MASTER'S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

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NOT EVERY ACT MOTIVATED BY RELIGION IS PROTECTED – The interrelations between freedom of religion, freedom of expression and hate speech based on sexual orientation in the case law of the European Court of Human Rights

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1. Introduction

1.1. Background

The European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights, the Convention) protects individual rights and freedoms in its articles as well as in its Protocols. However, the European Court of Human Rights (the Court), which is responsible for the interpretation of the Convention, is often faced with the assessment of the interrelations of two or more rights protected by the Convention, in which cases it has to determine the weight each right should be given in an individual case. One example of this kind of a case, which has arisen on the national level, is that of a Finnish Member of the Parliament against whom the Prosecutor General in Finland pressed charges in April 2022 on grounds of ethnic agitation towards homosexuals. The charges were pressed because of the opinions expressed by the politician on three different forums – online on two Christian webpages, on social media and in a radio talk show.[1] As will be demonstrated below, the legal questions in this national case concerned the interrelations of freedom of religion, freedom of expression and prohibition of discrimination, which are all also protected by the Convention.

In the Finnish case, the first of three counts concerns a text titled "He Created Them as a Man and a Woman – Homosexual relationships challenge the Christian idea of man" (freely translated by the author), which was written by the Member of the Parliament and published on two Christian webpages. The text was originally published as a response to public discussion concerning the legalisation of same-sex relationships and the discussion which followed on, for instance, a gender-equal Marriage Act, same-sex couples' right to adopt a child, and the Evangelic Lutheran church's views on same-sex relationships. The text presents both religious views on homosexuality as well as the author's own and allegedly scientifically proven facts of homosexuality. The text states, amongst others, that advocating for the rights of homosexuals advances the rupture of society's values, and that encouraging early homosexual experiments opens a lane to sexual abuse of children. Moreover, the text notes that while homosexual tendency is not, per se, a feature

[1] Etelä-Suomen syyttäjäalue, haastehakemus 29 April 2021, R 19/16305.

comparable to a mental problem or a physical illness, scientific evidence indicates that it is a disturbance of psychosocial development.[2]

The second count concerns posts published by the Member of the Parliament on social media. The posts state: "The church has announced its official partnership with Gay Pride 2019. How does the foundation of teachings of the church, the Bible, comport with elevating shame and sin as a cause of pride?" The text is accompanied by a picture of the text of the Bible.[3]

The third and final count concerns statements the Member of the Parliament has made during a talk show on radio entitled "What did Jesus think about gays?". In the talk show, the Member of the Parliament has stated, *inter alia*, that God created men as heterosexuals, not homosexuals. Moreover, they stated that studies have shown that the possibility of homosexuality being caused by genetic heritage remains quite small, and noted that alcoholism is caused by one's genetic heritage, too.[4]

According to the Prosecutor General in Finland, these opinions breach the equality and dignity of homosexuals and are likely to incite contempt, intolerance and even hatred towards homosexuals. The statements allegedly violate the prohibition of discrimination and surpass thus the boundaries of freedom of religion and freedom of expression.[5]

The Member of the Parliament has claimed that the statements have been made as part of a public dialogue, they represent the views of the Evangelic Lutheran church, and that they were not intended to defame or insult homosexuals. According to the Member of the Parliament, the expressions fall within the scope of freedom of religion the core of freedom of expression.[6]

To date, the case has only been decided in the District Court. It is, therefore, possible that the national process will continue further, and it is not sensible to examine the specificities of this case

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[2] Räsänen, Päivi: Mieheksi ja naiseksi hän heidät loi – Homosuhteet haastavat kristillisen ihmiskäsityksen. Myllypaino, Leväsjoki 2004, p. 10–12. Available at: https://www.lhpk.fi/julkaisut/aamuntahdet/29_mieheksijanaiseksi.pdf, last visited 11 March 2022 (freely translated by the author).
[3] Haastehakemus 29 April 2021, p. 6–7.
[4] Haastehakemus 29 April 2021, p. 7–8.
[5] Haastehakemus 29 April 2021, p.3, 7 and 8.
[6] Ennakkovastaus kiihottamista kansanryhmää vastaan koskevassa rikosasiassa, R 21/3567, p. 2, 3 and 4; and Syytekohtaa 3 koskeva ennakkovastaus, R 19/16305, p. 2.

in more detail within the context of this thesis. However, the themes and questions raised in the case of the Finnish Member of the Parliament serve as a well-founded basis for a more general assessment of the interrelations of freedom of religion, freedom of expression and hate speech within the context of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights.

In general, it can be noted that hateful remarks based on religion and directed towards homosexuals are not uncommon. For now, such cases have been assessed mostly on national level in the European context, and the courts have seldom found that the expressions would constitute hate speech. These kinds of outcomes can, at least to a degree, be dependent on the fact that homosexuality was criminalised in several countries not too long ago, and on the established role religion has as part of societies throughout Europe.[7] The European Court of Human Rights has dealt with hate speech directed towards, for instance, religion in several cases[8], but not with cases concerning hateful remarks made based on religion and directed towards homosexuals. Nevertheless, some case law on hateful remarks concerning homosexuals exists, and it seems unlikely that the Court would not have to assess more similar cases in the future.

According to the Court, freedom of religion is one of the foundations of a democratic society. Freedom of religion covers both internal and external dimension of religion, even if only internal dimension of freedom of religion is absolute. External dimension of freedom of religion can be restricted on the grounds explicitly mentioned in paragraph 2 of Article 9, for instance for the protection of rights of others. In principle, an individual has the freedom to manifest religion or belief in worship, teaching, practice or observance both in public and in private.[9]

Freedom of expression is also considered one of the foundations of a democratic society. Freedom of expression enjoys a special status in eyes of the Court, as it is perceived as both a consequence of a functioning democratic society and a factor promoting and protecting the functioning of a

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[7] Moon, Richard: Putting Faith in Hate – When Religion Is the Source or Target of Hate Speech, Cambridge University Press, 2018, p. 121.

[8] For instance, the European Court of Human Rights, *Tagiyev and Husenov v. Azerbaijan*, no. 13274/08, 5 December 2019; *I.A. v. Turkey,* no. 42571/98, ECHR 2005-VII*; Erbakan v. Turkey,* no. 59405/00, 6 July 2006.

[9] Martínez-Torrón, Javier: Manifestations of Religion or Belief in the Case Law of the European Court of Human Rights. Religion and Human Rights 12 (2017) 112-127, Brill Nijhoff, p. 116; and Council of Europe / European Court of Human Rights: Guide on Article 9 of the European Convention on Human Rights: Freedom of thought, conscience and religion. Updated on 31 August 2021, paragraph 26.

democratic society. A democracy could not exist without the opportunity to express one's opinions and participate in a political debate.[10] The scope of freedom of expression is wide, and it covers most of the forms of expressions, including expressions which can be considered offensive, shocking or disturbing[11]. Comparably to freedom of religion, freedom of expression can be restricted on the grounds explicitly mentioned in paragraph 2 of Article 10, for instance for the protection of rights of others. It must be noted, however, that there is only a little scope for restrictions on a debate of a matter of general interest.[12]

In turn, the prohibition of discrimination is considered to be of a fundamental nature[13]. Article 14 of the Convention provides that the enjoyment of rights set forth in the Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The list is not exhaustive, and the Court has in its case law repeatedly included sexual orientation among the "other grounds" based on which discrimination is prohibited[14]. Furthermore, the protection provided by Article 14 is complemented by Article 1 of Protocol No. 12 to the Convention, which provides for a general prohibition of discrimination in the enjoyment of any right set forth by law. The content of Article 1 of Protocol No. 12 is similar to that of Article 14 of the Convention, but the prohibition is self-standing, meaning that the application of Article 1 does not require the application of another right protected by the Convention or its Protocols.[15]

The relationship especially between freedom of expression and the prohibition of discrimination is further connected with the question of hate speech. The concept of hate speech is not expressly

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[10] Weber, Anne: Manual on Hate Speech. Council of Europe Publishing, September 2009, p. 19; Zwart, Tom: Changing the Court by Stealth – How the European Court of Human Rights has been moving the goalposts in the area of political free speech. In Ellian, Afshin and Molier, Gelijn: Freedom of Speech Under Attack. Eleven International Publishing 2015, p. 143; and Hirvelä, Päivi and Heikkilä, Satu: Ihmisoikeudet – Käsikirja EIT:n oikeuskäytäntöön. Alma Talent 2017, p. 121-122.

[11] Pellonpää, Matti; Gullans, Monica; Pölönen, Pasi; and Tapanila, Antti: Euroopan ihmisoikeussopimus, Alma Talent, Helsinki 2018, p. 866–867.

[12] European Court of Human Rights, *Couderc and Hachette Filipacchi Associés v. France,* no. 40454/07, 12 June 2014, para. 96.

[13] European Court of Human Rights, *S.A.S. v. France* [GC], no. 43835/11, §149, ECHR 2014 (extracts); and *Străin and Others v. Romania,* no. 57001/00, §59, ECHR 2005-VII.

[14] See, e.g. European Court of Human Rights, *Salgueiro da Silva Mouta v. Portugal,* no. 33290/96, § 28, ECHR 1999-IX ; and *Fretté v. France,* no. 36515/97, § 32, ECHR 2002-I.

[15] Guide on Article 14 of the Convention (prohibition of discrimination) and on Article 1 of Protocol No. 12 (General prohibition of discrimination) – Prohibition of Discrimination, updated 31 August 2021, paras 19–20.

mentioned in the Convention, but it has been perceived by the Court as a ground to restrict freedom of expression or even as a ground to consider that freedom of expression does not apply at all.[16] The Court's case law with regard to hate speech is also scattered and naturally based on a case-by-case analysis, which is why it is impossible to define straightforward definitions or means of interpretation.[17] However, hate speech directed towards homosexuals has been expressly identified by the Court as one of the forms of hate speech, which is why it clear that the question of hate speech should be covered within the context of this thesis.

1.2. Research Question and Limitations

This thesis aims at sheading light to how the European Court of Human Rights has interpreted the interrelations between freedom of religion, freedom of expression and hate speech. As illustrated in the case of the Finnish Member of Parliament, situations in which freedom of religion, freedom of expression and hate speech have to be interpreted side by side may occur in domestic legal settings. To narrow the research questions down, the examination within this thesis will be focusing on expressions presented as part of a public discussion.

The research questions identified for the purpose of this thesis read as follows:

1) To what extent are religion-inspired expressions published online or presented in media as part of a public discussion protected under Article 9 of the Convention (freedom of religion) as manifestation of religion?

2) To what extent are religion-inspired expressions published online or presented in media as part of a public discussion protected under Article 10 of the Convention (freedom of expression)?

[16] Weber, p. 2.
[17] Lemmens, Koen: Hate Speech in the Case Law of the European Court of Human Rights – Good Intentions make Bad Law? In Ellian, Afshin and Molier, Gelijn: Freedom of Speech Under Attack. Eleven International Publishing 2015, p. 143; and Hirvelä and Heikkilä, p. 1040.

3) Under what circumstances can religion-inspired expressions published online or presented in media as part of a public discussion be restricted on the grounds of expressions allegedly inciting hatred towards homosexuals?

Before diving deeper into these questions, it is necessary to lay down the theoretical foundations concerning these questions. Therefore, this thesis will begin with the examination of the evolution and current status of the rights of homosexuals in the context of the European Convention on Human Rights in Chapter 2. This will allow the reader to gain an understanding on how the rights of homosexuals under the Convention are interpreted by the Court, and provide tools to assess these rights' status with regard to freedom of religion and freedom of expression. Freedom of religion and freedom of expression will be dealt with separately in Chapters 3 and 4 respectively. The examination of these rights will provide the necessary theoretical foundation to answer the first and second research question. Answering the last question on restrictions to freedom of religion or freedom of expression requires detailed examination of permissible conditions for interfering with freedom of religion and freedom of expression provided by the Convention, which are discussed respectively in Chapters concerning freedom of religion and freedom of expression. To answer the last research question, the examination of the Court's case law concerning hate speech is of particular relevance. It will be discussed in Chapter 5. Finally, Chapter 6 will provide with some concluding remarks on the applicability of both freedom of religion as enshrined in Article 9 and freedom of expression as enshrined in Article 10, and the possibilities to restrict these rights on the grounds of expressions allegedly inciting hatred towards homosexuals.

Within this thesis, it is not possible to examine the interrelations between freedom of religion, freedom of expression and hate speech exhaustively, which is why the scope of examination is narrowed in the research questions both in terms of the content and subject of the expressions, and the media used for their distribution. Furthermore, the assessment is limited to the European Convention on Human Rights and the interpretation of the relevant provisions of the Convention by the Court. The examination of, for instance, the United Nations' interpretations of freedom of religion, freedom of expression and hate speech would undoubtedly be interesting and even beneficial with regard to understanding in a more comprehensive manner the context in which the interrelations of the freedoms and hate speech is to be examined, as well as the possible

interpretations of these interrelations. However, the examination of other sources than those produced within the Council of Europe is not possible within this thesis.

Moreover, the examination of the applicability of freedom of religion is somewhat affected by the fact that the assessment within this thesis will be made on a general level, rather than focusing on a single, individual religion. This limitation is made because of the limited possibilities to examine comprehensively the forms especially manifestation of religion could take in a specific individual religion. Furthermore, a more general discussion on the Convention and Court's interpretations concerning the research questions with regard to freedom of religion can also be considered significant, as it does not bind the assessment to the specificities of an individual religion but provides instead with more all-encompassing remarks on the applicability of freedom of expression. Despite the limitations of the sources of this thesis, it is possible to make general conclusions on how the question would be assessed by the Court on a general level.

The examination of the discussion concerning the applicability of freedom of expression, as well as the circumstances under which religion-inspired expressions in the context of this thesis could be restricted on the grounds of expressions allegedly inciting hatred towards homosexuals, is also affected by the general formulation of the research questions. Because the individual circumstances with regard to these questions have not been defined, it is not possible to evaluate comprehensively how the Court would assess these situations. However, in a similar vein to the above presented concerning the research question concerning freedom of religion, a more general discussion also with regard to freedom of expression can, nevertheless, be considered necessary precisely because the discussion is not limited to the individual circumstances of a case but is, instead, of a more all-encompassing nature. As the case is with freedom of religion, also with regard to the applicability of freedom of expression, as well as with regard to the possible restrictions, it is possible to examine these questions on a general level and to provide with some guidelines on how these questions would be assessed.

1.3. Sources and Method

The analysis in this thesis focuses on protection afforded by the European Convention on Human Rights to freedom of religion, freedom of expression and the prohibition of discrimination in the context of hate speech. The European Court of Human Rights is the body which interprets the provisions of the Convention, which is why in addition to the Convention, the examination is

concentrated on the case law of the Court. The examination will concentrate especially on Article 9 (freedom of religion) and Article 10 (freedom expression) as well as on the prerequisites for the acceptability of each freedom, as enshrined in Articles 9 (2) and 10 (2) respectively. Furthermore, this thesis will concentrate on the Court's case law concerning hate speech, which is not explicitly mentioned in the Convention but which the Court has examined primarily under its case law concerning Article 10. In this regard, also the Court's case law concerning Article 17 (prohibition of abuse of rights) is assessed briefly in order to illustrate the differences between hate speech considered to aim at destructing the rights and freedoms laid down in the Convention and the less severe form of hate speech. The European Convention on Human Rights, as well as the Court's case law interpreting the Convention, constitute hard law, and they are therefore binding on the Contracting Parties.

The relevant provisions of the Convention and the case law of the Court will be discussed in order to develop an understanding on how the Court interprets freedom of religion and freedom of expression especially with regard to religion-inspired expressions. Moreover, the discussion of the Convention and the relevant case law intends to define how the Court has defined the concept of hate speech in its case law and what kind of a meaning it has given to allegedly hateful expressions with regard to freedom of religion and freedom of expression. The discussion within this thesis will be focused on analysing the practical application of legal provisions, and, hence, legal dogmatic method will be followed.

In addition to hard law, this study will also briefly discuss other Council of Europe sources. For instance, a Committee of Ministers' Recommendation on hate speech[18] is discussed in order to understand in a more comprehensive manner how the Council of Europe statutory bodies define hate speech. Furthermore, a Committee of Ministers' Recommendation[19] and a Parliamentary Assembly Resolution on discrimination on grounds of sexual orientation or gender identity[20] are briefly discussed with regard hate speech concerning homosexuals. These documents are

[18] Council of Europe Committee of Ministers Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech". Adopted by the Committee of Ministers on 30 October 1997.

[19] Council of Europe Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010.

[20] Council of Europe Parliamentary Assembly Resolution 1728 (2010) on Discrimination on the basis of sexual orientation and gender identity, adopted by the Assembly on 29 April 2010.

highlighted in order to indicate how the interpretation of homosexuals' rights under the Convention has evolved, as well as to establish in a slightly broader sense the meaning Council of Europe attributes to discrimination on the basis of sexual orientation.

The Court is not bound by the Committee of Ministers' recommendations nor by the Parliamentary Assembly's Resolutions. However, the recommendations and resolutions provide guidance to Council of Europe Member States, and have on occasion also been referenced to by the Court[21]. Thus, these documents are likely to have an effect on how the Court interprets both discrimination based on sexual orientation and hate speech on grounds of sexual orientation, and therefore their brief examination within the context of this thesis is necessary.

Lastly, legal literature is discussed throughout this thesis in order to provide background to the interpretation of the Convention and the Court's case law, as well as to present criticism, praises and other possible remarks especially on the Court's case law made by academic researchers. Legal literature also allows for binding together the relevant provisions of the Convention and the Court's case law, which can at times appear scattered. Understanding the relevant provisions and the Court's case law is of absolute importance in order to answer the research questions on the protection of religion-based expressions under freedom of religion or freedom of expression, as well as on how the allegedly inciting nature of the religion-based expressions affects the provided protection

[21] See, for instance, European Court of Human Rights, *Lilliendahl v. Iceland,* no. 29297/18, 12 May 2020.

2. The Evolution of Sexual Orientation Discrimination in the Interpretation of the European Convention on Human Rights

The research questions of this thesis concern in part the question of what kinds of statements concerning homosexuals are justified under the Convention. The answer to this question benefits from the examination of a short history of how the former European Commission of Human Rights (the former Commission) and the Court have changed and evolved their interpretation of the justifiability of acts or statements concerning homosexuals.

Discrimination is prohibited in Article 14 of the Convention. Prohibited discrimination grounds include sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. As will be demonstrated below, it took quite a while before sexual orientation discrimination was recognised as a prohibited form of discrimination under the European Convention on Human Rights. Before diving deeper into the case law of the former Commission and the Court, it has to be noted that the prohibition of discrimination as enshrined in Article 14 is not an independent right, as it can only be examined in conjunction with another right protected in the Convention. However, even if the Court would not find a violation of another right, it could find a violation of Article 14.[22]

Article 14 of the Convention has later been complemented by Article 1 of Protocol No. 12 to the European Convention on Human Rights (the Protocol), under which the notion of discrimination is to be interpreted in the same manner as under Article 14 of the Convention[23]. Thus, despite a lack of an express mention, sexual orientation is included in prohibited grounds of discrimination, too.[24] Article 1 of the Protocol extends protection to "any right set forth by law", and its application

[22] McGoldrick, The Development and Status of Sexual Orientation Discrimination under International Human Rights Law, Human Rights Law Review, 2016, 16, 613-668, p. 633-634; Council of Europe / European Court of Human Rights: Guide on Article 14 of the Convention (prohibition of discrimination) and on Article 1 of Protocol No. 12 (General prohibition of discrimination) – Prohibition of Discrimination, updated 31 August 2021.

[23] European Court of Human Rights, *Pilav v. Bosnia and Herzegovina,* no. 41939/07, 9 June 2016, para. 40; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, ECHR 2009, paras 55–56; and *Zornić v. Bosnia and Herzegovina*, no. 3681/06, 15 July 2014, para 27.

[24] Council of Europe / European Court of Human Rights: Guide on Article 14 of the Convention…, paras 19–20.

does not require application of another right enshrined in the Convention or its Protocols.[25] Article 1 of the Protocol can be interpreted as a general prohibition of discrimination[26].

The former Commission, which was responsible for the assessment of admissibility of individual applications until 1998[27], received in 1955 to 1980 a number of complaints relating national laws criminalizing consensual and private homosexual sexual activities, most of which it declared inadmissible.[28] In *X v. the Federal Republic of Germany*[29], the complaint concerned national laws maintaining a higher minimum age for male homosexual acts than for heterosexual or female homosexual acts. The former Commission was convinced of that masculine homosexuality created a specific social danger and that the danger was the result of masculine homosexuals often constituting a distinct socio-cultural group which had a tendency to "proselytize adolescents"[30]. The legislative measures were seen as necessary because "a minor involved in homosexual relationships with an adult might in fact be cut off from society and seriously affected in his psychological development[31]". Whilst the conception of male homosexuality is a brutal one, the former Commission's decision is important in that it established the principle of sexual life being undoubtedly and important aspect of private life, and found that homosexuals constitute a distinct socio-cultural group.[32]

The first case concerning criminalisation of private homosexual acts to reach the European Court of Human Rights was *Dudgeon v. the United Kingdom*[33], which also was the first case to be decided in favour of sexual minorities. In its judgment in 1981, the Court found that the "maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life)"[34]. Similar decisions

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[25] Council of Europe / European Court of Human Rights: Guide on Article 14 of the Convention…, paras 19–20.
[26] See, for instance, European Court of Human Rights, *Savez crkava "Riječ života" and Others v. Croatia*, no. 7798/08, 9 December 2010, para. 103.
[27] Johnson, Homosexuality and the European Court of Human Rights, Taylor & Francis Group, 2012, p. 19.
[28] Johnson, pp. 19, 21.
[29] European Commission on Human Rights, X v Federal Republic of Germany, no. 5935/72, Commission decision, 30 September 1975.
[30] *X. v Federal Republic of Germany*, p. 56.
[31] *X. v Federal Republic of Germany*, p. 54.
[32] Johnson, p. 36.
[33] European Court of Human Rights, *Dudgeon v. the United Kingdom,* 22 October 1981, Series A no. 4.
[34] Dudgeon v. the United Kingdom, para. 41.

were taken by the Court in 1988 and 1993 respectively in *Norris v. Ireland*[35] and *Modinos v. Cyprus*[36]. In these cases, the respondent states referred to their respective attitudes towards homosexuality which were based on religion, and stated that "protection of morals" justified maintaining the national laws. The Court found that the aim of protecting morals was legitimate. The Court, however, found that there was no pressing social need for upholding national legislation criminalising private homosexual acts and that, in fact, maintaining these laws violated the right to private life.[37]

The right to privacy was for the first time was considered outside the context of penal laws criminalising homosexual acts in 1999 in the cases of *Lustig-Prean and Beckett v. the United Kingdom* and *Smith and Grady v. the United Kingdom.* These cases concerned national laws excluding gays and lesbians from the military, which the Court found to be in breach of right to privacy as enshrined in Article 8 of the Convention.[38]

The first case in which the rights of homosexuals were assessed with regard to prohibition of discrimination was in 1999 in *Salguiero da Silva Mouta v. Portugal*[39], which concerned a father who was dispossessed of his custody rights because of his sexual orientation. In its judgment, the Court recognised sexual orientation as a prohibited ground of discrimination under Article 14 by stating that

> there was a difference in treatment […] based on the applicant's sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention. The Court reiterates in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words 'any ground such as'[40].

Since then, the Court has examined claims of a violation of Article 14 in cases concerning sexual orientation discrimination for example in cases concerning adoption or second-parent adoption[41],

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[35] European Court of Human Rights, *Norris v. Ireland,* 26 October 1988, Series A no. 142.
[36] European Court of Human Rights, *Modinos v. Cyprus,* 22 April 1993, Series A no. 259.
[37] *Norris v. Ireland,* paras 46 , 47; *Modinos v. Cyprus*, paras 23–25.
[38] European Court of Human Rights, *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, 27 September 1999; *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, ECHR 1999-VI; and O'Halloran, Sexual orientation, gender identity and international law: common law perspectives, Practitioners Guide No. 4, 2019, p. 17-18; 36-37.
[39] European Court of Human Rights, *Salgueiro da Silva Mouta v. Portugal,* no. 33290/96, ECHR 1999-IX.
[40] *Salgueiro da Silva Mouta v. Portugal*, para 28.
[41] European Court of Human Rights, *E.B. v. France* [GC], no. 43546/02, 22 January 2008; *X and Others v. Austria* [GC], no. 19010/07, ECHR 2013; *Gas and Dubois v. France*, no. 25951/07, ECHR 2012.

succession rights[42], freedom of expression and assembly by LGBT organisations[43], treatment in detention[44] and residence permits for the purpose of family reunification[45]. The Court now takes sexual orientation discrimination more seriously and considers it to be as serious as discrimination on other grounds such as sex, origin or colour.[46] For example in *X and Others v. Austria* the Court stated:

> "Sexual orientation is a concept covered by Article 14. The Court has repeatedly held that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, particularly convincing and weighty reasons. […] Where a difference in treatment is based on sex or sexual orientation, the State's margin of appreciation is narrow. […] Differences based solely on considerations of sexual orientation are unacceptable under the Convention."[47]

The Court reached another milestone in 2010 in its judgment in *Schalk and Kopf v. Austria*[48], in which the Court found that the life of same-sex couples could be considered as "family life" instead of an aspect of private life for the purposes of Article 8 of the Convention. The Court took note of the growing European consensus towards legal recognition of same-sex couples. Because the majority of States did not yet provide for a legal recognition of same-sex couples, the question of timing of relevant legislative changes still had to be regarded as one in which the States enjoy a wide margin of appreciation. While the Court found that the right to marry would not in all circumstances be limited to marriage between different-sex couples, the question on allowing same-sex marriage was left for Contracting States to regulate on a national level.[49]

In its more recent case law, the Court has assessed prohibition of discrimination of homosexuals, inter alia, with regard to hate speech. For instance in *Vejdeland and Others v. Sweden*[50] and in *Lilliendahl v. Iceland*[51], the Court has reiterated that discrimination based on sexual orientation is as serious as discrimination based on race, origin or colour. In *Vejdeland and Others v. Sweden* the Court found no violation of Article 10 with regard to the conviction of applicants who had

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[42] European Court of Human Rights, *Karner v. Austria* no. 40016/98, ECHR 2003-IX.
[43] European Court of Human Rights, *Alekseyev v. Russia*, nos. 4916/07 and 2 others, 21 October 2010; *Vejdeland and Others v. Sweden*, no. 1813/07, 9 February 2012; *Identoba and Others* v. Georgia, no. 73235/12, 12 May 2015.
[44] European Court of Human Rights, *X v. Turkey*, no. 24626/09, 9 October 2012.
[45] European Court of Human Rights, *Pajić v. Croatia*, no. 68453/13, 23 February 2016.
[46] See for example *Vejdeland and Others v. Sweden* and *Karner v. Austria*.
[47] *X and Others v. Austria* [GC], para. 99.
[48] European Court of Human Rights, *Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010.
[49] European Court of Human Rights, *Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010, paras 94, 104–108.
[50] European Court of Human Rights, *Vejdeland and Others v. Sweden*, no. 1813/07, 9 February 2012.
[51] European Court of Human Rights, *Lilliendahl v. Iceland,* no. 29297/18, 12 May 2020.

distributed leaflets against homosexuality in a school, even if the leaflets *per se* did not entail a call for an act of violence. *Lilliendahl v. Iceland,* in turn, concerned the conviction of the applicant who had made homophobic comments in a response to an online article. The Court found the application inadmissible as being manifestly ill-founded.

As it has been demonstrated above, the Court's interpretation of the rights of homosexuals within the context of the Convention has evolved in the past decades. After accepting that homosexuality falls within the scope of private life as enshrined in Article 8, the Court expanded the protection afforded under Article 8 and found that homosexuality falls within the scope of family life, instead of private life. Later the Court has included homosexuality as a prohibited discrimination ground provided in Article 14. Currently discrimination based on sexual orientation is considered as serious as other forms of discrimination, and Contracting States enjoy only a narrow margin of appreciation in cases which concern difference in treatment based on sexual orientation. Different treatment based solely on sexual orientation is not considered acceptable, nor are, for example, hateful expressions concerning homosexual person. Hate speech concerning homosexuals and the Court's case law concerning hate speech is returned to in more detail in Chapter 5.

3. Freedom of Religion

3.1. Freedom of Religion in the European Convention on Human Rights

In the European Convention on Human Rights, freedom of thought, conscience and religion is protected in Article 9, which represents "one of the foundations of a "democratic society""[52]. Article 9 is complemented by Article 2 of Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (1952), which obliges State's to respect the right of parents to ensure education and teaching of their children in conformity with their own religious and philosophical convictions. Furthermore, also other rights and freedoms protected in the Convention may extend their scope to religious questions. For example, Article 8 (right to respect for private and family life) might encompass one's right to private religious practices, Article 10 (freedom of expression) freedom of religious and antireligious expression, and Article 11 (freedom of assembly and association) one's right to freedom of religious assembly and association.[53]

The main research question under examination in this regard is whether certain types of acts can be considered manifestation of religion or belief protected in Article 9 of the Convention. Thus, of particular interest is the concept of manifestation of one's religion or belief enshrined in the Convention and interpreted by the Court. This Chapter will, therefore, examine first freedom of religion and belief as a whole, and then move on to the more detailed examination of manifestation of one's religion or belief.

Article 9 of the Convention reads as follows:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject to only such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

With regard to the scope of protection afforded by Article 9, it should be noted that the words "religion" or "belief" are not defined by Article 9 itself nor by the Court's case law. With regard

[52] Council of Europe / European Court of Human Rights: Guide on Article 9 …, para. 10.
[53] Witte, John Jr.: The Blessings of Liberty: Human Rights and Religious Freedom in the Western Legal Tradition, Cambridge University Press, 2021. p. 233.

to "religion", the reasoning behind the lack of definition lies in the near impossibility of formulating such a definition – while the definition should be wide and flexible in order to be applicable to all religions worldwide, it should also be narrow and specific in order to be applicable to individual cases.[54]

The concept of "religion" can be seen as slightly clearer than that of "belief", at least in the context of Europe and its major world religions. The interpretation of the term "religion" has, however, caused some challenges with regard to new or atypical religious groups[55]. Meanwhile, "belief" has been interpreted as worldviews that are non-religious but comparable to religion, which in a single case might not be simple to establish. In its case law, the Court has defined that views which "attain a certain level of cogency, seriousness, cohesion and importance" qualify as beliefs[56]. If the Court finds that a particular case concerns "religion" or "belief", both are granted the same protection under Article 9.[57]

Even though some challenges have arisen with regard to the definition of the terms "religion" and "belief", the Court has also outlined which religions and beliefs definitely fall within the scope of Article 9. Article 9 applies to, for example, some world religions which can be qualified as "major" or "ancient", as well as to some more recent religions or spiritual practices. Moreover, Article 9 applies to several beliefs such as veganism[58], oppositions to abortion[59] and pacifism[60]. The religions and beliefs covered by Article 9 are protected under Article 9 whether or not the State in question officially recognises them. On the other hand, should the Court doubt whether the system of beliefs can be considered constituting a religion or not, the Court may base its decision on that

[54] Council of Europe / European Court of Human Rights: Guide on Article 9 …, para. 14.
[55] See for example European Commission of Human Rights decision as to the Admissibility, *Church of Scientology of Paris v. France*, Application No. 19509/92, 9 January 1995; and European Court of Human Rights, *Leela Förderkreis e.V. and Others v. Germany*, No. 58911/00, 6 November 2008.
[56] See European Court of Human Rights, *Campbell and Cosans v. the United Kingdom*, 25 February 1982, para. 36, Series A no. 48; and *Leela Förderkreis e.V. and Others v. Germany*, para. 80.
[57] Martínez-Torrón, p. 113-114.
[58] European Court of Human Rights, *W v. the United Kingdom*, Application No. 18187/91, 10 February 1993.
[59] European Commission on Human Rights, *Knudsen v. Norway*, No. 11045/84, 8 March 1985, DR 42; and *Van Schijndel and Others v. the Netherlands*, No. 30936/96, 10 September 1997.
[60] European Commission on Human Rights, *Arrowsmith v. the United Kingdom*, No. 7050/75, 5 December 1978.

of the national authorities in the respondent State, as it has done, for example, with regard to Scientology and Neo-Paganism.[61]

Moreover, it should also be noted that the protection afforded to a religion or belief differs depending on whether the question concerns *forum internum*, the internal dimension, or *forum externum*, the external dimension, even though the protection under Article 9 covers both dimensions. *Forum internum* refers to one's freedom to choose a religion or belief. In this respect, one's freedom of choice signifies that a person has the right to have or not to have a religion, as well as the right to change or abandon their religion. The Court has ruled that *forum internum* is absolute and should not be restricted on any grounds. *Forum externum*, meanwhile, refers to one's freedom to manifest said religion or belief. As for *forum externum*, restrictions are not *per se* prohibited. It is possible, for instance, that other people are impacted by another person manifesting their religion or belief, which is why *forum externum* might be restricted under the conditions of Article 9(2).[62]

The possibility to restrict *forum externum* has a significant role in the assessment of the research questions of this thesis, especially the question of restricting freedom of religion on grounds of alleged hateful expressions concerning homosexuals. However, before diving deeper into the possible restriction grounds, the concept of manifestation of religion must be clarified.

3.2. What Kinds of Acts are Considered Manifestation of Religion or Belief?

3.2.1. General Remarks on Manifestation of Religion or Belief

According to Article 9 (1), a person has the "freedom […] in public or private, to manifest his religion or belief, in worship, teaching, practice and observance". Despite the inclusion of the word "or", the religion or belief can be practiced both in public and in private. In other words, the provision does not grant authorities a possibility of choice between the public and private sphere, nor are the two mutually exclusive.[63] Furthermore, the freedom includes also a negative aspect:

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[61] See for example the European Commission on Human Rights, *X. and Church of Scientology v. Sweden,* no. 7805/77, 5 May 1979, DR 16*; Church of Scientology and Others v. Sweden,* no. 8282/78, 14 July 1980, DR 21*;* and European Court of Human Rights, *Kimlya and Others v. Russia,* nos. 76836/01 and 32782/03, ECHR 2009*; Ancient Baltic religious association "Romuva" v. Lithuania,* no. 48329/19, 8 June 2021; and Council of Europe / European Court of Human Rights, Guide on Article 9…, paras 18–21.
[62] Martínez-Torrón, p. 116; Council of Europe / European Court of Human Rights, Guide on Article 9…, para. 26.
[63] European Commission on Human Rights, *X. v. the United Kingdom,* no. 8160/78, 12 March 1981, DR 22.

every person has the right to choose whether or not to manifest their religion or belief. The negative aspect includes, moreover, the right to practice one's religion or belief, or to keep it private.[64] It should also be noted that while the scope of Article 9 is a wide one, protecting both religious and non-religious opinions and convictions, not all opinions or convictions fall within the scope of the provision.[65]

It is not unambiguous what is required for an act to be considered as manifestation of religion or belief in the meaning of Article 9 (1). The different approaches to different forms of manifestation of religion or belief will be examined closer in the following sub-chapters. Nevertheless, some general remarks of the scope of "manifestation of religion or belief" can be made already here.

First of all, it seems clear that according to the Court, an intimate link between the act itself and the religion or belief in question must exist for an act to be considered manifestation of religion or belief. The Court's case law, and especially its judgment in *Eweida and Others v. the United Kingdom*[66]*,* seems to suggest that the Court considers manifestation of religion or belief to be dividable to two: to a form of manifestation "which forms part of the practice of a religion or belief in a generally recognised form" and those forms where "a sufficiently close and direct nexus between the act and the underlying belief"[67] can be found, depending on the facts of the case. Thus, while, for example, acts of worship usually fall within the scope of Article 9 (1), the scope is not limited to such generally recognised forms of practice of religion or belief. The Court may, depending on the facts of the case, consider as manifestation of religion or belief also acts which cannot usually be regarded as established practices. The prerequisite for these kinds of acts to fall within the scope of Article 9 is that the nexus between the act and religion or belief must be sufficiently close and direct, which is determined on a case-by-case basis.[68] However, the scope

[64] Martínez-Torrón, p. 117; Council of Europe / European Court of Human Rights, Guide on Article 9…, para. 27.
[65] See for example Council of Europe / European Court of Human Rights, Guide on Article 9…, paragraph 14.
[66] European Court of Human Rights, *Eweida and Others v. the United Kingdom,* nos. 48420/10 and 3 others, ECHR 2013 (extracts).
[67] *Eweida and Others v. the United Kingdom*, paragraph 82.
[68] Council of Europe / European Court of Human Rights, Guide on Article 9…, para. 85; Evans, Malcolm: The Freedom of Religion or Belief in the ECHR since Kokkinakis. Or "Quoting Kokkinakis". Religion and Human Rights 12 (2017) 83–98, Brill Nijhoff, p. 92

of Article 9 (1) does not cover such acts or omissions which do not at all express or are only remotely connected to the belief in question.[69]

3.2.2. Manifestation Through Worship, Teaching, Practice and Observance

The Convention identifies four forms of manifestation: worship, teaching, practice and observance. Worship as a form of manifestation is universally accepted as essential for the protection of religious freedom, which is why it is also logical to have it expressly mentioned in the Convention. Manifestation through worship may take the form of, for example, ritual and ceremonial acts, religious rites with regard to birth, marriage and death, as well as celebration of religious holidays.[70] In its case law, the Court has specified that for example the right to establish places of worship and to have freely accessible meetings are included in the freedom to manifest one's religion or belief through worship, and has also recognised other positive aspects of freedom of worship.[71] Meanwhile, it could be stated that the Court has not been as accepting towards the negative aspect of freedom of worship, which might take the form of, inter alia, an individual's right not to participate in such acts or ceremonies they consider contrary to their religion or beliefs[72].

Article 9 (1) protects manifestation also through teaching and observance. Teaching refers to teaching of individuals or groups, or in other words, "the right to disseminate religious or belief doctrines", or "the right to try to convince one's neighbour"[73]. The freedom of teaching covers also preaching in places suitable for it, also in other places than in churches, temples or religious schools.[74] Furthermore, the Court has established that the right to manifest one's religion or belief through teaching encompasses proselytism, assuming that abusive means, such as fraud or violence, are not resorted to[75]. As for manifestation through observance, the Court has interpreted

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[69] Schabas, William: The European Convention on Human Rights – a commentary. Oxford University Press, 2015, p. 431.
[70] Martínez-Torrón, p. 121.
[71] European Court of Human Rights, *Manoussakis and Others v. Greece,* 26 September 1996, Reports of Judgments and Decisions 1996-IV; and *Pentidis and Others v. Greece,* 9 June 1997, Reports of Judgments and Decisions 1997-III.
[72] See for example European Court of Human Rights, *Efstratiou v. Greece,* 18 December 1996, Reports of Judgments and Decisions 1996-IV; and *Valsamis v. Greece,* 18 December 1996, Reports of Judgments and Devisions 1996-VI.
[73] See for example the European Court of Human Rights, *Kokkinakis v. Greece,* 25 May 1993, Series A no. 260-A, paragraph 31.
[74] Martínez-Torrón, p. 122.
[75] *Kokkinakis v. Greece*.

its meaning widely. For example, respecting a religious day of rest or dietary requirements have been interpreted to fall within the scope of manifestation through observance.[76] Wearing a cross has, too, been considered to fall within the scope of manifestation through observance, while also falling within the scope of manifestation through worship and practice[77].

The fourth form of manifestation, manifestation through practice, is fully applicable to both religion and belief, unlike worship and observance, which are limited in their scope to only religious manifestation. The term "practice" refers to the fact that manifestation of religious and moral beliefs takes often a practical form, which consists of personal actions of different nature. These actions go well beyond teaching, complying with religious rites or taking part in acts of worship. A simple interpretation of the protection of manifestation through practice seems to imply that the actions which an individual understands as their moral obligation stemming from their religion or belief would amount to such manifestation of religion or belief which is protected under Article 9 (1).[78] The interpretation is, nevertheless, not as simple and requires a more detailed assessment, as will be demonstrated below.

The openness to interpretation of the term practice is also visible in the case law of the Court, as well as in the case law of the former Commission. The former Commission has first in *Arrowsmith v. the United Kingdom*[79] interpreted Article 9 (1) in a restricted way, noting that the protection of freedom of religion or belief afforded by Article 9 (1) does not extend to all acts which are motivated by religion or belief. In *Arrowsmith,* the applicant claimed to be entitled to distribute pacifist leaflets on an army camp, in which the applicant claimed that the troops should not serve in Northern Ireland. While the Commission accepted that manifestation of pacifist belief could take the form of public declarations which proclaim the idea of pacifism, it stated that to fall within the scope of protection under Article 9 (1), the actions of an individual would have to actually express the belief in question. The Commission concluded that in *Arrowsmith* no pacifist views were expressed in the leaflets form the outsider's perspective, and thus the applicant could not be seen as manifesting their belief as is meant in Article 9 (1). Consequently, the Commission seemed

[76] European Court of Human Rights, *Cha'are Shalom Ve Tsedek v. France* [GC], no. 27417/95, ECHR 2000-VII; and *Jakóbski v. Poland,* no. 18429/06, 7 December 2010. See also Martínez-Torrón, p. 123–124.
[77] *Eweida and Others v. the United Kingdom,* para. 89.
[78] Martínez-Torrón, p. 125.
[79] The Commission first made this interpretation in *Arrowsmith v. the United Kingdom*.

to formulate a condition according to which an act would have to actually express the belief concerned in order to be covered by Article 9 (1), and not to be considered simply as an act which is motivated or influenced by a religion or belief.[80]

The Court has to a certain extent followed in the footsteps of the Commission. The Court has not adopted the "actual expression test", that is the requirement that the actions of an individual would have to actually express the belief in question, in a similar vein as it was used in *Arrowsmith.* Meanwhile, one of the main lines of argumentation developed by the Commission in *Arrowsmith*, and later followed by the Court, is that not every act, which is motivated by a religion or belief, is protected under Article 9 (1). The action must actually express a belief in order to fall within the scope of protection of freedom of religion as enshrined in Article 9 (1).[81] As already the wording suggests, no clear guidelines on what kind of behaviour is considered manifestation of religion or belief through practice, can be derived from the Court's case law. Nevertheless, some examples based on the case law can be presented.

For instance, in a case concerning assisted suicide, the Court found no violation of Article 9 in a case in which the applicant claimed their freedom of belief was interfered with because the authorities refused to give the undertaking not to prosecute the applicant's husband for assisting the applicant with suicide. The Court accepted that the applicant had firm views on assisted suicide but observed that not all opinions or convictions constitute beliefs protected by Article 9 (1). The Court found that the applicant's claims did not involve a form of manifestation of a religion or belief as described in Article 9 (1), and reiterated that the term "practice" did not cover every act motivated or influenced by a religion or belief.[82]

In *Pichon and Sajous v. France*[83], the Court declared inadmissible as manifestly ill-founded the application of pharmacists who, because of their religious convictions, had refused to sell contraceptive pills. The Court pointed that Article 9 mainly protects personal convictions and religious beliefs, *i.e.,* the *forum internum*. The Court noted that Article 9 (1) also covers acts such

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[80] van de Beek, A., van der Broght, Eduardus, and Vermeulen, Bernardus: Freedom of Religion. Leiden, Boston, Brill 2010, p. 15-16; and Taylor, Paul M.: Freedom of Religion – UN and European Human rights Law and Practice. Cambridge University Press. Print publication year 2005, online publication date January 2010. p. 211

[81] van de Beek, van der Broght, and Vermeulen, p. 16; and Taylor, p. 216 and 220.

[82] European Court of Human Rights, *Pretty v. the United Kingdom,* no. 2346/02, ECHR 2002-III, para. 82.

[83] European Court of Human Rights, *Pichon and Sajous v. France* (dec.), no. 49853/99, ECHR 2001-X.

as worship or devotion, which form "part of the practice of a religion or belief in a generally accepted form", and that forms which manifestation of one's religion or belief may take, are listed in Article 9. However, the Court stressed that not all acts motivated or influenced by a religion or belief are protected as manifestation of religion through practice as enshrined in Article 9 (1) of the Convention. Noting that the applicants could manifest their beliefs in several ways outside the professional sphere, the Court found that the applicants could not give "precedence to their religious beliefs and impose them on others as justification for their refusal to sell [contraceptives]". [84]

The Court has also found Article 9 (1) applicable in cases concerning such practices which a religion or belief heavily inspires, while said practices may not, *per se,* form part of the core concepts of a religion or belief. For instance, the Court has found Article 9 (1) applicable in a case concerning applicants of Muslim faith who, because of their beliefs, wished that their daughters did not have to attend mixed swimming lessons in school[85]. Article 9 (1) was also ruled to apply to a case of a Muslim man, who wished to wear a skullcap. The Court took note of that while wearing a skullcap was not seen as a strict religious duty, it was strongly rooted traditionally and conceived by many as one.[86] In *Eweida and Others v. the United Kingdom*[87]*,* and in *Leyla Şahin v. Turkey*[88]*,* among others, the Court has also considered that wearing religiously significant garments or symbols constitutes manifestation of religion through practice as enshrined in Article 9 (1).

3.3. Interferences with Freedom of Religion

3.3.1. General Remarks on Interferences with Freedom of Religion

Should the Court find that religion-inspired expressions published online or presented in media as part of a public discussion were to fall within the scope of freedom of religion enshrined in Article 9 (1) of the European Convention on Human Rights, it would be faced with the question of whether

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[84] *Pichon and Sajous v. France (dec.)*, p. 3–4.
[85] European Court of Human Rights, *Osmanoğlu and Kocabaş v, Switzerland,* no. 29086/12, 10 January 2017.
[86] European Court of Human Rights, *Hamidović v. Bosnia and Herzegovina,* no. 57792/15, 5 December 2017, para. 30.
[87] European Court of Human Rights, *Eweida and Others v. the United Kingdom,* nos. 48420/10 and 3 others, ECHR 2013 (extracts).
[88] European Court of Human Rights, *Leyla Şahin v. Turkey*, no. 44774/98, 29 June 2004.

freedom of religion was interfered with and if the possible interference was permissible under the Convention. The prerequisites for the acceptability for an interference with freedom of religion are stated in paragraph 2 of Article 9, which states that the interference must be prescribed by law, pursue a legitimate aim, and be necessary to achieve the pursued aim.

First, it is required that the grounds for limitations to freedom of religion are "prescribed by law", or in other words that they are found in national law. The Court has interpreted the notion of law in both a substantive and qualitative sense, meaning that it has not determined any specific standards to be followed with regard to the procedure to achieve a valid legal basis. No specific type of "law" is required either, but the law regulating the interference in question must fulfil the qualitative requirements set for a law.[89] In *Sunday Times v. the United Kingdom,* the Court specified that in order to fulfil the requirement of an interference being prescribed by law, the law must be "adequately accessible" and "formulated with sufficient precision to enable the citizen to regulate his conduct" [90]. The national law must also provide for adequate protection against arbitrariness.[91]

It has been noted that the Court has not shown itself to be too willing to question the existence of a domestic legal basis, but usually accepts the national courts' views on whether or not the domestic law is valid[92]. If, and when, the Court finds that the national law fulfils the requirements mentioned above, the Court is likely to leave the interpretation of said legislation to national courts and other authorities. The Court will interfere with the interpretation of national courts and authorities only if the national interpretation proves to be arbitrary or manifestly unreasonable.[93]

Secondly, the justifiability of an interference requires that the interference pursues a legitimate aim. Legitimate aims listed in Article 9 (2) include public safety, protection of public order, health or morals, and the protection of the rights and freedoms of others. It has been noted that it is usually

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[89] Gerards, Janneke: General Prinicples of the European Convention on Human Rights. Cambridge University Press, 2019, p. 198–199; Pellonpää, Gullans, Pölönen and Tapanila, p. 352; and Hirvelä and Heikkilä, p. 872.
[90] The European Court of Human Rights: *The Sunday Times v. the United Kingdom (no. 1),* 26 April 1979, Series A no. 30, para. 49.
[91] Gerards (2019), p. 199-200; Pellonpää, Gullans, Pölönen and Tapanila, p. 352; Hirvelä and Heikkilä, p. 872; Hill, Mark and Barnes, Katherine: Limitation on Freedom of Religion and Belief in the Jurisprudence of the European court of Human Rights in the Quarter Century since its Judgment in *Kokkinakis* v. *Greece.* Religion and Human Rights 12 (2017) 174–197, Brill Nijhoff, p. 179.
[92] Gerards (2019), p. 203.
[93] Gerards (2019), p. 203; and Pellonpää, Gullans, Pölönen and Tapanila, p. 355.

relatively easy for a State to demonstrate the fulfilment of the requirement of a legitimate aim, and that normally the Court will not give too much attention to the examination of this requirement[94]. The Court itself has noted that:

> In cases [under Articles 8 to 11] respondent Governments have a relatively easy task in persuading the Court that the interference pursued a legitimate aim, even when the applicants cogently argue that it actually pursued an unavowed ulterior purpose. […] The cases in which the Court has voiced doubts about the cited aim without ruling on the issue […] left the issue open [...] or has rejected one or more of the cited aims […] are few and far between. The cases in which it has found a breach of the respective Article purely owing to the lack of a legitimate aim are rarer still […].[95]

Lastly, the intervention has to be necessary in a democratic society. In order to be able to determine whether a limitation has been necessary in a democratic society, it is vital first to understand what the Court perceives as a democratic society. The Court has stated that pluralism, tolerance and broadmindedness are hallmarks of a democratic society[96]. The Court has reiterated this view in *İzzettin Doğan and Others v. Turkey*[97], in which it also elaborated its conception on pluralism:

> Pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position. […] Pluralism is also built on a genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs and artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. [98]

To fulfil the requirement of "necessary in a democratic society", the State must show that its actions amounting to an interference have been necessary. In other words, the interference must have been dictated by a "pressing social need", and does not have the flexibility of expressions such as "useful" or "desirable"[99]. Additionally, the limitations must be proportionate with regard to the pursued legitimate aim, and the State must have adequate and acceptable reasons for it.[100] The requirements provided by the Court are left somewhat open, but some interpretations on their nature can be presented. It has been noted that the requirement of "relevance and sufficiency"

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[94] Pellonpää, Gullans, Pölönen and Tapanila, p. 356; and Gerards (2019), p. 220–221; and Schabas, p. 182–183.
[95] European Court of Human Rights, *Merabishvili v. Georgia,* no. 72508/13, 14 June 2000, paras. 295–296.
[96] See, for instance, European Court of Human Rights, *Smith and Grady v. the United Kingdom*, para. 87; *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria,* 19 December 1994, Series A no. 302, para 36; and *Dudgeon v. the United Kingdom,* para. 53.
[97] European Court of Human Rights, *İzzettin Doğan and Others v. Turkey* [GC], no. 62649/10, 26 April 2016.
[98] para. 109.
[99] European Court of Human Rights, *Svyato-Mykhaylivska Parafiya v. Ukraine,* no. 77703/01, 14 June 2007, para 116.
[100] *The Sunday Times v. the United Kingdom (no. 1),* para. 62.

indicates that the limitation in question should have a certain importance, as well as be adequate and appropriate to serve objectives of general interests.[101]

Furthermore, it has been noted that while the three parts of the so-called "classic proportionality test", that is effectiveness or suitability, the requirement of necessity, and the requirement of proportionality in the strict sense, are reflected in the case law of the Court, they are not explicitly mentioned nor applied in a consistent way. The Court is said to have been focusing merely on the requirement of proportionality in the strict sense, which concerns the requirement of achieving a balance between the interests served by the interference and those harmed by the interference. The requirement of a fair balance between the aim and the right interfered with is not expressly mentioned in the Convention, but the Court has stated that the "search for a fair balance between the demands of the general interest of the community and the requirement of the protection of fundamental rights" is "inherent in the whole Convention" [102]. The Grand Chamber has reiterated this view[103]. With regard to the three parts of the so-called "classic proportionality test", the Court does not consistently take into account the first two elements concerning the relationship between the aims of the interference and the means or instruments chosen to achieve these aims.[104]

3.3.2. Margin of Appreciation

The requirement of limitations to freedom of religion being "necessary in a democratic society" is closely connected with the doctrine of margin of appreciation, which the States are often given with regard to evaluating the necessity and proportionality of limitations. It has been noted that the doctrine reflects the principle of subsidiarity, which in turn can be found especially within the European Union law system, but which has also been emphasised in the context of margin of appreciation in the system of the European Convention on Human Rights.[105] The margin of appreciation doctrine stands, in principle, for that the protection of human rights on a national level is primary to the machinery of protection established by the Convention. According to the Court, the Contracting States are better suited to assess the exact content of the requirements, as well as

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[101] Gerards (2019), p. 231.
[102] European Court of Human Rights, *Soering v. the United Kingdom,* 7 July 1989, Series A no. 161, para. 89.
[103] European Court of Human Rights, *N. v. the United Kingdom* [GC], no. 26565/05, ECHR 2008, para. 44.
[104] Gerards, Janneke: How to Improve the Necessity Test of the European Court of Human Rights, Oxford University Press and New York University School of Law, CON (2013), Vol. 11, No. 2, 466–490. p. 467–469.
[105] Pellonpää, Gullans, Pölönen and Tapanila, p. 355, 357–358; Gerards, p. 232; and Hill and Barnes, p. 191.

the necessity of possible interventions. In the first place, securing the rights and liberties enshrined in the Convention is the task of the Contracting States.[106]

Furthermore, the margin of appreciation doctrine is closely connected with a European supervision. The nature of European supervision, as well as the width of the margin of appreciation is dependent on several factors. The Court often refers to the European jurisdictions especially in matters of a sensitive nature, such as morality, ethics, or social policy, to determine whether a consensus exists. If the Court finds that a uniform European conception has been established with regard to the subject in question, States' margin of appreciation is narrower and the supervision practiced by the Court is more comprehensive. If national conceptions on the subject vary considerably, States' margin of appreciation is correspondingly wider, and the Court's supervision less comprehensible.[107]

3.3.3. "Necessary in a Democratic Society" from Article 9 Perspective

The Court's perceptions of what is necessary in a democratic society means will be assessed in this sub-chapter from the perspective of freedom of religion. While this thesis focuses on possibly interfering with freedom of religion on grounds of hateful expressions concerning homosexuals, the Court's case law will, in the absence of case law expressly concerning this question, be examined from a slightly broader perspective in order to picture in a more coherent way the factors the Court might take into consideration.

The assessment of whether or not an interference is necessary in a democratic society is as a whole the most subjective part of applying paragraph 2 of Article 9, as it requires making distinctions of a subtle nature with regard to whether the authorities have struck a fair balance between the interests of the individual and of society as a whole[108]. As has been explained above, the Court is faced with the task to determine if said measures are necessary and proportionate, *i.e.,* that there are "no other means of achieving the same end that would interfere less seriously with the fundamental right concerned". Moreover, "to satisfy the proportionality requirement, the burden

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[106] European Court of Human Rights, *Handyside v. the United Kingdom,* 7 December 1976, Series A no. 24. paras. 48–49.
[107] Pellonpää, Gullans, Pölönen and Tapanila, p. 358, 359; and Schabas, p. 438.
[108] Schabas, p. 437–438.

is on the authorities to show that no such measures were available".[109] When assessing whether the interference has been necessary in a democratic society in the context of Article 9, the Court must also take into account the specificities concerning the religion in question, such as its historical background, special features and observance. The are factors a State might as well be obliged to take into account when deciding on relations between various religions.[110]

It might indeed be necessary for a State to interfere with the exercise of freedom of religion in such democracies in which several religions coexist in order to assure that all religions are equally respected and to find a balance between the differing interests of these groups. The Court has noted that it has "frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conductive to public order, religious harmony and tolerance in a democratic society". [111]

The Court has assessed the proportionality of a State's actions with regard to Article 9 in several cases concerning clothing, head-covering and other religious symbols. One of the factors the Court has emphasised is to which degree clothing or other religious symbols are used in order to manifest religion or belief. In *Eweida and Others v. the United Kingdom,* the Court gave value to the need of "an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others". In its judgment the Court found that the applicant should have the right to wear a discreet cross necklace at their workplace, which had also allowed wearing, for instance, hijab or headscarf.[112]

It should be noted that while the Court has the task of supervising the national courts and authorities, it does not have the power to act as a fourth instance nor take the place of national courts or authorities. As has been demonstrated above, the Court must respect the margin of appreciation granted to the States. The margin of appreciation concerning cases which fall within the scope of Article 9 is usually wide.[113]

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[109] European Court of Human Rights, *Biblical Centre of the Chuvash Republic v. Russia,* no. 33203/08, 12 June 2014, para 58.
[110] Council of Europe / European Court of Human Rights: Guide on Article 9 …, para. 48.
[111] European Court of Human Rights, *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98 and 3 others, ECHR 2003-II, para. 91.
[112] para. 94.
[113] Council of Europe / European Court of Human Rights, Guide on Article 14…, para. 45 and 464.

The Court takes into account margin of appreciation either explicitly or implicitly in all cases where it assesses interferences of freedom of religion. It appears that the Court has in its case law often resorted explicitly to the margin of appreciation doctrine when examining the necessity of a restriction in a democratic society. The use of the margin of appreciation doctrine has been complimented for the Court acknowledging its own limitations and the national authorities' better position to evaluate the best means to achieve a certain aim. However, resorting to the doctrine has also caused criticism based on the fact that the Court is no longer seen as fulfilling its duties with regard to recognising deficiencies in democracies.[114] Furthermore, the Court has been criticised for not examining fully the grounds for limitations (prescribed by law, pursues a legitimate aim, and is necessary to achieve the pursued aim), but instead hiding behind the margin of appreciation doctrine[115]. While the compliments nor the criticism will not be examined further in this thesis, it appears important to keep both aspects in mind when examining further the scope of margin of appreciation doctrine in the Court's case law.

The Court has, indeed, explicitly resorted to the margin of appreciation doctrine in numerous cases, especially with regard to religious clothing. In *Kokkinakis v. Greece,* the Court noted that "a certain margin of appreciation is left to the Contracting States in assessing the existence and extent of the necessity of an interference [with Article 9]" [116]. The Court has justified the use of a particularly wide margin of appreciation in, *inter alia*, *Leyla Şahin v. Turkey,* in which it stated the following:

> Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance […] It is not possible to discern throughout Europe a uniform conception of the significance of religion in society […], and the meaning or impact the public expression of a religious belief will differ according to time and context […] Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order […] Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context […].[117]

The case of *Osmanoğlu and Kocabaş v. Switzerland*[118] can also be mentioned as an example of the Court's case law concerning margin of appreciation within the scope of Article 9. The case

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[114] Berry, Stephanie E.: Religious Freedom and the European Court of Human Rights' Two Margins of Appreciation. Religion and Human Rights 12 (2017) 198–209, Brill Nijhoff, p. 199 .
[115] Hill and Barnes, p. 190.
[116] para. 47.
[117] para. 109.
[118] European Court of Human Rights, *Osmanoğlu and Kocabaş v, Switzerland,* no. 29086/12, 10 January 2017.

concerned Muslim parents who claimed a violation of freedom of religion, because their daughters were obliged to participate in mixed swimming lessons at school. After finding that the rule pursued a legitimate aim, namely that of protecting the rights and freedoms of others, the Court carried out to evaluate whether the rule was necessary in a democratic society. The Court noted the wide margin of appreciation granted to States concerning the relations between state and religion. With regard to margin of appreciation, the Court emphasised the fact that swimming lessons were meant as an activity for all the children to enjoy together, the particularly special role of the school in ensuring social integration, and that the applicants' children had been offered a possibility to wear a burkini, as well as to change clothes and shower separately. The Court found no violation of Article 9.[119]

In *Eweida and Others v. the United Kingdom* one of the aspects was that an employee of a private firm refused to provide counselling to homosexuals on religious grounds. In this case, the Court noted that:

> the most important factor to be taken into account is that the employer's action [to dismiss the applicant] was to secure the implementation of its policy of providing a service without discrimination. The State authorities therefore benefitted from a wide margin of appreciation in deciding where to strike the balance between Mr MacFarlane's right to manifest his religious belief and the employer's interest in securing the rights of others. In all the circumstances, the Court does not consider that this margin of appreciation was exceeded in the present case.[120]

In some cases, the Court has demonstrated willingness to find a violation of Article 9 despite the fact that the margin of application afforded to the State party is often considered a wide one. In *Association for Solidarity with Jehovah's Witnesses and Others v. Turkey*[121], for example, the Court found a violation of Jehovah's Witnesses' Article 9 rights when the State had placed size-related restrictions on places of religious worship even though the applicants, as a minority religion, only required a small venue for their activities.

[119] paras. 95–100.
[120] para 109.
[121] European Court of Human Rights, *Association for Solidarity with Jehovah's Witnesses and Others v. Turkey,* nos. 36915/10 and 8606/13, 24 May 2016.

4. Freedom of Expression

4.1. Scope of Protection

Should the Court be faced with the assessment of religion-inspired expressions published online or presented in media both from the perspective of freedom of religion and freedom of expression, the Court would probably end up with assessing the case only from the perspective of one of these rights. In its case law, the Court has assessed cases in which both freedom of religion and freedom of expression have been invoked from the perspective of freedom of religion[122] and from the perspective of freedom of expression[123], depending on which of these freedoms the case primarily concerns. In some cases, the Court has assessed the case from the perspective of freedom of expression, but taken into account on necessary parts the interpretation of freedom of religion[124]. Thus, should the Court find that religion-inspired expressions published online or presented in media did not fall within the scope of Article 9, it would examine if they fell within the scope of freedom of expression as enshrined in Article 10 of the Convention. Therefore, the above-mentioned aspects on freedom of religion can be moved aside for a while, while the discussion is now turned to the specificities of freedom of expression.

In a similar way to Article 9, also Article 10 is comprised of two paragraphs. The first paragraph defines the contents of the freedom, and the second paragraph lists exhaustively the acceptable grounds on which it is possible to infringe or restrict freedom of expression.

Article 10 of the Convention reads as follows:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licencing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are described by law and are necessary

[122] European Court of Human Rights, *Kokkinakis v. Greece*; *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, no. 71156/01, 3 May 2007; *Nasirov and Others v. Azerbaijan*, no. 58717/19, 20 February 2020.
[123] European Court of Human Rights, *Murphy v. Ireland* no. 44179/98, ECHR 2003-IX (extracts); *Glas Nadezhda EOOD and Elenkov v. Bulgaria*, no. 14134/02, 11 October 2007; *Balsyté-Lideikienė v. Lithuania*, no. 72596/01, 4 November 2008.
[124] European Court of Human Rights, *Ibragim Ibragimov and Others v. Russia*, nos. 1413/08 and 28621/11, 28 August 2018.

> in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Freedom of expression has a special status in society when compared with other rights enshrined in the Convention. While freedom of expression is considered by the Court as the consequence of a functioning democracy, it is also considered to be the foundation and fostering actor of democracy. A democracy could not exist nor could it develop without the right to express one's opinions or the right to free political debates. Also, the Court has in its jurisprudence stressed the particular importance of freedom of expression. It has repeatedly highlighted that freedom of expression is one of the foundations of a democratic society.[125] In *Handyside v. the United Kingdom*[126], the Court listed as the main principles of freedom of expression the importance of freedom of expression in a democratic society, its independence on the quality of imparted information, the high threshold in interfering with freedom of expression, as well as the secondary role of the Court in relation to national margin of appreciation.

Handyside v. the United Kingdom laid down also the scope of freedom of expression. According to the judgment,

> [f]reedom of expression constitutes one of the essential foundations of such a [democratic society], one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society".[127]

The scope of freedom of expression as enshrined in Article 10 of the Convention is a broad one. Firstly, freedom of expression protects freedom of opinion, which cannot be restricted on any grounds. Freedom of expression protects also the right to express opinions and information as well as receive information orally, in a written form or through electronic means of communication. These rights can be restricted on the conditions expressly mentioned in paragraph 2 of Article 10.[128] Generally it can be stated that freedom of expression protects everyone as a user, all imparted information as a subject, and receiving and imparting information and thoughts as a form of

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[125] Weber, p. 19; Zwart, p. 143; and Hirvelä and Heikkilä, p. 121-122.
[126] European Court of Human Rights, *Handyside v. the United Kingdom,* 7 December 1976, Series A no. 24.
[127] para. 49.
[128] Pellonpää, Gullans, Pölönen, and Tapanila, p. 866–867.

manifestation. Freedom of expression covers also different means to express information and thoughts.[129]

The concept of "information" has as well been interpreted broadly: in addition to hard facts, raw data and matters of public interest the concept covers also, for example, radio and television programmes and photos. Freedom of expression applies also to the internet and other information imparted electronically and in other ways. The Court has in its case law recognised the special character of the internet in imparting information. For instance, in *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*[130] the Court stated that the internet is a special tool of communication especially when it comes to its capacity to store and impart information.[131]

Furthermore, the scope of freedom of expression is not dependent on the subject of information. Freedom of information covers all subjects of expression, including political opinions and opinions expressions concerning the society, culture, artistic expression and information of a commercial nature. It should be noted, however, that the Court has placed a special emphasis on the need to promote free political debate in a democratic society, and thus, freedom of expression in the context of political debate is attributed with the highest importance[132]. Moreover, the scope of freedom of expression is not unlimited. For instance, the right to vote does not fall within the scope of Article 10.[133]

4.2. Some Remarks on the Court's Case Law on Freedom of Expression

The interpretative practice of the Court might be difficult to understand and grasp comprehensively based on the case law concerning freedom of expression. In a similar way, it may be difficult to predict what kind of result the case would lead to. The absence of a streamlined jurisprudence has been explained by the nature of the Court's work – the Court can only examine and interpret those cases of which an application has been made, and its interpretation can only be based on the arguments presented by the parties. In addition, the situations and cases in which questions

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[129] Hirvelä and Heikkilä, p. 908; and Weber p. 20.
[130] European Court of Human Rights, *Editorial Board of Pravoye Delo and Shtekel v. Ukraine,* no. 33014/05, ECHR 2011 (extracts).
[131] Hirvelä and Heikkilä, p. 908, 918–919; and Weber, p. 20.
[132] See, for instance, European Court of Human Rights, *Oberschlick v. Austria (no. 1),* 23 May 1991, Series A no. 204*;* and *Feldek v. Slovakia,* no. 29032/95, ECHR 2001-VIII.
[133] Hirvelä and Heikkilä, p. 121–122, 908, 918–919; Weber, p. 20; and Zwart, p. 143.

concerning freedom of expression actualise, are numerous and vary considerably in nature. Therefore, it may not be possible to specify in a comprehensive manner how different kinds of situations would be assessed by the Court with regard to freedom of expression.[134]

Some general remarks on factors influencing the Court's assessment can, nevertheless, be presented. As it has defined in the research questions, the general assumption is that the religion-inspired expressions published online and presented in media examined within the context of this thesis have been made with the intention of participating in a public debate. Therefore, the Court's views on public discussions on the context of freedom of religion are here of particular interest, even if other factors considered by the Court are not left without attention either.

When the Court examines an individual case, it needs to assess the facts of said case on a certain level. In these cases, the outcome of the case may be dependent on the contents of an expression presented in a single occasion. Moreover, the outcome may be affected by the possible special national meaning, nature and purpose, and the subject of the expression in question. Furthermore, the Court's assessment may depend on the person behind the expression, the forum on which the expression was made and the public of the expression in question.[135] In defamation cases elements of importance include "the position of the applicant, the position of the person against whom his criticism was directed, the subject matter of the publication, characterisation of the contested statement by domestic courts, the wording used by the applicant, and the penalty imposed on him.[136]"

The Court also stresses the context in which the expression has been presented. As it has been mentioned above, political debate enjoys a particularly high protection of Article 10. The same applies to a debate of public interest.[137] The meaning of the concept of public interest is wide and enjoys autonomy with international definitions. The first criterion for a discussion or a debate to be considered one of a public interest is the topic of the expression as well as the question of whether or not the topic is of public interest. Ordinarily this means matters which have such an effect to the public that the public takes an interest in them, matters which attract the public's

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[134] Hirvelä and Heikkilä, p. 932; and Lemmens, p. 141.
[135] Hirvelä and Heikkilä, p. 932
[136] European Court of Human Rights, *Krasulya v. Russia*, no. 12365/03, 22 February 2007, para. 35.
[137] Zwart, p. 122; and Hirvelä and Heikkilä, p. 914.

attention or matters which concern the public to a certain degree. Subject matters considered publicly interesting vary in the Court's case law and are interpreted quite widely. Above all, matters of public interest cover political topics, matters of serious societal nature, matters concerning people's wellbeing, matters causing conflicting emotions, matters concerning an important social question or a problem people should be informed of. However, matters of public interest are not limited to political and societal themes, but can cover also economic, cultural, commercial and religious issues.[138]

The nature of the expression in question, as well as the aims and intentions of the person responsible for the expression can also be of relevance when the Court assesses whether or not the expression falls within the scope of Article 10[139], as can the identity or status of the person responsible for the expression. Even if freedom of expression, *per se,* applies to everyone, the Court has recognised the freedom's particular importance to politically elected representatives of the people and journalists. With regard to politically elected representatives, for instance, the Court has stated that their societal opinions and expressions have particular meaning as "[t]hey represent the electorate, draw attention to their preoccupations and defend their interests[140]". Both the opinions of politicians and those of journalists contribute to the societal discussion in a specific way, which is why they enjoy a particularly privileged status.[141]

Moreover, the freedom of expression of politically elected representatives within the parliament or comparable bodies is a special area which enjoys the protection of freedom of expression in a democratic society. The Court has noted that the "[p]arliament or such comparable bodies essential for political debate. Very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein." Moreover, opinions of politicians enjoy an equivalent protection when they are presented in a written form or as part of a general debate.[142] Even if parliamentary debate in a democratic society has to be free and pluralistic, certain duties and responsibility also

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[138] Hirvelä and Heikkilä, p. 914–915; see also European Court of Human Rights *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, 27 June 2017*; Selistö v. Finland* 56767(00, 16 November 2004*; Couderc and Hachette Filipacchi Associés v. France; Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60631/08, ECHR 2012*; Axel Springer AG v. Germany* [GC], no. 39954/08, 7 February 2012.
[139] Pellonpää, Gullans, Pölönen and Tapanila, p. 867.
[140] European Court of Human Rights, *Lombardo and Others v. Malta,* no. 7333/06, 24 April 2007, para. 53.
[141] Hirvelä and Heikkilä, p. 1016.
[142] Zwart, p. 122; Hirvelä and Heikkilä, p. 1017–1018; and European Court of Human Rights, *Jerusalem v. Austria,* no. 26958/05, ECHR 2001-II, para. 40.

apply to expressions made in parliament or comparable bodies. For example, inciting violence can be sanctioned.[143]

Lastly, it can be noted that freedom of expression is often being assessed in relation to another right protected by the Convention. In these cases, the Court is faced with the assessment of whether one of these rights or freedoms have preference with regard to the other. According to the Court's case law, at least two types of expressions can be identified which are less deserving of the protection of Article 10. Firstly, the Court considers that speech inciting violence is not protected as freedom of expression. The Court's case law with regard hate speech will be examined further in the next Chapter of this thesis. Secondly, the Court considers that Article 10 protects less such artistic expressions which ridicule or insult specific religious convictions. For instance, in *Otto-Preminger-Institut v. Austria*[144]*,* a case concerning the collision between freedom of expression and freedom of religion, the Court found that because the expression in question was more of an artistic than a political nature, it had to give way to the religious convictions of others.[145]

4.3. Interferences with Freedom of Expression

4.3.1. General Remarks on Interferences with Freedom of Expression

As has been noted above, the Court considers freedom of expression as the main rule to be applied in a democratic society and requires that restrictions to freedom of expression remain an exception. The following three elements govern the Court's assessment of freedom of expression: aspiration to protect freedom of expression as far as possible; restricting the freedom only in exceptional cases to protect other values; and the national margin of appreciation.[146] Thus, even if restricting freedom of expression is not desirable, in some cases restrictions may be necessary. The permitted restrictions grounds are listed exhaustively in paragraph 2 of Article 10, which applies to imparting information. Freedom to hold opinions cannot be restricted.

It must be noted that freedom of expression is limited by duties and responsibilities mentioned in paragraph 2 of Article 10. Duties and responsibilities refer to, for instance, an obligation to avoid

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[143] Hirvelä and Heikkilä, p. 1018; and European Court of Human Rights, *Karácsonyi v. Hungary,* no. 37494/02, 18 April 2006, para .139.
[144] European Court of Human Rights, *Otto-Preminger-Institut v. Austria,* 20 September 1994, Series A no. 295-A.
[145] Zwart, p. 123.
[146] Lemmens, p. 142, 143.

gratuitously offensive expressions which infringe the rights of others[147]. Furthermore, all people exercising their freedom of expression are under an obligation to differentiate between facts and value judgments. With regard to facts, the user of freedom of expression is obliged to establish the truthfulness of the expression, while establishing the truthfulness of value judgments is often impossible due to their nature. The meaning of responsibilities in the meaning of paragraph 2 of Article 10 has been assessed by the Court in several cases, including those concerning politicians, lawyers, journalists, publishers, writers and artists. The question under consideration is often the duty or responsibility to protect the rights of others. For instance, criminal conviction of people spreading national socialist or racist views has been considered acceptable in the light of paragraph 2[148], or in some cases excluded all together from the protection of Article 10 based on Article 17 (prohibition of abuse of rights).[149] In *Bayev and Others v. Russia,* the Court found that the use of legislation banning the promotion of homosexuality, in other words the ban on "propaganda "of homosexuality among underaged children violated Article 10. Said legislation was considered to strengthen the stigma associated with homosexuality and to incite homophobia, which "was incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society".[150]

4.3.2. "Necessary in a Democratic Society" from Article 10 Perspective

Paragraph 2 of Article 10 of the Convention includes corresponding grounds for interfering with freedom of expression as Article 9 does for interfering with freedom of religion, namely that the interference has to be prescribed by law, pursue a legitimate aim and be necessary in a democratic society. As with regard to Article 9, also with regard to interferences with Article 10 the first two grounds, namely to requirements of the interference being prescribed by law and having a legitimate aim, usually do not pose problems.[151] Legitimate aims listed in paragraph 2 of Article 10 include the prevention of disorder or crime, the protection of health or morals, the protection of

[147] European Court of Human Rights, *Gündüz v. Turkey*, no. 35071/97, ECHR 2003-XI, para. 37.
[148] *Erbakan v. Turkey*, *Féret v. Belgium*, and *Vejdeland and Others v. Sweden*.
[149] Hirvelä and Heikkilä, p. 941, 942; Weber, p. 1; and, Gullans, Pölönen, and Tapanila, p. 872.
[149] Pellonpää, Gullans, Pölönen, and Tapanila, p. 872.
[150] European Court of Human Rights, *Bayev and Others v. Russia,* nos. 67667/09 and 2 others, 20 June 2017, paras 51, 83–84.
[151] Weber, p. 31.

the reputation or rights of others, preventing the disclosure of information received in confidence, and maintaining the authority and impartiality of the judiciary.

As was explained in the context of Article 9, the Court has the Court has stated that the requirement of an interference being necessary in a democratic society means that the justification for the interference must be relevant and sufficient, or in other words, respond to a pressing social need. In addition, the means must be proportionate to the legitimate aim pursued. The Court has granted Contracting States a certain margin of appreciation in this regard, which means that the states have to power to determine for themselves how they regulate issues falling under the scope of Article 10.[152]

The margin of appreciation connected with freedom of expression depends, *inter alia*, on the subject and the context of the expression. The margin of appreciation is wider in, for instance, issues concerning morality and religion of which no European "yardstick" exists. According to the Court, "a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.[153]" The margin of appreciation is wider also in issues concerning restrictions of commercial expressions. Instead, margin of appreciation remains narrow with regard to issues concerning political freedom, which falls within the core of freedom of expression, and with regard to artistic expression. As a whole, the Court's supervision is strictest when the case concerns statements that constitute an incitement to hatred.[154]

It falls usually for the national authorities to decide if such a pressing social need exists which justifies the interference with freedom of expression. However, as it has been stated above, even margin of appreciation is not unlimited. According to the Court, "[t]he Contracting States have a certain margin of appreciation in assessing whether such a [pressing social] need exists […], but

[152] Weber, p. 31; McGonagle, Tarlach, in collaboration with McGonagle, Marie and Ó Fathaigh, Ronan: Freedom of Expression and Defamation – A study of the case law of the European Court of Human Rights. Council of Europe, September 2016, p. 12.
[153] European Court of Human Rights, *Wingrove v. the United Kingdom,* 25 November 1996, *Reports of Judgments and Decisions* 1996-V, para. 58
[154] Hirvelä and Heikkinen, p. 932; Weber, p. 32.

it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court.[155]„ [156]

In determining the width of the margin of appreciation the Court departs from assessing if the interference is proportionate to the legitimate aim pursued. In this connection the aim refers to one or more of the values or interests listed in paragraph 2 of Article 10. Thus, the Court assesses the case at hand as a whole and determines whether the justification for an interference and its implementation has been relevant and sufficient. "[T]he Court has to satisfy itself that the national authorities applied standards […] which were in conformity with the principles embodied in Article 10.[157]" The lack of sufficient justifications has often been the cause for the Court to find a violation of Article 10, as the interference has been found excessive and disproportionate to the aim pursued.[158]

In its assessment of the proportionality of the interference the Court will take into account the context in which the expressions in question have been made. As it has been mentioned above, matters of legitimate public interest enjoy a special status and restricting debate concerning them is seldom acceptable. In its assessment, the Court is concerned about making sure that the acts of national authorities do not create chilling effect to a debate concerning matters of legitimate public interest.[159] For instance, too stringent sanctions may cause a chilling effect which, in turn, may lead to that societally important issues are not covered or otherwise brought to the public's attention in fear of penalties or other sanctions.[160] As the Court has stated, this chilling effect "works to the detriment of society as a whole[161]". Thus, in addition to the context, the "nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10[162]".

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[155] European Court of Human Rights, *Lingens v.* Austria, 8 July 1986, Series A no. 103, para. 38.
[156] McGonagle, p. 13; Weber, p. 32.
[157] European Court of Human Rights, *Cumpănă and Mazăre v. Romania*, no. 33348/96, 10 June 2003, para. 90.
[158] Hirvelä and Heikkinen, p. 932–933; Bychawska-Siniarska, Protecting the Right to Freedom of Expression under the European Convention on Human Rights – A handbook for legal practitioners. Council of Europe, July 2017, p. 44.
[159] McGonagle, p. 24. s
[160] Hirvelä and Heikkinen, p. 935.
[161] *Cumpănă and Mazăre v. Romania,* para. 114.
[162] *Cumpănă and Mazăre v. Romania,* para. 111.

Furthermore, a general remark on the Court's approach towards the rights of minorities can be made. With regard to issues falling within the scope of states' margin of appreciation, the Court has been criticized for protecting rather the rights of majority populations than those of minorities. The Court's judgment in *Handyside v. the United Kingdom* has been mentioned as an example. In *Handyside,* the national authorities had condemned the book in question as liberal and anti-authoritarian, which can be seen as condemning ideologies opposing conservative worldviews. The Court accepted that the restrictions placed on freedom of expression were proportionate. The Court's statements in its judgment have been interpreted to validate the societal discomfort with sexual minorities when it criticizes the passages of homosexuality for generating "a very real danger that this passage would create in the minds of children a conclusion that that kind of relationship was something permanent", and labelled the publication "hopelessly damned" because of its few references to marriage.[163]

However, the Court has in its more recent case law assessed, among others, hateful comments made about homosexuals, and in this regard also considered whether or not interference with the applicant's freedom of expression had been necessary in a democratic society. In *Lilliendahl v. Iceland,* the Court first noted that the national Supreme Court had taken into account the competing interests, that is the applicant's right to freedom of expression, and the right of homosexuals to private life. The Court accepted the Supreme Court's finding of the comments being "serious, severely hurtful and prejudicial", and reiterated, as it has done in other cases too, "that discrimination based on sexual orientation is a s serious as discrimination based on "race, origin or colour"". The Court made a reference to Council of Europe statutory bodies[164], which "call for the protection of gender and sexual minorities from hateful and discriminatory speech". Finally, the Court finally noted that the prejudicial and intolerant comments did not appear to have been originated by the municipal decision which had originally started the debate, and found that the

[163] para. 34; and O'Reilly, Aoife: In Defence of Offence: Freedom of Expression, Offensive Speech, and the Approach of the European Court of Human Rights. Trinity College Law Review 19 (2016): 234–260. p. 251–252.

[164] Council of Europe, Committee of Ministers Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity; and Council of Europe Parliamentary Assembly Resolution 1728 (2010) on Discrimination on the basis of sexual orientation and gender identity.

national Supreme Court had given "relevant and sufficient reasons for the applicant's conviction".[165]

With regard to the above presented Court's recent case law, it seems safe to say that, at least in all cases, the Court does no longer protect rather the rights of majority populations than those of minorities. As it has been noted in the first Chapters of this thesis, and as is presented by the two cases examined above, the Court's interpretation of the scope of homosexuals' rights under the Convention has evolved and expanded over the last decades. Thus, perceptions of the Court's current interpretations cannot be made based on a judgment given decades ago, such as the judgment in *Handyside.* The above discussion indicates, however, how complex issues falling under the States' margin of appreciation can be, and how the interpretation concerning them can change in a fairly short amount of time due to changes in the European society.

[165] paras 44–46.

5. Hate Speech

5.1. Definition of Hate Speech

As has been demonstrated in the previous Chapter, freedom of expression as enshrined in Article 10 of the Convention is seen as one of the essential foundations of a democratic society. Freedom of expression protects both information and ideas that are considered inoffensive, indifferent or received favourably, as well as information and ideas that are considered offensive, shocking or disturbing.[166] Furthermore, as it has been noted in the previous Chapters, and as is clear also from the text of the Convention, also freedom of expression can be subjected to limitations or restrictions given the fulfilment of the requirements of Article 10 (2). This Chapter will allow a deeper examination of the concept of "hate speech" and its impact on restricting freedom of expression. This examination is crucial in order to able to determine whether religion-inspired expressions allegedly insulting homosexuals could be considered amounting to hate speech and, thus, to justify an interference with freedom of expression.

Ultimately, in the context of hate speech, freedom of expression can be limited if it risks conflicting with the prohibition of all forms of discrimination, and incites hatred and demonstrates characteristics of "hate speech"[167]. The Court has repeatedly emphasised that it considers important to combat, among others, racial discrimination in all its forms and manifestations[168]. The Court has noted that:

> tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance […], provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued.[169]

Despite the fact that the term "hate speech" has been used frequently by various regional and international actors, no universally accepted definition of the term exists. One definition for hate speech can be found in the Council of Europe Committee of Ministers Recommendation on "Hate

[166] European Court of Human Rights: Factsheet – Hate speech, Press Unit, January 2022, p. 1.
[167] Weber, p. 2.
[168] See, for instance, European Court of Human Rights, *Jersild v. Denmark*, 23 September 1994, Series A no. 298, para. 30.
[169] See, for instance, *Gündüz v. Turkey*, para. 40.

Speech"[170] which defines hate speech as follows: the term "hate speech" shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism, nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."

The term "hate speech" is also used by the European Court of Human Rights, which has not provided with an explicit definition for the it, but has in its case law provided for some definitions of hate speech in the context of an individual case. In some of its judgments, the Court has referred to a general definition similar to that of the Committee of Ministers, namely "all forms of expression which spread, incite, promote or justify hatred based on intolerance"[171]. Because of the case-by-case approach of the Court, no clear parameters for the identification of acts amounting to hate speech can be identified. It should also be noted that difficulties arise also from the fact that statements under consideration are not necessarily expressed through expressions of hate or emotions, but can instead be hidden under what at first seems acceptable.[172]

Nevertheless, it is possible to identify some particularly relevant topics based on the Court's case law. Such topics include political hate speech, racist hate speech, hate speech based on religion and hate speech based on sexual orientation. Of these, sexual orientation is the most recent addition to the relevant topics.[173] Based on the Court's case law it is also possible to conclude that hate speech cases often concern incitement to violence or justification of violence against individuals, authorities or a group of people. Moreover, hate speech can occur as some other kind of insulting and hostile statement directed against, for instance, race or sexual minority, without it necessarily downright encouraging to acts of violence against the group in question.[174]

When assessing a case concerning alleged hate speech, the Court has two approaches. It can either apply Article 17 (prohibition of abuse of rights) if the statements in question negated the fundamental values of the Convention. Alternatively, in less severe cases, the Court can examine

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[170] Council of Europe Committee of Ministers Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech". Adopted by the Committee of Ministers on 30 October 1997.
[171] See, for instance, *Gündüz v. Turkey,* para. 40.
[172] Lemmens, p. 143; and Hirvelä and Heikkilä, p. 1040.
[173] Weber, p. 3–4; and Lemmens, p. 148–149.
[174] Hirvelä and Heikkilä, p. 1040.

the case with regard to the limitation clause provided for in Article 10 (2). As a main rule, resorting to the application of Article 17 is considered an exceptional and extreme means to demonstrate the borders of freedom of expression.[175] Despite the exceptional nature of the application of Article 17, both Article 17 and Article 10 (2) are examined in more detail below in order to gain a more comprehensive understanding on the Court's viewpoints on hate speech.

5.2. Combating Hate Speech through the Application of Article 17

Article 17 of the Convention provides:

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

The purpose of Article 17 is to protect democratic society, human rights and rule of law so that the rights, freedoms and responsibilities enshrined in the Convention cannot be used in a manner contrary to the underlying values of the Convention. Therefore, some expressions which are considered to contradict the values underlying the Convention, are left without the protection of freedom of speech under Article 10 based on Article 17, and do therefore not need to be assessed under Article 10 (2).[176] The Court itself has emphasised that there is no doubt that any remarks directed against the values underlying the Convention would see themselves excluded from the protection of Article 10 by Article 17[177].

In the case law of the Court and the former Commission, Article 17 has been applied in cases concerning promoting neo-Nazism[178], promoting fascist, racist, anti-Semitist and communist ways of thought[179] as well as those concerning negationism, i.e., incitement to hatred against the Jewish community and the denial of the Nazi Holocaust[180]. Both the former Commission and the Court

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[175] Hirvelä and Heikkilä, p. 1042; European Court of Human Rights: Factsheet – Hate Speech, p. 1; and Weber, p. 19.
[176] Hirvelä and Heikkilä, p. 1042; and Weber, p. 22.
[177] European Court of Human Rights, *Seurot v. France,* No. 57383/00, decision sur la recevabilité, 18 May 2004.
[178] See, for instance, European Commission of Human Rights, *B.H., M.W., H.P. and G.K. v. Austria,* application No. 12774/87, decision on the admissibility, 12 October 1987.
[179] See, for instance, European Court of Human Rights, *Perinçek v. Switzerland*, no. 27510/08, 17 December 2013.
[180] See, for instance, European Court of Human Rights, *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX (extracts).

have applied Article 17 in cases concerning manifestly racist statements, which constitute racial hate speech.[181]

Therefore, the Court could exclude a case concerning a clearly racist statement form the protection of Article 10 of the Convention. Nevertheless, it must be reiterated that direct application of Article 17 is not common. This can, perhaps, be seen as a positive, as Article 17 does not leave much room for discussion or balancing opposing rights. Article 17 rather acts from a very black and white perspective, and could even be described as a "guillotine provision".[182]

Instead of applying Article 17 directly, the Court has in some cases adopted a way of using Article 17 as a principle of interpretation. Article 17 is in these cases utilised especially with regard the assessment of proportionality. In such cases, "the Court will begin by considering question of compliance with Article 10, whose requirements it will however assess in the light of Article 17.[183]" The Court has also resorted to aspects of Article 17 in its assessment concerning necessity under Article 10 without referring directly to Article 17.[184]

5.3. Combating Hate Speech through the Application of Article 10 (2)

5.3.1. General Remarks on the Application of Article 10 (2) to Hate Speech Cases

As has been stated above, the Court only rarely resorts to the application of Article 17. Therefore, the most common way to assess cases concerning alleged hate speech is through the application of the general limitations clause of Article 10 (2). Thus, the Court has to verify whether an interference exists. As has been explained above, if the Court finds an interference, it has to assess whether the interference is prescribed by law and pursues one or more of the legitimate aims set out in Article 10 (2), and whether the interference is necessary in a democratic society to achieve the legitimate aim.

As in any other case, the Court examines the case as a whole and makes a decision on it based on the particular circumstances of the case. With regard to hate speech, there are no clear factors to

[181] Weber, p. 26.
[182] Weber, p. 27; and Lemmens, p. 145.
[183] European Court of Human Rights, *Lehideux and Isorni v. France,* 23 September 1998, Reports of Judgments and Decisions 1998-VII.
[184] Weber, p. 27; Lemmens, p. 148; and Hirvelä and Heikkilä, p. 1043.

help draw the line between accepted and prohibited speech. Rather, the Court takes into account several elements, which it assesses on a case-by-case basis.[185] It has been noted that lately, the Court has given less weight to the need for a political debate and more weight for the need of tolerance and equal dignity of all human beings as the foundation of a democratic society. This can be seen from the Court's judgments in cases such as *Soulas and Others v. France*[186]*, Leroy v. France*[187]*, Féret v. Belgium*[188] and *Vejdeland and Others v. Sweden*, which will be examined in more detail later in this Chapter. In these cases, the Court first extended the definition of incitement and then stated that to be considered incitement to hatred the act does not specifically have to contain a call to violence or other criminal acts.[189]

One of the central elements taken into account by the Court is whether the applicant's intention was to use "hate speech" to disseminate racist ideas and opinions, or if the applicant rather intended to inform the public on a public interest matter. It must be noted that this is a difficult element to assess, as it is not straightforward to determine an individual's intentions.[190]

For example, in *Jersild v. Denmark* the Court found a violation of Article 10 in a case in which the group of people interviewed by the applicant in a television show had made overtly racist remarks, and the applicant had been convicted for it on grounds of aiding and abetting a xenophobic group. The Court noted that "taken as a whole, the feature could not have appeared to have as its purpose the propagation of racist views and ideas. On the contrary, it clearly sought – by means of an interview – to analyse and explain this particular group of youths, […] thus dealing with specific aspects of a matter that already then was of great public concern."[191]

When examining a case concerning alleged hate speech, the Court also takes into consideration the context in which the expressions have been presented. Political discourse and matters of public

[185] Weber, p. 33.
[186] European Court of Human Rights, *Soulas and Others v. France,* no. 15948/03, 10 July 2008.
[187] European Court of Human Rights, *Leroy v. France,* no. 36109/03, 2 October 2008.
[188] European Court of Human Rights, *Féret v. Belgium,* no. 15615/07, 16 July 2009.
[189] Zwart, p. 129–130.
[190] Hirvelä and Heikkinen, p. 1041; and Weber, p. 33.
[191] *Jersild v. Denmark*, para. 33.

interest are attached with particular importance, and when the expressions are connected with these, restrictions on freedom of expression are allowed only exceptionally.[192]

The ideology behind the expression may also in some cases be of relevance. For instance, speech of religious nature is often given a special status since, as presented in the previous Chapters, the States enjoy a wide margin of appreciation with regard to religious topics. Nevertheless, paragraph 2 of Article 10 affords also duties and responsibilities to those exercising freedom of expression. In this regard, the Court has noted that

> whoever exercises the rights and freedoms enshrined in [Article 10, paragraph 2] undertakes "duties and responsibilities". Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs[193].

Moreover, the Court takes into account the status of both the person or entity behind the allegedly hateful expression as well the victim. The margin of appreciation granted to the States is considerably narrower in cases in which the applicant is a politician, which is due to the meaning and importance of free political debate in a democratic society. However, the status of a politician also brings along some responsibilities. The Court has noted that it is crucially important that politicians avoid disseminating comments in their public speeches which are likely to foster intolerance.[194]

The victim's status may be of importance for instance in cases in which the victim is a politician. According to the Court, "[t]he limits of acceptable criticism are accordingly wider as regards a politician than as regards a private individual[195]". With regard to governments the Court has noted that the "limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only to the legislative and judicial authorities but also of the press and public opinion.[196]"

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[192] See, for instance, *Erbakan v. Turkey,* para. 55; and Hirvelä and Heikkinen, p. 1041; and Weber, p. 35.
[193] *Gündüz v. Turkey*, para. 37.
[194] *Erbakan v. Turkey,* para. 64; and Weber, p. 37.
[195] *Lingens v. Austria*, para. 42.
[196] European Court of Human Rights, *Castels v. Spain,* 23 April 1992, Series A no. 236, para. 46.

The Court, furthermore, examines the potential impact of the means of the expression in question. In this regard, the Court pays attention to in which form the expression was employed, which medium was used for its dissemination, as well as the context in which the dissemination took place.[197] With regard to the chosen medium, the Court has stressed that on the grounds of the importance of freedom of the press, written press enjoys a strong protection[198]. The principles applied to written press also apply to audio-visual media, which often may have a more immediate and powerful effect than the print media[199].

In *Gündüz v. Turkey,* the Court faced the assessment of the expressions of made by an applicant during a live television broadcast. In this context the Court stressed the importance of other participants balancing the statements of the applicant, as well as the fact that "the applicant's statements were made orally during a live television broadcast, so that he had no possibility of reformulating, refining or retracting them before they were made public.[200]"

The penalties, in particular their nature and severity may also be factors the Court takes into account when assessing the proportionality of the interference in the context of expressions allegedly inciting hatred. It has, however, been noted that this criterion remains rather secondary in the case law of the Court, which sometimes passes the assessment of the penalty or mentions it only briefly or partially.[201]

The main factors taken into account by the Court when assessing a case concerning alleged hate speech are presented above. Nevertheless, as the Court's case law leaves it undetermined what kinds of expressions are categorised as hate speech, a closer look into its case law is necessary. The Court's case law on hate speech based on sexual orientation is scarce, which is why it is necessary to examine briefly some other forms of hate speech as well in order to gain a fuller understanding on the Court's perception on what kinds of expressions could be considered as hate speech. Some examples on cases concerning racist hate speech, hate speech based on religion, as well as hate speech based on sexual orientation, will be examined in more detail in the following

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[197] Weber, p. 14; and Hirvelä and Heikkilä, p. 1041.
[198] See, for instance, *Halis Doğan v. Turkey*, no. 75946/01, 7 February 2006.
[199] Weber, p. 41; and *Jersild v. Denmark,* para. 31.
[200] paras. 49 and 51.
[201] Weber, p. 43. See also *Gündüz v. Turkey* and *Jersild v. Denmark*.

subchapter. The following subchapters also highlight briefly some more general remarks on these topics for the purpose of providing a background for the assessment of hate speech cases.

5.3.2. Racist Hate Speech

Soulas and Others v. France concerned applicants who had published a book "The colonization of Europe – Truthful remarks about immigration and Islam". The applicants had been convicted for inciting hatred and violence against Muslim communities from Northern and central Africa. The Court found no violation of Article 10. The Court emphasized the military language used by the applicants together with other terms, which gave rise in readers to a feeling of antagonism and rejection.

Féret v. Belgium concerned a Belgian Member of Parliament and Chairman of a political party, who was convicted of incitement to racial discrimination because of the leaflets they had distributed during their election campaign. The distributed leaflets included slogans such as "Stand up against Islamification of Belgium", "Stop the sham integration policy" and "Send non-European jobseekers home". Again, the Court found no violation of Article 10. It was noted that the statements were liable to arouse contempt and even hatred towards foreigners among the public. The Court stressed that racist discrimination and hatred towards foreigners was to be opposed even when it did not specifically encourage violation. It was also emphasised that politicians had to express themselves in a way that avoided comments increasing intolerance. Racist and xenophobic speech was liable to weaken trust in democratic institutions.

In *Šimunić v. Croatia*[202] the Court assessed the case of a football player, who was fined for shouting at the end of a football match the spectators of the match such messages which were considered to express hatred on the basis of race, nationality and faith. The Court declared the applicant's complaint under Article 10 inadmissible as being manifestly ill-founded. When examining the proportionality of the State's measures the Court stressed the modest nature of the fine imposed upon the applicant as well as the context in which the applicant had expressed the messages in question. The applicant's free speech was assessed with regard to the State's interest to promote tolerance and respect at sports events, as well as to combat discrimination through sport. The Court

[202] European Court of Human Rights, *Šimunić v. Croatia*, no. 20373/17, 22 January 2019.

also noted that as a famous football player the applicant was a role model for many football fans and in these roles should have been more cautious with regard to the possible negative impact of their behaviour.

Finally, *Jersild v. Denmark* concerned a journalist's responsibility for opinions expressed by their interviewees. The journalist in question had made a documentary on youth and their racist attitudes. During the interview the interviewees made insulting and defamatory remarks on aliens and their ethnic groups by, among others, claiming that people of colour were animals and comparing their looks with those of animals. The journalist was condemned for fines. The Court found that the journalist's freedom of expression as protected by Article 10 had been violated. The Court noted that there was no doubt to whether the statements made by the interviewees were defamatory. Nevertheless, the journalist had clearly differentiated themselves from their interviewees and dismissed some of the claims as untrue. As a whole the interview gave the impression of that the racist opinions presented were part of a particular youth group's general attitude against the society. The Court also stressed the importance of news reporting based on interviews, which was considered one of the most important ways for the press to fulfil its task of "public watchdog".

5.3.3. Hate Speech and Religion

The case of *Tagiyev and Husenov v. Azerbaijan* concerned the conviction of two applicants who had published an article allegedly inciting religious hatred and hostility. The Court found a violation of Article 10. In its assessment, the Court noted particularly that the conviction of the applicants had been excessive. The intervention with the applicants' freedom of expression had not been justified in the context of the case, in which the article had mainly been comparing Western and Eastern values and contributed to a debate on a matter of public interest, the role of religion in society. The Court noted that the applicants' remarks had not been put in context or their right to express their views on religion had not been tried to balance against religious people's right to respect for their beliefs.

In addition to being the target of hate speech, religion can also be the source of hate speech. In *Gündüz v. Turkey* the applicant was a leader of an Islamic sect who had criticised democracy and called for Sharia law in a televised debate. The applicant had been convicted of incitement to commit an offence and incitement to religious hatred based on religious intolerance targeting non-

Muslims. The Court found that the applicant's rights under Article 10 had been violated. The Court noted, inter alia that

> the mere fact of defending sharia, without calling for violence to establish it, cannot be regarded as "hate speech". Moreover, the applicant's case should be seen in a very particular context. Firstly […], the aim of the programme in question was to present the sect of which the applicant was a leader; secondly, the applicant's extremist views were already known and had been discussed in the public arena and, in particular, were counterbalanced by the intervention of other participants in the programme; and lastly, they were expressed in the course of a pluralistic debate in which the applicant was actively taking part. Accordingly, the Court considers that in the instant case the need for the restriction in issue has not been established convincingly.[203]

Some additional, general remarks on religion as a source of hate speech can be also made based on academic literature. It has been stated that there are at least two possible difficulties in cases concerning religion as a source of hate speech. Firstly, there is the difficulty in determining an individual's intention, which is a difficulty with regard to all expressions allegedly amounting to hate speech. Unquestionable incitement to violence is more likely to be classified as hate speech. The real question concerns reference to scriptural passages according to which, for instance, killing the members of a particular group is justified, and whether they should be read literally or not. Secondly, related to the first problem, the courts may be reluctant to interpret that an expression based on religion would carry a hateful message sufficiently extreme to constitute hate speech.[204] These are aspects one should keep in mind and think critically of when assessing whether expressions based on religion amount to hate speech or not.

5.3.4. Hate Speech and Sexual Orientation

As has been mentioned above, hate speech on grounds of sexual orientation is the newest addition to the list of possible grounds for the Court to consider an expression to fall within the scope of hate speech, and the Court's case law with regard to hate speech based on sexual orientation is still scarce. Nevertheless, a couple of examples can be presented.

The first case concerning hate speech based on sexual orientation, *Vejdeland and Others v. Sweden,* concerned the conviction of applicants who had distributed leaflets against homosexuality in a school. The leaflets claimed homosexuality to be a "deviant sexual proclivity", that homosexuality had a morally destructive effect on society and that it was one of the main causes

[203] para. 51.
[204] Moon, p. 115–116.

of HIV/AIDS. The Court found no violation of Article 10. In a similar vein to its statements in *Féret v. France,* the Court stressed that:

> inciting hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner.

The Court further noted that "discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour". With regard to the "necessary in a democratic society" requirement, the Court reiterated the Swedish Supreme Court's notion of that freedom of expression entails obligations, one of them being to avoid, as far as possible, unwarrantably offensive statements which constitute an assault on their rights. The Supreme Court had found that the statements in the case had been unnecessarily offensive. The Court also paid attention to the fact that the leaflets had been distributed in the lockers of pupils of a delicate age without them having an opportunity to decline to accept them.

Another case concerning hate speech based on sexual orientation is *Lilliendahl v. Iceland* in which the Court found the application inadmissible as being manifestly ill-founded. The case concerned homophobic comments the applicant had made in their response to an online article, for which the applicant was convicted and fined. It was noted that the applicant's comments had been "serious, severely hurtful and prejudicial[205]" and unwarranted with regard to the original decision of measures to strengthen education in schools on matters concerning sexual orientation. The Court first noted that, "although the comments were highly prejudicial", it was "not immediately clear that they aimed at inciting violence and hatred or destroying the rights and freedoms protected by the Convention". Thus, the statements could not be said to fall within the scope of Article 17[206].

The Court then moved on to the assessment of the "second category of hate speech", that is the "'less grave' forms of 'hate speech' which the Court has not considered to fall entirely outside the protection of Article 10 [based on Article 17], but which it has considered permissible for the Contracting States to restrict.[207]" The Court noted that this category includes both speech explicitly calling for violence or other criminal acts, as well as "attacks on persons committed by insulting,

[205] para. 45.
[206] para. 26
[207] para. 35.

holding up to ridicule or slandering specific groups of the population". In those cases which do not explicitly call for violence of other criminal acts, the conclusion of the speech constituting hate speech is made "based on an assessment of the content of the expression and the manner of its delivery".[208] In the context of *Lilliendahl,* the Court found it clear that the comments, including the terms *kynvilla* (sexual deviation) and *kynvillingar* (sexual deviants) to describe homosexuals, especially with regard to them being put together with the expression of disgust, were to be categorised under the second category of hate speech. The assessment was not changed by the fact that the comments were expressed by a member of the general public nor by the fact that the comments were not expressed "from a prominent platform likely to reach a wide audience".[209]

Furthermore, the Council of Europe Committee of Ministers has in 2010 issued a recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity[210]. The recommendation states that "neither cultural, traditional nor religious values, nor the rules of a "dominant culture" can be invoked to justify hate speech or any other form of discrimination, including on grounds of sexual orientation or gender identity." The recommendation further obliges Member States to

> take appropriate measures to combat all forms of expression, including in the media and on the Internet, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against lesbian, gay, bisexual and transgender persons. Such "hate speech" should be prohibited and publicly disavowed whenever it occurs.[211]

The Parliamentary Assembly of the Council of Europe has taken a similar stance in its Resolution on discrimination on the basis of sexual orientation and gender identity[212]. The Resolution calls for Member States to "condemn hate speech and discriminatory statements and effectively protect LGBT people form such statement while respecting freedom of expression. Furthermore, the Resolution provides:

> Hate speech by certain political, religious and other civil society leaders, and hate speech in the media and on the Internet are also of particular concern. The Assembly stresses that it is the paramount duty of all public authorities not only to protect the rights enshrined in human rights instruments in a practical and effective manner, but also to refrain from speech likely to legitimise and fuel

[208] para. 36.
[209] paras. 38 and 39.
[210] Committee of Ministers: Recommendation CM/Rec(2010)5.
[211] para. 6.
[212] Council of Europe Parliamentary Assembly Resolution 1728 (2010) on Discrimination on the basis of sexual orientation and gender identity, adopted by the Assembly on 29 April 2010.

> discrimination or hatred based on intolerance. The boundary between hate speech inciting crime and freedom of expression is to be determined in accordance with the case law of the European Court of Human Rights. [213]

6. Protection Afforded to Religion-Inspired Expressions – Concluding Remarks

The aims set to this thesis were to examine whether religion-inspired expressions published online or presented in media as part of a public discussion are protected under Article 9 of the Convention (freedom of religion) as manifestation of religion, or under Article 10 (freedom of expression). Furthermore, the intention was to determine the circumstances under which religion-inspired expressions published online or presented in media as part of a public discussion could be restricted on the grounds of the expressions allegedly inciting hatred towards homosexuals.

Firstly, the assessment of whether the expressions in question fall within the scope of Article 9 as manifestation of religion requires primarily examining of what the Court perceives as manifestation of religion. It has to be noted, however, that the examination within this thesis is not limited to a specific religion, but aims to cover religion-inspired expressions in a more general manner. Accordingly, the interpretations and views presented here remain on a general level and are not directly applicable to a specific religion. In an individual case the Court would take into account also the practices of manifestation of the religion in question in a more detailed manner.

To begin with, Article 9 of the Convention mentions four forms of manifestation of religion which fall within the scope of freedom of religion: worship, teaching, practice and observance. These forms of manifestation are not exclusive. In other words, a single act can be interpreted to fall within the scope of several forms of manifestation. Thus, the religion-inspired expressions examined in this thesis could, in principle, be protected under freedom of religion as more than one form of manifestation.

In this respect it can be noted that the Court has in its case law defined some general requirements for an act to be considered as manifestation of religion. Firstly, there must exist an intimate link between the act itself and the religion in question. Moreover, the Court may consider as

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[213] paras. 7 and 16.4.

manifestation of religion an act which forms part of the practice of a religion in a generally recognised form. Simply interpreted this would signify that all the acts an individual perceives as responsibilities caused by religion would be considered manifestation of religion. However, the interpretation is not as straightforward. The Court has stressed that not all acts motivated or influenced by a religion are protected as manifestation of religion as enshrined in Article 9 (1) of the Convention.

Based on the Court's case law, some forms of manifestation appear to be clearer in their content than others. For example, manifestation of religion through worship refers to acts such as ritual and ceremonial acts, religious rites and celebration of religious holidays. Thus, it appears that manifestation of religion through practice covers such acts which are extremely intimately linked with practicing the religion in question and which have a fundamental meaning with regard to practicing the religion.

Manifestation of religion through observance, for one, refers widely to complying with religious customs. The Court has in its case law found that manifestation of religion through observance encompasses, for instance, wearing a cross, celebrating religious holidays and obeying religious dietary requirements. This thesis examines the assessment of religion-inspired texts published online and presented in media as part of a public discussion. Taking into account the nature and intention of the expressions examined, it seems safe to assume that the expressions would not be interpreted as manifestation of religion through worship nor as manifestation of religion through observance.

According to the Court's case law, manifestation of religion through teaching includes both teaching and proselytising. In principle, in certain circumstances it could be possible that teaching or proselytising was practiced online or maybe even in media. However, in this context of expressions presented as part of a public discussion, which are examined within this thesis, it seems unlikely that the expressions would fall within the scope of freedom of religion as manifestation of religion through teaching.

A slightly more detailed discussion appears to be in order with regard to assessing whether said expressions could be considered manifestation of religion through practice. The case law of the Court does not comprehensively define which kinds of acts could be considered as manifestation through practice. With this regard, the assessment is highly affected by the above-mentioned

general requirements for an act to be considered manifestation of religion, that is the existence of an intimate link between the act and the religion in question, or the fact that the act forms part of the practice of a religion in a generally recognised form.

The first question with regard to the expressions examined within the context of this thesis is whether or not the expressions form part of the practice of a religion in a generally recognised form. It seems safe to assume that expressions published online or presented in media as part of a public discussion are not, *per se*, acts which would be considered practising any religion in their generally recognised form. The question remaining is whether such an intimate link exists between the expressions and religion based on which the expressions would fall within the scope of Article 9 as manifestation of religion through practice.

The Court has in its case law stressed that freedom of religion protects primarily *forum internum*, and based on the Court's case law it does not appear that the Court would be willing to interpret the scope of manifestation through practice in a particularly wide manner, or to widen the scope to include such acts which do not have a clear and visible link to the religion inspiring the act. In its existing case law, the Court has considered manifestation of religion through practice to encompass mostly wearing religious clothing and accessorises, and in one case interpreted that the refusal to take part in swimming lessons in school fell within the scope of manifestation of religion through practice. The Court has furthermore ruled that, for instance, refusing to sell contraceptive pills in a professional role does not fall within the scope of freedom of religion as manifestation of religion through practice.

Moreover, in some cases, the Court has stated that even those acts which do not form part of the core concepts of a religion could be interpreted as manifestation of religion through practice protected by Article 9 (1). This is the case especially when the act in question is deeply rooted into practice and is generally considered a form of manifestation and practicing the religion. In its case law, the Court has emphasised, for instance, the motivation of the act as a determining factor – if the act has been motivated by something else than manifestation of religion, it does not enjoy the protection afforded by Article 9 (1).

These factors have to be assessed within the context of this thesis, namely the context of religion-inspired expressions published online or presented in media as part of a public discussion. First, it can be noted that these expressions are undoubtedly motivated by religion. However, based on the

nature of the expressions, as well as on the Court's interpretations, it appears that they cannot be considered acts deeply rooted into practice which would generally be considered a form of manifestation and practicing religion. Furthermore, with regard to the acts the Court has considered as manifestation of religion through practice, it seems unlikely that the expressions examined within this thesis would be considered as manifestation of religion through practice.

It has to be noted that the Court's case law is of an evolving nature, and the interpretations made by the Court may change over time. The existing case law does, therefore, not provide with an exclusive interpretation of what kinds of acts are to be considered manifestation of religion through practice. However, taking into account all the above presented, it seems highly unlikely that these expressions would fall within the scope of freedom of religion as manifestation through practice or any other forms of manifestation of religion as recognised in Article 9 (1).

Therefore, the Court's interpretation of religion-inspired expressions published online or presented in media as part of a public discussion is likely to concern an issue of religiously motivated speech. In this case the case would most likely be assessed under freedom of expression as enshrined in Article 10 of the Convention. This steers the discussion to the second research question, namely that of the extent to which religion-inspired expressions published online or presented in media as part of a public discussion are protected under Article 10 of the Convention.

According to the Court, freedom of expression is in a particularly significant role in a democratic society. The scope of freedom of expression as enshrined in Article 10 is wide, and it covers several different types of forms of expressions. These include, but are not limited to, expressions made both orally and in writing and those presented, for instance, in media or published online. Furthermore, according to the Court's case law, freedom of expression covers both information and ideas which are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the State or any sector of the population. The status of the person behind the expressions is not relevant with regard to the assessment of the applicability of freedom of expression as enshrined in Article 10, as the freedom applies, in principle, to everyone.

When assessing freedom of expression, the Court takes into account for instance the contents of the expression, the subject of the expression as well as the possible national significance of the expression. The Court has in its case law stated that the functioning of a democratic society

requires free political debate. This is why freedom of expression in within the context of political debate as well as a debate of public interest enjoy special protection under freedom of expression. A debate of public interest could cover widely different types of issues of societal interest, such as political issues or matters of serious societal nature, but also issues of economic or religious nature. Interfering with political debate or a debate of public interest is permissible only exceptionally.

Thus, based on the Court's case law, expressions published online or presented in media would, in principle, fall within the scope of freedom of expression as enshrined in Article 10 of the Convention whether or not they were inspired by religion. Furthermore, because the expressions in question have been presented as part of a public discussion, they enjoy an even stronger protection under Article 10 than expressions presented in another context would. With regard to the particular importance given to a discussion of general interest, the media which have been used for the distribution of the expressions in question are, in principle, irrelevant. However, the status of the person behind the expressions could be of relevance when assessing the strength of the protection afforded by Article 10. For instance, if the expressions were made by a politically elected representative of the people, the expressions would in principle enjoy a stronger protection than those made by an average citizen.

As has been noted above, freedom of expression covers, *per se*, also expressions which offend, shock and disturb States or any sector of the population. Even though the scope of application of Article 10 is a wide one, it also carries with it certain duties and responsibilities as is mentioned in Article 10 (2). According to the Court's case law, these duties and responsibilities include, *inter alia*, the responsibility to avoid, as far as possible, gratuitously offensive expressions which are offensive to others and thus infringe their rights. These kinds of expressions do not contribute to any form of public debate which would be capable of furthering progress in human affairs. According to the Court, the duties and responsibilities provided by Article 10 (2) apply also to expressions based on religion.

Therefore, whether or not the expressions examined within the context of this thesis fall within the scope of freedom of expression depends also on the content of the expressions. This brings us to the examination of the third and final research question, namely under what circumstances can religion-inspired expressions published online or presented in media as part of a public discussion be restricted based on expressions allegedly inciting hatred towards homosexuals.

It has been concluded above that it is unlikely that the expressions would fall within the scope of freedom of religion as enshrined in Article 9 of the Convention. Therefore, it is not necessary to assess the grounds for interfering with Article 9 in these conclusions. The focus is directed solely on assessing under which circumstances Article 10 is applicable. The discussion will also cover the question of whether freedom of expression as enshrined in Article 10 can be interfered with, and under which circumstances, when the expressions in questions are allegedly inciting hatred towards homosexuals. Once again, it should be reminded that the question concerns public discussion of a general interest, which, according to the Court's case law, can only be interfered with exceptionally. Interferences are considered acceptable, for example, when the expressions in question constitute hate speech.

Thus, the central question within the context of this thesis is whether the allegedly hateful expressions can be considered to constitute hate speech as meant by the Court. The Court has not defined in a comprehensive manner what it perceives as hate speech. In its case law, the Court has on a general level stated that expressions spreading, inciting, promoting or justifying hatred based on intolerance constitute hate speech. To date, the Court has recognised political hate speech, racist hate speech, hate speech based on religion and, as the latest edition, hate speech based on sexual orientation as forms of hate speech.

If the Court was to consider an expression to constitute hate speech, it would have two opportunities: either to apply Article 17 (prohibition of abuse of rights) or to assess the case under the general requirements for interferences as provided by Article 10 (2). Article 17 is applied in cases in which the statements in question negate the fundamental values of the Convention. With regard to hate speech, Article 17 has been applied only in extreme cases concerning, for instance, promoting anti-Semitist, fascist and racist ways of thought. If the Court was to apply Article 17, the expressions in question would not fall at all within the scope of freedom of expression. It has to be noted, however, that Article 17 has been applied only rarely. Therefore, it is more likely that the expressions were to be assessed under the general requirements for interferences provided for in Article 10 (2).

As it has been mentioned above, should the expressions examined within this thesis be considered as an interference of freedom of expression, the Court would assess the case based on general requirements for restricting freedom of expression. Article 10 (2) provides that interferences with

freedom of expression must be prescribed by law, pursue a legitimate aim and be necessary in a democratic society. The research questions examined within the context of this thesis are general, which is why the first requirement cannot be assessed in this context. It should be kept in mind, however, that the interference must be prescribed by law as enshrined in Article 10 (2) and interpreted by the Court in its case law. The legitimate aim pursued would, in the context of this thesis, be the protection of the rights of others, which is one of the legitimate aims mentioned in paragraph 2 of Article 10. According to the Court's case law, protecting the rights of others encompasses the rights of homosexuals from the perspective of, for instance, the prohibition of discrimination.

The final requirement is that the infringement must be necessary in a democratic society. In other words, the infringement must be dictated by a pressing social need and be proportionate with regard to the aim pursued. There must, therefore, exist a balance between the interests served and the interests harmed by the interference. This assessment is usually left for the States to make under the margin of appreciation, while the Court would only supervise that the assessment does did not interfere with the rights and freedoms guaranteed in the Convention.

Because of the general approach of this thesis, it is not possible to examine in detail whether or not the interferences with freedom of expression would be considered necessary in a democratic society if they were based on remarks allegedly inciting hatred towards homosexuals. However, the assessment of whether the expressions in question constitute hate speech is deeply rooted in the Court's assessment of whether an interference had been necessary in a democratic society. In the cases in which the Court has found the expressions to constitute hate speech, it has found the interferences permissible. Thus, a more general discussion on the definitions and criteria the Court takes into account when assessing whether an expression amounts to hate speech, is in order.

As has been discussed above, the Court has not defined hate speech. Moreover, it has to be noted that since the Court's case law is based on the assessment of individual cases, it is not possible to determine comprehensively what kinds of expressions are considered acceptable and what kinds of expressions would be considered hate speech. The contents of the expressions examined within this thesis, nor the person behind them, the medium used or other individual facts have not been defined. Therefore, it is not possible to comprehensively assess whether restricting freedom of expression based on expressions allegedly inciting hatred towards homosexuals would be

considered a violation of freedom of expression or not. However, even in the absence of an express definition and without access to individual circumstances, it is possible to make some general observations based on the Court's case law.

When assessing whether or not an expression constitutes hate speech, the Court assesses the content of the expression. In its case law, the Court has stressed that inciting hatred does not necessarily entail a call for an act of violence or other criminal acts, but that attacks committed by insulting, holding up to ridicule or slandering the specific groups of the population can also be regarded as hate speech. Thus, the concept of hate speech is a rather wide one, and it is not solely limited to expressions directly calling for, for instance, acts of violence. The Court has considered as hate speech for example, flyers which claim homosexuality to be a "deviant sexual proclivity" and which state that homosexuality had a morally destructive effect on society and was one of the main causes of HIV/AIDS. Furthermore, the Court has found that the use of terms such as "sexual deviation" and "sexual deviants" to describe homosexuals combined with the expressions of disgust, were to be categorised under the category of hate speech.

The Court also places importance on the context in which the expressions have been presented. The context can refer to, for example, a debate of a public interest, which is held in a significant status with regard to freedom of expression. The Court has in its case law assessed, for instance, extremist views presented during a live television show. In this context the Court considered as an extenuating circumstance the fact that the expressions were presented as part of a pluralistic debate in which the applicant participated actively, that they were balanced by other participants of the show, as well as the fact that the views were already known and had been discussed in the public arena. It may be necessary to keep in mind that in its recent case law, the Court has been noted to have been giving less weight to the need for a political debate and more weight on the need for tolerance and equal dignity of all human beings. Moreover, it has to be noted that in addition to an alleged connection to a political debate or a debate of a general interest, the Court also needs to find that there exists an actual connection between the expressions and the political or generally interesting debate.

In addition to the above mentioned, the Court may also assess the ideology behind the expressions. In this regard it has to be reiterated that based on Article 10 (2), individuals are obliged to refrain from expressions which are gratuitously offensive to others and thus infringe their rights. This

obligation applies even in cases in which the expressions are based on an individual's ideology, such as religion. Therefore, religion by itself does not justify offensive expressions which infringe the rights of others.

When assessing whether or not the expressions constitute hate speech, the Court also takes into account the intention behind the expressions. The Court may evaluate whether the person behind the expressions intended to use the expressions to convey racist ideas and opinions, or whether their intention was, for instance, to provide the public information on a societally significant issue. For example, when assessing the significance of presenting extremist views on a live television show the Court has stressed as an extenuating circumstance the fact the views were presented as part of a political debate and made on a live television show, in the context of which it was not possible to, for instance, rephrase the comments. On the other hand, when assessing the responsibility of a journalist the Court has stressed again as an extenuating circumstance the fact that the intention of the journalist had been to analyse and explain the views of a racist group, which already were an issue of a public concern.

As has been mentioned above, the status of the person behind the expressions may as well be of relevance. Politicians and journalists enjoy a special protection under freedom of expression. When assessing the protection of journalists' freedom of expression, the Court has emphasised their role as "public watchdogs" and the fact that one of the most significant ways to fulfil this role is through news reporting based on interviews. Therefore, the Court has found that a journalist's freedom of expression could not be interfered with based on the fact that the people they interviewed had presented expressions comparable to hate speech. Nevertheless, the protection awarded to journalists and politicians is not unlimited. For instance, because of their status, politicians are under an obligation to avoid disseminating comments in their public speeches which are likely to foster intolerance. Thus, the status does not justify hateful expressions, despite the fact that political speech enjoys a wider protection of freedom of expression. Other kind of status may also have an effect on the Court's evaluation. For instance, the Court has found that a football player who was considered as a role model to others should have been more careful with regard to the possible actions of their expressions. Nevertheless, the Court does not require that the person behind hate speech is a person of a special status. For example, in *Lilliendahl v. Iceland,* the expressions considered as hate speech were presented by a member of the general public.

Furthermore, the Court may place weight on the forum on which the expressions have been presented. In *Vejdeland and Others v. Sweden,* the Court emphasised the fact that the leaflets inciting hatred towards homosexuals were distributed in the lockers of pupils of a delicate age without them having an opportunity to decline or accept them. In *Lilliendahl v. Iceland,* for one, the Court assessed views insulting homosexuals which were written as comments to an article published online. In this context the Court found irrelevant the fact that these views were presented on a platform which was unlikely to reach a wide audience. In *Gündüz v. Turkey,* the Court took into account the fact that because the views were presented on a live television show, the person behind them did not have an opportunity to rephrase them or to withdraw the statements before they were made public. Written and audio-visual media enjoy, as it is, a wide protection because of the significant status freedom of the press has societally and with regard to the functioning of a democratic society.

Finally, the Court may take into account the sanction or other consequence the expressions have led to. A sanction or a consequence too severe may lead to that the interference is not considered acceptable. In its assessment, the Court places importance on the nature of the interferences as well as their influence on the case and more generally. The Court considers it crucial that the interferences do not create a chilling effect to a debate concerning matters of legitimate public interest.

To conclude, it appears unlikely that religion-inspired expressions published online or presented in media as part of a public discussion would be considered to fall within the scope of freedom of religion as enshrined in Article 9 of the Convention. However, it seems likely that they would fall within the scope of freedom of expression as enshrined in Article 10 of the Convention. In this case an interference with the freedom of expression would most likely be assessed based on the requirements set out in paragraph 2 of Article 10, instead of Article 17, namely the requirements of the interference being described by law, pursuing a legitimate aim and being necessary in a democratic society. This assessment is usually left for States, while the Court supervises that it is done in accordance with the Convention.

As it has been mentioned several times above, political debate and discussions of a public interest can, in principle, be restricted only exceptionally. With regard to the above presented, it appears unquestionable that hateful expressions concerning homosexuals can be considered a ground to

interfere with freedom of expression even in the context of a political or publicly interesting debate mainly on the grounds of Article 10 (2), if the Court finds that these expressions constitute hate speech. Because the specificities concerning the expressions examined within this thesis, such as the question of the person behind the expressions, the forum, the more precise content of the expression as well as all the other individual circumstances, are left undetermined, it is not possible to assess the acceptability of the interference in more detail. However, the above-mentioned factors, which the Court would likely take into account, provide for a more general approach and guidance to the application of Article 10 (2). How the Court would balance and assess each factor and assess the general requirements for an interference to be considered justifiable under Article 10 (2), depends on the individual circumstances of a particular case.

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ÅBO AKADEMI – FACULTY OF SOCIAL SCIENCES, BUSINESS AND ECONOMICS

Abstract for Master´s Thesis

<table>
<tr><td colspan="2">Subject: Public International Law, Master´s Degree Programme in International Human Rights Law</td></tr>
<tr><td colspan="2">Author: Alexandra Strandén</td></tr>
<tr><td colspan="2">Title of the Thesis: Not Every Act Motivated by Religion is Protected – The interrelations between freedom of religion, freedom of expression and hate speech based on sexual orientation in the case law of the European Court of Human Rights</td></tr>
<tr><td>Supevisor: Catarina Krause</td><td>Supevisor:</td></tr>
<tr><td colspan="2">This thesis examines the interrelation between two freedoms enshrined in the European Convention on Human Rights, namely freedom of religion, freedom of expression, and hate speech based on sexual orientation as they are interpreted by the European Court of Human Rights. The inspiration for the thesis comes from a national case in which a Member of the Parliament has defended their religion-inspired expressions, which allegedly incite hatred towards homosexuals, by stating that they fall within the scope of their freedom of religion and freedom of expression. The national case is not assessed further within the scope of this thesis. However, the case raises a more general question on how and in what kinds of circumstances religion-inspired expressions which are allegedly hateful can be considered justified based on freedom of religion or freedom of expression. Thus, the examination within this thesis is kept on a general level instead of assessing these interrelations from the perspective of defined circumstances of an individual case. The themes covered are, nevertheless, somewhat narrowed in the research questions to limit the scope of the thesis.

This thesis aims to answer the following three research questions: 1) To what extent are religion-inspired expressions published online or presented in media as part of a public discussion protected under Article 9 of the Convention (freedom of religion) as manifestation of religion?; 2) To what extent are religion-inspired expressions published online or presented in media as part of a public discussion protected under Article 10 of the Convention (freedom of expression)?; and 3) Under what circumstances can religion-inspired expressions published online or presented</td></tr>
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in media as part of a public discussion be restricted on the grounds of expressions allegedly inciting hatred towards homosexuals?

Answering these questions requires a more detailed discussion on freedom of religion and freedom of expression as well as the requirements for interferences with these rights both from the perspective of the Convention and the Court's case law. In addition, an analysis of especially the Court's case law is required with regard to the definitions and interpretations concerning the concept of hate speech, which is not expressly mentioned in the European Convention on Human Rights. The examination is mainly conducted through the analysis of the Convention and the Court's case law interpreting the Convention. As necessary, legal literature and other documents prepared by the Council of Europe bodies are taken into account.

Based on the Court's case law examined within the context of this thesis, it appears unlikely that the expressions referred to in the research questions would be considered manifestation of religion as protected by freedom of religion in Article 9 of the Convention. Therefore, it is considered unnecessary to assess further the permissibility of interferences with freedom of religion. Instead, it is considered likely that the expressions would fall within the scope of freedom of expression as enshrined in Article 10 of the Convention. According to the Court's case law, the expressions enjoy a wide protection of freedom of expression especially as part of a public discussion. Nevertheless, it is possible to interfere with this freedom under certain conditions mentioned in paragraph 2 of Article 10. The Court has interpreted these conditions to include hate speech. Based on the Court's case law it is clear that hate speech concerning, among others, homosexuals can be a ground to restrict freedom of expression. This thesis is concluded by presenting those factors the Court might take into account in determining that expressions allegedly inciting hatred towards homosexuals were to be considered hate speech, and based on which interferences with freedom of expression could, thus, be permissible.

Key words: Human Rights, European Convention on Human Rights, European Court of Human Rights, Freedom of Religion, Freedom of Expression, Hate Speech, LGBT Rights	
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