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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT PRELIMINARY REPORT**

**ON THE NATIONAL LEGISLATION IN EUROPE  
CONCERNING BLASPHEMY, RELIGIOUS INSULTS  
AND INCITING RELIGIOUS HATRED**

**Prepared on the basis of comments by**

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## I. Introduction

1. In its Resolution 1510(2006) on Freedom of expression and respect for religious beliefs<sup>1</sup>, the Parliamentary Assembly of the Council of Europe addressed the question of whether and to what extent respect for religious beliefs should limit freedom of expression. It expressed the view that freedom of expression should not be further restricted to meet increasing sensitivities of certain religious groups, but underlined that hate speech against any religious group was incompatible with the European Convention on Human Rights. The Assembly resolved to revert to this issue on the basis of a report on legislation relating to blasphemy, religious insults and hate speech against persons on grounds of their religion, after taking stock of the different approaches in Europe, including [...] the report and recommendations [...] of the Venice Commission.

2. By a letter of 11 October 2006, the Secretariat of the Parliamentary Assembly, on behalf of Mrs Sinikka Hurskainen, Rapporteur of the Committee on Culture, Science and Education on this matter, requested the Venice Commission to prepare an overview of national law and practice concerning blasphemy and related offences with a religious aspect in Europe.

3. A working group was promptly set up within the Venice Commission, composed of Mr Pieter van Dijk (member, the Netherlands), Ms Finola Flanagan (member, Ireland) and Ms Hanna Suchocka (member, Poland). Mr Louis-Léon Christians, Professor at University Louvain, Belgium, was invited to join the group as an expert and to collect the domestic provisions relating to blasphemy, religious insults and incitement to hatred of the Council of Europe members States. Mr Christians' preliminary report was submitted to the Venice Commission in December 2006; it was subsequently supplemented and updated, where necessary, by the Commission members, and finalised by the Secretariat (CDL-FR(2007)003). It collects the legal provisions which are in force in all CoE member States, and contains some references to the relevant case-law of the national courts.

4. A preliminary discussion of the request submitted to the Venice Commission took place at the meeting of the Sub-commission on Fundamental Rights which was held in Venice on 13 December 2006. At this meeting, in the light of the impossibility, under the applicable time constraints, to dispose of exhaustive information on the practice and case-law of all CoE member States, it was decided to send a more detailed questionnaire to a selected number of countries in order to obtain some indication of current trends and problems in Europe, as well as of related legal practices. The questionnaire was sent to twelve States (Albania, Austria, Belgium, Denmark, France, Greece, Ireland, the Netherlands, Poland, Romania, Turkey, the United Kingdom). Ten replies were received (CDL-FR(2007)002).

5. The working group also relied on the material and information collected by the Committee of Experts for the Development of Human Rights (DH-DEV) relating to the national legislation on hate speech<sup>2</sup>.

6. The Working group exchanged information with the above Committee of Experts as well as with the Secretariat of the European Commission against Racism and Intolerance (ECRI)<sup>3</sup> and wishes to thank them for the fruitful co-operation.

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<sup>1</sup> Adopted by the Parliamentary Assembly on 28 June 2006 (19th sitting)

<sup>2</sup> GT-DH-DV A (2006)008 Addendum, Human Rights in a Multicultural Society, Compilation of the replies received from the member States to the questionnaire on hate speech. This information concerns 37 countries.

<sup>3</sup> [http://www.coe.int/T/e/human\\_rights/ecri/1-ECRI](http://www.coe.int/T/e/human_rights/ecri/1-ECRI)

7. *The Commission was given a rather limited time for preparing this report. As it understands that the Committee on Culture, Science and Education wishes to receive some input before its meeting in April, the Commission prepared a brief analysis and preliminary conclusions, which cannot however be considered as exhaustive. The Commission wishes to continue to reflect on this matter and will produce a more thorough report in due time.*

8. *The present report was discussed at the meeting of the Sub-Commission on Fundamental Rights on 15 March 2007 and was subsequently adopted by the Commission at its ... Plenary Session (Venice, ..).*

## **II. General Remarks**

9. Freedom of expression, guaranteed by Article 10 of the European Convention on Human Rights, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, 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.<sup>4</sup>

10. There is a growing awareness within Europe that freedom of expression, although a fundamental right and a crucial one in a democracy, may and should be restricted to prohibit the expression of opinions that amount to incitement to violence, hate and/or discrimination. Far more controversial is the extent to which it is necessary to restrict freedom of expression in order to protect the religious beliefs and practices of certain individuals and groups of persons.

11. Indeed, the second paragraph of Article 10 provides that the exercise of the freedom of expression, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and 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.

12. Ensuring respect for the religious beliefs of others pursues the aims of "protection of the rights and freedoms of others" and of "protecting public order and safety", which are legitimate aims to restrict the right to freedom of expression.<sup>5</sup> Indeed, States have an obligation to protect religious beliefs from unwarranted or offensive attacks, in order to guarantee religious peace.<sup>6</sup> However, the concepts of pluralism, tolerance and broadmindedness on which any democratic society is based, mean that the right to freedom of expression does not, as such, envisage that an individual is to be protected from exposure to a religious view simply because it is not his or her own.<sup>7</sup>

13. Amongst the duties and responsibilities of those who exercise their right freely to express their opinion, in the context of religious opinions and beliefs the obligation may legitimately be included to avoid as far as possible expressions that are gratuitously offensive to others and

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<sup>4</sup> See ECtHR, *Giniewski v. France* judgment of 31 January 2006, § 43.

<sup>5</sup> See inter alia ECtHR, *Murphy v. Ireland* judgment of 10 July 2003, § 64

<sup>6</sup> ECtHR, *Otto-Preminger-Institut*, cit.

<sup>7</sup> *Murphy*, cit. § 72.

thus constitute an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.<sup>8</sup>

14. In this context, it can be observed that, despite the progressive secularisation of Europe, there is a growing interest in the protection of religious feelings as part of the right to respect for one's religion and beliefs. As was seen above, respect for the religious feelings of believers as guaranteed *inter alia* in Article 9 of the European Convention on Human Rights can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration or offensive attacks on religious principles and dogmas; these may in certain circumstances be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society<sup>9</sup>. The Convention is to be read as a whole and therefore the interpretation and application of Article 10 must be in harmony with the logic of Article 9, and of the Convention as a whole (see also Article 17).

15. In a democratic society, as is explained above, the right to freedom of expression – which includes the right for an individual to impart to the public controversial views and, by implication, the right of interested persons to take cognisance of such views - must be weighed against the need to allow others the enjoyment of their right to respect for their religion and beliefs as well as against the general interest to preserve public order (including “religious peace”).

16. Restrictions to the right to freedom of expression must be made “in accordance with the law”. The nature and quality of the domestic legislation is therefore important, and so are the interpretation and application of the law, which depend on practice. Indeed, domestic law is interpreted and applied by domestic courts, which are responsible for bringing about the balance of interests and deciding whether an interference with the right to freedom of expression is necessary in a democratic society, and notably is proportionate to the legitimate aims pursued.

17. Member States enjoy a certain but not unlimited margin of appreciation. The absence of a uniform European concept of the requirements of the protection of the rights of others in relation to attacks on their religious convictions broadens the Contracting States' margin of appreciation when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or religion.<sup>10</sup>

18. A prohibition or limitation of freedom of expression may be justified on the basis of Article 17 of the European Convention on Human Rights, which prohibits the use of a right or freedom with the aim of destructing any of the rights or freedoms of others or their limitation to a greater extent than is provided by the Convention<sup>11</sup>. No one may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the rights and freedoms guaranteed by the Convention<sup>12</sup>. No one is allowed to abuse of their right to freedom of expression to destroy or unduly diminish the right to respect for the religious beliefs of others.

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<sup>8</sup> See ECtHR, *Otto-Preminger-Institut v. Austria* judgment of 20 September 1994, § 49.

<sup>9</sup> ECtHR, *Otto-Preminger-Institut*, cit. § 47

<sup>10</sup> ECtHR, *Giniewski*, cit., § 44; *Aydin Tatlan v. Turkey* judgment of 2 May 2006, §§ 26,27..

<sup>11</sup> ECtHR, *Garaudy v. France*, dec. 24 June 2003.

<sup>12</sup> ECtHR, *Lawless v. Ireland*, judgment of 1 July 1961, Series A no. 3, p. 45, § 7.

### III. National legislation on blasphemy, religious insults and inciting religious hatred

19. The Parliamentary Assembly requested an overview of the legislation of the Council of Europe member States in regard of religious offences within the context of the reciprocal limitations of freedom of expression and freedom of religion.

20. The following question therefore arises:

to what extent is the relevant domestic legislation (mostly criminal) adequate and/or effective for the purpose of bringing about the appropriate balance between the right to freedom of expression and the right to respect for one's beliefs, and is there a need for supplementary legislation?

21. The Commission observes in the first place that the European Commission against Racism and Intolerance, in its general policy recommendation N°7<sup>13</sup>, has made *inter alia* the following, relevant recommendations concerning domestic criminal legislation:

"18. The law should penalise the following acts when committed intentionally:

- a) public incitement to violence, hatred or discrimination,
- b) public insults and defamation or
- c) threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;
- d) the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;
- e) the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes;
- f) the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, with a racist aim, of written, pictorial or other material containing manifestations covered by paragraphs 18 a), b), c), d) and e); [...]

22. The Commission notes that practically all Council of Europe member States (with the apparent exception of Andorra, Georgia, Luxemburg and San Marino) provide for an offence of incitement to hatred. The term "hatred" in the domestic legislation generally covers racial, national and religious hatred in the same manner<sup>14</sup> (at times also hatred on the ground of sex or sexual orientations, political convictions, language, social status, physical or mental disability). In some countries, the incitement to hatred must disturb the public order in order for it to become an offence (Albania, Armenia, Austria, Germany). The intention to stir up hatred is generally, and the public character of the act in question always is a necessary element of the offence.

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<sup>13</sup> ECRI general policy recommendation N°7 on national legislation to combat racism and racial discrimination, Adopted by ECRI on 13 December 2002, at [http://www.coe.int/t/e/human\\_rights/ecri/1-ecri/3-general\\_themes/1-policy\\_recommendations/recommendation\\_n7/3-Recommendation\\_7.asp](http://www.coe.int/t/e/human_rights/ecri/1-ecri/3-general_themes/1-policy_recommendations/recommendation_n7/3-Recommendation_7.asp)

<sup>14</sup> In its policy recommendation cited above, ECRI uses "racism" to mean "the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons"; ECRI uses "direct racial discrimination" to mean "any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification." It must be noted however that the European Court of Human Rights has recently stated that "no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures." (Eur.Court HR, *Timishev v. Russia* judgment of 13 December 2005 (final on 13 March 2006), § 58).

23. Most States provide for specific, more stringent or severe provisions relating to incitement to hatred through the mass media.

24. *Religious* insults are a criminal offence in only a little more than half the member States (while insult as such is generally considered as a criminal or administrative offence in all countries). “Negationism” is an offence in few countries (Austria, Belgium, France, Switzerland).

25. Blasphemy is an offence in only a minority of member States (ten) and where it is an offence, it is, nowadays, rarely prosecuted. This may be explained, in part, by the circumstance that in most European States there is less religious homogeneity today than there was at the time when these provisions were established.

26. The Commission notes that the boundaries between religious insult and hate speech are easily blurred, and the dividing line, in an insulting speech, between the expression of ideas and the incitement to actions is often difficult to identify. (The same is true for hate speech, but that offence in most countries specifically consists in the incitement to mere *hatred*, not only to violent acts). The question arises whether it would be desirable to criminalise *religious* insults or rather to introduce a specific offence of “incitement to religious hatred” as was recently done, after a very long debate, in the United Kingdom (England and Wales).

27. The Commission observes that when it comes to freedom of expression, there appears to be a difference between racist insults and religious insults: while race is inherited and unchangeable, religion is not, and is instead based on principles and values which the believer will tend to hold as the only truth<sup>15</sup>. This would seem to admit as lawful a wider scope of criticism in respect of a religion than of disrespect in respect of a race. On the other hand, it cannot be forgotten that international instruments and most domestic legislation put race and religion on an equal footing as forbidden grounds for discrimination and intolerance.

28. In addition, it must be noted that an insult to a principle or a dogma, or to a representative of a religion does not necessarily amount to an insult to an individual who believes in that religion. The difference between group libel and individual libel may be disputable, although the European Court of Human Rights has recently made clear that an attack on a representative of a church does not automatically discredit and disparage a sector of the population on account of their faith in the relevant religion<sup>16</sup> and that criticism of a doctrine does not necessarily contain attacks on religious beliefs as such<sup>17</sup>.

29. The Commission is cognizant that these matters are extremely sensitive and complex. In order to reach a conclusion, the Commission intends to take a pragmatic approach in assessing possible advantages and disadvantages of a supplementary legislative intervention in this area.

30. Among the advantages, the following could be cited. Such legislative intervention may afford better protection of vulnerable religious groups and of the religious feelings of their members. It may also give a powerful signal to everyone, both potential victims and potential perpetrators, that gratuitously offensive statements and publications are not tolerated in an effective democracy.

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<sup>15</sup> Admittedly, the boundaries between race and religion are unclear. See, as a recent example, European Commission, Religion and belief discrimination in Employment – the EU law, Part V, pp. 34-35, November 2006.

<sup>16</sup> ECtHR, Klein v. Slovakia, judgment of 31 October 2006, § 51

<sup>17</sup> ECtHR, Giniewski, cit. § 51

31. On the other hand, one has to be aware of certain counter-productive effects of such efforts. New, specific legislation might raise expectations concerning prosecution and condemnation that will not be met, on account of problems of proof or for reasons of opportunity within the discretionary powers of the prosecuting authorities. Moreover, too activist an attitude on the part of the latter authorities may place the suspect persons or groups in the position of underdog, and provide them and their goal with propaganda and public support (the role of martyrs). In addition, the intention of the accused speaker or author, the effects of his action and the political; social or scientific context in which the contested statements or publications are made, constitute elements that may be problematic to evaluate and balance for the prosecuting authorities and the courts.

32. On balance, the Commission has reached the conclusion, on the basis of the information provided about the situation at national level, that there is no general need to enact new legislation. It is more useful to focus on the full and correct implementation of the existing legislation, which seems to offer the potential to achieve the aim of a good balancing of the fundamental rights at issue. Courts are well placed to enforce rules of law in relation to these issues and to take into account the facts of each situation.

33. This does not mean, however, that there should not be broad public debates on these matters. Courts must reflect public opinion in their decisions, or the latter risk not to be understood and accepted, and to lack legitimization..

34. As concerns the "increasing sensitivities of certain religious groups", which is the expression used by the Parliamentary Assembly, the Commission considers that they must certainly be taken into due account by the national authorities when they are to decide whether or not a restriction to the freedom of expression is to be imposed and implemented. In this respect, any general statement as to whether these sensitivities should be allowed to restrict freedom of expression is incorrect and misleading. Apart from "the rights of others", protection of public order and safety is one of the legitimate aims for restricting freedom of expression: when the sensitivities become unrest and threaten the public peace, States may have to take appropriate measures; they have a broad margin of appreciation in this respect.

35. At the same time, the threshold of sensitivity of certain religious group may be too low in certain specific circumstances, and this should not become of itself a reason to prevent any form of discussion on religious matters involving that particular religion: the right to freedom of expression in a democratic society would otherwise be jeopardised. For this reason, the recommendations of PACE, ECRI and many others as to the need to promote dialogue and encourage an ethic of communication for both the media and the religious groups should be taken up by way of urgency. Education should also be seen as an essential tool in this respect.

#### **IV. Preliminary conclusions**

36. In the limited time of which it disposed, the Commission could only reach preliminary conclusions, which must in no way be considered exhaustive or final.

37. Practically all Council of Europe member States have enacted legislation to combat incitement to hatred, which includes religious hatred. Most States provide for specific, more stringent or severe provisions relating to incitement to hatred through the mass media. Religious insults are a criminal offence in only a little more than half the member States. Negationism is an offence in certain countries. Blasphemy is an offence in only a minority of member States and where it is one, it is, nowadays, rarely prosecuted.

38. Extending the criminalisation of specific *religious* insults might have advantages and disadvantages. As for the advantages, the following could be cited: it would allow a better protection of vulnerable religious groups and of the religious feelings of their members, and it

would give a powerful signal to everyone, both potential victims and potential perpetrators, that gratuitously offensive statements and publications are not tolerated in an effective democracy. In this way, it would also serve the interest of the prevention of disorder and crime. As for the disadvantages, raising expectations as to the prosecution of religious offenders might prove unrealistic, in the light of the difficulty of proving these offences, while too activist an attitude on the part of the prosecuting authorities could create “martyrs” and amplify the propaganda effects of unwarranted offensive expressions, and at the same time could result in self-censorship.

39. On balance, the Commission considers that there is no need to enact new, specific legislation concerning blasphemy, religious insults and inciting religious hatred. The focus should rather be on the full and correct implementation of the existing one, which seems to offer the potential to achieve the aim of a good balancing of the fundamental rights at issue. Courts are well placed to enforce rules of law in relation to these issues and to take into account the facts of each situation.

40. Modern societies, however, must not become hostage to these sensitivities. Open discussion of controversial issues is a vital element of democracy. Public debates, dialogue and improved communication skills of both religious groups and the media should be used in order to lower the threshold of sensitivity when it exceeds reasonable levels. Education should also be seen as an essential tool in this respect. The ultimate goal is of course that everyone fully enjoys the right to freedom of expression and, on equal footing, the right to respect for one’s religious beliefs, but always in full respect of the same rights of others.