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INTERPLAY BETWEEN THE FREEDOM OF RELIGION AND FREEDOM OF EXPRESSION IN THE EUROPEAN COURT OF HUMAN RIGHTS

Abstract

In this article, the interaction between two crucial rights enshrined in the European Convention on Human Rights, namely freedom of religion and freedom of expression is analyzed. In that regard, firstly, the way of the European Court of Human Rights examines particular disputes over these two freedoms will be discussed. Moreover, the questions on how the exercise of one right may interfere with the enjoyment of another and whether the exercise of one right justifies limitations on another will be tried to be answered through the case-law of the European Court of Human Rights.

Annotasiya

Bu məqalədə "İnsan hüquqlarının və əsas azadlıqların müdafiəsi haqqında" Avropa Konvensiyasında əks olunan iki əsas hüquq – din azadlığı və ifadə azadlığı arasındakı qarşılıqlı əlaqəni təhlil edilir. Bununla əlaqədar, ilk növbədə, Avropa İnsan Hüquqları Məhkəməsinin bu iki hüquq üzrə konkret məhkəmə mübahisələrini həll etmə yollarından bəhs ediləcəkdir. Həmçinin, məqalədə Avropa İnsan Hüquqları Məhkəməsinin qərarları əsasında formalaşmış hüquqi mövqeyə uyğun olaraq qeyd olunan hüquqlardan birinin həyata keçirilməsinin digər hüququn həyata keçirilməsinə təsiri müzakirə ediləcək və bir hüquqdan istifadənin digər hüququn istifadəsinə məhdudiyyətlər qoyulmasına haqq qazandırıb-qazandırmaması kimi suallara cavab tapmağa çalışılacaqdır.

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Introduction

Freedom of expression, as the European Court of Human Rights (hereinafter the Court) stated, is one of the important foundations of a democratic society. It is one of the conditions for the development

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of everyone.[1] As it can be seen in Article 10 (1) of the European Convention on Human Rights (hereinafter Convention), this right involves not only the freedom to impart information and ideas but also the freedom to hold opinions and the freedom to receive information and ideas.[2] In terms of freedom to hold opinions, it enjoys absolute protection from interference, under Article 10 (2) of the Convention, by the States.[3] The Court reiterated in its case-law that everyone has a right to receive information which is considered as a general interest.[4] For this reason, the States which restrict the people's access to information, have to maintain strong justifications for its limitation.[5] Lastly, everyone has the freedom to impart information and ideas which can be regarded as an important aspect of a democratic society, as well as of political life. This right under Article 10 (1) of the Convention enables people to disseminate their information and ideas freely.[6] As in the right to receive information, this right also enjoys the protection from the States' interference. Actions or omissions by the States are subject to close examination by the Court. Moreover, Article 10 allows people to choose the form, in addition to the substance of the information and ideas, in which they want to deliver them.[7] For that the expression is not limited with verbal forms, but also applies to non-verbal forms such as artistic work, display of symbols.[8]

On the other hand, "freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention".[9] As the Court reiterated in different cases, freedom of religion forms the identity of believers and also of non-believers.[10] It derives from this meaning that those who believe in a certain religion, as well as those who are atheists, agnostics, sceptics and the unconcerned, enjoy the protection with Article 9 of the Convention.[11] In addition to having freedom of religion, people are protected to change, as well as to manifest their religion within the meaning of this provision. As stated in Article 9 of the Convention, everyone is entitled to manifest their religion, which is considered an integral part of this right,[12] personally or publicly by worshipping, teaching, practicing and

[1] Handyside v. The United Kingdom, ECHR No. 5493/72, § 49 (1976).
[2] The European Convention on Human Rights, art. 10 (1) (1950).
[3] Steering Committee for Human Rights, Guide to Good and Promising Practices on the Way of Reconciling Freedom of Expression with Other Rights and Freedoms, in Particular in Culturally Diverse Societies, 8-11 (2019).
[4] Magyar Helsinki Bizottság v. Hungary, ECHR No. 18030/11, § 160-163 (2016); *See also* Couderc and Hachette Filipacchi Associés v. France, ECHR No. 40454/07, § 100-103 (2015).
[5] Steering Committee for Human Rights, *supra* note 3, 8.
[6] *Supra* note 2.
[7] *Supra* note 3.
[8] *Id*., 11-13.
[9] Kokkinakis v. Greece, ECHR No. 14307/88, § 31 (1993).
[10] Lautsi and Others v. Italy, ECHR No. 30814/06, § 60 (2011); Grzelak v. Poland, ECHR No. 7710/02, § 87 (2010).
[11] *Supra* note 9.
[12] Jim Murdoch, Protecting the Right to Freedom of Thought, Conscience and Religion under the European Convention on Human Rights, 21 (2012).

observing. In some cases, the term "manifestation" can sometimes make the Court decide whether the person concerned manifests their religion or their opinion. As the Court noted, the word "beliefs" within the meaning of Article 9 is related to "views that attain a certain level of cogency, seriousness, cohesion and importance".[13] Therefore, it is not synonymous with the words "opinions" and "ideas" which are protected within the meaning of Article 10 of the Convention.[14] On the other hand, freedom of expression extends to a broader range of subjects than freedom of religion.[15] The Court determines, in accordance with circumstances of each particular case, whether the right of the applicant falls within Article 9 or Article 10, and it varies in its almost every case.

As freedom of expression and freedom of religion often collide, many cases, which comprise the conflict of these freedoms, have been heard by the Court. Those who criticize religions cause dissatisfaction among believers who claims that the critics of religion abuse their freedom of expression. On the other hand, protectors of freedom of expression accuse believers of defending the restrictions on free speech.[16] Considering such a collision, the solution to this issue could be to find a mean between these freedoms because otherwise unlimited freedom of expression can put the believers' freedom of religion in danger. The Court has also taken such an approach in such circumstances. The analysis and conclusion of the Court through its formulated principles will be discussed and how it varies from case to case will be examined in this article.

I. The way of examination by the European Court of Human Rights

In terms of protecting the rights of individuals, including freedom of expression and freedom of religion, the States have negative and positive obligations. According to Article 1 of the Convention, the States, as a negative obligation, have a duty to avoid any disproportionate interference with the rights of people guaranteed by the Convention. Besides, this provision implies a positive obligation as the States must take measures to protect the rights of individuals and ensure the effective exercise of the Convention rights.[17] Especially, securing everyone's rights and freedoms within the State's jurisdiction becomes much more complicated in case two or more rights are at stake. It is because the protection of a certain right of a person by the State might cause restrictions on other rights. For example, in case of conflict

[13] Campbell and Cosans v. The United Kingdom, ECHR No. 7511/76; 7743/76, § 36 (1982).
[14] *Ibid*.
[15] Andras Sajo, Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World, 262 (2007).
[16] Eva Hauksdóttir, *Restricting Freedom of Expression for Religious Peace: On the ECHR's Approach to Blasphemy*, 1 European Convention on Human Rights Law Review 75, 79 (2021).
[17] *Supra* note 3, 16.

between the freedom of expression and the freedom of religion, if the State decides to preserve freedom of expression of an individual, freedom of religion of others can be violated. Consequently, the State concerned will be held liable for not fulfilling its obligations imposed by the Convention. Therefore, for avoiding such liability, the State will attempt to counterbalance these rights by putting some limitations on its individuals. In other words, a person's freedom of expression will be restricted to a certain level for the sake of protecting of freedom of religion of others. However, such limitations must satisfy three criteria which will be identified in the next paragraphs.

The Court, by examining the circumstances of a specific case through three cumulative criteria, will determine if the limitations by the States are justified. As it is evident from the texts of Article 9 (2) and Article 10 (2) of the Convention, the first criterion is that the interference has to be *"prescribed by law"*.[18] Therefore, the measure by the States must be in accordance with domestic law and be both accessible and foreseeable and contain protection from arbitrariness by the national authorities.[19] For the law to be accessible, it must be duly announced and be available for the person concerned. In terms of the requirement of "foreseeability", the Court maintained that the norm must be precise so that the people can foresee the consequences of the action. Moreover, the law must contain sufficient protection from any arbitrary interference by national authorities. During an examination, the Court's main task is to define whether the ways of the State and its implications adhere to the Convention, rather than determining the appropriateness of ways chosen by the State's legislature.[20]

The next criterion is the compliance of interference with the *"legitimate aim"*. The States can only put limitations on people's rights if it is aimed to protect the interests enumerated in Article 9 (2) and Article 10 (2) of the Convention. Moreover, it must be noted that the list is limited to those stated in the above-mentioned articles.[21]

After the examination of two criteria, the Court will scrutinize whether the interference is *"necessary in a democratic society"*. For the limitations to be necessary, the States must have strong justifications. According to the Court, the term "necessity" in Article 9 (2) and Article 10 (2) means the existence of a "pressing social need" for the interferences imposed by the States.[22] So, limitations by the States on freedom of expression for the protection of others' religious feelings must be examined strictly.[23] The Court determines if the reasons for that interference are appropriate and sufficient, and *"proportionate*

[18] *Supra* note 2, art. 9 (2)-10 (2).
[19] Murdoch, *supra* note 12, 37.
[20] Magyar Kétfarkú Kutya Párt v. Hungary, ECHR No. 201/17, § 93-95 (2020).
[21] *Supra* note 3, 21.
[22] *Supra* note 12, 39-40.
[23] Sajo, *supra* note 15, 264.

to the legitimate aim pursued". The nature and severity of penalties are taken into consideration when the Court evaluate the proportionality and necessity of such interferences.[24]

As it is seen from its case law, the determination of the first and second criteria is not so complicated for the Court in comparison with the third. Moreover, it must be mentioned that the States enjoy a margin of appreciation which allows them a certain discretion on their actions as they are *"in principle in a better position than the international judges"*.[25] The extent of the margin of appreciation varies from case to case. It is also the same for those cases that involve an interplay between freedom of expression and freedom of religion which will be referred to in the next paragraphs when dealing with various cases. It should also be added that the margin of appreciation is not unlimited as it *"goes hand in hand with a European supervision"*.[26] So, the Court itself gives the final decision, in the end, on whether the State overstepped their margin of appreciation.

II. Situations in which interplay between two rights emerges

The interplay between freedom of expression and freedom of religion usually emerges in two conditions. The first situation occurs when these two rights come into conflict. In this case, the States restrict the freedom of expression of a person, within the meaning of "the protection of the rights of others" under Article 10 (2) in order to protect others' religious feelings. The second situation happens when a person uses his freedom of expression as a result of his freedom of religion. A person disseminates his religious opinions which do not fall within the meaning of the *"manifestation of religion"* under Article 9.[27] The Court dealt with different cases related to both situations.

A. When these two rights come into conflict

The initial case regarding the first situation is *Otto-Preminger-Institut v. Austria*.[28] In this specific case, the applicant announced a series of six showings, which were in a religious context, and distributed a bulletin to its 2,700 members, which also contains the information that those who are under 17 years old are prohibited for the showings. Nevertheless, criminal proceedings were instituted against the manager of Otto-Preminger-Institut with a charge of *"disparaging religious doctrines"*.[29] In addition to that, after the display of the first private session in the presence of a duty judge, the film was

[24] *Supra* note 3, 22-23.
[25] Bédat v. Switzerland, ECHR No. 56925/08, § 54 (2016); *See also* Miljević v. Croatia, ECHR No. 68317/13, § 58 (2020).
[26] *Supra* note 1.
[27] *Supra* note 3, 31.
[28] *See generally* Otto-Preminger-Institut v. Austria, ECHR No. 13470/87 (1994).
[29] *Ibid*.

seized by the application of public prosecutor and later forfeited. Consequently, public showings could not take place. The domestic courts concluded against the applicant by stating that the limitation on freedom of expression is justified because it could offend the feelings of Roman Catholics as it contains erotic scenes of Jesus Christ and Virgin Mary.[30] The Court when dealing with this case, maintained that besides inoffensive or indifferent information and ideas, statements which "shock, offend or disturb the State or any sector of the population" falls within the ambit of Article 10 § 2. However, people who exercise their freedom of expression must refrain from those expressions which are "gratuitously offensive" towards religious people. It is included in the "duties and responsibilities" within the meaning of Article 10 § 2.[31] So, those who enjoy their freedom of expression must take into consideration that their speech which does not serve any public debate can lead to the infringement of other's rights. On the other hand, the Court mentioned that those who manifest their religion have to "tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith". By taking into account that majority, about 87%, of the Tyrolean population is Roman Catholic believers, the Court concluded that there is a "pressing social need" for the limitation imposed by the States to protect religious peace.[32] Moreover, it referred to the State's margin of appreciation and stated that national authorities are better placed than the international judge to evaluate the situation, as there is no single opinion about the importance of religion in society throughout Europe.[33] It must also be added that margin of appreciation becomes wider when there is a risk for religious people to be offended as a result of expression of opinions by others.[34]

Another question before the Court was whether the announcement can be considered "public" because it is an important element to define whether the expression can be considered to cause offence against the religious feelings of others. In that regard, although the applicant argued there was a requirement of payment of an admission fee and a requirement of an age limit, the Court maintained that the announcement, which also contained the content of the film having an indication of its nature, reached the high amount of people to be called "public". Taking into consideration that others being aware of the content knew that there are some sensitive parts against religious feelings of Christians, suggested screening of the film must be regarded as an expression to cause offence to the public.[35]

[30] *Id*., § 10-19.
[31] *Id*., § 9.
[32] *Ibid*.
[33] *Id*., § 46-52.
[34] Wingrove v. The United Kingdom, ECHR no. 17419/90, § 58 (1996).
[35] *Supra* note 28, § 54.

On contrary, some judges such as Palm, Pekkanen and Makarczyk stated, by making a distinction between the *Müller case (No.10737/84, 24 May 1988)*, in their dissenting opinion that audience for the film was relatively small to be considered as "public" and for that, the limitation by the State was disproportionate to the aim pursued.[36] However, the Court concluded that the interference is "necessary in a democratic society" and therefore, there is no violation of Article 10 of the Convention.

Some other cases are related to blasphemy against the religion. The cases of *İ. A. v. Turkey (No. 42571/98, 13 September 2005)* and *Aydın Tatlav v. Turkey (No. 50692/99, 2 May 2006)* are the best examples of this kind of matter. Both of them are related to the books which, in the national authority's opinion, contain offensive opinions toward Islam and to Prophet Muhammed. The States started criminal proceedings and fined both applicants in accordance with Article 175 of the Criminal Code of Turkey for prevention of disorder and protection of the rights of others.[37] In both cases, the Court reiterated its general principles mentioned above in cases of *Otto-Preminger-Institut v. Austria* and *Wingrove v. The United Kingdom.* By applying these principles, the Court maintained that, in *İ. A. v. Turkey*, the applicant's comments do not only offend or shock, or are not provocative, but also abusive to the Prophet of Islam.[38] In addition, by taking into account that the book was not seized at all and the amount of fine was small, the Court concluded that the measure by the State has met a "pressing social need" and was proportionate to the aim pursued.[39] It should be added that some judges of the case did not agree with the Court's conclusion. According to them, the principle in the case of *Handyside v. The United Kingdom* implies that "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 shock, offend or disturb the State or any sector of the population", must be considered strictly.[40] And also, this kind of criminal proceedings towards those who exercise their freedom of expression can dissuade them from disseminating their opinions that are not conformist on religion.[41] This approach was also used by the Court in its decision of *Aydın Tatlav v. Turkey*. In this case, the Court concluded that the applicant only introduced his historical study and critical comment on Islam and did not intend to insult religious symbols or believers. For that, there was no "pressing social need" for interference by the State.[42]

[36] *Id*., § 9.
[37] İ. A. v. Turkey, ECHR No. 42571/98, § 13 (2005); *See also* Aydın Tatlav v. Turkey, ECHR No. 50692/99, § 14 (2006).
[38] *Id*., § 19.
[39] *Id*., § 30-32.
[40] *Id*., § 1.
[41] *Id*., § 6.
[42] *Id*., § 28-31.

The last two cases demonstrate that the applicant made an offensive speech. In that regard, it is crucial to know the categories of offensive speech and determine whether they are protected by Article 10 of the Convention. The first category includes those expressions which are considered "gratuitously offensive". The Court takes it less seriously as the person concerned, in some circumstances, can be protected even when he expresses his opinion in a gratuitously offensive manner.[43] However, as the Court maintained, hate speech, which forms the second category of offensive speech and includes all expressions that provoke, justify, promote xenophobia, anti-Semitism, hatred based on race and religion or on any other forms of intolerance, does not enjoy protection from the Convention.[44] Although the Court has not provided the explanation and scope of "gratuitously offensive" in detail, it can be concluded that it is one of two categories of offensive speeches which is less serious in comparison with hate speech. For this reason, the Court, depending on the circumstances of each case, can find the limitations on "gratuitously offensive" speeches unjustified.

Regarding the freedom of expression in the context of religious doctrines, the Court also makes a distinction between facts and value judgments in expressions in its cases. While the existence of facts is a requirement, the person is not liable to prove the truth of their value judgments provided that they have a factual basis.[45] The person who expresses his judgments must substantiate them with sufficient facts. Those judgments which have enough factual basis must be examined by the Court strictly.[46] It is the same when an offensive speech is at stake. When the Court determines the necessity of the measure, firstly, it will scrutinize whether the expression concerned involves only facts or value judgments, or both. Later, according to the principles mentioned above, the Court will conclude whether the limitations on offensive speech are "necessary in a democratic society" and proportionate to the aim pursued.

After the discussion of issues related to gratuitously offensive speeches which the Court dealt with in its cases of *İ. A. v. Turkey* and *Aydın Tatlav v. Turkey*, cases that concern alleged hate speech will be analyzed. The first of these cases is *Gündüz v. Turkey (No. 35071/97, 4 December 2003)*. The applicant, who was a leader of Tarikat Aczmendi, participated in a television programme and expressed his severe religious opinions in discussions. Through the discussions, he showed his discontent towards secularism and democracy in Turkey, supported the idea to establish a Sharia regime and even called bastards the children who were born as a result of civil marriage

[43] Gündüz v. Turkey, ECHR No. 35071/97, § 41 (2003).
[44] *Supra* note 15, 265.
[45] Lingens v. Austria, ECHR No. 9815/82, § 46 (1986).
[46] *Supra* note 15, 267.

rather than a religious one.[47] Criminal proceedings have been started against him for inciting people to hatred on a distinction founded on religion. When dealing with this case, firstly, the Court reiterated its general principles which were mentioned in the above cases.[48] Later, it separated Gündüz's speech into 3 parts:[49] his attitude towards institutions in Turkey, his statement of calling bastard the children born of civil marriage and establishment of Sharia regime in Turkey. For the first part, the Court maintained that the applicant was engaged in public debate on a television programme and expressed his opinions which cannot be regarded as a call to violence based on religious intolerance. In terms of the second statement, the Court decided not to take it as a hate speech by taking into account the fact that the "applicant was actively participating in a lively public discussion".[50] Finally, according to the Court, the applicant only defended Sharia and did not call people to establish the regime violently. For this reason, it cannot be regarded as a hate speech too.

By considering these circumstances and the margin of appreciation of the State, the Court found a violation of Article 10 of the Convention.[51] However, in my opinion, while the Court was true in the first and the third parts, it reached a false conclusion in terms of the statement calling bastard the children born of civil marriage. First of all, as judge Türmen stated in his dissenting opinion, the word "bastard" is seriously offensive and used by the applicant of religious hatred.[52] In addition, if we evaluate the present situation with the distinction between facts and value judgments, we can identify the statement of the applicant as value judgment because he did not express any fact, rather expressed his opinions. As mentioned earlier and the Court maintained in its cases, value judgments have to also contain sufficient factual basis. But in this case, the applicant did not support his value judgment with facts, rather stating his subjective view about children born outside marriage. For these reasons, the Court, as in its other decisions, should justify the limitation of the State concerned on value judgment without any factual basis.

The case of *Norwood v. The United Kingdom*[53] about hate speech is also interesting. The applicant, who showed a large poster with the photo of the Twin Towers in flame, the words "Islam out of Britain – Protect the British People" and a symbol of a crescent and star in a prohibition sign, was charged with displaying hostility towards the religious group and as a result, fined at the amount GBP 300. The Court found, differently from the previous case, no violation of Article 10. According to the Court, the expression constituted a

[47] *Supra* note 43, § 10-11.
[48] *Id*., § 37-41.
[49] Klein v. Slovakia, ECHR No. 72208/01, § 11-15 (2006).
[50] *Ibid*.
[51] *Id*., § 47-53.
[52] *Supra* note 43, *see* Dissenting Opinion of Judge Türmen.
[53] Norwood v. The United Kingdom, ECHR No. 23131/03 (2004).

violent attack against Muslims in the United Kingdom by linking all of them with terrorism and therefore it is a hate speech against a religious group.[54] The Court evaluated the activities of the applicant as abuse of rights in under Article 17 and concluded that he is not protected with Article 10 of the Convention.[55]

The next cases which will be discussed are related to alleged defamation of the highest representative of a religious community and religious sects. The first case to be referred to is the case of *Klein v. Slovakia (No. 72208/01, 31 October 2006)* for the former, and the case of *Jerusalem v. Austria (No. 26958/95, 27 February 2001)* for the latter. In the first case, the applicant published an article which contained slang terms and allusions with vulgar and sexual connotations against Archbishop Jan Sokol, the highest representative of the Roman Catholic Church in Slovakia. After the complaint of two associations, he was sentenced to a fine of 15,000 Slovakian korunas because he had defamed, in domestic courts' judgments, the highest representative and members of that church.[56] Although the Government stated that they aimed to protect the rights and freedoms of others by this limitation, the Court maintained that the applicant strongly criticized only Archbishop Sokol. By these comments against him, he neither interfered with the believers' right to express and exercise their religion nor vilified their faith. In addition, by taking into consideration the fact that the person whom the article was directed pardoned him, the applicant's conviction for defamation of believers' religious faith is inappropriate to this specific case.[57] For this reason, the Court found a violation of Article 10 of the Convention.[58]

In *Jerusalem v. Austria*, the applicant, a member of the Vienna Municipal Council, gave a speech related to sects during the debate about granting subsidies to an association which helped parents whose children joined sects. When the debate about drugs policy began, the applicant criticized the collaboration between IPM, which was a sect, and the Austrian People's Party. According to domestic courts, she further talked about common features of IPM and another sect, VPM, and stated that both display totalitarian character. Subsequently, both associations filed a civil complaint against her and claimed from domestic courts to order her to retract the statements, to publish in newspapers about retraction and to prohibit her from saying again that "IPM is a sect".[59] These requests were granted by the domestic courts. After the applicant exhausted domestic remedies, she brought the case before the Court. The main task before the Court was to determine whether the

[54] *Supra* note 3, 11-12.
[55] *Ibid*.
[56] *Supra* note 49.
[57] *See generally* Van den Dungen v. The Netherlands, ECHR No. 22838/93 (1995).
[58] *Id*., § 51-55.
[59] *See generally* Dahlab v. Switzerland, ECHR No. 42393/98 (2001).

statements of the applicant were facts or value judgments.[60] The Court maintained that the applicant, after clarifying the term "sect", disseminated her opinions about totalitarianism and did not refer to IPM and VPM. She only criticized relations between these sects and the Austrian People's Party. As it has been mentioned before, while facts must be proved by the person, this is not a requirement for value judgments. However, value judgments must also have a sufficient factual basis. In this specific case, the Court stated that the applicant would have proven the basis of her opinions, but the domestic courts, as the Government agreed, did not seek for expert opinion at the request of the applicant and did not let her introduce evidence of witnesses. In addition, this case is also important to know the extent of protection of Article 10 for politicians. The Court maintained that limits of acceptable criticism for elected representatives of the people are wider in comparison with private individuals and associations. Politicians, as well as private bodies which participate in public areas actively, must show a higher degree of tolerance, as they "lay themselves open to the scrutiny of word and deed by both journalists and the public at large".[61] For that, in this specific case, IPM and VPM have to show tolerance against comments of the applicant. In the end, the Court concluded that the State exceeded its margin of appreciation by asking the applicant to verify the truth of her comments and at the same time not accepting the evidence brought by her. Therefore, the Court found a violation of Article 10 of the Convention.[62]

Distinction, which was made by the Court, between criticism and insult should be discussed in the last two cases. As it can be seen from *Klein v. Slovakia* and *Jerusalem v. Austria*, criticism is protected within the meaning of Article 10 of the Convention. However, the limit for criticism has been set and exceeding this limit will justify the interferences by the States. However, it is not the same in case of insult. According to the Court, when the statements "amount to wanton denigration and its sole purpose is to insult", it is not protected by Article 10 of the Convention.[63]

B. When a person employs his freedom of expression as a result of his freedom of religion

The Court also dealt with those cases in which a person concerned uses his freedom of expression as a result of his freedom of religion. The case of *Van den Dungen v. The Netherlands*[64] is related to this matter. The applicant, who was showing images of foetal remains with photographs of Christ and by that persuading them not to abort their child, was prohibited to come close to within 250 metres of the clinic for 6 months. She claimed before the

[60] *Ibid*.
[61] *Ibid*.
[62] Jerusalem v. Austria, ECHR No. 26958/95, § 36-47 (2001).
[63] *Supra* note 3, 12-13.
[64] *Supra* note 57.

Commission that his rights within Article 9 and Article 10 of the Convention has been breached by State's limitation. The Commission stated that acts of worship or devotion are parts of the practice of religion. However, each act for the practice of religion is not covered by Article 9 of the Convention. In this specific case, the applicant was not expressing her belief, but rather trying to dissuade women from abortion through her religious faith. By applying this principle to the circumstances of the case, the Commission decided to examine the situation within the meaning of Article 10.[65] Thus, the main difference between the situation in which freedom of expression and freedom of religion come into conflict emerges. As it is seen from the circumstances of this specific case, there is no conflict between the two rights. Rather the person concerned expresses her religion which does not constitute a "manifestation of religion" in the meaning of Article 9 and therefore falls within Article 10. In conclusion, the Commission maintained that the prohibition for the applicant was limited in terms of duration and area. She was not deprived of his freedom of expression but was restricted for the protection of the rights of others. Therefore, the interference was "necessary in a democratic society" and proportionate to the aim pursued.[66]

On the other hand, the Court includes prohibitions of wearing religious symbols into the meaning of Article 9 of the Convention. The case of *Dahlab v. Switzerland (No. 42393/98, 15 February 2001)* is related to this matter. In this specific case, the applicant, who was wearing an Islamic headscarf in classes, was prohibited to do so by domestic courts. They concluded that wearing a headscarf is against the principle of gender equality and neutrality, and even it can cause conflict within school. When the Court was dealing with the case, firstly, it started with repeating the above-mentioned general principles and margin of appreciation about freedom of religion. Later the Court stated its acceptance of the State's position. According to the Court, a headscarf is a strong symbol which can be seen easily by others and may be quite influential for children aged between four and eight. And also, by taking into consideration that the headscarf is only imposed on women, and it might have some kind of proselytising effect, wearing a headscarf is against the principle of gender equality, and neutrality. Therefore, the Court found no violation within the meaning of Article 9.[67]

Conclusion

Both freedoms of expression and freedom of religion are the foundations of a democratic society. In the Court's jurisprudence, the threshold for limits on freedom of expression is quite high. However, among other purposes, the States are entitled to put certain limitations on free speech related to religion

[65] *Ibid*.
[66] *Ibid*.
[67] *Supra* note 59.

for protecting others, especially believers' religious feelings. In other words, the Court attempts to counterbalance the freedom of expression and freedom of religion. To this end, as discussed in the paper, the Court formulated criteria to examine the limitation on freedom of expression applied by the State. Through the criteria, the Court analyzes under the circumstances of each case whether the interference by the State is prescribed by law, whether it pursues a legitimate aim and whether it is necessary and proportionate to the legitimate aim pursued. In case the State fails in one of these requirements, the Court finds the interference as unjustified and therefore, concludes the violation of the Convention.

From the analysis of the Court's above-mentioned case law, it is clear that the Court divides offensive speeches into two parts: "gratuitously offensive" speeches and hate speech. The former is protected within the meaning of Article 10 of the Convention, whereas the latter does not fall within the ambit of that Article. Nevertheless, abusive statements in the category of "gratuitously offensive" speeches against religious figures also do not enjoy protection from the Convention. On the other hand, as the Court mentioned in its case *Gündüz v. Turkey*, for the speech to be considered hate speech, it must comprise a call to violence based on religious intolerance. In other words, the threshold defined for hate speech is much higher in comparison with speeches that are "gratuitously offensive". However, taking into account that some speeches might not spark violence against the religious community, but provoke hatred based on religion, the Court should also include such expressions in the category of hate speech and consequently, should find the limitation imposed by the State as justified. However, currently, Court's jurisprudence does not consider it hate speech.

Regarding the alleged defamation of religious figures, the Court keeps the margin wider for freedom of expression. Criticisms of those individuals are protected within the meaning of Article 10 of the Convention provided that such an expression does not involve insult. The Court's approach is based on its respect for people's freedom in a democratic society to impart information related to particular religion even if it is considered shocking or offended by believers. However, as hate speech, the Court has not included insult of certain religious figures or doctrine into the protection of Article 10 of the Convention.

Apart from the situations in which these two rights come into conflict, the Court, in some of its cases, had to define whether certain activities of an individual are to be regarded as freedom of expression or freedom of religion. In that regard, according to the Court's case-law, in case an individual expresses his/her beliefs, it should be understood within the meaning of Article 9, rather than Article 10 of the Convention. It was the reason that wearing religious symbols was construed as an expression of beliefs in the case *Dahlab v. Switzerland* and therefore, examined through Article 9 of the

Convention by the Court.

The Court has rightly chosen an approach which tries to counterbalance the freedom of expression and freedom of religion because much more protection of one of these rights can disrupt a balance in society. For example, permitting people to convey all their opinions on religion, including those characterized as an insult, can lead to intolerance in society. On the other hand, prohibiting people, for the protection of the rights of believers, to express their judgments about religion, including criticisms, can dissuade them from disseminating opinions. Therefore, from my perspective, when the Court examines the facts of the specific case, it takes and should continue to take into consideration that if it preserves one of these rights more over another, it can lead to social discontent in the Member States and, consequently, it should decide the case on this.