with borderline problems related to fundamental freedoms. To maintain that these are 'easy' questions, which can be categorically and simply resolved by an extensive interpretation of the right to free expression seems very unrealistic. Simplification is never a good or realistic approach to difficult issues.

In my opinion, the principles set up by the European Court of Human Rights are useful and valid, in spite of the difficulties inherent in their application, for they attempt to reach a balance between diverse legal interests with the aim of facilitating a 'juridical atmosphere' in which all fundamental freedoms can be actually exercised. However, as with all concepts that imply limitations on freedom, these principles must be applied strictly and carefully. Certainly, a 'relaxed' or conformist practical understanding of the state's margin of appreciation would endanger the actual protection of free speech, which is indispensable for pluralistic democracy, and leave it in the hands of prevailing religious ideas (or more often, I would say, in the hands of 'political correctness'). On the other hand, an unrestricted position in favor of freedom of expression, understood as pure freedom to offend, would entail the permission to perform acts of aggression towards others – not physical, but verbal aggression. To allow the creation of an atmosphere of social aggression could easily impair the real freedom of other people to express themselves, including the freedom to express their religious beliefs; in certain circumstances, it could also affect the reputation, and therefore the credibility, of a religious community. In addition, experience demonstrates that the effects of verbal aggressions often go beyond pure verbality: hate speech is a good example. Respect for others, although we reject or even despise their ideas, is an essential component of a pluralistic and free society. Freedom of expression is not the freedom to offend, but the freedom to say something that may be offensive to others or that may be understood by others as offensive. The emphasis is on the content of the information or the ideas expressed, not on the offence as such. Assertive or even offensive language (offence may be a way of communicating an idea) is different from abusive language, although the dividing line is not always clear in particular cases.

Hate speech is the clearest example of abusive language and is therefore not protected by the fundamental right to freedom of expression. Its potential impact on society goes far beyond merely verbal offences, for it promotes intolerance, which is a germ of violence, based upon the notion that some

human beings are inferior or despicable by reason of some personal traits (e.g., race or sex) or voluntary choices (e.g., religion or belief). As we have seen, hate speech includes incitement to hatred based on religion. In this regard, verbal offences to religion or to a religious group that constitute hate speech are not essentially different from verbal attacks based on race or sex.

The problem is that, in practice, it is not always easy to distinguish between those offences against religion that constitute hate speech and those that are just 'gratuitous offences,' in the ECtHR's meaning. It is a question of limits, and calls for a careful answer, for the treatment that each of those offences receives from the ECtHR is very different. While hate speech enjoys no protection by Article 10(1) ECHR, the necessity of restrictive measures on gratuitous offences adopted by a state in application of Article 10(2) ECHR must be evaluated by the Court in each particular case.

On the other hand, we should not lose sight of the limited role that law must play in this area. After all, legal coercion is an instrument that works when other means of social restraint have failed. The law should not intervene in every case of offensive language, but only in those cases that are particularly clear. In case of doubt, the law must refrain from interfering with free speech, irrespective of how deplorable offensive expressions against religion may be. Democracy and pluralism could be more endangered by a possible abuse of the power to restrict free speech than by the potential harm that abusive forms of expression cause to religious beliefs. From a different perspective, the limited role of the law in this realm would be compatible with a legal prohibition on disseminating offensive expressions against religion through mass media that receive public funding, especially in the case of media with a powerful social influence, such as television or radio; the case law of the ECtHR provides some basis to support such possible prohibitions.[148]

These considerations, however, must face the reality: in the context of European legal systems, there are no uniform standards to solve conflicts between freedom of expression and freedom of religion. The possibilities of the European Court to develop such standards are limited by the margin of appreciation doctrine. The ECtHR understands that it is not a substitute for national jurisdictions, but is a supervisory body which, in this area, has the exclusive function of assessing whether the states' restrictive measures have been proportional to the legitimate goals alleged. In any event, the most recent cases decided by the European Court suggest that the Court could – and should – definitely apply its own principles to the facts based upon a much more careful and detailed analysis of the evidence provided by the parties.

[148] *See supra* notes 103-107, the references to the Murphy and Jersild cases. We could also mention the prohibition of indoctrination enunciated in the Kjeldsen case, *supra* note 114.