Right to offend: what is it that matters most, the offender, the offended or the offence itself?

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HUMAN RIGHTS THESIS

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Executive Summary

The present thesis addresses a controversial issue of legal regulation of offence and the extent of its permissibility from the point of view of the European Court of Human Rights and the international instruments of human rights protection. Taking as starting point theoretical perspectives involved in offence, identity and justice, the thesis analyses the role and the weight of the above notions in the mentioned instruments of human rights protection with a view to attained consistency in the protection of the identical interests of different groups and upholding the principles of justice.

In this realm, the thesis argues that offence to feelings shall not be a ground for legal condemnation, while the prohibition of speech that objectively deprives any group of persons of the possibility to continue to be equal members of the society has to be guaranteed for any group subject to equal harm.

In applying these arguments to the approaches international law and the European Court of Human Rights (ECtHR) adopt, I argue the following: (I) the jurisprudence of the ECtHR cannot stand the criticism of inconsistency within its own case-law resulting from disproportionate regard to interests of religious groups that qualify as the issues falling under margin of appreciation of the domestic authorities. (II) In contrast, the current approach of international law remains mostly consistent and explicit in drawing the lines between the speech offensive to feelings and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence and while recognizing one as protected speech requires the second to be prohibited in national legal systems. However, the analysis of the differences

between International Covenant on Civil and Political Rights (ICCPR) and International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), demonstrate that unequal measures are employed to protect different groups, presumably as a result of the fact that it is taken for granted that attack to racial groups is more damaging, than the attack on religious groups in view of the elevated protection by ICERD and the lower threshold for application of its specific provisions.

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Introduction

> *"[A] Muslim who espouses one of its fundamental tenets — that homosexuality is wicked and a sin — might find himself banged up by the old bill for inciting homophobic hatred. And if I were then to say what I believe — that, partly because of its attitude towards gay people, Islam is a vindictive, bigoted and repressive ideology — then I might be banged up, too. This is surely ludicrous."*[1] *(Ron Lidddle, The Spectator)*

Overlap and conflict between freedom of religion or belief and freedom of expression is not a rare occasion. Religiously motivated speech can offend. Such speech is subject to hate speech concerns.[2] In contrast, any speech can offend religious believers as a whole or a particular group of them.[3] While blasphemy laws are aimed at protecting religious ideas as such, laws regulating religious insult and religious hatred protect the persons holding such beliefs.[4] From abstract point of view both rights, freedom of expression and freedom of religion or belief, are considered to be equally important.[5] Scholars, among them Ian Leigh[6], Jeroen Temperman[7], Malcolm D.

[1] Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (Oxford ; New York: Oxford University Press, 2009), 385

[2] Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge, UK ; New York: Cambridge University Press, 2005), 77.

[3] W. Cole Durham and Brett G. Scharffs, *Law and Religion: National, International, and Comparative Perspectives*, Elective Series (New York: Aspen Publishers, 2010), 183,184.

[4] Ian Leigh, "Damned If They Do, Damned If They Don't: The European Court of Human Rights and the Protection of Religion from Attack," *Res Publica* 17, no. 1 (2011): 57–59.

[5] Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality*, 1st ed (Oxford, U.K: Oxford University Press, 2012), 157, 158.

[6] Ian Leigh, "Damned If They Do, Damned If They Don't: The European Court of Human Rights and the Protection of Religion from Attack," *Res Publica* 17, no. 1 (2011): 72.

[7] Silvio Ferrari, Rinaldo Cristofori, and International Consortium for Law and Religion Studies, eds., *Law and Religion in the 21st Century: Relations between States and Religious Communities* (Farnham, Surrey ; Burlington, VT: Ashgate Pub, 2010), 222.

Evans[8], Mohamed Saeed M. Eltayeb[9] believe that there is no clash if we embrace freedom of religion correctly. Mohamed Saeed M. Eltayeb emphasizes the importance of 'interdependency' of human rights recognized under Universal Declaration of Human Rights.[10] The same position was communicated *by Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*,[11] conclusions agreed upon by experts who participated in the workshops organized by Office of the United Nations High Commissioner for Human Rights.[12] However, 'if' in the above contention is a sufficient ground for clashes to exist in reality.

It seems quite natural that certain speech may offend. Otherwise, if it were acceptable for everybody, then it would not even need to be protected. The fact that freedom of speech is prone to attack is exactly the reason for providing special protection to it.[13] However, as Waldron argues in *The Harm in Hate Speech* total ignorance of the harm hate speech could bring to 'dignity' and 'social standing' of a person would be too extreme.[14]

Before embarking on assessing the clash, some insight on the links and differences of these rights would be helpful. Some scholars pose the question whether freedom of religion is

[8] Malcolm D. Evans, *The freedom of religion or belief and the freedom of expression*, Religion and Human Rights 4 (2009): 199, 205, 211.
[9] Mohamed Saeed M. Eltayeb, "The Limitations on Critical Thinking on Religious Issues under Article 20 of ICCPR and Its Relation to Freedom of Expression," *Religion & Human Rights* 5, no. 2 (2010): 123.
[10] Ibid, at 122
[11] The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence,(2012): at 10.
http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf (last accessed 26 November 2015)
[12] Ibid, at 1-6.
[13] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford [UK] ; New York: Oxford University Press, 2007): at 114.
[14] Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, Mass.: Harvard University Press, 2014), 5.

redundant when we have freedom of expression protected well.[15] The general need to refrain from assessing the legitimacy of religions could bring us to the same point.[16] Liberalism values religious beliefs not out of their own merit but only because they are the product of an expression of a 'voluntary choice'.[17] Sandel introduces a concept of the 'situated self' and criticizes above liberal accounts arguing that people's lives and identities are closely linked to the communities they come from, be it religious or any other.[18] The argument in favor of redundancy of freedom of religion or belief under the circumstances of already existent protection of freedom of expression could hold true only as far as religious belief is a choice, expression of freedom and is not a heteronomous decision. And even if it holds true, we also need to consider that religion is a special kind of a choice, one also giving rise to duties. This consideration makes religiously-motivated choices, which would otherwise more resemble libertarian claims, legitimate even if they go against generally applicable law.[19] Thus, some differences are present to logically embrace separate protection of religion and expression under international and regional human rights systems.

Despite these differences, religiously-motivated speakers find themselves in circumstances analogical to speakers that offend religious feelings when their speech perceived by them as manifestation of religion, offend other nonsecular and secular values. If exercise of freedom of expression in its both forms as ordinary speech or manifestation of religion may serve the

[15] W. Cole Durham and Brett G. Scharffs, *Law and Religion: National, International, and Comparative Perspectives*, Elective Series (New York: Aspen Publishers, 2010), 202, 203.
[16] Metropolitan Church of Bessarabia and others v. Moldova (ECtHR 2001): at 117.
[17] Rex J. Ahdar and I. Leigh, *Religious Freedom in the Liberal State*, Second edition (Oxford: Oxford University Press, 2013), 79.
[18] Michael J. Sandel, ed., *Liberalism and Its Critics*, Readings in Social and Political Theory (New York: New York University Press, 1984), 6. Rex J. Ahdar and I. Leigh, *Religious Freedom in the Liberal State*, Second edition (Oxford: Oxford University Press, 2013), 54.
[19] Rex J. Ahdar and I. Leigh, *Religious Freedom in the Liberal State*, Second edition (Oxford: Oxford University Press, 2013), 79-80.

validation of the identity of the speaker, in turn the aim of protecting the offended as a result of such speech is derived from the demands of identity, also. Both can be harmful as whichever is privileged, the identity of the speaker or the offended will have to take the attack. I will argue that there is a solution of privileging the speaker vis-à-vis the addressees, both of which can be representative of either of the identities discussed in the thesis unless the circumstances created by speech totally deprives the offended persons of the possibility to continue to be equal members of the society. The solution, if it cannot satisfy everybody's demands, would at least be just treatment for all from an objective point of view.

As far as the structure is concerned, Chapter one will address theoretical perspectives in relation to core notions inherent in the clash of these rights. Chapter two will examine the approach of the European Court of Human Rights (ECtHR). Chapter three will see how the above questions are addressed under international law with special regard to the views taken by UN Human Rights Committee (CCPR) through the General Comments issued and the jurisprudence developed in this connection.

Chapter one: Theoretical Perspectives

In the present Chapter, I will address theoretical perspectives in relation to core notions inherent in the clash of the right of freedom of expression and freedom of religion or belief, namely instances when offence is experienced as a result of speech directed to religious sensibilities and in the second case, when offence is a result of speech, believed by speaker to be manifestation of his/her religion. In both cases, offence is a result of an assumed attack to an identity of a person, be it religious or any other. In view of recognized negative nature of experiencing offence, the way legal system tries to rectify the possible harm suffered, raises concerns of justice. I will consider the theoretical scenarios ensuing by different characterization of offence and identity and how such characterization might affect the sense of justice at both sides of the conflict. At the end, I will seek for a scenario, if any, that can sustain at least criticisms out of concerns of justice. For the purposes of the chapter, when I refer to identity, its meaning relates to both, religious and non-religious identities that turn out to be affected by speech, unless I specify which kind of identity I am explicitly describing.

1.1 Offence

Qualification of relevant acts as an offence rather than denial of truth is a corollary of the general consensus that no religion has monopoly over truth[20] and that generally 'truth' as such might not be discoverable at all, the reasoning pursued by critics of Mill's theory based on the value of truth.[21] Therefore, whenever identity is attacked, the disturbing fact is not that others believe in something different but that they do not respect what the others believe. Even if we accept that religion sees itself as ultimate holder of the truth, basing the protection of religion based on its relation to truth can be opposed through Mill's own words that truth needs to be defended against

[20] Rex J. Ahdar and I. Leigh, *Religious Freedom in the Liberal State*, Second edition (Oxford: Oxford University Press, 2013), 77.
[21] E. M. Barendt, *Freedom of Speech*, 2nd ed (Oxford ; New York: Oxford University Press, 2007): 7–9.

its opposition, for it not to turn into a 'dead dogma', but remain a 'living truth'.[22] In sum, the existent consensus that denial of truth is not to the core of the problem posed in the thesis is sufficient in order to move on to consider next points.

The concept of 'offence' as of its objective definition connotes negative mental state.[23] Based on Feinberg's 'offense principle'[24], for conduct to be legally condemned no direct harm to others is required. Lord Devlin even goes as far as to argue that conduct can be legally condemned based on the motive of the society to preserve its 'moral bounds'.[25] Thus, no objective notion of 'evil' is at its core, but recognition of it as such by majority. [26]In contrast, 'the harm principle' by Mills states that 'the only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others.'[27]

Whichever position we take it will be helpful to determine what the harm caused by offence could constitute. Generally it is held that for harm to exist, 'setback to a person's interests, where a person's interests comprise the things that make his or her life go well' has to be created. [28] Thus, hypothetically if negative mental state disappears and leaves one intact without inflicting

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[22] Mill, John Stuart, *on liberty,*(1974),The Walter Scott Publishing Co., Ltd, (2011), p. 64; http://www.gutenberg.org/files/34901/34901-h/34901-h.htm (last accessed November 26 2015)
E. M. Barendt, *Freedom of Speech*, 2nd ed (Oxford ; New York: Oxford University Press, 2007): 8-9.

[23] Peter Jones, "Religious Belief and Freedom of Expression: Is Offensiveness Really the Issue?," *Res Publica* 17, no. 1 (2011): 80.

[24] Joel Feinberg, *The Moral Limits of the Criminal Law. Volume 2, Volume 2,* (New York; Oxford: Oxford University Press, 1985), 1.
A. P. Simester and Andrew von Hirsch, "RETHINKING THE OFFENSE PRINCIPLE," *Legal Theory* 8, no. 3 (September 1, 2002): 269.

[25] Patrick Devlin, *The Enforcement of Morals* (London ; New York: Oxford University Press, 1965), 11.

[26]Jeffrie Murphy, "A Failed Refutation and an Insufficiently Developed Insight in Hart's Law, Liberty, and Morality.," *Criminal Law & Philosophy* 7, no. 3 (October 2013): 420.

[27]Mill, John Stuart, *on liberty,* (1974), The Walter Scott Publishing Co., Ltd, (2011): 17; http://www.gutenberg.org/files/34901/34901-h/34901-h.htm (last accessed November 26 2015)
Jeffrie Murphy, "A Failed Refutation and an Insufficiently Developed Insight in Hart's Law, Liberty, and Morality.," *Criminal Law & Philosophy* 7, no. 3 (October 2013): 420.

[28] A. P. Simester and Andrew von Hirsch, "RETHINKING THE OFFENSE PRINCIPLE," *Legal Theory* 8, no. 3 (September 1, 2002):269-295.

loss of future opportunities, no harm is present in the offence. However, it can be argued that psychological harm, harm to self-esteem of persons[29] and harm to the possibility of accessing community life satisfy the above criteria.[30] The question is how important the harm needs to be, to outweigh the other kind of harm caused by restricting speech, evident in the interference with personal autonomy and the effect it has on the choice one makes from the opportunities available. [31] Thus, as harm tends to exist on both sides and can theoretically cancel each other out, I will proceed to focus on theories condemning offence regardless of any explicit harm caused.

Based on Feinberg's theory, conduct is offensive solely on the basis that it is unpleasant, though, further consideration has to be given to its extent and intensity, examination of 'reasonable avoidability' and the extent of voluntariness of incurring offence on himself/herself, [32] 'alternative opportunities' for the actor[33], his/her motives and social value of the speech are also necessary.[34] Based on Simester and Hirsch, specific reasons are required for a conduct to be offensive in the first place, the presence of an audience representing one of them.[35] If one and only thing that matters is negative mental experience, then pursuant to Feinberg's theory, in case members of religious groups disseminated knowledge of a specific offense to larger numbers in

[29] A. P. Simester and Andrew von Hirsch, "RETHINKING THE OFFENSE PRINCIPLE," *Legal Theory* 8, no. 3 (September 1, 2002): 282.
[30] Ibid, p.292
[31] Ibid, p.281, cited in footnote 30
[32] Joel Feinberg, *The Moral Limits of the Criminal Law. Volume 2, Volume 2,* (New York; Oxford: Oxford University Press, 1985), 35. A. P. Simester and Andrew von Hirsch, "RETHINKING THE OFFENSE PRINCIPLE," *Legal Theory* 8, no. 3 (September 1, 2002): 280.
[33] Joel Feinberg, *The Moral Limits of the Criminal Law. Volume 2, Volume 2,* (New York; Oxford: Oxford University Press, 1985), 26, 44. A. P. Simester and Andrew von Hirsch, "RETHINKING THE OFFENSE PRINCIPLE," *Legal Theory* 8, no. 3 (September 1, 2002): 271.
[34] Joel Feinberg, *The Moral Limits of the Criminal Law. Volume 2, Volume 2,* (New York; Oxford: Oxford University Press, 1985), 26. Raymond Wacks, *Privacy and Media Freedom*, First edition (Oxford, United Kingdom: Oxford University Press, 2013), 39.
[35] A. P. Simester and Andrew von Hirsch, "RETHINKING THE OFFENSE PRINCIPLE," *Legal Theory* 8, no. 3 (September 1, 2002): 279-280.

their religious group, then their conduct would be offensive to the ones affected, too. [36] In theory, this means that if Christians offended by a certain speech spread the word about the mere fact of the occurrence of offensive speech to other members of Christian community, then the ones spreading the word would qualify as offenders, too. The example illustrates that negative experience cannot be the only thing that matters. Regardless of the difference of standpoints with regard to relevant factors, such as extent and intensity of the offence, possibility of avoiding it and alternatives for the actor, they still constitute important criteria for assessment of an offensive speech. For instance, there is considerable consensus about disregarding 'bare knowledge' offences which describe the situation when the offended do not in any way avoid the offence, thus introducing the responsibility of the offended in the fact that his/her identity was adversely affected. [37]

There is a view that even in the absence of audience that might be offended, 'badness' of causing it can still be recognized[38]. In the reality where the beliefs of some, are necessarily 'rival' as Raz puts it[39], recognition of such 'badness' can become a common denominator, fitting well within the notion of 'public reason' defended by Rawls.[40] However, recognition of its 'badness' has features of utilitarian rationale as 'the more unpleasant it feels, the worse it is'[41] which after all, is difficult to calculate, and even if it was not, recognition of this extent of utilitarianism would

[36] Sune Lægaard, "The Cartoon Controversy: Offence, Identity, Oppression?," *Political Studies* 55, no. 3 (October 2007): 488.
[37] Peter Jones, "Religious Belief and Freedom of Expression: Is Offensiveness Really the Issue?," *Res Publica* 17, no. 1 (2011): 85-86.
[38] Ibid, p. 77, 80
[39] Joseph Raz, *Ethics in the Public DomainEssays in the Morality of Law and Politics* (Oxford University Press, 1995), 165. Rex J. Ahdar and I. Leigh, *Religious Freedom in the Liberal State*, Second edition (Oxford: Oxford University Press, 2013), 58.
[40] John Rawls, *Political Liberalism*, The John Dewey Essays in Philosophy, no. 4 (New York: Columbia University Press, 1993), 213. Rex J. Ahdar and I. Leigh, *Religious Freedom in the Liberal State*, Second edition (Oxford: Oxford University Press, 2013), 61-63.
[41] Peter Jones, "Religious Belief and Freedom of Expression: Is Offensiveness Really the Issue?," *Res Publica* 17, no. 1 (2011): 79.

leave only the liberty not objected by anybody as H.L.A Hart describes it,[42] that being practically impossible as Muslim beliefs necessarily conflict with Christian, and both of them do so with atheist ones. [43] As Waldron puts it: 'Religious freedom means nothing if it is not freedom to offend: that is clear.'[44] Jeroen Tempermann also points out that simple manifestation of religion by some may be offensive to others.[45] Sejal Parmar notes that the 'concept of defamation of religions is extremely difficult as religions differ on their understanding of divine authority and make rival claims to absolute truth. One religion may therefore be viewed as a "defamation" of another.'[46] Thus, even though absence of audience does not necessarily rule out existence of concerns for the offensive conduct in the moral sphere, legal recognition of it would lead to absurd liberty.

Still, on most occasions offence does reach the audience. However, through an analogy it can be argued that theoretically the offended state of mind might be a result of a mistake. Peter Jones while differentiating between 'sensory-based' and 'belief-based' offences explains that 'sensory-based' offence can sometimes be 'belief-informed'. As he explains the degree of offence felt can be higher when one knows that the rotten smell comes from a dead body of a person rather than an animal. Thus, such 'sensory-based' offence which is 'belief-informed' is distinguished from 'belief-based' offence as the latter is a result of the perception of the objective 'wrongness' of the

[42] Herbert L. A. Hart, *Law, Liberty and Morality*, Nachdr., The Harry Camp Lectures at Stanford University 1962 (Stanford, Calif: Stanford Univ. Press, 2007), 47.
Peter Jones, "Religious Belief and Freedom of Expression: Is Offensiveness Really the Issue?," *Res Publica* 17, no. 1 (2011): 85.
[43] Ibid, p. 88
[44] Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, Mass.: Harvard University Press, 2014), 130.
[45] Silvio Ferrari, Rinaldo Cristofori, and International Consortium for Law and Religion Studies, eds., *Law and Religion in the 21st Century: Relations between States and Religious Communities* (Farnham, Surrey ; Burlington, VT: Ashgate Pub, 2010), 216.
[46] S. Parmar, "The Challenge of 'Defamation of Religions' to Freedom of Expression and the International Human Rights System," *EUROPEAN HUMAN RIGHTS LAW REVIEW*, no. 3 (2009): 6.

conduct which is absent from the former.[47] However, in contrast with the sharp categorization presented by him, the very feature of 'sensory-based' offence, that one might perceive something as more 'offensive' than it is in real if complemented by some belief, possibly a mistake, is also characteristic to a 'belief-based' offence, as it might be the mistake of understanding what was said as more offensive than the real meaning of the words expressed. The question is raised whether we endorse misunderstandings, or correct it.

Even in the absence of a mistake and other concerns discussed above about the ambiguous nature of the concept, assessment whether it is reasonable for one to be offended or not calls for some technique to penetrate the experience of the offended,[48] something similar to 'imaginative leap' described by Eekelaar which in turn aims to bring adult's decisions in line with children's interests by making adults do 'some kind of imaginative leap and guess what a child might retrospectively have wanted once it reached a position of maturity.'[49] Similarly, in the case when beliefs are different, one needs to penetrate the veil of identity of another to understand degree of the harm caused to their feelings. In addition to that, it has to be seen what difference having a religious identity makes, whether it has quantitative effect and intensifies negative experience or it is qualitatively different from offences to sensibilities other than religious ones.[50] The sensibilities offended can also belong to speaker if he/she is stopped on account of feelings of others. John Stuart Mill in his work *On Liberty* equated 'the feeling of a person for his own opinion, and the feeling of another who is offended at his holding it' with 'the desire of a thief to take a purse, and the desire of the right owner to keep it' as he claims that 'a person's taste is as

[47] Peter Jones, "Religious Belief and Freedom of Expression: Is Offensiveness Really the Issue?," *Res Publica* 17, no. 1 (2011): 81.
[48] Ibid p. 79
[49] Jane Fortin, *Children's Rights and the Developing Law*, 3rd ed, Law in Context (Cambridge, UK ; New York: Cambridge University Press, 2009), 17.
[50] Sune Lægaard, "The Cartoon Controversy: Offence, Identity, Oppression?," *Political Studies* 55, no. 3 (October 2007): 487-488.

much his own peculiar concern as his opinion or his purse.'[51] All in all the above considerations bring us to the next theoretical question, namely what Identity, as a concept can hold.

1.2 Identity

Some religious groups define themselves through their belief-system. Thus, religion forms part of the identity for them. On the other hand, freedom of expression is itself one of the most important ways to cultivate self-respect[52] and as Joseph Raz puts it, its capacity to validate a lifestyle nurtures the sense that their lifestyle is worthwhile.[53] Consequently, identity has to be defined for both the speaker, be he/she motivated by religious grounds or rejection of self-censorship, as well as the addressee of speech. In this light, in theory the identity aspect in both interests of speech and sensibilities among them religious can cancel each other out.

Within the identities that one might hold, some general distinctions can be identified. For instance, racial identity is an inseparable part of identity of a person. [54] While it can be at least disputed that religious identity is a separable one,[55] as after all it is an identity chosen and changeable. [56] However, some argue that religious identity can have a 'totalizing' psychological effect.[57] Whether this contention is a valid justification for one identity to matter more than the other, is a controversial question that raises concerns of fairness for those who happen to base their identity on rationality rather than emotions. However, previous argument is strengthened in

[51] Mill, John Stuart, *on liberty,* (1974), The Walter Scott Publishing Co., Ltd, (2011): 158; http://www.gutenberg.org/files/34901/34901-h/34901-h.htm (last accessed 26 November 2015)

[52] Sune Lægaard, "The Cartoon Controversy: Offence, Identity, Oppression?," *Political Studies* 55, no. 3 (October 2007): 491.

[53] Joseph Raz, *Ethics in the Public Domain Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1995), 156.

[54] E. M. Barendt, *Freedom of Speech*, 2nd ed (Oxford ; New York: Oxford University Press, 2007): 33.

[55] Peter Jones, "Religious Belief and Freedom of Expression: Is Offensiveness Really the Issue?," *Res Publica* 17, no. 1 (2011): 79.

[56] Raymond Plant, "Religion, Identity and Freedom of Expression.," *Res Publica (13564765)* 17, no. 1 (February 2011): 12.

[57] Rex J. Ahdar and I. Leigh, *Religious Freedom in the Liberal State*, Second edition (Oxford: Oxford University Press, 2013), 66.

light of apostasy in Islamic law[58] suffice to mention an example of Sudan where it is punishable by death.[59] The arguments in favor of this point can be further complemented by the fact that on many occasions religious identity is more 'heteronomous' rather than a result of a choice to begin with.[60] Moreover, even when it is not influenced from outside, some believers see their religious allegiance as a call rather than a choice.[61] As for sexual orientation, some continue to see it as a life-style chosen, therefore a separable identity, while the same clearly is not contested for gender identity.[62]

In light of Rawls' perception of liberty as the capability to choose, pursue and revise 'conception of the good' and of persons as 'reasonable and rational', 'free and equal citizens',[63] the question whether a specific identity is a separable one, will be decisive. The conclusion is that if it is not, then attack on it is, in essence, closer to the one on racial or national identity. I agree with Bernard Williams' claim that it is hard to subject anybody's identity even to some impartial setting, if having that specific identity is the condition of having any interest in being around at all.[64] However, inevitable question is raised whether one particular identity can be more important, than the fact that multiple of them can coexist.[65] For the co-existence, some viable

[58] Mark S. Ellis et al., eds., *Islamic Law and International Human Rights Law: Searching for Common Ground?*, First edition (Oxford, United Kingdom: Oxford University Press, 2012), 146–147. Rex J. Ahdar and I. Leigh, *Religious Freedom in the Liberal State*, Second edition (Oxford: Oxford University Press, 2013), 77.

[59] Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge, UK ; New York: Cambridge University Press, 2005), 51.

[60] Rex J. Ahdar and I. Leigh, *Religious Freedom in the Liberal State*, Second edition (Oxford: Oxford University Press, 2013), 79.

[61] Raymond Plant, "Religion, Identity and Freedom of Expression.," *Res Publica (13564765)* 17, no. 1 (February 2011): 12-13.

[62] Ibid, 12.

[63] John Rawls, "The Idea of Public Reason Revisited," *The University of Chicago Law Review*, 1997, 800.
George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford [UK] ; New York: Oxford University Press, 2007): 106.

[64] Bernard Williams, *Moral Luck: Philosophical Papers 1973 - 1980*, Reprinted (Cambridge: Cambridge Univ. Press, 1999), 14. Raymond Plant, "Religion, Identity and Freedom of Expression.," *Res Publica (13564765)* 17, no. 1 (February 2011): 16-17.

[65] E. M. Barendt, *Freedom of Speech*, 2nd ed (Oxford ; New York: Oxford University Press, 2007): 34.

mechanism for the constraint of identities shall be pursued in order to avoid dominance of one over others. In the next paragraph, I will demonstrate that the concept of 'dignity' can serve that purpose.

Dignity can be closely linked with self-fulfillment of the speaker, as well as respect for the belief that the offended holds,[66] thus the identities discussed above. In a similar vein as identity, dignity aspects of the conflict can also cancel each other out as it features on both sides. However, dignity, a context broad as it is[67] can still be useful in the resolution of the issue confronted.

First, Based on Waldron, 'dignity' can have a specific meaning and it should be defined as 'the social standing, the fundamentals of basic reputation' which is a guarantee that persons are treated 'as equals in the ordinary operations of society'.[68] Accordingly, as far as persons are treated as equals, dignity remains intact. If identities of one group of persons were prioritized over the identity of others, clearly, treatment would be arbitrary and unequal. However, protection from the abuse of the identity of the offended, shall not allow another instance of abuse of identity of the speaker in the form of total denial of 'social standing' of specific groups of persons. Thus, the scope of assessment can be focused on the prejudice to 'dignity' in the form of 'social standing' in the society rather than the feelings as such. The latter approach to 'dignity' can serve as an objective qualifier of the kinds of speech to be outlawed and the ones to be left alone.

According to Professor Andras Sajo, the only ones to define what offence is in terms of identity are the ones having it. Then he raises the question whether 'dignity' requiring the treatment of all

[66] Ibid, p.13
[67] Ibid, p.33
[68] Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, Mass.: Harvard University Press, 2014), 5.

with the presumption of their rationality could limit the extent of identity when its reasonable assessment from outsiders is under question.[69] In this light, dignity limits the capacity of a conception of identity that attempts to have monopoly over the identities of others. Thomas Scanlon argues that an individual has a right to hear views, make an independent judgment and consider acting on them.[70] This can serve self-fulfillment for both the speaker and the listener. For this formula to work, dignity-based understanding that humans will act on the views heard rationally is important. [71] However, if we are not committed to the rationality of humans in general, then justifications against authoritarian 'enlightened despots' collapse.[72] In representative democracies, clearly we are already committed to the general notion of human rationality. The need for avoiding dominance of one identity over the other, leads to my next point that inevitable justice considerations arise out of clash of these identities. In the next subchapter I will devise a theoretical scenario, where the treatment of the identities on all sides is just.

1.3 Justice

From an abstract point of view, without reference to individual interests of enjoying the specific rights, protection of both sides of the interests in the clash of speech and offence equally have beneficial aspects. Justice Holmes, J. in his dissenting opinion in the case of *Abrams v. United States* stresses the added value of protecting speech elaborating that 'free trade in ideas' as 'the

[69] András Sajó, ed., *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World*, Issues in Constitutional Law, v. 4 (Utrecht : Portland, OR: Eleven International Pub. ; Distributed in USA and Canada by International Specialized Book Services, 2007), 290–291.
[70] T. M. Scanlon, "WHY NOT BASE FREE SPEECH ON AUTONOMY OR DEMOCRACY?" *Virginia Law Review* 97, no. 3 (May 2011): 547–548. Robert Amdur,"Scanlon on Freedom of Expression," *Philosophy & Public Affairs*, 1980, 292. E. M. Barendt, *Freedom of Speech*, 2nd ed (Oxford ; New York: Oxford University Press, 2007): 16.
[71] E. M. Barendt, *Freedom of Speech*, 2nd ed (Oxford ; New York: Oxford University Press, 2007): 17.
[72] Ibid: 33.

best test of the truth' is 'the ultimate good' beneficial to all.[73] Raz also draws attention to the importance of general interests protected under specific rights as a result of 'their service to the promotion and protection of a certain public culture' contributing to the well-being of the whole community, among them persons other than the right-holders.[74] Such 'public culture' can be a tolerant society, for instance,[75] which is equally relevant for freedom of expression, as well as freedom of religion or belief. In a similar manner, Tom Campbell advocates that free speech is an integral part of fulfillment and self-development, especially intellectual one.[76] It is worth noting that such self-development in its pure sense does not require resources and is 'free' for anybody to avail of.[77] However, the above beneficial aspects of prioritized protection of speech can be confronted with counterarguments. First of all, the points made with regard to fulfillment and self-development above would work the same way in favor of protection of the offended and especially religious believers.[78] One might argue that exactly for the sake of having a tolerant society, some speech has to be eliminated.

Moving from abstract values discussed above, I will elaborate on concrete individual interests involved in the consideration of the issue by reference to Rawls' *Theory of Justice*,[79] based on which basic liberties put everyone in the position to have sovereignty over their life, in other

[73] *Abrams* v. *United States,* 250 U. S. 616 (1919). E. M. Barendt, *Freedom of Speech*, 2nd ed (Oxford ; New York: Oxford University Press, 2007): 11.
https://www.law.cornell.edu/supremecourt/text/250/616 (last accessed 26 November 2015)
[74] Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1988), 256.
[75] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford [UK] ; New York: Oxford University Press, 2007): 102.
[76] Tom Campbell and Wojciech Sadurski, eds., *Freedom of Communication*, Applied Legal Philosophy (Aldershot ; Brookfield, USA: Dartmouth, 1994), 33–34
[77] E. M. Barendt, *Freedom of Speech*, 2nd ed (Oxford ; New York: Oxford University Press, 2007): 14.
[78] Ibid*,* p. 13
[79] John Rawls, *A Theory of Justice*, Rev. ed (Cambridge, Mass: Belknap Press of Harvard University Press, 1999), 10.

words choose, pursue and revise their 'conception of the good'.[80] Based on him, this does justice to individuals with differing conceptions of such life, existence of which is inevitable and is a sociological fact.[81] In light of the theory, as long as it is possible for one to maintain identity after it has been offended, then justice is not sacrificed.

Based on Rawls' 'public reason'[82], instead of 'comprehensive doctrines of truth or right'[83], reasons behind justice have to be 'politically reasonable'[84], such that they can be accepted by citizens generally, nevertheless, 'nonpublic reasons'[85] can also be accepted, among them religious reasons, provided that it is balanced by secular, 'proper political reasons'.[86] Basing his arguments on Rawls's *Theory of Justice*, Dworkin triggers the right to 'equal concern and respect' for all, but unlike Rawls recognizes it as an agreement on one of the 'truths' rather than 'a condition of admission to the original position'[87]and adds that particular 'good' is not made superior by mere fact that officials believe it is so or it is followed by numerous or more powerful groups.[88] In light of the latter theories, religious reasons do not have to be excluded, as long as it can be responded and vice versa.

[80] Ibid. Preface XII, 111. John Rawls, "The Idea of Public Reason Revisited," *The University of Chicago Law Review*, 1997, 784. George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford [UK] ; New York: Oxford University Press, 2007), 106.
[81] Rex J. Ahdar and I. Leigh, *Religious Freedom in the Liberal State*, Second edition (Oxford: Oxford University Press, 2013), 56-57.
[82] John Rawls, "The Idea of Public Reason Revisited," *The University of Chicago Law Review*, 1997, 766
[83] Ibid: 766
[84] Ibid: 799.
[85] Ibid: 800.
[86] Ibid: 780, 783, 784.
Rex J. Ahdar and I. Leigh, *Religious Freedom in the Liberal State*, Second edition (Oxford: Oxford University Press, 2013), 63.
[87] Ronald Dworkin, *Taking Rights Seriously*, Bloomsbury Revelations Series (London: Bloomsbury, 2013), 219–220. George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford [UK] ; New York: Oxford University Press, 2007): 100, 112-113.
[88] Rex J. Ahdar and I. Leigh, *Religious Freedom in the Liberal State*, Second edition (Oxford: Oxford University Press, 2013), 56.

Thus, permission of offensive speech to all would satisfy the justice requirements of discussed theories rectifying the limitations inherent in precisely measuring the interests on both sides. 'Equal concern and respect' will be given to all believers of all kinds, without the judgement whether they deserve more or less respect, and also personal autonomy to continue to pursue, revise or alter 'conception of good ' will be preserved. 'Public reason' would be guaranteed as they would agree on the 'truth' that it is inevitable for them to disagree, eliminating any need to fix the reality which will not change any way. The only circumstance that could invalidate the logic of the above reasoning is if an allegiance to an additional divine authority has an effect of a greater extent on the holders of nonsecular values, but as demonstrated above it is impossible to convincingly claim that demands of secular convictions cannot be seen as equal to the duties towards the divine in any circumstances.[89]

If freedom of expression, as a way of validating his/her form of life[90], is guaranteed to religions additionally in the specific form of freedom of manifestation of religion, then what about those, whose form of life can only be validated by creating an artistic work that engages feelings of religious believers? However, if the reverse is the case, and manifestation of religion is reduced to private sphere only, as a result of affirming 'public reason', then according to Julian Baggini, closer relation of the natural mode of atheism to secular values, will distort the balance between beliefs that in principle has equal stance under the general umbrella of 'public reason'.[91] Inequalities might be also caused by the fact that some simply are more susceptible to attack and

[89] Ibid, p. 82

[90] Joseph Raz, *Ethics in the Public Domain Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1995), 156.

[91] Julian Baggini, "The Rise, Fall and Rise Again of Secularism," *Public Policy Research* 12, no. 4 (February 2006): 204, 206–207.Rex J. Ahdar and I. Leigh, *Religious Freedom in the Liberal State*, Second edition (Oxford: Oxford University Press, 2013), 68.

feel offended when others are not.[92] From all the variables discussed above, only when manifestation of religion is not confined to private sphere so that it can balance out natural closeness of atheism to secular values and in turn, as long as others who are devoid of protection of manifestation of religion freedoms are in the position to validate their form of life also, is the justice preserved unequivocally.

1.4 Conclusion

In light of all the ambiguities inherent in the nature of offence and identity, an additional question that arises is who we entrust the task of deciphering the above issues. General distrust of government becomes irrelevant in cases of explicit trust, for instance to protect freedom of religion of citizens[93] or to eliminate discrimination. The real question is how far we allow the state to enter into sphere, where notions as delicate as offence and identity are concerned.[94]

After demonstrating the shortcomings of elevating a notion like offence as ambiguous as it is to a legal dimension, I argue that even presentation of it as an objective notion detached from the idea of hurt feelings, namely as the lack of 'respect for beliefs' proposed by Peter Jones cannot be a viable solution.[95] Even if we exclude mistakes that inform the belief and consequently aggravate the disgust or offence, still, ultimately, in broad terms, elevation of the notion of 'disrespect of beliefs' cancels itself out as the fact of placing emphasis on the respect for specific beliefs might itself be an act of 'disrespect of beliefs' of others. If we stay away from asserting one truth, then certainly beliefs should require equal respect. Therefore, in this line the only way to address the 'disrespect of belief' is to refer back to Dworkin's 'equal respect and concern' for all that

[92] Peter Jones, "Religious Belief and Freedom of Expression: Is Offensiveness Really the Issue?," *Res Publica* 17, no. 1 (2011): 85.
[93] E. M. Barendt, *Freedom of Speech*, 2nd ed (Oxford ; New York: Oxford University Press, 2007): 23.
[94] Raymond Plant, "Religion, Identity and Freedom of Expression," *Res Publica (13564765)* 17, no. 1 (February 2011): 20.
[95] Peter Jones, "Religious Belief and Freedom of Expression: Is Offensiveness Really the Issue?" *Res Publica* 17, no. 1 (2011): 86-87.

extends to beliefs when necessary. In light of all the ambiguities discussed above, I argue that the easiest solution to maintain 'equal respect' for all in the legal dimension is to have respect for beliefs when they are expressed and none when they have not left human's minds, just because the equation fails and calculations are blurred as it was already argued. Fortunately, no one can penetrate one's mind to offer precise recipe for the degree of respect required based on one's identity. The only exception to the rule that has to be permitted and even required is the instances when the expression of beliefs has such a totalizing effect for the environment where the persons live that they are deprived of general 'social standing' in the society and cannot objectively continue to be members of it on an equal basis. This exception is applicable for the speech that is directed to religious groups as well as the one inspired by religion and is much easier to be 'objectified' and involves less risk for 'governmental abuse'.[96] I argue that the above scenario is one, if not the only option capable of withstanding any criticism out of concerns for justice at least.

In the end, I would refer to A. J. Richards' claim that even when the offence is successfully avoided by all sides, it does not necessarily mean that structural injustice is eliminated. [97] Indeed, when the society remains intolerant and simply does not express it explicitly, actual understanding and final resolution of such injustice is compromised.

Chapter two: Overview of the Jurisprudence of ECtHR

In the jurisprudence of the European Court of Human Rights (ECtHR), the role of freedom of expression is elevated when political speech, questions of public interest, press and other social

[96] Jeroen Temperman, "Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech," *BYU L. Rev.*, 2011:744, 748

[97] David A. J. Richards, *Free Speech and the Politics of Identity* (Oxford ; New York: Oxford University Press, 1999), 240.

'watchdogs' are concerned[98], but the court takes a more modest stance vis-à-vis moral values, religious beliefs or identity of some groups of people.[99] The court in the landmark case *Handyside* declared a principle that information and ideas that 'offend shock or disturb the state or any sector of population' fall under the protection of freedom of expression.[100] Regardless of the recognition of the right to express oneself in an offensive manner for religious speakers as well as for everybody else, obviously as a qualified right it might be overridden by other interests deemed to be more important in a particular case.[101] The ECtHR has been reluctant to reject blasphemy laws in total.[102] As for hate speech Committee of Ministers of the Council of Europe stated that hate speech covers 'all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, [..]'.[103] Such broad definition of hate speech and the absence of the term of violence in it have been reflected in the case–law of the European Court.[104] In the following chapter I will include the court's approach towards hate speech offences in so far as it pertains to offence to religious feelings and offence to feelings motivated by religious grounds. In sum, the case-law discussed relates to blasphemy offences, religious insult and defamation, and hate speech offences. Continuing with the discussion of the relevant case-law with regard to offence to feelings motivated by religious ground, a broader picture will be identified illustrating concerns of justice

[98] Lingens v. Austria (ECtHR 1986): at 41, 42; Castells v. Spain (ECtHR 1992): at 43; Bladet Tromso and Stensaas v. Norway,(ECtHR 1999): 64, 68. Társaság a Szabadságjogokért v. Hungary, (ECtHR 2009): at 26.

[99] Nicolas Bratza and Josep Casadevall, *Freedom of Expression: Essays in Honour of Nicolas Bratza, President of the European Court of Human Rights* (Strasbourg: Council of Europe Pub, 2012), 298.

[100] Handyside v. the United Kingdom, (ECtHR 1976): at 49.

[101] Ian Leigh, "Damned If They Do, Damned If They Don't: The European Court of Human Rights and the Protection of Religion from Attack," *Res Publica* 17, no. 1 (2011): 56.

[102] Ibid, p. 57-59

[103] Recommendation number (97) 20 of the Committee of Ministers to member states on "hate speech"(30 October 1997); http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec(97)20_en.pdf at 107 (last accessed 26 November 2015)

[104]Feret v. Belgium (ECtHR 2009): at 73.

related to possible differentiation of offensive religious speech that offends vis a vis any speech that offends.[105]

2.1 When non-religious speech offends Religion

European Commission of Human Rights in the admissibility decision of the case *Gay News ltd. And Lemon v. the United Kingdom* which concerned publication of a poem describing acts of sodomy with the body of Christ held that restriction of freedom of expression had a legitimate aim and was necessary in a democratic society despite the fact that domestic law only protected attacks at Christianity.[106] The legitimacy of the law despite its discriminative nature was later upheld in *Wingrove*.[107] Although the applicants raised complaints with regard to both article 9 and 10, the court limited its reasoning to article 10 claims, as the applicant had not demonstrated that the publication of the poem constituted manifestation of religion. The court first time in this case pointed to the recognition of the 'right of citizens not to be offended in their religious feelings'. The decision did not explicitly say that this was a right within article 9[108], however, the court might have indicated that such a right was applicable by implication, despite the fact that nothing in article 9 as it is suggests to include it. [109]

The court in the case of *Otto-Preminger-Institut v. Austria* upheld the seizure and forfeiture of a film based on a play that depicted figures from Christian religion, namely God the Father, Jesus Christ, and the Virgin Mary in a critical way. Six public showings of the film were announced in a bulletin distributed to 2 700 members of the same association that was showing the film and

[105] W. Cole Durham and Brett G. Scharffs, *Law and Religion: National, International, and Comparative Perspectives*, Elective Series (New York: Aspen Publishers, 2010): 187.
[106] Gay News ltd. And Lemon v. the United Kingdom (ECommHR 1982); Silvio Ferrari, Rinaldo Cristofori, and International Consortium for Law and Religion Studies, eds., *Law and Religion in the 21st Century: Relations between States and Religious Communities* (Farnham, Surrey ; Burlington, VT: Ashgate Pub, 2010), 218.
[107] Wingrove v. The United Kingdom (ECtHR 1996): 50.
[108] Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge, UK ; New York: Cambridge University Press, 2005): 84, 85.
[109] Ibid.

also in various display windows, people under the age of 17 were not permitted to see the film and there was an entrance fee included in the announcement.[110] Despite the fact that the court explained that the state duty to ensure 'peaceful enjoyment' of the right under article 9 is engaged in extreme cases when attacks on beliefs inhibit believers to hold and express them,[111] The court acknowledging 'the respect for the religious feelings of believers as guaranteed in Article 9' as a legitimate aim, focused on the 'duties and responsibilities' of the association that announced a showing of the film 'Council in Heaven'. The court opted for no violation stating that the conviction of the association's manager was justified as he had to 'avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights' and as such expressions 'do not contribute to any form of public debate capable of furthering progress in human affairs.'[112] In other words, the court held that association had to think ahead before announcing a showing of the film that involved religious symbols in a way that could insult religious feelings and did not elaborate more how the showings would inhibit believers from holding and expressing their beliefs. However, from the facts of the case, it seems that association had actually considered the potential offensive nature of the film and had taken some measures accordingly. The court also paid particular attention to the fact that majority of the population in Tyrol were Roman Catholics.[113]

The same principles were reiterated in *Wingrove v. the United Kingdom* and similarly to *Otto-Preminger-Institute* case, the court upheld a refusal of the broadcasting authority to allow a video depicting St. Theresa in a state of sexual ecstasy and believed it to be necessary in a democratic

[110] Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality*, 1st ed (Oxford, U.K: Oxford University Press, 2012), 149.
[111] Otto-Preminger-Institut v. Austria (ECtHR 1994): at 47
[112] Ibid: at 49
[113] Ibid, at 52

society.[114] The court did not accept the applicant's argument that a short experimental video in the given case would have a restricted number of viewers, furthermore, limiting the distribution of the video to licensed sex shops could have reduced the risk of 'unwittingly' exposing Christian to it.[115] The court explained that 'it is in the nature of video works that once they become available on the market they can, in practice, be copied, lent, rented, sold and viewed in different homes, thereby easily escaping any form of control by the authorities.'[116] The court in Wingrove stressed the absence of 'uniform European conception' regarding attacks on religious beliefs and broadened the 'margin of appreciation' already invoked in *Otto-Preminger* despite the fact that the restriction had the form of a prior restraint.[117] However, the reasoning of the court in Wingrove was less focused on article 9 protection[118] and did not equate 'respect for the religious feelings of believers' with the guarantees under article 9.[119] The latter article was mentioned once by majority when it noted that the aim pursued in the case undoubtedly corresponded to the protection of 'the rights of others' under paragraph 2 of Article 10 and was 'fully consonant with the aim of the protections afforded by Article 9.'[120] As for possible discriminatory nature of blasphemy laws and relation of the state's discretion to that, the court in *Wingrove v. the United Kingdom* stated: 'the uncontested fact that the law of blasphemy does not treat on an equal footing the different religions practiced in the United Kingdom does not detract from the legitimacy of the aim pursued in the present context.'[121] Thus, the state's discretion, or

[114] Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (Oxford ; New York: Oxford University Press, 2009), 74.
[115] Wingrove v. The United Kingdom (ECtHR 1996): at 62
[116] Ibid: at 62
[117] Ibid: at 58
[118] Ian Leigh, "Damned If They Do, Damned If They Don't: The European Court of Human Rights and the Protection of Religion from Attack," *Res Publica* 17, no. 1 (2011): 60.
[119] Paul M. Taylor, "Questionable Grounds of Objections to Proselytism and Certain Other Forms of Religious Expression, The," *BYU L. Rev.*, 2006, 835.
[120] Wingrove v. The United Kingdom (ECtHR 1996): at 48.
[121] Ibid, at 50

in other words, 'margin of appreciation' also included the possibility to differentiate between religions while enacting blasphemy laws.

In the admissibility decision of Choudhury concerning the book of Salman Rushdie, the court in addition to rejecting state's positive obligation to defend believers when it comes to oral or verbal expressions that offend religion, also dismissed the complaint under article 14 against the differentiation that blasphemy laws in England made between Christianity and other religions[122] on the basis that the positive duty of the state was outside the ratione materiae of the article.[123] The admissibility decision in *Dubowska & Skup v. Poland* specified that there is no guaranteed 'right to bring any specific form of proceedings against those who, by authorship or publication, offend the sensitivities of an individual or of a group of individuals'.[124] The positive duty under article 9 was later recognized in the case-law of ECtHR[125], among them the cases of Otto-Preminger and Wingrove where positive duties stemming from article 9 were invoked.[126] In this connection, it is worth noting that the jurisprudence of the court broadens the scope of article 14 and makes it applicable also in cases where 'the State has voluntarily decided to provide' for those rights that fall within the general scope of the article in the Convention,[127]a principle entrenched in the case-law of the court as early as 1968.[128]

In the case of *I.A v. Turkey* where Muslim sensitivities were believed to be offended by publishing a fictional work in which characters make potentially insulting remarks, the European

[122] Ian Leigh, "Damned If They Do, Damned If They Don't: The European Court of Human Rights and the Protection of Religion from Attack," *Res Publica* 17, no. 1 (2011): 69.
[123] Choudhury v. the United Kingdom (ECommHR 1991), admissibility decision
[124] Dubowska & Skup v. Poland (ECommHR 1997), admissibility decision
[125] 97 members of the Gldani congregation of Jehovah's witnesses and others v. Georgia (ECtHR 2007)
[126] Ian Leigh, "Damned If They Do, Damned If They Don't: The European Court of Human Rights and the Protection of Religion from Attack," *Res Publica* 17, no. 1 (2011): 69.
[127] E.B v. France (ECtHR 2008): at 48.
[128]Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium (Merits) (ECtHR 1968): at 9

court found the restriction of freedom of speech acceptable.[129] The court claimed that specific passages of a book constituted 'an abusive attack on the Prophet of Islam'. It also noted that '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 passages.'[130] The dissent of the case in *I.A v. Turkey* referred back to *Handyside* and stated that 'democratic society' is not a 'theocratic one' and urged to 'revisit' the case-law, which in their view overly focused on 'uniformity of thought'.[131]

Eight month later, the court in Aydin v. Turkey held unanimously that conviction of the author of a book *The Reality of Islam* criticizing the religion of Islam was a violation. The court conceded that Muslims could have felt offended by the book. Nevertheless, it was not enough for deeming it proportionate interference with freedom of expression. The court 'did not observe in the incriminating passages an insulting tone aimed directly at believers, or an abusive attack against sacred symbols.'[132] Regardless of the fact that the decision followed the urge of the dissent in *I.A v. Turkey* to revisit the case-law, it seems that the difference in approach in the latter case resulted from the nature of the tone and the attack, which being recognized as a factor by the court, made it enter into the assessment of the work of the author in the circumstances when any deficiency of assessing the work in its entirety runs the risk of wrongly evaluating the tone and degree of attack from the excerpts taken out of the context. In sum, the difference in the outcome

[129] W. Cole Durham and Brett G. Scharffs, *Law and Religion: National, International, and Comparative Perspectives*, Elective Series (New York: Aspen Publishers, 2010), 196, 197.
[130] I.A v. Turkey (ECtHR 2005): at 29.
[131] Ibid, joint dissenting opinion of judges costa, cabral barreto and Jungwiert, at 1, 5, 8.
[132] Aydin Tatlav v. Turkey (ECtHR 2006): at 28.

in the present case does not point towards an actual revision of the court's approach towards the issues.

The court paying attention to the fact that the feelings offended may have been of the majority population resembles Lord Devlin's understanding of the offence, where conduct can be legally condemned based on the motive of the society to preserve its 'moral bounds'.[133]However, it has to be noted that majority is always in a better position to preserve itself than a minority that can be more prone to marginalization.[134] In addition, without the offensive materials having been actually imposed on public or even shown as a result of a prior restraint, also with a view to the possibility to avoid the offence themselves and the precautions that the applicants undertook or might have taken to let religious believers avoid it, ECtHR seems to recognize that even 'bare knowledge'[135] of the offence without experiencing it is worthy of protection.

In contrast to the deference generally employed by the court in blasphemy cases above, the ECtHR differs in its approach towards those instances when public criticism of religious figures or groups is restricted.[136] In *Klein v. Slovakia* which concerned harsh criticism of a religious leader and permissibility of its restriction on the basis that religious feelings of members of a church were offended, the court ruled in favor of freedom of expression. The applicant urged decent members of the church to leave it, the statement believed by the domestic court to be discrediting to members of the church. Despite the outcome in the case, the court stressed 'duties and responsibilities' of a speaker as it did in *Otto-Preminger-Institute v. Austria* and also

[133] Devlin, *The Enforcement of Morals*, 11.
[134] Jeroen Temperman, "Protection Against Religious Hatred under the United Nations ICCPR and the European Convention System," *LAW AND RELIGION IN THE 21ST CENTURY: RELATIONS BETWEEN STATES AND RELIGIOUS COMMUNITIES*, 2012, 217.
[135] Peter Jones, "Religious Belief and Freedom of Expression: Is Offensiveness Really the Issue?," *Res Publica* 17, no. 1 (2011): 86.
[136] Ian Leigh, "Damned If They Do, Damned If They Don't: The European Court of Human Rights and the Protection of Religion from Attack," *Res Publica* 17, no. 1 (2011): 61.

emphasized 'peaceful enjoyment of the rights guaranteed under article 9'.[137] The judgment pointed out that the statements of the applicant were related exclusively to the high representative of a church. Thus, it could not discredit a 'sector of the population' on account of their faith.[138] The scale of the test of undue interference with the right of believers to express and exercise religion leaned towards the applicant in this case.[139] Nevertheless, such formulations left the question open what approach the court would adopt in case the criticism extended to followers of a specific religion more explicitly.

Similarly, in a unanimous decision in *Giniewski v. France*, the criticism of the Pope's statements in the encyclical 'The Splendor of Truth' that claimed supremacy of the New Testament over the Old, was not believed to extend to criticism of Christian community as a whole. The fact that the applicant saw seeds of anti-Semitism in the pope's statements and talked about the catholic church's contribution to the extermination of Jews in Auschwitz was not held to be 'gratuitously offensive', but as a contribution to public debate about the causes of Holocaust that is of 'indisputable public interest'.[140] Therefore, the applicant had an interest protected by article 10 of the convention 'to seek historical truth',[141] which he did without casting doubt on 'clearly established historical facts'[142] which could become a ground for excluding protection of the convention on the basis of article 17.[143] In this judgment, the court requires more than mere fact that religious believers are offended in view of the value of the speech concerned.

[137] Klein v. Slovakia (ECtHR 2006): at 47.
[138] Ibid, at 51
[139] Ibid, at 52
[140] Giniewski v. France (ECtHR 2006): at 51.
[141] Ibid, at 51
[142] Ibid, at 52
[143] Garaudy v. France (ECtHR 2003)

In *Norwood v. the United Kingdom*, a person was convicted for displaying a poster stating 'Islam out of Britain' and 'Protect the British people' with a symbol of a crescent and star in a prohibition sign, with the background of the picture of the destruction of World Trade Centre in New York. The Strasbourg Court invoked article 17, declared the application inadmissible and this way expressed its rejection of 'Islamophobia'.[144] The Court equated 'such a general, vehement attack against a religious group' to an act and declared it 'incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination'.[145] Broad interpretation of article 17 in the present case excluded the applicant from the protection of article 10 at all.[146] Such approach relieves the state from the burden of substantiating the proportionality of the restriction totally.

Reasoning of the court in the above cases lets us conclude that religious believers are provided with protection against expression offensive to religious sensibilities, grounded in freedom of religion under the article 9 of the Convention, which as a matter of law includes freedom of conscience and belief or absence of it. Artistic expression falling under the scope of freedom of expression[147] needs to be avoided 'as far as possible' when it is 'gratuitously offensive' to religious feelings.[148] 'Provocative portrayals'[149] are part and parcel of artistic expression. If the question is whether the value of art overrides over its provocative nature, then the next question

[144] Ian Leigh, "Damned If They Do, Damned If They Don't: The European Court of Human Rights and the Protection of Religion from Attack," *Res Publica* 17, no. 1 (2011): 63.
[145] Norwood v. the United Kingdom (ECtHR 2004)
[146] Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (Oxford ; New York: Oxford University Press, 2009), 77-79.
[147] Muller and others v. Switzerland (ECtHR 1988): at 27
[148] Otto-Preminger-Institut v. Austria (ECtHR 1994): at 49. Wingrove v. The United Kingdom (ECtHR 1996): at 52.
[149] Otto-Preminger-Institut v. Austria (ECtHR 1994): at 47. Wingrove v. The United Kingdom (ECtHR 1996): at 46.

would be who is to assess the value of it, [150]or any other creative form of speech, who is to decide about the contribution of artistic work to public debate. This might be less difficult to be shown for a historian[151] or a journalist[152], while an artist[153] seems to be excluded from the role they aim to pursue in public debate only because of the greater burden to decipher its value, though such burden is also great in cases of satirical journalism as in *Klein v. Slovakia* where the court stated that it did not have to assess the journalistic quality of the article indicative of a positive tendency towards potential approach to the posed question.[154].

2.2 When religious speech offends

Based on the jurisprudence of the court, for a belief to be protected under article 9, it does not have to be one of the traditionally accepted, but it has to attain a necessary level of 'cogency, seriousness, cohesion and importance'.[155] For an act to qualify as a 'manifestation' under article 9, it has to be 'intimately linked' to the beliefs.[156] The court saw free speech as an aspect of religious liberty in *Kokkinakis v. Greece*,[157] where it held that article 9 had been violated as Jehovah's witnesses were convicted for proselytism without sufficient reasoning from domestic courts.[158] The court stated that the freedom to manifest one's religion 'includes in principle the

[150] Nicolas Bratza and Josep Casadevall, *Freedom of Expression: Essays in Honour of Nicolas Bratza, President of the European Court of Human Rights* (Strasbourg: Council Of Europe Pub, 2012), 301. Puja Kapai and Anne SY Cheung, "Hanging in a Balance: Freedom of Expression and Religion," *Buff. Hum. Rts. L. Rev.* 15 (2009): 66.
[151] Giniewski v. France (ECtHR 2006)
[152] Giniewski v. France (ECtHR 2006), Klein v. Slovakia (ECtHR 2006).
[153] Otto-Preminger-Institut v. Austria (ECtHR 1994), IA v. Turkey, Wingrove v. The United Kingdom (ECtHR 1996), Muller and others v. Switzerland (ECtHR 1988): at 27.
[154] Klein v. Slovakia (ECtHR 2006): at 49.
[155] Campbell and Cosans v. the United Kingdom, ECtHR (1982): at 36, Peter Griffith, "Protecting the Absence of Religious Belief? The New Definition of Religion or Belief in Equality Legislation," *Religion & Human Rights* 2, no. 3 (2007): 158.
[156] Eweida and others v. the United Kingdom (ECtHR 2013): 82
[157] Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (Oxford ; New York: Oxford University Press, 2009), 388.
[158] Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge, UK ; New York: Cambridge University Press, 2005), 50.

right to try to convince one's neighbor, for example through "teaching" [..]'.[159] It is also worth mentioning that the court by saying that 'improper proselytism' is incompatible with the 'respect for the freedom of thought, conscience and religion of others' first introduced the notion later used in subsequent article 10 cases discussed in the thesis.[160] Avoiding 'improper proselytism'[161], namely through 'immoral and deceitful means' was seen as a legitimate aim pursued by government.[162] Concurring judge Pettiti disagreed with the latter and stated that criminalization of proselytism which was a form of religious speech, was a violation on its face.[163]

In *Refah Partisi v. Turkey***,** the dissolution of the largest political party was upheld by the European court as it intended to impose Sharia law, which was believed to be discriminatory of other religions. Although the case concerned freedom of association, in essence, in broader terms, it could have been seen as freedom of expression in an organized manner. Thus, analogies can be drawn for the attitude of the European court towards religious discriminatory speech. [164] In the same case the court stated that 'the state's duty of neutrality and impartiality is incompatible with any power on the State's part to assess legitimacy of religious beliefs.'[165] Despite these statements, in Refah, what the court did was declare sharia incompatible with the

[159] Kokkinakis v. Greece (ECtHR 1993): at 31

[160]Ibid: at 48; Paul M. Taylor, "Questionable Grounds of Objections to Proselytism and Certain Other Forms of Religious Expression, The," *BYU L. Rev.*, 2006, 828.Puja Kapai and Anne SY Cheung, "Hanging in a Balance: Freedom of Expression and Religion," *Buff. Hum. Rts. L. Rev.* 15 (2009): 68.

[161] Kokkinakis v. Greece (ECtHR 1993): at 48;

[162] Ibid, at 42-44

[163]Jeremy Gunn, "Adjudicating Rights of Conscience Under the European Convention on Human Rights," in *Religious Human Rights in Global Perspective: Legal Perspectives*, ed. John Witte and Johan Van der Vyver, vol. Religious Human Rights in Global Perspective: Legal Perspectives The Hague (Kluwer Law International, 1996), 330.

[164] Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (Oxford ; New York: Oxford University Press, 2009), 430, 435-436.

[165] Refah Partisi (The Welfare Party) and others v. Turkey (ECtHR, Grand Chamber 2003): at 91.

values of the Convention,[166] in view of sharia being discriminatory towards other beliefs, hostile to gender equality and homosexuality.[167] The only way to reconcile these two views of the court is to see sharia enjoying freedom from assessment of its legitimacy as long as it remains a religion, until it penetrates the competencies of the state. The court suggests that if the roles are to be interchanged, principles cannot be the same. Refah as an example of applying the principle of 'militant democracy', triggers thoughts whether such militancy is also necessary and can extend to speech which is not organized on such a high level to be a majority party in a country.[168]

In *Leyla Sahin v. Turkey***,** the court stated that even a permission to use Islamic dress will pose, where Islam is the religion of the majority, namely where 94 percent of the population are Muslims, threat to freedom of conscience and religion in light of the right to be free from pressure and intimidation.[169] The court seems to take into consideration the practical effects of the permission of such expression on gender equality.[170]

Despite the outcomes in *Refah* and *Sahin*, which seem consistent with the general approach of restricting offensive speech directed to identity of a person, specific characteristics of the cases need not be ignored. Namely, *Refar* was a major political party that was likely to come into government and in *Sahin*, giving permission placed 94 percent of the population in an obviously dominant position to have undue influence on the identities of others. Here it was the extreme

[166] Refah Partisi (The Welfare Party) and others v. Turkey (ECtHR, Grand Chamber 2003): at 123, Refah Partisi (The Welfare Party) and others v. Turkey (ECtHR Chamber 2001): at 72.
[167] Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (Oxford ; New York: Oxford University Press, 2009), 439.
[168] Refah Partisi (The Welfare Party) and others v. Turkey (ECtHR Chamber 2001): at 62.
[169]Leyla Şahin v. Turkey, 111 (ECtHR Grand Chamber 2005): 111. Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (Oxford ; New York: Oxford University Press, 2009), 434-435
[170] Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (Oxford ; New York: Oxford University Press, 2009), 434

power of attack on secular values that justified the restriction of expression motivated by religious reasons.

Unlike the cases above**,** the case of *Gunduz v. Turkey* as the case concerning religiously motivated offensive speech, is directly comparable to cases concerning non-religious offensive speech discussed in the previous subsections. In the present case, the applicant was convicted of inciting to hatred and hostility on account of a religious distinction during a live TV program where he referred to secular institutions in Turkey as 'impious', criticized democracy and urged for the introduction of sharia.[171] The court recognized the necessity of having hate speech offences in domestic systems, but stated that they can only be compatible with the Convention provided that they are proportionate to the aim they pursue. It defined 'hate speech' as 'all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)' in line with the definition the Committee of Ministers offers.[172] However, the European Court added that the mere fact of defending Sharia and expression of dissatisfaction with contemporary institutions without calling for violence cannot be regarded as 'hate speech'.[173] Despite the fact that the word 'bastard' which described the children born out of civil marriage could have been offensive to people being deeply attached to secular way of life who favored civil marriage over religious ones, the court still found a violation as the domestic court had not given enough weight to this factor and also the expression was made in a lively debate with no possibility to reformulate or retract it.[174] The latter arguments do not seem

[171] Ian Leigh, "Damned If They Do, Damned If They Don't: The European Court of Human Rights and the Protection of Religion from Attack," *Res Publica* 17, no. 1 (2011): 64.
[172] Gunduz v. Turkey (ECtHR 2003): at 40.
[173] Ibid, 51
[174] Ibid, at 48, 49

convincing for resolute ignorance of the offence to secular values, whereas non-secular ones deserve explicit protection in the cases discussed.

The case of *Murphy v. Ireland* concerned an applicant's exclusion from broadcasting a religious advertisement.[175] The advertisement was mainly informational, but to some extent it alluded to a specific belief, namely that the Christ was the only son of God. The court in the case found that restriction of speech was proportionate to the legitimate aim of ensuring 'respect' for religious beliefs of others,[176]stressed 'peaceful enjoyment' of the rights under article 9, 'duties and responsibilities' under article 10[177] and wide margin of appreciation left to the state.[178] Some kind of elevation of supervisory function is to be identified when the court stresses that such control of the court is 'all the more necessary given the rather open-ended notion of respect for the religious beliefs of others', thus recognizing the risk of excessive restriction of speech under the pretext of tackling 'allegedly offensive material'. [179] However, the risks would have been reduced if the court discussed the restriction and its necessity from a different angle, namely 'the need to regulate religious advocacy in commercial settings' so the majority and richer religions do not get advantage over the communication of their views through media.[180] Briefly, within the framing of the case by the court, its approach to defer to the treatment of offence to religious sensibilities by domestic authorities remained the same in the case of expression motivated on religious grounds as well as expression devoid of any religious affiliation. However, I find that based on factual circumstances motive of the state corresponded more to the aim to 'regulate

[175] Murphy v. Ireland (ECtHR 2003): at 61.
[176] Ibid, at 63.
[177] Ibid, at 65
[178] Ibid, at 67
[179] Ibid, at 68
[180] Puja Kapai and Anne SY Cheung, "Hanging in a Balance: Freedom of Expression and Religion," *Buff. Hum. Rts. L. Rev.* 15 (2009): at 69.

religious advocacy in commercial settings' in order to counteract factual inequality between the means available to rich and poor religious communities.

Strasbourg Court did not have to rule on religiously-motivated homophobic speech in the case Hammond v. the United Kingdom, as it was held inadmissible because of the applicant's death.[181] However, the court addressed homophobic speech in general in *Vejdeland and others v. Sweden* for the first time in 2012, and held that restriction on the dissemination of the leaflets in schools conveying homophobic ideas did not constitute a violation of freedom of expression.[182] The court accepted that starting a debate about an issue is a legitimate aim.[183] Nevertheless, the wording of the leaflets insulted ridiculed and slandered a specific group of the population. The court underlined that 'inciting to hatred does not necessarily entail a call for an act of violence' and held that the expressive acts were sufficiently prejudicial to be restricted.[184] Most importantly, the court held that discrimination on the ground of sexual orientation was as bad as the one based on 'race, origin or color'.[185] The holding invites a thought from a theoretical perspective discussed in the first chapter and indicates that ECtHR affords equal protection against discrimination based on homosexual identity and discrimination based on other identities, inseparability of which is uncontested.

In sum, the cases illustrate that attack on secular values have to be of considerably higher degree in order to deserve the same kind of protection afforded to religious sensibilities. Such higher degree was apparent in *Sahin* and *Refah* cases, but was absent from *Gunduz v. Turkey*. *Murphy v.*

[181] Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (Oxford ; New York: Oxford University Press, 2009), 381
[182] Vejdeland and others v. Sweden (ECtHR 2012): at 60.
[183] Ibid: 54.
[184] Ibid: 54, 55.
[185] Robert Wintemute, "Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others," *The Modern Law Review* 77, no. 2 (2014): 246. Vejdeland and others v. Sweden (ECtHR 2012): at 55.

Ireland, though representing religious speech, is not so helpful in seeing the balance between the protections of religious or non-religious identities, as in the present case restriction of religious speech was aimed at protection of religious sensibilities also and in essence served the potential harm ensuing from the failure to counteract the factual inequalities between the means of different religious communities. Thus, mainly from *Gunduz* is that we can draw inferences and it does show that the balance is distorted. The dissenting judge in *Gunduz* disagreed that there were sufficient grounds for not addressing the offense to the ones holding secular values. He stated that the restrictions on the basis of the 'rights of others' shall cover the rights of non-religious persons, too.[186] These arguments are made stronger when viewed in terms of article 9, which protects freedom of religion, conscience and belief including the absence of the belief in any religion, as all the elements of this right are equally important. Among all persons with 'deeply held beliefs', restricting the protection to religious believers by ensuring 'respect' for their feelings, raises concern with regard to discrimination against non-religious believers.[187] If one's conscience is that civil marriage is the right decision, why is not the holder of this conscience protected the same way as the one of a member of any religion? In this vein, one might feel offended every time equality, for instance, gender equality is denied among others, through religious expression.

2.3 Inconsistencies within its own case-law

In the cases above, clearly the court puts special emphasis on the protection of freedom of religion. It refers to 'the respect for the religious feelings of believers' under article 9 when this does not feature in article 9 itself. Despite the fact that positive obligation with regard to article 9 was established in the case-law of the court when direct prosecution of religious groups and

[186] Gunduz v. Turkey (ECtHR 2003): Dissenting opinion of Judge Turmen.
[187] Puja Kapai and Anne SY Cheung, "Hanging in a Balance: Freedom of Expression and Religion," *Buff. Hum. Rts. L. Rev.* 15 (2009): 67.

express indifference of state authorities were present,[188] the court rejected the horizontal application of article 9 in relation to cases where 'respect for the religious feelings' seems to be at stake. Existence of positive obligations on this basis was rejected by the court when it declared inadmissible the application filed by British Muslims to ECtHR against publishers of Salman Rushdie's book, *The Satanic Verses* in relation to satirical literary attacks on the beliefs of Muslim community. The approach, namely rejection of positive obligation of the state in terms of such attacks on beliefs, makes the reliance on positive duty of protection of religious freedom developed in the case of *Otto-Preminger* inconsistent with the court's own jurisprudence. In addition, it is doubtable that expressions like the ones discussed in the cases could reach the threshold to prevent anybody from manifesting their religion.[189]

As for another instance of special emphasis on religious freedom, namely the reference to 'peaceful enjoyment' of the right under article 9 in *Klein v. Slovakia*, seems to be inconsistent with the approach of the court towards internal forum. The court rejecting to recognize interference with *forum internum* in coercion cases[190] acknowledges that inner beliefs are immune from any actions of third parties. I believe that circumstances in the same case of *Klein v. Slovakia* support this point made by the court. Neither would the statement of an archbishop convince the applicant to join Catholic Church and nor would the urge of the applicant to leave the church have affected the convictions of the believers. At least, this would be a reasoning based on theoretical understanding of human dignity discussed in the first chapter, that humans are rational and capable of withstanding mere criticism of their beliefs and actions.

[188] 97 members of the Gldani congregation of Jehovah's witnesses and others v. Georgia (ECtHR 2007)
[189] Ian Leigh, "Damned If They Do, Damned If They Don't: The European Court of Human Rights and the Protection of Religion from Attack," *Res Publica* 17, no. 1 (2011): 65-68.
[190] Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge, UK ; New York: Cambridge University Press, 2005), 135.

As for the doctrine of 'margin of appreciation', it can be seen as consistent even in view of absence of horizontal application of article 9 discussed above, as the court's statements can be understood to suggest that exactly because ECtHR is not in the position to know whether it is necessary or not to address such offences, wider margin of appreciation is afforded to domestic authorities. Such flexible approach to the width of discretion afforded to the state is even more apparent when the court defers to the decision of domestic authorities to differentiate between religions in terms of limiting anti-religious expression and does not see it as a sufficient ground to question legitimacy of the aim in *Wingrove v. the United Kingdom* [191] and admissibility decision in *Choudhury*.[192] Similarly, wide margin of appreciation, as a 'second-order reason'[193], is applied in cases relating to accommodation of religious beliefs when there is conflict between religion and sexual orientation.[194] Thus, the court is consistent in withholding its explicit position with regard to such controversial issues and chooses to remain ambiguous.[195] However, I agree with the challenge triggered by scholars, stating that wide margin appreciation was inconsistent with the circumstances in *Otto-Preminger* as no margin had to be available to the state. The fact that measures already employed by the applicant association resulted in moderate interference into both freedom of expression under article 10 and 'peaceful enjoyment' of freedom of religion under article 9, which would have been serious for either of the two in alternative cases, excluded the margin of appreciation entirely.[196] Furthermore, flexible approach to the margin permitting the legitimate aim to be discriminatory towards other religions and only consider

[191] Wingrove v. The United Kingdom (ECtHR 1996): at 50.
[192] Choudhury v. the United Kingdom (ECommHR 1991), admissibility decision
[193] Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*, 1st ed, Oxford Monographs in International Law (Oxford, U.K: Oxford University Press, 2012):37
[194] Robert Wintemute, "Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others," *The Modern Law Review* 77, no. 2 (2014): 243.
[195] Ibid, Eweida and others v. the United Kingdom (ECtHR 2013)
[196] Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality*, 1st ed (Oxford, U.K: Oxford University Press, 2012), 162-164.

interests of Christians was a clear indication that protection of religious feelings could not have been a pressing social need if absence of protection of religious feelings of some was unnecessary in a democratic society. In addition, such differentiation was impermissible as the prohibition of discrimination extended to state obligations voluntarily undertaken with regard to the rights falling under the scope of Convention articles. In a nutshell, it is clear that inconsistency within the case law in relation to any dispute before the court has to be addressed, as such arbitrariness in and of itself lowers the quality of protection offered.

The approach of the court towards hate speech offences is inconsistent in view of the different scrutiny undertaken in *Gunduz v. Turkey* and in *Norwood v. the United Kingdom*. In the former case, the state was required to provide proper justification for restriction of freedom of expression to substantiate that the interference was proportionate, while in the latter, speech was redefined as the one not falling under protection of article 10 at all, even though it was not discussed or established whether it called for violence or not.[197] Furthermore, it is worth noting that the absence of the call for violence was decisive in *Gunduz*, while in *Vejdeland* incitement to hatred was established without the expressions entailing a call for an act of violence in view of the sufficiently prejudicial effect of the speech.[198]

Inconsistencies in the case-law of the court to issues concerning religion seem to be the result of the fact that for the European Court religion still remains taboo.[199] Despite the actual reason, structured reasoning is especially important when difficult moral questions are decided by the

[197] Ian Leigh, "Damned If They Do, Damned If They Don't: The European Court of Human Rights and the Protection of Religion from Attack," *Res Publica* 17, no. 1 (2011): 64. Norwood v. the United Kingdom (ECtHR 2004)
[198] Vejdeland and others v. Sweden (ECtHR 2012): at 54, 55.
[199] Ian Leigh, "Damned If They Do, Damned If They Don't: The European Court of Human Rights and the Protection of Religion from Attack," *Res Publica* 17, no. 1 (2011): 55-57.

court.[200] Consistency through structured reasoning is the best that the court can offer for resolution of difficult questions. Such procedural fairness will definitely serve the reduction of sense of injustice for both sides.

2.4 Conclusion: Further steps other than addressing inconsistencies

In view of my claim made in the first chapter, that human dignity can serve a useful purpose of avoiding dominance of one identity over the other, there are sufficient bases in the case-law of ECtHR already to allow the reliance on the concept of human dignity in their reasoning for the same purpose. The court has said that the underlying aim of the Convention is 'respect for human dignity and human freedom.'[201] The partly dissenting judge Martens in *Kokkinakis* recognized the potential application of 'dignity' with the purpose stated in the first Chapter by pointing out: 'respect for human dignity and human freedom implies that the State is bound to accept that in principle everybody is capable of determining his fate in the way that he deems best.'

Theories that reject existence of one and only 'conception of the good', turn into the concept of pluralism in the jurisprudence of ECtHR. In *Handyside* pluralism, tolerance and broadmindedness was presented as one of the main characteristics of democracy.[202] Despite the fact that pluralism is first and foremost aimed at preserving the existence of some groups, there is a tight connection between individual freedoms and pluralism, as the latter serves both as a precondition and a result of exercising individual liberties.[203] In cases of *Kokkinakis v. Greece*,

[200] Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality*, 1st ed (Oxford, U.K: Oxford University Press, 2012), 165.
[201] Pretty v. the United Kingdom, the Grand Chamber, Marcus Düwell et al., eds., *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge, United Kingdom: Cambridge University Press, 2014), 5. Pretty v. the United Kingdom (ECtHR 2002): at 44, 42.
[202] Aernout Nieuwenhuis, "The Concept of Pluralism in the Case Law of the ECtHR," *European Constitutional Law Review* 3, no. 03 (2007): 368-370.
[203] Ibid: 373.

Refah Partisi and *Sahin v. Turkey*, the court explained: '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. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.'[204] Based on the jurisprudence, the state has the duty to remain neutral and impartial towards religions or beliefs which serves the preservation of pluralism. The court stresses the need for 'dialogue' and rejects the role of the states 'to remove the cause of tension by eliminating pluralism' but instead calls for the guarantees from them 'to ensure that the competing groups tolerate each other'.[205] The statements are a powerful argument for grounding the need to reevaluate whether interpretation by the court in the discussed cases does protect all beliefs and identities on an equal footing.

In addition, the positions of the concurring judge in *Wingrove* and the dissenting one in *Gunduz* are worth noting. They both emphasized that considerations with a view to justice called for the extension of the restriction of offensive expression to cover secular values also. Judges argued that 'the rights of others' in paragraph 2 of article 10 along with the rights of religious believers also includes the rights of secular people.[206] As soon as protection applies to one group, quite naturally other groups in comparable circumstances will claim it. This can go infinitely, until the speech is turned into expression of 'acceptable' ideas and not only this, but 'acceptable' for all. This illustrates that the temptation of restricting religious speech out of justice concerns can hint at restricting speech of any kind of believers. Thus, the chain of restriction can be endless, while

[204]Kokkinakis v. Greece (ECtHR 1993): at 31; Refah Partisi (The Welfare Party) and others v. Turkey (ECtHR, Grand Chamber 2003): at 90; Leyla Şahin v. Turkey, 111 (ECtHR Grand Chamber 2005): at 104;
[205] Metropolitan Church of Bessarabia and others v. Moldova, (ECtHR 2001): 116.
[206] Gunduz v. Turkey (ECtHR 2003): Dissenting Opinion of Judge Turmen.

the path of lifting it is quite conclusively just. These considerations support my claim that none of the identities, religious or non-religious should avail of such broad protection. When faced with options between infinity of restrictions, and infinity of speech, I believe that the latter is a conclusively more fair method of self-regulation of offence through a free product, speech, generally available to everyone.

Other than procedural fairness discussed in the previous subsection, a sense of justice requires consistency in a broader sense, namely that identities of all are given equal protection. If the court decided to pursue the path of preserving balance between the protections afforded to religious and non-religious identities provided that the speech does not deprive persons of their 'social standing', definitely it would not be introducing new concepts but grounding their approach in its own case law as illustrated above.

Chapter three: Overview of the views within the UN

Following the discussion on European standards, I will move on to address the views taken internationally in different frameworks within the United Nations (UN). The human rights instruments prescribe desirable standards in the words of the whole international society, when review of the aspirations in different countries unfolds a different perspective. Discrepancy in attitudes has revealed itself in numerous UN resolutions issued by United Nations Commission on Human Rights and then its successor Human Rights Council. The system based on which the membership of the Council is attained, namely election by General Assembly, allows different constitution of 47 states at the Council at different times[207] and affects the position it expresses in the name of the international society. However, positive signs are discerned pointing at consensus on very fundamental issues revolving around freedom of expression and freedom of religion or belief.

Before I embark on more substantial consideration of the views that the UN Human Rights Committee (CCPR) adopts based on International Covenant on Civil and Political Rights (ICCPR) in relation to defamation of religion, and other forms of expression offensive to religious sensitivities versus expression offensive to any kind of sensibilities including religious ones through manifestation of religion, I will discuss general context created by non-binding documents adopted by different UN bodies.

3.1 'Soft Law' and General Context

In 1981 *declaration on the elimination of all forms of intolerance and discrimination based on religion or belief* [208]was adopted within the mandate of the UN. The document has the status of 'soft law' under international law, and mainly represents an expression of commitment to

[207] http://www.ohchr.org/en/hrbodies/hrc/pages/hrcindex.aspx (last accessed November 26, 2015)
[208] http://www.un.org/documents/ga/res/36/a36r055.htm (last accessed November 26, 2015)

tolerance and non-discrimination with regard to religion or belief.[209] Similar declaration with regard to race was adopted in 1963[210] which was followed by a binding Convention in 1965.[211] In the 1981 declaration influences of the latter instruments can be traced.[212] Despite the fact that the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) does not regulate religious hatred as such in comparison with ICCPR, it has been argued by scholars that analogies might be drawn in view of potential application of the instrument in cases of religious hatred.[213] (See subsection 3.2)

As a result of sentiments prevailing after September 11 attacks in 2001, through the proposal of present Organization of Islamic Cooperation[214] resolutions on combating 'defamation of religions' were passed several times during the decade first by Human Rights Commission and then after its replacement in 2006 by Human Rights Council with the last one passed in 2010. Nearly identical resolutions were adopted by General Assembly since 2005. In 2006, 111 states voted for the resolution.[215] The resolutions raised concerns among scholars and was believed to

[209] Puja Kapai and Anne SY Cheung, "Hanging in a Balance: Freedom of Expression and Religion," *Buff. Hum. Rts. L. Rev.* 15 (2009): 14.
[210] http://www.un-documents.net/a18r1904.htm (last accessed November 26, 2015)
[211] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx (last accessed November 26, 2015)
Natan Lerner, "Freedom of Expression and Advocacy of Group Hatred," *Religion & Human Rights* 5, no. 2 (2010): 138.
[212] Natan Lerner, "Freedom of Expression and Advocacy of Group Hatred," *Religion & Human Rights* 5, no. 2 (2010): 139.
[213] Natan Lerner, "Freedom of Expression and Advocacy of Group Hatred," *Religion & Human Rights* 5, no. 2 (2010): 141,142. Silvia Angeletti, "Freedom of Religion, Freedom of Expression and the United Nations: Recognizing Values and Rights in the 'defamation of Religions' Discourse," *Stato, Chiese E Pluralismo Confessionale*, 2012, http://riviste.unimi.it/index.php/statoechiese/article/view/2442.
[214] http://tomlantosinstitute.hu/files/tli_lecture_sejalparmar_17.02.2015.pdf, p. 10 (last accessed November 26, 2015)
[215] Rebecca J. Dobras, "Is the United Nations Endorsing Human Rights Violations: An Analysis of the United Nations' Combating Defamation of Religions Resolutions and Pakistan's Blasphemy Laws," *Ga. J. Int'l & Comp. L.* 37 (2008): 339.353,354.

'undermine directly international guarantees on freedom of expression by protecting religions and potentially lending support to the state suppression of religious or dissenting voices.'[216]

The preamble of 2010 resolution stressing that 'defamation of religions is a serious affront to human dignity leading to a restriction on the freedom of religion of their adherents and incitement to religious hatred and violence' gives rise to an abuse of the concept of dignity as it only adds up to already existent ambiguity around it.[217] In turn the resolution does not define defamation of religion as such.

The resolution adopted in 2010 refers to the submitted report of the United Nations High Commissioner for Human Rights 'on the possible correlation between defamation of religions and the upsurge in incitement, intolerance and hatred in many parts of the world' and the report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance presented to the Council.[218] Based on the same resolution, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has to 'report on all manifestations of defamation of religions, and in particular on the ongoing serious implications of Islamophobia, for the enjoyment of all rights by their followers, to the Council.'[219] Clearly, these tasks foreseen by the resolution are in and of itself in contradiction with the Covenant and its interpretation in General Comment 34 which prohibits blasphemy laws as such. [220] The resolution arbitrarily adds 'general welfare' as a ground for a

[216] S. Parmar, "The Challenge of 'Defamation of Religions' to Freedom of Expression and the International Human Rights System," *EUROPEAN HUMAN RIGHTS LAW REVIEW*, no. 3 (2009): 10.
[217] UN Human Rights Council, *Combating defamation of religions : resolution,* 15 April 2010, A/HRC/RES/13/16 http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.RES.13.16_AEV.pdf, preamble (last accessed November 26, 2015)
[218] Ibid at 1
[219] Ibid at 21
[220] General Comment 34, U.N. Doc. CCPR/C/GC/34/CRP.2 (2010)**:** at 48

permissible restriction to those included in article 19.[221] The resolution states in the preamble that defamation of religions could lead to 'social disharmony'. However, 'social disharmony' is a much lower standard than public order.[222] All the resolutions on combating defamation of religions include the wording: 'deep concern that Islam is frequently and wrongly associated with human rights violations and terrorism'.[223] Generally, resolutions put excessive emphasis on the negative targeting of Islam.[224] 2010 resolution in the preamble notes the 'need to adopt a comprehensive and non-discriminatory approach to ensure respect for all races and religions'.[225] However, religion as such is not the subject of either regional or international human rights instruments.[226] Consecutive adoption of such resolutions might have some normative value. However, the normative value does not amount to opinio juris on the issue of defamation of religions.[227]

2011 was the first year when the resolution identical to the ones described was not proposed to the Human Rights Council. The Council adopted a resolution by consensus entitled *Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief*[228]never mentioning

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S. Parmar, "The Challenge of 'Defamation of Religions' to Freedom of Expression and the International Human Rights System," *EUROPEAN HUMAN RIGHTS LAW REVIEW*, no. 3 (2009): 4.

[221] http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.RES.13.16_AEV.pdf at 11

[222] Ibid, preamble; Silvia Angeletti, "Freedom of Religion, Freedom of Expression and the United Nations: Recognizing Values and Rights in the 'defamation of Religions' Discourse," *Stato, Chiese E Pluralismo Confessionale*, 2012: 8.

[223] http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.RES.13.16_AEV.pdf at 7

[224] S. Parmar, "The Challenge of 'Defamation of Religions' to Freedom of Expression and the International Human Rights System," *EUROPEAN HUMAN RIGHTS LAW REVIEW*, no. 3 (2009): 4.

[225] http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.RES.13.16_AEV.pdf, preamble

[226] S. Parmar, "The Challenge of 'Defamation of Religions' to Freedom of Expression and the International Human Rights System," *EUROPEAN HUMAN RIGHTS LAW REVIEW*, no. 3 (2009): 6.

[227] S. Parmar, "The Challenge of 'Defamation of Religions' to Freedom of Expression and the International Human Rights System," *EUROPEAN HUMAN RIGHTS LAW REVIEW*, no. 3 (2009): 9.

[228] http://www.ohchr.org/Documents/Issues/Religion/AdditionalInfoSGReport67_178.pdf (last accessed November 26, 2015)

'defamation of religions'.[229] Rabat Plan of Action[230] followed next adopted by the office of the High Commissioner for Human Rights.[231]

In the Rabat Plan of Action, it is underlined that severity is a precondition for any limitation of expression, among them restrictions of speech required under article 20. The plan states that intent is a clear requirement flowing from the words 'advocacy' and 'incitement', [232] among other factors to be considered in order to assess severity is the position or status of the speaker, context, content or form and extent of the speech. Extent of the speech also includes the consideration of the ability of the group to act on it. These factors help determine whether there is 'reasonable probability that the speech would succeed in inciting actual action against the target.' However, the requirement of likelihood does not demand that the action advocated is committed in real.[233] Thus, based on the Plan, under some circumstances even the speech motivated by hate and intended to incite hatred might not reach the threshold of severity required for constituting hate speech, the determining factor being the likelihood to incite to discrimination, hostility or violence.

[229] Silvia Angeletti, "Freedom of Religion, Freedom of Expression and the United Nations: Recognizing Values and Rights in the 'defamation of Religions' Discourse," *Stato, Chiese E Pluralismo Confessionale*, 2012: at 12.
[230] http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf (last accessed November 26, 2015)
[231] http://tomlantosinstitute.hu/files/tli_lecture_sejalparmar_17.02.2015.pdf p. 9 (last accessed November 26, 2015)
[232] Human Rights Watch has commented: 'The term "advocacy" implies that there must be a conscious intent to spur hatred, rather than just approval of or inadvertent contribution to hatred. The fact that the advocacy of hatred must additionally constitute incitement points to provocation of an action, rather than merely fostering negative feelings.' http://www.hrw.org/legacy/wr2k7/essays/shrinking/ashrinkingrealm.pdf, p. 12 (last accessed November 26, 2015)
[233] http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf at 22, p. 6 (last accessed November 26, 2015)

3.2 Analogies drawn between ICERD and ICCPR in relation to religious hatred

The prohibition of racial discrimination has been recognized as Jus Cogens norm by International Court of Justice on several occasions. [234] It is explicitly prohibited by ICERD and ICCPR. Article 4 of ICERD requires state parties to prohibit by law 'all dissemination' of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin'.[235] Thus, in contrast to article 20 of ICCPR,[236] article 4 of ICERD imposes the obligation on states to prohibit not only advocacy of hatred, but all dissemination of ideas based on racial superiority or hatred.[237] Unlike ICCPR, ICERD is limited to the prohibition of advocacy of hatred based on racial superiority or hatred and does not mention religious grounds in article 4. In principle, distinction should not be permissible between the target groups of hate speech when 'social or psychological damage' inflicted by speech is identical.[238] However, as already described international law differentiates between the measures with regard to advocacy to specific type of hatred by leaving out among others religious groups beyond the elevated protection in ICERD.[239]

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234 Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (New York: Cambridge University Press, 2015), 240.

235 http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx (last accessed November 26, 2015)

236 http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (last accessed November 26, 2015)

237 Mohamed Saeed M. Eltayeb, "The Limitations on Critical Thinking on Religious Issues under Article 20 of ICCPR and Its Relation to Freedom of Expression," *Religion & Human Rights* 5, no. 2 (2010): 132. S. Parmar, "The Challenge of 'Defamation of Religions' to Freedom of Expression and the International Human Rights System," *EUROPEAN HUMAN RIGHTS LAW REVIEW*, no. 3 (2009): 7.

238 Rex J. Ahdar and I. Leigh, *Religious Freedom in the Liberal State*, Second edition (Oxford: Oxford University Press, 2013), 449.
Natan Lerner, "Freedom of Expression and Advocacy of Group Hatred," *Religion & Human Rights* 5, no. 2 (2010): 139.

239 Natan Lerner, "Freedom of Expression and Advocacy of Group Hatred," *Religion & Human Rights* 5, no. 2 (2010): 142.

Nevertheless, potential interpretation of ICERD might extend to religious aspects also. I will focus on the possible interrelationship of the above-mentioned documents towards regulation of religious hatred. Based on article 4 'state parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form'.[240] Inclusion of the words 'in any form' may point in favor of interpretation extending to prohibition of all propaganda based on religious hatred. The article continues with emphasizing the relevance of 'principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention' which among others prohibits racial discrimination over enjoyment of the right to freedom of religion.[241] Racial discrimination can be realized in the discrimination of racial groups to enjoy their right to freedom of religion.[242] Moreover, definition of 'racial discrimination' in article 1 of the 1965 Convention stating 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms' also point towards expansive interpretation.[243] 'Any distinction' based on race can be presented in the form of attacks towards religious groups and through referring to religion racial group can be hurt.

In addition, scholars argue for possible correlation between ICERD and ICCPR in relation to religious hatred and its legal regulation internationally with a view to the historical link between

[240] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx
[241] Ibid
[242] Patrick Thornberry, "Forms of Hate Speech and the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)," *Religion & Human Rights* 5, no. 2 (2010): 102.
[243] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx
Nazila Ghanea, "Expression and Hate Speech in the ICCPR: Compatible or Clashing?," *Religion & Human Rights* 5, no. 2 (2010): 181.

the documents and overlapping character of race and religion in certain circumstances.[244] Furthermore, it is noteworthy, that the Covenant on Civil and Political Rights consisting of binding human rights obligations of states concluded in 1966 refers to advocacy to religious and racial hatred in the same context under the same article 20.[245] Article 2 of the Convention on Genocide defines Genocide as specific acts 'committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.[246] The crime of incitement to genocide in article 3 accordingly encompasses both religious and racial groups.[247] Article 3 of 1978 UNESCO declaration on Race and Racial Prejudice condemns **'**any distinction, exclusion, restriction or preference based on race, color, ethnic or national origin or religious intolerance motivated by racist considerations.'[248] Multiple examples of identical treatment of the grounds in the documents further support the point.

In concluding observations on Georgia in 2005, Committee on the Elimination of Racial Discrimination (CERD) noted that 'Religious questions are of relevance to the Committee when they are linked with issues of ethnicity and racial discrimination.'[249] In the 2011 Report of the Committee on the Elimination of Racial Discrimination, the committee recommended to Georgia to 'recognize racial, religious, national or ethnic grounds as a general aggravating circumstance,

[244] Natan Lerner, "Freedom of Expression and Advocacy of Group Hatred," *Religion & Human Rights* 5, no. 2 (2010): 141-142, Silvia Angeletti, "Freedom of Religion, Freedom of Expression and the United Nations: Recognizing Values and Rights in the 'defamation of Religions' Discourse," *Stato, Chiese E Pluralismo Confessionale*, 2012: 4.

[245] http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
Natan Lerner, "Freedom of Expression and Advocacy of Group Hatred," *Religion & Human Rights* 5, no. 2 (2010): 138, 141.

[246] https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf (last accessed November 26, 2015)

[247] Ibid

[248] http://www.unesco.org/webworld/peace_library/UNESCO/HRIGHTS/107-116.HTM

[249] http://www.bayefsky.com//pdf/georgia_t4_cerd_67.pdf , at 18 (last accessed November 26, 2015); Patrick Thornberry, "Forms of Hate Speech and the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)," *Religion & Human Rights* 5, no. 2 (2010): 102,103.

in connection with all crimes and offences.' It also expressed its concern 'at reports of stereotyping, prejudice and misconceptions with regard to members of ethnic and religious minorities expressed through the media, by politicians and in school textbooks.'[250] CERD's references to Islamophobia, discrimination against the Jews and Sikhs, religions of indigenous peoples when it sees the intersection between ethnicity and religion, points to the inclusion of religious issues under its mandate being an additional indication of potential expansive interpretation of ICERD. [251] It is noteworthy that on some occasions, the necessity of such 'intersection' has not even been emphasized. In the conclusions of CERD, the committee expressed its concern 'about reports of vandalism of religious sites of minorities, such as defacing of synagogues in different areas of Ukraine, as well as of anti-Muslim and anti-Tatar statements by Orthodox priests in Crimea'.[252]

However, as a matter of law, in its case-law the CERD still supports the position that unless an 'intersection' between race and religion is established, the Committee's mandate to consider the case will not be engaged. Scholars consider the future application of 'discrimination in effect' or 'indirect discrimination' to address such cases when the direct racial or ethnic attack is circumscribed by attacking the majority religion of such groups.[253] The committee in the case of *the Jewish community of Oslo et al. v. Norway* stated that 'whilst the contents of the speech are objectively absurd, the lack of logic of particular remarks is not relevant to the assessment of

[250] http://www2.ohchr.org/english/bodies/cerd/docs/A.66.18.pdf , p.42 (last accessed November 26, 2015)
[251] Patrick Thornberry, "Forms of Hate Speech and the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)," *Religion & Human Rights* 5, no. 2 (2010): 103.
[252] Patrick Thornberry, "Forms of Hate Speech and the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)," *Religion & Human Rights* 5, no. 2 (2010): 103.
http://www.bayefsky.com//general/a_61_18_2006.pdf , at 418 (last accessed November 26, 2015)
[253] Patrick Thornberry, "Forms of Hate Speech and the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)," *Religion & Human Rights* 5, no. 2 (2010): 104.

whether or not they violate article 4.'[254] General approach of CERD in the above case focusing on the overall assessment and effect of the speech more than the literal meaning of the words is also supportive of the above interpretation by scholars.

3.3 ICCPR and General Comments of CCPR

Under ICCPR article 18 and article 19 stand for freedom of religion or belief and freedom of expression respectively. Article 20, the only article in the Covenant that requires state parties' specific action, imposes the positive obligation on the state to prohibit 'advocacy of national, racial and religious hatred constitutes incitement to discrimination, hostility or violence.'[255] Article 20 can be seen as a type of generic limitation on the exercise of both freedoms. [256] This is confirmed by General Comment no 22[257] and General Comment no 11[258]. Article 20 is simultaneously lex specialis with regard to limitation clauses of these articles as these are the particular circumstances when the state action is not only permitted but required in the form of prohibition by law.[259] Furthermore, General Comment no 11 notes that the obligatory prohibitions under article 20 'are fully compatible with the right of freedom of expression as contained in article 19.'[260] Thus, restrictions under article 20 have to be in line with the limitation clauses of both article 18 and 19[261] including proportionality analysis[262] as also confirmed in the

[254] The Jewish community of Oslo et al. v. Norway, U.N. Doc. CERD/C/67/D/30/2003 (2005), at 10.4
[255] Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (Oxford ; New York: Oxford University Press, 2009), 70-71. http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
[256] Malcolm D. Evans, *The freedom of religion or belief and the freedom of expression*, Religion and Human Rights 4 (2009): 211.
[257] General Comment no 22 UN. Doc. HRI/GEN/1/Rev.1 at 35 (1994): at 7
[258] General Comment no 11 U.N. Doc. HRI/GEN/1/Rev.1 at 12 (1994): at 2
[259] Jeroen Temperman, "Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech," *BYU L. Rev.*, 2011, 744.
[260] General Comment 11 U.N. Doc. HRI/GEN/1/Rev.1 at 12 (1994): at 2
[261] Nazila Ghanea, "Expression and Hate Speech in the ICCPR: Compatible or Clashing?," *Religion & Human Rights* 5, no. 2 (2010):187.

case of *Ross v. Canada*.[263] Article 20 can also be seen as lex specialis to article 5 of ICCPR which states 'nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.'[264] In turn, article 27 of ICCPR can be seen as lex specialis to article 18, as it affirms the right of religious minorities 'to profess and practice their own religion', including the right to do this 'in community with the other members of their group'. [265]

In General Comment no 31 on 'the Nature of General Legal Obligation Imposed on State Parties to the Covenant', the Committee recognizes the notion of positive state obligations[266] as also indicated in article 2 of ICCPR formulated in the following manner: 'each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.' Although Committee denies the 'direct horizontal effect as a matter of international law', it states that based on article 2 of ICCPR 'the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between

[262] Dr Agnes Callamard, "Expert Meeting on the Links between Articles 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred That Constitutes Incitement to Discrimination," *Hostility or Violence, UN HCHR, October*, 2008, 163.
[263] Dr Agnes Callamard, "Expert Meeting on the Links between Articles 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred That Constitutes Incitement to Discrimination," *Hostility or Violence, UN HCHR, October*, 2008, 163. Ross v. Canada, U.N. Doc. CCPR/C/70/D/736/1997 (2000), at 10.5 - 10.6.
[264] Nazila Ghanea, "Expression and Hate Speech in the ICCPR: Compatible or Clashing?," *Religion & Human Rights* 5, no. 2 (2010):177,188.
[265] http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (last accessed November 26, 2015)
[266] General Comment no 31 U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004)

private persons or entities.' [267]The General Comment clarifies that in certain circumstances failure of the state to ensure Covenant rights 'as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities' can give rise to violations by States Parties of those rights. Article 20 obligation represents an example of specifically stated positive obligations of states.[268] As positive obligations extend to all rights in the Covenant, freedom of religion or belief is not an exception, either.[269] However, the formulation in the General Comment indicates that the standard being 'due diligence', certain failures to ensure Covenant rights will not lead to violations and the obligation to provide 'fool-proof preventive measures' does not arise.[270] It cannot automatically be regarded a proper preventive measure to restrict speech which is supposed to in the longer term and indirectly prejudice the freedom to manifest religion as the same measures will harm freedom of expression in relation to which the same positive obligations exist.[271] Thus, understanding of prohibition of blasphemy or any other prejudice to religious sensibilities as 'a fool-proof preventive measure' cannot be based on recognition of positive obligations of the state as it would not be just in relation to positive obligations arising from article 19.

The Human Rights Committee in its General Comment no 34 that replaced the General Comment no 10 on article 19 in 2011[272] declares blasphemy laws and laws punishing criticism of religious leaders incompatible with the Covenant except when the expression reaches the

[267] Ibid
[268] Dennis De Jong, "The Legal Obligations of State and Non-State Actors in Respect of the Protection of Freedom of Thought, Conscience and Religion or Belief," *Religion & Human Rights* 3, no. 1 (2008): 2.
[269] Ibid: 7.
[270] Ibid: 3
[271] Ibid: 12.
[272] Esther Janssen, *Faith in Public Debate: On Freedom of Expression, Hate Speech and Religion in France & the Netherlands*, School of Human Rights Research Series, volume 68 (Cambridge, United Kingdom ; Antwerp [Belgium] ; Portland [Oregon]: Intersentia, 2015),148.

threshold required pursuant to article 20, paragraph 2 and article 19, paragraph 3. Even if such laws fulfill all the preconditions necessary for restriction under the above articles, they shall not entail discrimination of any kind, including the one in favor of believers over non-believers.[273] This position was also reiterated in the Rabat Plan of Action by the UN Office of the high commissioner for human rights.[274]

General Comment 34, which complements the stance in the case of *Faurission v. France*, states: 'the Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events. Restrictions on the right of freedom of opinion should never be imposed and, with regard to freedom of expression, they should not go beyond what is permitted in paragraph 3 or required under article 20.'[275] Thus, automatic prohibition of certain speech, denial of historical facts in this case, without consideration of the individual circumstances is rejected by the Human Rights Committee.

The Human Rights Committee in its general Comment no. 22 notes that freedom of thought and conscience is equally protected with the freedom of religion and belief.[276] In the words of the Committee 'article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.'[277] The Committee specifically stresses the relevance of non-discrimination in interpreting the scope of permissible limitations.[278]

The Human Rights Committee takes the position that 'the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts and the concept

[273] General Comment no.34, U.N. Doc. CCPR/C/GC/34/CRP.2 (2010): at 48
[274] http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf at 17 (last accessed November 26, 2015)
[275] Faurission v. France, at 49
[276] General Comment no 22 UN. Doc. HRI/GEN/1/Rev.1 at 35 (1994): at 1
[277] Ibid, at 2
[278] Ibid, at 8

of worship extends to rituals and ceremonial acts giving expression to belief, as well as various practices integral to such acts'.[279] It follows from the above that manifestation of religion may be realized in speech also. The UN declaration of the elimination of all forms of intolerance and discrimination based on religion or belief treats free speech as an aspect of religious liberty as provided for in article 6 of the declaration. The UN Human Rights Committee also comments that 'the terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.'[280] However, it has been made clear that limits still exist. The CCPR noted that a belief consisting primarily in the worship and distribution of a narcotic drug cannot be brought within the scope of Article 18 of the Covenant.[281]

The General Comment 11 on article 20 explains the nature of the positive obligation under this provision and states that in order to comply with the provision national legislation has to make it clear that such hate speech described in the article is 'contrary to public policy' and provide 'appropriate sanction'.[282] The mere fact that in contrast with paragraph 1 of article 20 where 'propaganda' is the term used, 'advocacy' features in the second paragraph, makes it explicit that the threshold foreseen for the type of speech is higher in relation to particular hatreds mentioned, which is made even more stringent by the requirement that such hatred has to incite

[279]General Comment no 22 UN. Doc. HRI/GEN/1/Rev.1 at 35 (1994): at 4
[280] Ibid at 2
[281] M.A.B., W.A.T. and J.-A.Y.T. v. Canada, at 4.2; Malcolm D. Evans, *The freedom of religion or belief and the freedom of expression*, Religion and Human Rights 4 (2009): 206.
[282] General Comment no 11 U.N. Doc. HRI/GEN/1/Rev.1 (1994): at 2
Rex J. Ahdar and I. Leigh, *Religious Freedom in the Liberal State*, Second edition (Oxford: Oxford University Press, 2013), 449.

'discrimination, hostility or violence'.[283] Discrimination is defined in article 26 of ICCPR as 'an autonomous right' to equality not limited to rights laid down in ICCPR.[284] Terms 'violence' and 'hostility' lack specific definition under the Covenant, however, historical experience can be useful indicators. One thing that has to be born in mind is that the focus is not the violence itself, as grave as it might be, but the speech has to be assessed independently of the violence persisting. In other words, hatred has to be established first and the ensuing violence itself does not determine that the hatred was advocated.[285] The advocacy of hatred that constitutes incitement has to have rational connection with discrimination, hostility or violence caused.[286]

3.4 Jurisprudence of the UN Human Rights Committee

In the case of *Fatime Andersen v. Denmark*, the Human Rights Committee reiterated that claims that have the form of actio popularis is not allowed before the Committee. With regard to author's claims under article 20 and 27, the committee concluded that it had not been demonstrated that the statement of the member of the Danish People's Party on the National Danish Television comparing Nazi symbol swastika to Muslim headscarf 'had specific consequence for her or that the specific consequences of the statements were imminent and would personally affect the author.'[287] Thus, in the case the need for establishing 'direct and immediate connection' between the expression and the personal harm inflicted was reaffirmed.[288] The case also raised an interesting issue in relation to positive obligations ensuing from article 2

[283] Nazila Ghanea, "Expression and Hate Speech in the ICCPR: Compatible or Clashing?," *Religion & Human Rights* 5, no. 2 (2010): 174.
[284] General Comment no 18 U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994)at 12; Nazila Ghanea, "Expression and Hate Speech in the ICCPR: Compatible or Clashing?," *Religion & Human Rights* 5, no. 2 (2010): 174.
[285] Nazila Ghanea, "Expression and Hate Speech in the ICCPR: Compatible or Clashing?," *Religion & Human Rights* 5, no. 2 (2010):189.
[286] Nazila Ghanea, "Expression and Hate Speech in the ICCPR: Compatible or Clashing?," *Religion & Human Rights* 5, no. 2 (2010):189.
[287] Fatima Andersen v. Denmark, U.N. Doc. CCPR/C/99/D/1868/2009 (2010), at 6.4
[288] Silvia Angeletti, "Freedom of Religion, Freedom of Expression and the United Nations: Recognizing Values and Rights in the 'defamation of Religions' Discourse," *Stato, Chiese E Pluralismo Confessionale*, 2012: 18.

of ICCPR. The author claimed that 'by authorizing such speeches, the Danish authorities allegedly failed to acknowledge the need to protect Muslims against hate speech and thus prevent future hate crimes against members of this religious group.'[289] As the Committee stated article 2 does not have a separate standing and 'may be invoked by individuals only in relation to other provisions of the Covenant.' The committee stated that article 2 paragraph 3 (b) can be invoked only if the claims are 'arguable under the Covenant'[290] and is not relevant in relation to 'complaints which are insufficiently founded and where the author has not been able to prove that she was a direct victim of such violations.' [291] Thus, the reasons for refusing to consider the case are second-order reasons relating to the 'victim status'. However, it would have been interesting to the court's first-order reasons presented in relation to positive obligation of the state. Despite the fact that second-order reasons blocked the consideration of the merits and more specifically consideration of the content of the speech, the case made an important determination with regard to the extent of claims under article 20. The approach towards 'victim status' was broader in the case of *Toonen v. Australia* decided by the Human Rights Committee, where the mere existence of specific legal regime and the potential to become subject to it was sufficient ground for the determination of the 'victim status'.[292] The approach adopted was also broad in the case of *The Jewish community of Oslo et al. v. Norway* considered by CERD. In the latter case, the authors complained of the Norwegian Supreme Court's decision acquitting the person who disseminated ideas of racial discrimination and hatred and the Committee agreed that they

[289] Fatima Andersen v. Denmark, U.N. Doc. CCPR/C/99/D/1868/2009 (2010), at 3.2
[290] Ibid, at 4.2
[291] Ibid, at 6.5
[292] Toonen v. Australia, U.N. Doc CPPR/C/50/D/488/1992 (1994), at 5.1

could have been affected by the decision of the Supreme Court and recognized them as potential victims. [293]

The case of *Faurission v. France*, which did not concern either religiously-motivated speech or speech offending religious sentiments but the speech denying the existence of gas chambers for the purposes of extermination during Holocaust,[294] established general principle that 'respect of the rights or reputations of others' could extent to the collective reputation of a group and that requirement of intention was excluded for restricting freedom of expression.[295] In the absence of the evidence to the contrary, the Committee accepted the state's argument that denial of Holocaust was 'the principal vehicle for anti-semitism'.[296] As the court noted 'since the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-Semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-Semitism.'[297] It is noteworthy that the notion of 'respect' in the case does not refer to beliefs but the members of the community of believers.[298] However, as already stated, General Comment 34 prohibits automatic prohibition of denial of historic facts. In its conclusion the Committee considered a number of factors, including the broader social context in which the expression was made.[299] The committee did not explore the relevance of article 20 in this case, however, four of the five separate opinions touched upon the

[293] The Jewish community of Oslo et al. v. Norway, U.N. Doc. CERD/C/67/D/30/2003 (2005), at 7.3, 7.4; The case was mentioned by the petitioners in Fatima Andersen v. Denmark (at 3.4)
[294] Robert Faurisson v. France, U.N. Doc. CCPR/C/58/D/550/1993(1996), at 2.1
[295] Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (Oxford ; New York: Oxford University Press, 2009), 70, 71.
[296] Robert Faurisson v. France, U.N. Doc. CCPR/C/58/D/550/1993(1996), at 9.7
[297] Robert Faurisson v. France, U.N. Doc. CCPR/C/58/D/550/1993(1996), at 9.6
[298] Paul M. Taylor, "Questionable Grounds of Objections to Proselytism and Certain Other Forms of Religious Expression, The," *BYU L. Rev.*, 2006, 823.
[299] S. Parmar, "The Challenge of 'Defamation of Religions' to Freedom of Expression and the International Human Rights System," *EUROPEAN HUMAN RIGHTS LAW REVIEW*, no. 3 (2009): 7. (Ftn. 91)

issue. [300] Individual concurring opinion by Elizabeth Evatt and David Kretzmer co-signed by Eckart Klein noted that in some circumstances when the stringent threshold foreseen by paragraph 2 of article 20 cannot be satisfied, but the effect of implicit advocacy is still 'pernicious',[301] right to be free from incitement as described under the article can be best served by the restrictions allowed under paragraph of 3 of article 19.[302] The opinion made reference to 'the value' of protecting 'the right to be free from incitement to racism' and concluded that this 'value' could not have been achieved in the circumstances by less drastic means. [303]

In J.R.T. and the W. G. party v. Canada, the Committee held that dissemination of anti-Semitic messages, namely spreading warning 'of the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles through recorded telephone messages[304] constituted 'advocacy of racial and religious hatred' under article paragraph 2 of article 20 and held the complaint under article 19 inadmissible as it was incompatible with the provisions of the Covenant, more specifically the state obligation under article 20.[305]

In *Ross v. Canada*, the Human Rights Committee held that removal of a teacher from his position for his anti-Jewish off-duty statements did not violate the covenant. As in Faurission, it was upheld that the 'rights of others' could extend to the community as a whole. However, this

[300] Nazila Ghanea, "Expression and Hate Speech in the ICCPR: Compatible or Clashing?," *Religion & Human Rights* 5, no. 2 (2010): 184,

[301] Individual Opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein attached to *Faurisson v. France*, at 4

[302] [302] Individual Opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein attached to *Faurisson v. France*, at 7

[303] Individual Opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein attached to *Faurisson v. France*, at 10; Nazila Ghanea, "Expression and Hate Speech in the ICCPR: Compatible or Clashing?," *Religion & Human Rights* 5, no. 2 (2010): 184,185.

[304] J. R. T. and the W. G. Party v. Canada, U.N. Doc. CCPR/C/OP/2 at 25 (1984), at 2

[305] J. R. T. and the W. G. Party v. Canada, U.N. Doc. CCPR/C/OP/2 at 25 (1984), at 8 (b)

did not extend to religion as such, but consisted in the right of the community to be 'protected from religious hatred'.[306] Thus, an individual right has been identified from a prohibition under article 20.[307] Later, a complaint was based on the potential violation of article 20 in *Fatima Andersen v. Denmark.* However, the case was declared inadmissible for the absence of 'victim status'.[308] In contrast with *Faurission*, where the court stated that 'the restriction served the respect of the Jewish Community to live free from fear of an atmosphere of anti-Semitism', the court did not refer to the notion of 'respect' and rather focused on the rights of the persons of the Jewish face.[309] In contrast with the approach in In *J.R.T. and the W. G. party v. Canada*, the committee in *Ross v. Canada* decided to consider the case on the merits rather than deem it inadmissible under article 20, arguing that the speech falling under article 20 will also be permissible under article 19.[310] While recognizing a collective 'right to be protected from religious hatred' as a legitimate restriction ground for freedom of expression, it also stated that 'such restrictions also derive support from the principles reflected in article 20(2) of the Covenant.'[311] The importance of article 20 as a 'value' that needs to be taken into account in the interpretation of article 19 restrictions was also emphasized in the individual concurring opinion by Elizabeth Evatt and David Kretzmer co-signed by Eckart Klein attached to the case of *Faurission v. France.*

[306] Silvio Ferrari, Rinaldo Cristofori, and International Consortium for Law and Religion Studies, eds., *Law and Religion in the 21st Century: Relations between States and Religious Communities* (Farnham, Surrey ; Burlington, VT: Ashgate Pub, 2010), 221. Ross v. Canada U.N. Doc. CCPR/C/70/D/736/1997 (2000), at 11.5

[307] Jeroen Temperman, "Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech," *BYU L. Rev.*, 2011, 739.

[308] Fatima Andersen v. Denmark, U.N. Doc. CCPR/C/99/D/1868/2009 (2010), at 3.4

[309] Paul M. Taylor, "Questionable Grounds of Objections to Proselytism and Certain Other Forms of Religious Expression, The," *BYU L. Rev.*, 2006, 823.

[310] Ross v. Canada, U.N. Doc. CCPR/C/70/D/736/1997 (2000), at 10.5 - 10.6

[311] Ross v, Canada, U.N. Doc. CCPR/C/70/D/736/1997 (2000), at 11.5

However, the implication of involving article 20 as a 'value' in and of itself was not sufficient justification for the Committee to shift focus from the rights discourse to the issue whether the targeted minority was hurt in their feelings.[312] The committee pointed out the importance of duties and responsibilities with regard to freedom of expression and emphasized such duties and responsibilities are even stronger in this case as education of young children was involved. In this context the committee also mentioned the finding of the Supreme Court that there was causal link between 'poisoned school environment' and the expressions in order to support its argument as to the necessity of the measure. [313] It is noteworthy that there was no direct evidence in this regard[314] and apparently the committee viewed the proof of this element as part of the domain of the state's discretion. The committee also emphasized that the statements 'called upon true Christians to not merely question the validity of Jewish beliefs and teachings but to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy and Christian beliefs and values.'[315] Thus, existence of both objective incitement element and necessity were scrutinized by the Committee.[316] The committee saw the expression as a manifestation of religion and noted that the same reasoning regarding the necessity test applied. [317]

3.5 Conclusion

As of today, international approach towards the issue of the thesis seems to be streamlined into one consistent direction. The concerns with regard to the certain normative value of developments of 'soft law' in the field were eliminated in 2011 by adoption of a resolution on

[312] Jeroen Temperman, "Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech," *BYU L. Rev.*, 2011, 743.
[313] Ross v. Canada, U.N. Doc. CCPR/C/70/D/736/1997 (2000), at 11.6
[314] Esther Janssen, *Faith in Public Debate: On Freedom of Expression, Hate Speech and Religion in France & the Netherlands*, School of Human Rights Research Series, volume 68 (Cambridge, United Kingdom ; Antwerp [Belgium] ; Portland [Oregon]: Intersentia, 2015), 155.
[315] Ross v, Canada, U.N. Doc. CCPR/C/70/D/736/1997 (2000), at 11.5
[316] Jeroen Temperman, "Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech," *BYU L. Rev.*, 2011, 744.
[317] Ross v. Canada, U.N. Doc. CCPR/C/70/D/736/1997 (2000), at 11.8

Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief followed by Rabat Plan of Action coming down to the determination that any restriction of speech has to be motivated by hate, intended as well as likely to incite to discrimination, hostility or violence. The conclusions reflected in General Comments and the jurisprudence of the committee, even if consisting of slight differences, does not entail contradictions and display a process of developing one lineage of interpretation. For instance, in *J.R.T. and the W. G. party v. Canada*, the committee did not consider the case on the merits and declared it admissible under article 20. However, in *Faurission v. France*, restriction of expression was justified without reference to article 20 in the main decision and later in 2000 in *Ross v. Canada* the committee considered the case on the merits, arguing that the speech falling under article 20 will also be permissible under article 19.[318] General Comment 34 issued in 2011 is consistent with the latter development[319] and even rejects automatic prohibition of 'an erroneous opinion or an incorrect interpretation of past events' without the scrutiny under article 19 paragraph 3.[320] The consistency in and of itself has a positive effect on procedural fairness.

The focus of the protection afforded by CCPR is on 'the right to be protected from religious hatred'. Starting with the 'respect' of the Jewish community to live free from religious hatred in *Faurission v. France,* the CCPR in *Ross v. Canada* developed the right to be protected from religious hatred. However, never did the Committee base its argumentation on the respect of beliefs or religions as such, but rather the regard of the persons for whom they matter. The consistency in this regard also contributes to procedural fairness.

[318] Ross v. Canada, U.N. Doc. CCPR/C/70/D/736/1997 (2000), at 10.5 - 10.6
[319] General Comment no 34, U.N. Doc. CCPR/C/GC/34/CRP.2 (2010): at 48
[320] Ibid at 49

It is noteworthy that the CCPR derives from article 20 not only a right to live free from certain types of hatred but the values, which in cases when the high threshold set by the article is not met, in the absence of any obligation to that, is the basis for a margin afforded to states to restrict damaging speech. The implication of involving the values derived from article 20 has not been the shift of the focus from the rights discourse to the issues of respect of feelings against offence. In essence, the regulation of speech can be split into three categories, the one requiring the restriction, the other permitting and the third outlawing it. Relatively explicit differentiation further contributes to procedural fairness in this regard.

As I pointed out, in principle, distinction should not be permissible between the target groups of hate speech when 'social or psychological damage' inflicted by speech to such groups are equal.[321] Strictly speaking, regardless of possible expansive interpretation of ICERD discussed, international law takes it for granted that attack to racial groups will be more damaging, than the attack on religious groups in view of the explicit differences between the specific provisions in ICCPR and ICERD. Comparison of the standard of 'victim status' in view of identical factual circumstances in *Fatime Andersen v. Denmark* and *The Jewish community of Oslo et al. v. Norway* dealt with by CCPR and CERD respectively and different approaches established by them further raise justice considerations in between two different instruments of human rights protection. However, within the framework of ICCPR and as of the obligations under article 20, prohibition of discrimination is an accompanying qualitative requirement of the laws that have to be in place. Such discrimination is impermissible between followers of different belief systems,

[321] Natan Lerner, "Freedom of Expression and Advocacy of Group Hatred," *Religion & Human Rights* 5, no. 2 (2010): 139.

as well as between believers and non-believers.[322] Thus, justice considerations are addressed and are integral to the notion of 'religious hatred' under ICCPR.

[322] General Comment no 34, U.N. Doc. CCPR/C/GC/34/CRP.2 (2010): at 48

Conclusion

One of the core differences in the approach of international and regional human right mechanisms discussed in the thesis flows from the focus of protection on 'the right to be protected from religious hatred' in the first instance and 'the right not to be insulted in religious feelings' in the second.[323] Despite the differences, CCPR and ECtHR overlap in their approaches towards criticism of religious leaders. ICCPR accepting the hate speech offence as legitimate restriction when satisfying the criteria sees the harm to religious believers and non-believers as equal in principle. The basic critique of ECtHR jurisprudence developed in the thesis consists in exactly the lack of fair action against equal harm to believers and non-believers. In addition to that, ECtHR has accepted the claim that laws had legitimate aims even in the cases of direct discrimination between different religions.[324]

ICCPR having a specific article 20 on hate speech protects potential victims of it and conceives of the possibility to bring a claim on this ground[325], while inclusion of hate speech considerations under articles 10 and 17 of ECtHR does not provide a ground for a separate claim by individuals harmed or potentially harmed by hate speech.[326] Article 20 along with article 5 of ICCPR and article 17 under ECHR can overlap in its functions as representing prohibition of abuse of rights in the instruments. However, ICCPR requires that they also comply with article 19 requirements,[327] the jurisprudence of the Human Rights Committee confirming the latter by

[323] Temperman, "Freedom of Expression and Religious Sensitivities in Pluralist Societies," 734, 739.
[324] Wingrove v. The United Kingdom (ECtHR 1996): at 50
[325] Fatima Andersen v. Denmark, U.N. Doc. CCPR/C/99/D/1868/2009 (2010)
[326] Temperman,"Freedom of Expression and Religious Sensitivities in Pluralist Societies," 740.
[327] General Comment no 11 U.N. Doc. HRI/GEN/1/Rev.1 at 12 (1994): at 2 http://www2.ohchr.org/english/bodies/crc/docs/CRC.GC.C.11.pdf (last accessed November 26, 2015);
Nazila Ghanea, "Expression and Hate Speech in the ICCPR: Compatible or Clashing?," *Religion & Human Rights* 5, no. 2 (2010):187;
Dr Agnes Callamard, "Expert Meeting on the Links between Articles 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred That Constitutes Incitement to Discrimination," *Hostility or Violence, UN HCHR, October*, 2008, 163.

considering the cases of hate speech on the merits,[328] rather than deeming it inadmissible, while a different tendency can be identified from the case-law of the European Court of Human Rights.[329] Briefly, ICCPR has a broader and more focused protection of the victims of hate speech, while ECtHR addressing the interests of offended non-applicants sufficiently fails to equip the potential victims of hate speech with a proper remedy.

Both ICCPR and ECHR recognize positive obligations of states, however, for both instruments it is limited to certain extents, CCPR emphasizing 'due diligence'[330] and ECtHR, rejecting claims of horizontal application of article 9 in relation to cases where 'respect for the religious feelings' is at stake[331] and only recognizing it when direct prosecution of religious groups and express indifference of state authorities are present.[332] It shall not be forgotten that application of some general preventive measures to protect against possible harm to the enjoyment of the right to freedom of religion will prejudice the fulfillment of positive obligations of such preventive nature with regard to freedom of expression also.

In the end, I will illustrate my final point by referring to an article by Eric Heinze *Cumulative Jurisprudence and Hate Speech: Sexual Orientation and Analogies to Disability, Age, and Obesity*, in which he argues that inclusion of sexual orientation as a separate ground for hate speech bans raises the question whether these bans would be narrowly drawn and will discriminate specific groups to favor from hate speech protection or would be broadly drawn to include them and restrict speech excessively. I believe that his argument is flawed in that the

[328] Ross v. Canada, U.N. Doc. CCPR/C/70/D/736/1997 (2000), at 10.5 - 10.6
[329] Norwood v. the United Kingdom (ECtHR 2004), Esther Janssen, *Faith in Public Debate: On Freedom of Expression, Hate Speech and Religion in France & the Netherlands*, School of Human Rights Research Series, volume 68 (Cambridge, United Kingdom ; Antwerp [Belgium] ; Portland [Oregon]: Intersentia, 2015),153.
[330] General Comment no 31 U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004): at 8
[331] Choudhury v. the United Kingdom (ECommHR 1991), admissibility decision
[332] 97 members of the Gldani congregation of Jehovah's witnesses and others v. Georgia (ECtHR 2007)

examples he brings about using the terms such as 'idiot', 'moron', 'obese', 'schizo' would offend the individuals, but would rarely amount to hate speech.[333] Jeremy Waldron in his book *The Harm in Hate Speech* defines 'dignity' as a guarantee of 'social standing' to all individuals, deprivation of which amounts to speech that needs to be restricted.[334] In such cases, I agree with Eric Heinze that exclusion of any group of society should not be a permissible compromise and approval of prohibition of offence will draw unrestricted cumulative jurisprudence that will be hard to contain at any point as demonstrated in the first chapter of my thesis. Offence to identity is too subjective a criterion as both terms are devoid of objective elements. However, without entering deeper in the discussion, I claim that differences with regard to restricting instances of expression that have the same effect on the targeted groups, either in the form of insulting their feelings or depriving them of their 'social standing' shall demand identical measures, be the speech motivated on religious grounds or not.

It is important to realize for the advocates of restriction of offensive speech on both sides that the same restrictions will also harm their freedom to express themselves as they wish, respond to offense as they deem it necessary and have their internal affairs not liable to state restriction excessively.[335]

All in all, the direction that the international law has taken is far more considerate of justice considerations as well as concerns stemming from the need to avoid cumulative jurisprudence than the European Court. In the jurisprudence of ECtHR a wide margin of appreciation of the state with regard to sensitive issues such as religion blocks the possibility of streamlining the

[333] Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (Oxford University Press, 2009), 274, 275, 284, 285.
[334] Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, Mass.: Harvard University Press, 2014), 5.
[335] De Jong, "The Legal Obligations of State and Non-State Actors in Respect of the Protection of Freedom of Thought, Conscience and Religion or Belief," 12.

case-law into a just and consistent resolutions of these questions despite the European Consensus that could be held to exist in view of the ratification of the Covenant by all state parties to the Convention.

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