

**Expert workshop on the prohibition of incitement to
national, racial or religious hatred**

Study for the workshop on Europe (9 and 10 February 2011, Vienna)

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Terms of reference

This report has been prepared at the request of the Office of the United Nations High Commissioner for Human Rights (OHCHR) in accordance with the terms of reference decided in July 2010 and set out in paragraph 134 of the Durban Review Conference outcome document, as adopted by the General Assembly, which “takes note of the proposal of the OHCHR, in cooperation with regional stakeholders in all parts of the world, to organize in light of the OHCHR Expert Seminar on the links between articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR) a series of expert workshops to attain a better understanding of the legislative patterns, judicial practices and national policies in the different regions of the world with regard to the concept of incitement to hatred, in order to assess the level of implementation of the prohibition of incitement to hatred, as stipulated in article 20 of the ICCPR, without prejudice to the mandate of the Ad Hoc Committee on the Complementary Standards.”

That is the context within which this report puts forward an analysis of major trends in national legislation, case law and policy relating to the prohibition of incitement to hatred in Europe.

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Introduction

“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” The implementation of ICCPR, article 20, paragraph 2, has become one of the major issues of international law. From the outset, combating incitement to hatred on the grounds of racial or national origin achieved a readier unity of national policy among countries than combating religious hatred. More than mere statements of principle and solemn declarations, a more responsive approach is needed that can take into account and stimulate local conditions and provisions. This report aims to take a new look at the practical questions raised by these conditions and provisions, thus helping to restore the effectiveness of fundamental rights.

Freedom of expression is internationally recognized, in article 19 of the Covenant, among other texts, as one of the major pillars of fundamental rights and of democracies. Case law in Europe especially makes it clear that it is specifically intended to protect information and ideas that are offensive, shocking or disturbing. It is, however, acknowledged that freedom of expression may nonetheless give rise to abuse and thus be subject to restrictions, provided, of course, that such restrictions are themselves justified under international principles.

Contrary to the general trend towards harmonization, the practical action taken against hate speech appears to have been extremely complex, variable and, ultimately, vague. How should we define the scope of the concept of incitement to hatred, particularly incitement to certain kinds of hatred, in this case those set out in article 20 of the Covenant, with its explicit reference to national, racial or religious hatred and to the advocacy of discrimination, hostility or violence, given that other types of hatred may be prohibited by regional instruments or national legislation?

Apart from such variations in the motives for hatred, there are also differences in their intensity and form. Some regional situations specifically limit the restrictions placed on speech to that which explicitly gives rise to a “clear and present danger”. The situation in Europe, which is the subject of this report, is such that a distinction is made between incitement to hatred and incitement to violence, incitement to hatred being given, where appropriate, a degree of autonomy as a separate concept. For this reason, the situation in Europe is both varied and complex:

- The punishment of hate speech is covered by a vast range of national laws that differ in nearly every State;
- Legislation has, for the most part, remained relatively vague in the concepts that it uses. Only a few countries specify criteria for identifying prohibited forms of incitement to hatred. There is, in any case, a strong tendency not to restrict the criteria simply to incitement involving “clear and present danger”, but also to take account of more indirect and more implicit incitement. This extension of the concept actually gives rise to further uncertainty and complexity;
- Existing provisions prohibiting incitement to hatred are variable in their impact and importance in relation to other common (usually older) laws in Europe relating to the suppression of (a) genocide denial, (b) insults based on belonging to a certain group, (c) offending religious feeling, (d) blasphemy and (e) attacks on national unity, etc.;
- Furthermore, provisions prohibiting incitement to hatred are incorporated into more general policies and legal instruments to combat discrimination. There are also aggravating circumstances in the form of “hate crimes”, whereby a general-law offence is punished more severely in cases where the motive is hatred or discrimination; such offences remain distinct from offences of incitement to hatred while being considered under the category of criminal policy, the priorities of which may vary from one State to another;
- Generally speaking, provisions prohibiting incitement to hatred are still fairly recent and there has not yet been sufficient case law to make a mature interpretation of the legal concepts;

- There are, however, various levels of international integration in Europe, where policies are focused on combating incitement to hatred as a form of racism and discrimination, whether through the European Union, the Council of Europe and the Organization for Security and Cooperation in Europe (OSCE) or through the case law of the European Courts in Luxembourg and Strasbourg.

Methodology

The data have been compiled from existing data obtained from various United Nations bodies, replies by States to enquiries by OHCHR and data collected by the European Union (largely by the FRA), the Council of Europe (through the European Commission against Racism and Intolerance (ECRI) and the European Commission for Democracy through Law (the Venice Commission)) and OSCE (chiefly through the Office for Democratic Institutions and Human Rights (ODHIR)), as well as the national resources of States, such as data published by their national agencies for fundamental rights and/or action against discrimination and the data put out by specialized non-governmental organizations (NGOs).

This report, after highlighting a number of strong trends in national and regional legislation relating to incitement to hatred, focuses on the question of the new challenges that seem to lie behind these trends and on various cases of practical implementation. The intention is to build up a kind of survey of the new resources for interpreting fundamental rights that have been deployed in Europe to deal with the issue of incitement to hatred. A European option that is, formally speaking, stricter than that of the “clear and present danger” test is noted and evaluated, taking into account both the risk of various forms of meta-discrimination because of the vagueness of the concepts involved and some good practices introduced to avoid such risks.

1. Typology

Europe has not yet arrived at an agreed definition of hate speech. Even at the regional level, this is a work in progress. Some broad outlines are, however, proposed in regional forums and will be discussed before an examination of national legislative trends.

1.1 Regional positions

Few definitions have been agreed, but, without going into further detail at this point, strong trends towards adopting approaches suggested by Council of Europe bodies may be noted. The policies of the European Union and OSCE may be considered generally comparable. We will return to this in the section relating to public policy.

Recommendation No. R (97) 20 of the Council of Europe Committee of Ministers ¹ states that: “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 and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.” ²

In 2002, ECRI adopted its Recommendation No. 7 ³ on national legislation against racism, which includes the following statements, among others: “The law should penalize the following acts when committed intentionally: (a) public incitement to violence, hatred or discrimination; (b) public insults

¹ www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec%281997%29020&ExpMem_en.asp.

² The implementation of the Recommendation is mentioned in Resolution 1754 (2010) of the Council of Europe Parliamentary Assembly on the fight against extremism: achievements, deficiencies and failures, paragraph 13.5 (see also para. 13.6), in which the Assembly invites member States of the Council of Europe to “enforce the penalties foreseen by their legislation against public incitement to violence, racial discrimination and intolerance, including Islamophobia”.

³ www.coe.int/t/dghl/monitoring/ecri/activities/GeneralThemes_en.asp.

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.” The Recommendation also states that 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 should be penalized, as should the public denial, trivialization, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes.

Lastly, in its Recommendation 1805 (2007)⁴ on blasphemy, religious insults and hate speech against persons on grounds of their religion, the Council of Europe Parliamentary Assembly cites as one example of hate speech statements that call for a person or a group of persons to be subjected to hatred, discrimination or violence on grounds of their religion as on any other grounds (paras. 12 and 17.2.2). The Assembly also considers (para. 15) “that, as far as it is necessary in a democratic society in accordance with Article 10, paragraph 2, of the Convention, national law should only penalize expressions about religious matters which intentionally and severely disturb public order and call for public violence.” One may note the prudence of the formula adopted in paragraph 17.2.4, which recommends that national law and practice “are reviewed in order to decriminalize blasphemy *as an insult to a religion*” (author’s italics).

The scope and importance of the case law of the European Court of Human Rights on the topic of incitement to hatred are also growing. Since 2003,⁵ the European Court has understood hate speech to consist, subject to the appropriate restrictions, of “all forms of expression which spread, incite, promote or justify ... hatred based on intolerance, including religious intolerance” but has not, however, committed itself to a definitive definition (see below). The Council of Europe manual on hate speech notes that “this is an ‘autonomous’ concept, insofar as the Court does not consider itself bound by the domestic courts’ classification. As a result, it sometimes rebuts classifications adopted by national courts or, on the contrary, classifies certain statements as ‘hate speech’, even when domestic courts ruled out this classification.”⁶

On the basis of an extensive body of scientific literature,⁷ three strands in European case law may be discerned:

- Inapplicability under the European Convention, article 17, of guaranteed freedom of expression to speech that is explicitly racist or denies genocide;
- Possibility of restricting freedom of expression with regard to less explicit hate speech (European Convention, art. 10, para. 2), within the strict limits of the six elements of content, form, type of perpetrator, perpetrator’s intention, the impact on the context and the proportionality of the punishment;

⁴ <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/frec1805.htm>.

⁵ See, for example, European Court of Human Rights *Garaudy v. France*, decision of 24 June 2003; *Gündüz v. Turkey*, 4 December 2003; *Norwood v. United Kingdom*, decision of 16 November 2004; *Alinak v. Turkey*, 29 March 2005; *Erbakan v. Turkey*, 6 July 2006; *Soulas and others v. France*, 10 July 2008; *Leroy v. France*, 2 October 2008; *Balsyte-Lideikiene v. Lithuania*, 4 November 2008; *Féret v. Belgium*, 16 July 2009.

⁶ Weber, A. *Manual on hate speech*, Council of Europe Manuals, Leiden, Martinus Nijhoff Publishers, 2009, 97 pp; see p. 3.

⁷ See, for example, M. Oetheimer, “Protecting Freedom of Expression: The Challenge of Hate Speech in the European Court of Human Rights Case Law” (2009) *Cardozo Journal of International and Comparative Law*, Vol. 17, p. 427 and *Revue trimestrielle des droits de l'homme*, 2007, pp. 63-80; D. Kean, “Attacking Hate Speech under Article 17 of the European Convention on Human Rights”, *Netherlands Quarterly of Human Rights* 4/2007, p. 641; I. Rorive, “What Can Be Done against Cyber Hate — Freedom of Speech versus Hate Speech in the Council of Europe”, *Cardozo Journal of International and Comparative Law*, Vol. 17, Issue 3 (Summer 2009), pp. 417-426; S. Douglas-Scott, “The Hatefulness of Protected Speech: A Comparison of American and European Approaches”, *7 William and Mary Bill of Rights Journal* 305 (1999); U. Belavusau, “A. ‘Dernier Cri’ from Strasbourg: An Ever Formidable Challenge of Hate Speech (Soulas & others v. France, Leroy v. France, Balsyte-Lideikiene v. Lithuania)”, *European Public Law*, Sep. 2010, Vol. 16, Issue 3, pp. 373-389; D. Voorhoof and H. Cannie, “Freedom of Expression and Information in a Democratic Society: The Added but Fragile Value of the European Convention on Human Rights”, *International Communication Gazette*, June 2010, pp. 407-423.

- Admissibility of legislation against religious insults and blasphemy, on the basis of which the Court refrains from considering it a violation of European law when restrictions are placed on expressions that are “gratuitously offensive” and do not contribute to “any form of public debate capable of furthering progress in human affairs”, despite the fact that this legal position has been contested by some academic writers and a number of Council of Europe bodies have spoken out, as indicated above, for the progressive abolition of the offence of blasphemy “*as an insult to a religion*”.

In the Court’s case law on incitement to hatred, the contextual impact seems to be the preeminent criterion. Some texts that are recognized as tending to incite hatred have therefore been seen as protected by freedom of expression, since their form (poetic or literary, for example) neutralizes their content or their impact. The test of the social impact is sometimes expressed as a reference to the presence — or absence — of the risk and its immediacy, without, however, leading to a legally confirmed principle.

To attempt a preliminary assessment: the current situation at the supra-State level in Europe may be summed up as a median interpretation of incitement to hatred, which makes a distinction from incitement to immediate violence and seeks to combine a profound semantic analysis of messages, perhaps only implicit, with a contextual analysis of their real social impact or the potentially imaginable impact at the moment of their expression.

1.2 National law

Although almost every European State legislates for the criminal offence of incitement to national, racial or religious hatred, the geometry of such offences is very variable both because of the wording used in each case and because there are alternative offences to be taken into account in every national system.

1.1.1 Types of wording

The formula used for the offence of incitement to hatred is often the same as that used for incitement to violence or discrimination, and sometimes for incitement to discord or hostility (Bosnia and Herzegovina, Montenegro, Romania, Serbia and Turkey). Some States make violence an aggravating circumstance in the incitement to hatred (Armenia, Bosnia, Lithuania, Montenegro, Serbia, Slovenia and Ukraine). Conversely, few States punish only incitement to violence, without reference to incitement to hatred (Austria, Cyprus, Greece, Italy and Portugal).

No European State penalizes the simple expression of hatred as such, without incitement, although racist statements are penalized simply because they are predicated on the inferiority or superiority of a particular race; this offence is extended by a certain number of States to the inferiority or superiority of a nationality or religion (Azerbaijan, Croatia, Denmark, Liechtenstein, Poland, Russia, Slovenia and Switzerland). Generally speaking, the offence lies in the public incitement of others to hatred, or sometimes “provocation” (France), “propagation” (Bulgaria), “ill will” (Cyprus), “division” (Montenegro, Romania, Serbia and Turkey) or “creation of an atmosphere of intimidation, hostility and humiliation ... ” (Romania, 2002). Under some bodies of law, the mere support by an individual of a group whose purpose is incitement to hatred (Belgium, Czech Republic, Italy, Luxembourg and Russia), or simply supporting any form of incitement (Luxembourg, United Kingdom), and the possession of symbols relating to fascist, racist or xenophobic associations (Romania) is punishable.

The offence is not usually incitement to hatred in general but to hatred on specific grounds (with the exception of Montenegro and, in part, Slovenia, where the offence is open-ended). In most European countries, the motives for hatred that are punishable are more extensive than those set out in article 20 of the Covenant (except in Georgia, Malta, Slovakia and the former Yugoslav Republic of

Macedonia, which seem to penalize only incitement to national, racial or ethnic hatred;⁸ and England and Wales, which deal with different forms of hatred — racial, religious and sexual — as distinct categories).

In addition to national origin, race or religion, countries may also legislate against hatred on the grounds of “debasement of national dignity” (Armenia, Azerbaijan, Hungary, Moldova, Romania, Russia and Turkey), “membership of a Church or religious society” (Austria), “sex, sexual orientation, civil status, birth, fortune, age, religious or philosophical convictions, actual or future state of health, a disability or physical characteristic” (Belgium, 2003), “age, sexual orientation, civil status, birth, fortune, religious or philosophical convictions, political convictions, trade-union affiliation, language, actual or future state of health, a disability, a physical or genetic characteristic, or social origin” (Belgium, 2009, and Luxembourg, 2006); “racial, religious, generic, national, ethnic or skin colour” (Croatia); “different classes, communities or persons” (Cyprus); “race, colour, nationality, ethnic origin, religion, sexual inclination” (Denmark); “on racist or anti-Semitic grounds or on any other grounds relating to ideology, religion or belief, family situation, sex, sexual orientation, a disease or a disability” (Spain); “national, racial, religious, political or class hatred” (Estonia and Lithuania); “section of the population, national, racial or religious group or a group characterized by its customs and traditions” (Germany); “race, religion or conviction, homosexual or heterosexual preference, physical, mental or intellectual disability” (Netherlands and Norway).

The circumstances or extent of the incitement are sometimes spelled out.

The majority of States focus on the public nature of the incitement, although this is not explicitly the case in the following States: Albania, Estonia, Malta, Moldova, Montenegro, Netherlands, Poland, Serbia, Slovenia and Ukraine. In Armenia and France, the public aspect is an aggravating circumstance.

Other conditions are sometimes attached: “liable to threaten public order” (Austria and Germany), “amounting to a violation of human dignity” (Austria, Germany and Liechtenstein), “carried out professionally, or habitually, or by two or more individuals” (as an aggravating circumstance, Netherlands), or “where more than the simple dissemination of factual information is involved” (Netherlands). The former Yugoslav Republic of Macedonia establishes a presumption of a link between various circumstances and incitement to hatred: “... ridiculing national, ethnic or religious symbols, attacking popular objects, desecrating monuments or other actions”.⁹

⁸ Note, however, recommendations by European bodies that the term “racism” should refer not only to race but also to any discriminatory treatment according to a person’s race, colour, language, religion, nationality or national or ethnic origin (ECRI General Policy Recommendation No. 7).

⁹ This non-specific provision of article 319 of the Criminal Code has been criticized by the Special Rapporteur on freedom of religion or belief, Asma Jahangir (A/HRC/13/40/Add.2, paras. 47-48 and 60): “[48] The risk that legal provisions prohibiting hate speech are interpreted loosely and applied selectively by the authorities underlines the importance of having unambiguous language and of devising effective safeguards against abuses of the law. With regard to the formulation of article 319 of the Criminal Code, the Special Rapporteur is concerned that this offence can be committed, inter alia, ‘in any other manner that causes or incites to national, racial or religious hatred, discord and intolerance’. The loose wording of article 319 of the Criminal Code throws the net too wide; for example, ‘any other manner’ could possibly include scholarly remarks, genuine dissent or grievance against specific religious tenets. The legal uncertainty triggered by the formulation of article 319 of the Criminal Code may have a chilling effect on the willingness of individuals to exercise their freedom of expression as well as their freedom of religion or belief, for example by changing their religion or manifesting religion or belief in worship, observance, practice and teaching. In addition, an overreaction against the utterances of a person by any individual or group cannot constitute justification for penalizing such an expression unless the threshold of article 20, paragraph 2, of the International Covenant on Civil and Political Rights is crossed. The Special Rapporteur would like to emphasize that the ultimate goal is to find the most effective ways for the State to protect individuals against advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence. [...] 60. The Special Rapporteur is also concerned at reports received regarding sectarian violence and incitement to religious hatred. In this regard, she would like to distinguish between the expression of opinions even when they are deemed offensive by some believers, and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence. While freedom of expression has to be respected, hate speech must be prohibited by law if it reaches the threshold of incitement to religious hatred described in article 20, paragraph 2, of the International Covenant on Civil and Political Rights. In order to protect the integrity of individuals, hate speech must not be tolerated. However, each case has to be examined on its own merits

The United Kingdom establishes a link between “threatening, abusive or insulting words” and incitement to racial hatred but does not make that link with incitement to religious hatred, which is linked only with “threatening” words (Racial and Religious Hatred Act 2006).¹⁰

Several countries provide for specific rules establishing aggravating circumstances when the media are used (Armenia, Azerbaijan, Czech Republic, Malta and Romania).

Some countries provide explicitly that an offence may be either intentional or due to negligence (Ireland, Malta, Netherlands, Norway and the United Kingdom, although in the latter the concept of negligence does not apply to incitement to religious hatred but only to incitement to racial hatred). Intent is specifically required in the laws of Cyprus, Ireland, Malta, Portugal and Ukraine.

The scale of penalties is extremely diverse, ranging from 1 to 10 years’ imprisonment: 1 in Belgium, France and Netherlands; 18 months in Malta; 2 years in Austria, Cyprus, Czech Republic, Denmark, Georgia, Iceland, Ireland, Lithuania, Slovenia and Sweden; 3 years in Azerbaijan, Bulgaria, Croatia, Estonia, Hungary, Italy, Lithuania, Moldova, Norway, Poland, Slovakia, Spain and Turkey; 4 years in Armenia; 5 years in Germany, Monaco, Montenegro, Portugal, Serbia, the former Yugoslav Republic of Macedonia and Ukraine; and 10 years in Albania. Fines in varying amounts may also replace or be added to a prison sentence.

1.1.2 Variable geometry of alternative offences

The punishment of incitement to hatred varies in significance, according to whether there exist alternative offences, such as:

- Collective insults (religious, in particular) in about half the States of Europe (Andorra, Cyprus, Czech Republic, Denmark, Finland, Germany, Greece, Iceland, Italy, Lithuania, Netherlands, Poland, Portugal, Russia, Slovakia, Spain, Switzerland, Turkey and Ukraine); and the “dissemination of harmful information that is known to be false” (Spain). It may be noted that the United Kingdom Racial and Religious Hatred Act 2006, Section 29 J, expressly states that the offence of incitement to hatred may not involve the restriction of free speech: “Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.”;
- The offence of denial or revisionism of the Holocaust or other acts of genocide (Austria, Belgium, France, Germany, Luxembourg and Switzerland);
- Various forms of hate crime (that is, general-law offences, where the motive of hatred is considered an aggravating circumstance);
- Various offences relating to the fight against acts of discrimination;

so that freedom of expression and freedom of religion or belief are not undermined. In this regard, the judiciary plays a vital role in striking a delicate balance on a case-by-case basis. In view of the vague formulation of article 319 of the Criminal Code, the Special Rapporteur would urge the Government to review this provision with a view to prevent any arbitrary interpretation and application by the authorities. Legislation of policies designed to combat religious discrimination should be all-inclusive, carefully crafted and implemented in a non-biased manner to achieve their objectives (A/HRC/10/31/Add.3, para. 24).”

¹⁰ The Criminal Justice and Immigration Act 2008, which abolishes the common law offence of blasphemy for England and Wales (see CCPR/C/GBR/Q/6/Add.1, para. 165), also introduces a new provision on incitement to hatred on the grounds of sexual orientation: section 74, schedule 16, of the Act is worded as follows: “Schedule 16 (a) amends Part 3 A of the Public Order Act 1986, para. 64 (hatred against persons on religious grounds) to make provision about hatred against a group of persons defined by reference to sexual orientation and (b) makes minor amendments of that Part.” Section 29 J (a) provides, however, that “for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.”

- The offence of blasphemy (Austria, Denmark, Finland, Greece, Ireland, Italy, Liechtenstein, Netherlands and San Marino).

Attempting an assessment of comparative law, we may note considerable variety in the national legislations of Europe. We see that the motive of religion is sometimes omitted and sometimes subject to specific conditions. The variable geometry of motives that may or may not lie behind incitement to racial, national or religious hatred may, according to circumstances, change the interpretation of the law. More fundamentally still, most European countries view the offence of the collective insult directed at groups of persons and the offence of incitement to hatred as a single offence or corpus of offences. Some countries establish a link between these two approaches. The link between incitement to violence and incitement to hatred is not, however, systematic. Meanwhile, a smaller number of European States associate abstract cases of insult with religious feelings and even fewer still retain the more abstract offence of blasphemy or have introduced an offence of genocide denial. Lastly, only a few laws are worded in a detailed and precise way; most texts remain cursory and therefore inevitably require elucidation by the courts.

2. Practical challenges

Incitement to hatred, even where distinguished from incitement to violence, is a performative act, linked by ICCPR, article 20, to incitement to discrimination or hostility. Differing in principle from the abstract discussion of ideas, incitement to hatred is a public call for disparaging conduct and attitudes towards specific categories of individual.

How, without bringing in incitement to violence, can a line of demarcation be drawn between discourse containing ideas that may be shocking but that can stimulate informed debate with a view to transforming society (whether through the free play of ideas in civil society or through various forms of institutionalized democracies) and discourse driven not by reason but by the release of an emotional reflex of hostility?

Abandoning the “clear and present danger” test would mean that Europe would have to take on the exacting task of analysing discourses and their impact in order to identify, quite apart from texts and contexts, the harmful effects that were intended or risked.

One issue that complicates still further the consideration of national practices, as has been said, relates to the unease frequently felt when protected categories are extended beyond the purely biological. Admittedly, even ethnic or supposedly racial categories are the product of cultural interpretations, all the stronger for being implicit. It may be seen, however, in several countries that some writers and some legal or parliamentary circles would seem to be in favour of making a fairly sharp distinction between various protected categories, according to whether they involve a matter of individual choice. Of the three categories covered by this report, therefore, the religious category would be distinct from the national and racial categories.¹¹

Not only United Nations bodies but also various European bodies have emphasized the potential danger of discriminatory or arbitrary implementation of action against incitement to hatred. Thus the Venice Commission stated: “The application of hate legislation must be measured in order to avoid an outcome where restrictions which potentially aim at protecting minorities against abuse, extremism or racism have the perverse effect of muzzling opposition and dissenting voices, silencing minorities, and reinforcing the dominant political, social and moral discourse and ideology.”¹² The Council of Europe Parliamentary Assembly Resolution 1754 (2010) (on the fight against extremism: achievement, deficiencies and failures) thus invites States to “ensure that anti-extremism legislation is applied systematically and consistently to all forms of extremism and avoid all risk of arbitrariness

¹¹ See, for example, C. W. Collier, “Hate speech and the mind-body problem”, *Legal theory*, 2001, pp. 203-234; cf J. A. Lindgren Alves, “Race and Religion in the United Nations Committee on the Elimination of Racial Discrimination”, 2008, 42 *University of San Francisco Law Review* 941.

¹² CDL-AD(2008)026, para. 58.

in its implementation” (para. 13.3) and to “enforce the penalties foreseen by the legislation against public incitement to violence, racial discrimination and intolerance, including Islamophobia” (para. 13.5).

An analysis of the case law of European States, the full range of which is still insufficiently accessible, shows in places the risks of the potentially discriminatory implementation of article 20 of the Covenant, using a differentiated approach according to the criteria set out in the article. Depending on the State and the context, this approach either strengthens or weakens the penalties for incitement to religious hatred in relation to the measures against ethnic or national hatred. As shown by the analysis of comparative law, a significant number of countries, although not all, penalize collective insult, speech implying superiority (racial and sometimes religious) and incitement to hatred as a single set of offences. Certain variations then appear: in the countries legislating for two kinds of offence (collective insult and incitement to hatred), the tendency seems to be for prosecutions to come down harder on offensive discourse, occasionally recharacterizing it as incitement to hatred. Conversely, the danger in some countries is that judges, not having both offences available to them, more frequently recharacterize religious hate speech as ideas that may be offensive but are not liable to prosecution.

This report begins by discussing the risks, including that of meta-discrimination, brought up by the literature and the competent institutions concerning the implementation of national laws. Secondly, the quantitative treatment of national case law is analysed, with particular regard to questions of effectiveness. Thirdly, some examples of a qualitative analysis of judgements are given.

2.1 Risk of meta-discrimination between incitement to national, racial or religious hatred

2.1.1 Discrimination on protected criteria

With regard to the options for public policies as between incitement to religious hatred and incitement to racial hatred, the type of risk envisaged is set out in a report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, adopted by the Venice Commission at its seventy-sixth session on 17 and 18 October 2006 and subsequently published in a book entitled “Tackling blasphemy, insult and hatred in a democratic society”:

60. In this respect, it is worth recalling that it is often argued that there is an essential difference between racist insults and insults on the ground of belonging to a given religion: while race is inherited and unchangeable, religion is not, and is instead based on beliefs and values which the believer will tend to hold as the only truth. This difference has prompted some to conclude that a wider scope of criticism is acceptable in respect of a religion than in respect of a race. This argument presupposes that while ideas of superiority of a race are unacceptable, ideas of superiority of a religion are acceptable, as it is possible for the believer of the “inferior” religion to refuse to follow some ideas and even to switch to the “superior” religion.

61. In the Commission’s opinion, this argument is convincing only insofar as genuine discussion is concerned but it should not be used to stretch unduly the boundaries between genuine “philosophical” discussion about religious ideas and gratuitous religious insults against a believer of an “inferior” faith. 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.

62. The Parliamentary Assembly, noting that, in the past, national law and practice concerning blasphemy and other religiously offences often reflected the dominant position of particular religions in individual States, has considered that “in view of the greater diversity of religious beliefs in Europe and the democratic principle of the separation of State and religion, blasphemy laws should be reviewed by member States and parliaments” and that “blasphemy, as an insult to a religion, should not be deemed a criminal offence. A distinction should be made between

matters relating to moral conscience and those relating to what is lawful, and between matters which belong to the public domain and those which belong to the private sphere.”

63. The Commission agrees with this view.

64. The Commission does not consider it necessary or desirable to create an offence of religious insult (that is, insult to religious feelings) *simpliciter*, without the element of incitement to hatred as an essential component.¹³ Neither does the Commission consider it essential to impose *criminal sanctions* for an insult based on belonging to a particular religion.¹⁴ If a statement or work of art does not qualify as incitement to hatred, then it should not be the object of criminal sanctions.”¹⁵

This tension, which is specific to religious hatred, simply shows that the legal treatment of any kind of incitement to hatred, as distinct from incitement to violence, calls on a cross-cutting methodology verifying through analogy whether certain kinds of rhetoric used in the ideas debate may not lead to imputing an identifiable characteristic or a characteristic identity to a group of people, on the basis of which these people become the object of incitement to hatred. Failing such a cross-cutting approach, it may be noted that the different legal approaches may simply be the result of characterizing the same groups — whether they are considered ethnic or religious — in different ways. One example of this is the variation between States in characterizing a person as Jewish or Muslim, according to whether an ethnic or a religious characterization is adopted.¹⁶

2.1.2 Discrimination according to the different points of view adopted and the transmitter/receiver reciprocity principle

The absence of discrimination in the implementation of national law also implies analogous treatment for hate speech:

- against persons identified by a specific religion (or nationality or ethnicity) or by their absence of religion (or nationality or ethnicity)
- by such persons, with the intention of incitement to hatred against other categories of specific persons

Various national reports put the emphasis squarely on giving priority to protecting identity and national cohesion, or else show the importance of the role of the majority religious or ethnic traditions.

2.1.3 Risk of exploitation of offences of incitement to hatred

¹³ This finding does not appear to comply fully with United Nations Human Rights Council resolution 7/19 of 27 March 2007 on defamation of religion, which reads as follows: “[The Human Rights Council] ... also urges States to provide, within their respective legal and constitutional systems, adequate protection against acts of hatred, discrimination, intimidation and coercion resulting from the defamation of any religion, to take all possible measures to promote tolerance and respect for all religions and their value systems and to complement legal systems with intellectual and moral strategies to combat religious hatred and intolerance.”

¹⁴ In its General Policy Recommendation No. 7, ECRJ recommends that public insults and defamation against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin be penalized. The Commission recalls in this respect that the offences of “insult” and “defamation” exist in every member State and can be used, subject to all the relevant legal conditions, also in cases of public insults and defamation on religious grounds.

¹⁵ CDL-AD (2008)026.

¹⁶ See, for example, P. Werbner, “Islamophobia: Incitement to Religious Hatred — Legislating for a New Fear? A sociological comparison of anti-Semitism and anti-Muslim sentiment in Britain”, *Anthropology Today*, vol. 21, No. 5, pp. 5-9, 2005. In France, the case of the comic Dieudonné has given rise to a number of judgements, differing from each other, concerning remarks by him whose aim was precisely to show, in an exaggerated way, the difference in the protection afforded to the various groups targeted in his shows. Cf Court of Cassation (plenary), 16 February 2007, *Bulletin criminel*, No. 1, p. 1, *Bulletin d’information de la Cour de cassation* (BICC), No. 660, annex.

It is noteworthy that, despite the considerable socio-political legitimacy acquired in Europe for penalizing incitement to hatred, such action has already presented numerous examples illustrating the risk of helping to “launder” less legitimate objectives. It has been shown in social psychology and political science that the relations between democracy-building, majority rule and social cohesion are severely undermined by the utopia, indeed the requirement, of political and social unanimity. From this point of view, any discourse that challenges a delicate unity or threatens a local cultural balance may be seen as being so sensitive that it is easily reinterpreted as being incitement to hatred, in the sense of incitement to division. Clearly, there is a wide diversity of national histories in Europe and there have been a number of quite recent subregional disputes. The discretion allowed to States, from the regional point of view, means that this dimension can be taken into account. The fact remains, however, that European case law has led to many national prosecutions for incitement to “division” being disqualified. Pluralism is not constructed by suppressing sources of tension but by creating the conditions for their peaceful coexistence. The offence of “incitement to division” calls for a careful examination of the cases in which these laws have been applied, in order to verify, among other things, whether any differentiation is made between the various discourses that threaten unity, according to whether such discourses are of a political or a sociocultural nature.

2.2 Notes on the analysis of national case law: the question of effectiveness

National data on the state of national case law are extremely variable, ranging from a total absence of cases for the past five years to over 10,000, yet without any proper indications to distinguish the cases that genuinely relate to incitement to hatred rather than general discrimination. Databases of comparative law, in France and elsewhere, or of national law held by anti-discrimination institutions are gradually improving access to substantial bodies of case law (references to the databases of Belgian, French and Swiss agencies, for example, are given below).¹⁷

There is, nonetheless, wide consensus that there is far too little comparative analysis of data on case law.¹⁸ This may be due to problems with court statistics or limited access to actual case law. It may also be due to the danger of self-censorship by the victims, or even an insufficiently active criminal policy, partly at the level of the public prosecutor’s office or local police forces but also at the level of the courts themselves, given that the conviction rate and the level of penalties as a proportion of the number of prosecutions remains low. In several paragraphs of its resolution 1754 (2010) on the fight against extremism: achievements, deficiencies and failures, cited above, the Council of Europe Parliamentary Assembly invites States to “improve the analysis of the phenomenon of extremism and the collection and comparability of relevant data” (para. 13.9). More specific policies are being put in place to take action against intolerance and discrimination against Muslims (paras. 14.2 and 15 of the same resolution) and the Roma.¹⁹

Apart from any consideration of the possible causes of lack of effectiveness, the current data on case law are still, in any case, far too scanty for any serious quantitative analysis. A handful of convictions out of populations of several millions or tens of millions offer very limited conclusions.

Since the figures are achieving significant levels, however, and are doubled through the use of an effective multi-criteria search, it may be possible to carry out some preliminary analysis. Thus the data from France indicate that, out of 678 offences broadly speaking relating to racism, cases of insult account for 458 convictions, while cases of public provocation to hatred amount to only 67, some 10 per cent of the total (figures for 2008, showing annual growth since 2000, when there were 175 convictions). Similarly, in Switzerland, between 1995 and the end of 2007, the relevant authorities received 438 claims (cases) based on the Criminal Code, article 261 bis. Out of all these cases, 228 resulted in material judgements. The Swiss Federal Commission against Racism has established a summary for each of those cases, with full anonymity. On 558 counts, the figures establish that, in

¹⁷ Belgium: www.antiracisme.be; France: www.halde.fr; Switzerland: www.ekr.admin.ch/dienstleistungen/00169.

¹⁸ See the bibliography below.

¹⁹ For the European Union, see www.aedh.eu/09-septembre-2010-Publication-d.html and for the Council of Europe, ECRI General Policy Recommendation No. 3 on combating racism and intolerance against Roma/Gypsies (March 1998) www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N3/Recommendation_3_en.asp.

23.8 per cent of cases, the victims were Jewish. A guilty verdict was pronounced in 16.6 per cent of cases. Meanwhile, 14.2 per cent of cases related to persons of colour and in 7.1 per cent of cases the perpetrator was convicted of racial discrimination directed at persons of colour. In nearly 24 per cent of the decisions by the courts concerned, however, no information on the victims was provided. Out of all the cases, only 67 related, if only in part, to incitement to hatred.²⁰

Even though the data do not exist in sufficient quantities to establish generalized and accessible statistics, or even sufficiently clearly delineated trends in comparative national laws in the lower courts at least, access to case law, particularly in the higher courts, even if it is patchy, is such that some useful work can be done to analyse difficult cases in qualitative rather than quantitative terms. In other words, the basic motives can be considered in each case, with the specific arguments and interpretation of the facts and the law relevant to the case.

2.3 In-depth discourse analysis as against contextual results

For the most part, the language of the laws in Europe offers no scope for a precise evaluation of discourse, whereas commentaries on specific judicial decisions, whether national or European, make it possible to compile a body of texts, statements, written documents and discourse that have been the subject first of legal claims brought under social justice law in Europe, then of legal proceedings and court judgements (for example, conciliation or alternative measures) and finally, in certain cases in which such action is appropriate, referral to a supreme court or an international court.

While the rulings of supreme courts clearly carry special weight in case law, European regional bodies are attaching increasing importance to the decisions of the European Court of Human Rights.

As regards the decisions of national supreme courts, comments provided by France underscore that in order for the offence to be punishable, the Court of Cassation requires the incitement to be explicit, as oral or written statements which are merely “capable” of provoking racial hatred do not fall under article 24 of the 1881 Act. Moreover, in a decision of 24 June 1997, the Criminal Division of the Court of Cassation for the first time made an extensive interpretation of the term “group of persons” used in article 24 of the 1881 Act on freedom of the press, stating that “foreigners residing in France who are singled out because they do not belong to the French nation constitute a group of persons within the meaning of article 24, paragraph 6”, which criminalizes incitement to discrimination, hatred or violence. This is an important step forward compared with earlier rulings, according to which the provisions of the 1881 Act, as amended by the Act of 1 July 1972, did not cover remarks that merely single out a category of persons as “foreigners” or “immigrants” without referring expressly to their origin or membership or non-membership of a given ethnic group, nation, race or religion (see, in particular, a decision by the Criminal Division of 6 May 1986, Crim. Bull. 153).²¹

²⁰ www.ekr.admin.ch/dienstleistungen/00169/00273/index.html?webgrab_path=aHR0cDovL3d3dy5lZGktZWtyLmFkbWluLmNoL3BocC94bGlzdC5waHA%2FbGFuZz1mcg%3D%3D&lang=fr.

²¹ This position is not shared by the Committee on the Elimination of Racial Discrimination in its interpretation of *Kamal Quereshi v. Denmark* (communication No. 33/2003), 9 March 2005. However, the Committee considered “itself obliged to call the State party’s attention (i) to the hateful nature of the comments concerning foreigners made by Mr. Andreasen and of the particular seriousness of such speech when made by political figures, and, in this context, (ii) to its General Recommendation 30, adopted at its 64th session, on discrimination against non-citizens” (para. 8). This General Recommendation, adopted in 2005, recommends States parties to the International Convention on the Elimination of All Forms of Racial Discrimination to take steps to address “in particular hate speech and racial violence” and to take “resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of ‘non-citizen’ population groups, especially by politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large.”

Other trends in jurisprudence have been identified. For example, in Hungary, the Constitutional Court has, since 1992, limited its interpretation of cases of incitement to hatred brought under criminal law to verification of “clear and present danger”²² to the extent that the judicial system has adopted an extremely restrictive interpretation of the prohibition of incitement to hatred.

The importance in Europe of research on the implicit contents of discourse is reflected strongly in the interpretation and defence of the offences of “negationism” or revisionism, which call into question the historical reality of the Holocaust or other cases of genocide, such offences being punishable under the legislation of some countries and disputed in some literature but not punished by the European Court of Human Rights. While most of the criticism directed at such legislation is based on the perception of that legislation as embodying forms of State truth, with categories of offence that are in some way modern versions of old blasphemy laws, constitutional and regional courts have developed an entirely new defence framework centered on the intention and message concealed behind such statements: incitement to hatred against protected groups that are the victims of such genocides, particularly the Holocaust, and in relation to certain countries. The constitutional courts of Belgium, Spain and Germany²³ and also the European Court of Human Rights,²⁴ for their part, have upheld the view that negationism constitutes violation of constitutional law, referring to Holocaust denial as a form of indirect incitement to hatred. These legal systems confirm the existence in Europe of the approach that incitement to hatred need not necessarily be explicit in order to constitute an offence, at least with regard to specific provisions under national legislation.

According to this interpretation, negationist discourses are not so much untruths as discourses from which underlying incitement to hatred can be presumed. It is in this way that such statements can be recognized as offences by law. This is precisely why groups that have been subject to genocide in the past are no longer necessarily regarded as victims of actual incitement to hatred, while offences of negationism do not necessarily relate to all genocides established as historical fact.

A more pragmatic approach on the part of the legal system has thus revealed the two sides to this judicial endeavour — analysis of discourse and of its contextual impact — conducted with the potential guidance of an extremely active regional court.

2.3.1 An overview of types of discourse analysis reveals extremely low predictability of the characterization of incitement to hatred

Explicit oral statements of incitement represent the main elements of the cases in question but pose little difficulty in terms of interpretation or punishment. For example, in decision No. 2008-12 of the Federal Commission against Racism,²⁵ the defendant was ordered to pay a penalty of 180 days’ fine at the rate of 21 Swiss francs per day with a suspended sentence for sending an unsolicited facsimile to a Waldensian company with the subject line “Master Abdullah’s initiative — payback for the bloodthirsty Sharon for his massacres in Palestine” and containing the following text: “[...] both he

²² Decision 30/1992 (affirmed by decision 95/2008), with a commentary by P. Molnar, “Towards Improved Law and Policy on ‘Hate Speech’ - The ‘Clear and Present Danger’ Test in Hungary” in *Extreme Speech and Democracy*, Ivan Hare, James Weinstein (eds.), Oxford University Press, 2009, pp. 237-264; and A. Sajo, “Hate speech for Hostile Hungarians”, (1994) 3 *E. Eur. Const. Rev.* 84.

²³ Germany: Federal Constitutional Court 90, 241, 94, with a commentary by D. Grimm, “The Holocaust Denial Decision of the Federal Constitutional Court of Germany”, in Ivan Hare, James Weinstein (eds.), *Extreme Speech and Democracy*, Oxford University Press, 2009, pp. 557-561 (the Federal Constitutional Court places greater emphasis on the absence of protection of historical untruths); Belgium: Constitutional Court, No. 45/96 of 12 July 1996, with a commentary by S. van Drooghenbroeck, “Répression du négationnisme. Commentaire sur C.A. No. 45/96 du 12 juillet 1996, Verbeke et Delbouille”, in O. de Schutter, S. van Drooghenbroeck, *Le droit international des droits de l’homme devant le juge national*, Bruxelles, Bruylant, 1999, pp. 587-597; Spain: STC 235/2007, with a commentary by A. Coll, “Freedom Of Speech In American & Spanish Law: A Comparative Perspective” (2010), *ExpressO*: http://works.bepress.com/alfredo_coll/1; R. A. Kahn, “Holocaust Denial as a Form of Past Directed Hate Speech”. Paper presented at the annual meeting of the The Law and Society Association, www.allacademic.com/meta/p301945_index.html.

²⁴ European Court of Human Rights, *Garaudy v. France*, decision of 24 June 2003.

²⁵ www.ekr.admin.ch/dienstleistungen/00169/00273/index.html?webgrab_path=aHR0cDovL3d3dy5lZGktZWtyLmFkbWwLmNoL3BocC94ZGV0YWlscy5waHA%2FaWQ9MjAwOC0xMg%3D%3D&lang=fr.

and they were witnesses, but they lost their human dignity, their courage and their Islamic devotion, which they replaced with slavish submission alongside the brothers of apes and pigs (the Jews) [...] the cause of Palestine is not an issue that is limited to withdrawal from the territory and from the so-called Palestinian Authority; it is not limited to withdrawal from Gaza, the West Bank or Jerusalem. The problem is the Jewish entity, an occupier that is violating Palestine. The solution is to tear out the roots of that entity from the entire Palestinian territory, as Allah says: ‘And slay them wherever you find them; and drive them out whence you have been driven’.”

However, other apparently explicit statements may nonetheless be open to interpretation. For example, in February 2007, the Supreme Court of Poland decided that “holding a placard reading ‘we shall liberate Poland from (among others) Jews’ did not amount to an offence under Article 256. The Court referred to article 51.1 of the Constitution, which protects the right to express opinions, the ordinary meaning of the word “liberate” and the use of the indicative, as opposed to the imperative, which showed no intention to incite national hatred.”²⁶

In France, the Criminal Division of the Court of Cassation found the following actions to have constituted incitement to racial discrimination:

- The publication of an article which included a drawing that showed young blacks and North Africans brandishing knives and clubs, with the caption: “Insecurity is often caused by ethnic gangs (of blacks and North Africans)” (decision of 5 January 1995);
- The publication of an article entitled “Plural society”, which, citing the President of the Republic as having said that “the French nation has a profound sense of the value of having immigrants among us, where they work and work well”, related various incidents involving persons from North Africa, black Africa or the gypsy community, singled out because of their membership of a particular ethnic group, race or religion, such a tendentious presentation, even without further comment, being likely to encourage reactions of rejection in the reader (decision of 21 May 1996, Crim. Bull. 210);
- An election pamphlet making a commitment to fight immigration fiercely, calling for the “invaders” to be driven out immediately, denouncing French officials as accomplices or collaborators with the “occupants of our land”, and demanding the expulsion of foreign pupils who were disrespectful and “harmful to the education of French youth” (decision of 24 June 1997, Crim. Bull. 253).

Final judgements handed down by national courts may render States liable under international law. For example, the United Nations Committee on the Elimination of Racial Discrimination found articles 4 and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination to have been violated by a decision to acquit, upheld by the Supreme Court of Norway, relating to a march and statements in honour of the Nazi Rudolf Hess and incitement to hatred towards Jews. The Committee also noted that that acquittal had set a precedent for local courts, notably with respect to such statements as “Jews had killed millions of ‘his people’, that Jews should be ‘cleansed’ and were ‘not human beings’ but ‘parasites’”.²⁷

The European Court of Human Rights, for its part, has carried out a meticulous analysis²⁸ with respect to incitement, considering, for example, that “the mere fact of defending sharia, without calling for violence to establish it”²⁹ did not constitute hate speech in the particular context of a

²⁶ Source: ECRI Report on Poland, 2010, available at: www.coe.int/t/dghl/monitoring/ecri/country-bycountry/poland/POL-CbC-IV-2010-018-ENG.pdf.

²⁷ Communication No. 30/2003, *The Jewish community of Oslo; the Jewish community of Trondheim; Rolf Kirchner; Julius Paltiel; the Norwegian Antiracist Centre; and Nadeem Butt vs. Norway* (CERD/C/67/D/30/2003, para. 9.4).

²⁸ Some proponents of the European doctrine consider that the standards of protection of freedom of expression are currently falling: D. Voorhoof and H. Cannie, Freedom of Expression and Information in a Democratic Society: The Added but Fragile Value of the European Convention on Human Rights, *International Communication Gazette* June 2010, 72: 407-423.

²⁹ See for example ECHR judgement on the case *Gündüz v. Turkey*, 4 December 2003, application. No. 35071/97, para. 51.

television broadcast that was aimed at presenting the sect led by the maker of the statement, whose extremist views were already known and were expressed, in the case in question, in the course of a pluralistic debate (ECHR, judgement on the case *Gündüz v. Turkey*, 4 December 2003, application No. 35071/97, paragraph 51). While the interference [with the applicant's freedom of expression] complained of as a violation of article 10 of the Convention would be justified where there was a "pressing social need" for such interference, ECHR concluded that the Convention had not been violated. However, it is important to qualify that conclusion by noting that ECHR attaches importance to the manner in which views are expressed; on the grounds that artistic media could have the effect of moderating or softening contentious statements, it concluded in this case that there had been a violation of article 10. As regards incitement to religious hatred, ECHR has twice adopted a special position characterizing as obscurantism the views expressed by religious fundamentalists and condemned by national courts as incitement to hatred because they invoke the vengeance of God, notably in such statements as "Heed our message; it is the clear warning of Allah to His enemies. Those that are our enemies will have to pay for what they have done. If you believe in Allah [...] ask Him, learn that we are the people that he has chosen. We are the ones who will save this country. These words will make many fly into a rage. They will make greater efforts to close down our radio stations. But whoever dares to do so, you will read about their punishment in the newspapers". In striving to "assess these statements in light of the religious basis for their expression", the Court considered that those statements were "of a proselytizing nature likely to instil superstition, intolerance and obscurantism" and that "although the comments might have been shocking and offensive, they [did] not in any way incite violence and [were] not liable to stir up hatred against persons that were not members of the religious community in question" (ECHR, judgement on the case *Nur Radyo Ve Televizyon Yayıncılığı A.Ş. v. Turkey*, 27 November 2007, application No. 6587/03, paragraph 30; *Kutlular v. Turkey*, 29 April 2008, application No. 73715/01, paragraphs 48 and 49). Calls for God's vengeance may no longer be questioned on account of their content, which, characterized as obscurantism, would render impossible or non-existent any incitement to hatred on the part of the person who uttered them ...

Incitement to *racial* hatred, however, has been unequivocally condemned by ECHR, which considered in one particular case that the injurious and offensive remarks addressed to immigrants and ethnic groups established in Denmark by "members of 'a group of young extremists' who were followers of the Ku Klux Klan [...] were more than insulting to the members of the groups targeted and did not enjoy the protection of article 10" (ECHR, decision on the case *Jersild v. Denmark* [GC], 23 September 1994, application No. 15890/89, paragraphs 34 and 35). However, the position of ECHR, which recognizes the need to combat racial discrimination in all its forms yet clearly favours freedom of expression, is paradoxical.³⁰ Indeed, in the *Jersild v. Denmark* case, the Court repeatedly referred to the right to freedom of expression of the journalist that had produced the television broadcast during which the statements complained of were made and of those who had made the statements: while the right of the journalist to freedom of expression was recognized (during the broadcast in question, he "was not pursuing a racist objective" (paragraph 36); consequently, his conviction by the domestic courts was found to be "unnecessary in a democratic society" (paragraph 37)), the same right was not accorded to the other persons concerned. The absence of intent calls for analysis of the imprudence of those prosecuted, such imprudence itself being ruled out by the informational purpose of the broadcast in question. With regard to the latter point, it has been remarked that ECHR itself makes no clear distinction between racism or racist statements and incitement to ethnic, national or religious hatred, referring as often to "incitement to racial hatred" (paragraph 34) as to the "spreading of racist ideas and opinions" (paragraph 33) or "racist aims" (paragraph 37).

³⁰ See ECHR decision on the case *Jersild v. Denmark* [GC], op. cit., and ECHR decision on the case *Lehideux and Isorni v. France* [GC], 27 September 1998, application No. 24662/94. In the latter case, the applicants had been convicted by the French courts (article 24, Law of 29 July 1881 on the Freedom of the Press) for public defence of crimes of collaboration. ECHR, affirming that "the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by article 10", considered that the applicants had "not so much praised a policy as a man [Marshal Pétain]" (paragraph 53) and ruled that their right to freedom of expression had been violated and their criminal conviction was disproportionate and, as such, unnecessary in a democratic society (paragraph 58).

The collection of decisions of national courts not subject to European control is methodologically more uncertain, but a closely contextual legal analysis confirms the complex balance between analysis of content and analysis of context. For example, a Belgian criminal court³¹ defined the various elements that must be present in order to characterize as incitement to hatred statements whose lawfulness is disputed.

The list includes: “a conscious and deliberate desire” to incite hatred, violence or discrimination; a provocative tone; the absence of nuances or distinctions in a statement containing an amalgam of ideas; the intent to show contempt; a wounding or offensive statement of a nature “to provoke a passionate reaction of aggression” against the persons targeted by the statement; conduct that “stimulates or promotes the resort to acts of violence”; organized acts; and “manifest absence of regret or reform”. All these criteria were met in the case before the court, which therefore passed a sentence of incitement to hatred without, however, determining whether the combination of all the criteria was a *sine qua non* for an offence to have been committed or, if it was not, whether the same weight should be given to each.

A textual analysis of hate speech leads courts to embark on an elucidation of the codes that are more or less accessible. Thus European case law shows that the use of violent extracts from sacred texts differs according to whether the selection of extracts shows, or betrays, a bias on the part of the person on trial. The more the collection of such extracts is biased or simply incomplete, the more likely a conviction for incitement. Private intellectual work on extracts of sacred texts triggers off sanctions where no reference to a violent sacred text is permitted. However, a reference to a violent text that does not come from the main sacred texts makes it easier to prosecute; indeed, several States consider these to be particularly important grounds in the fight against resurgent fascism. The same sort of consideration applies to other narrative decoys, which could be the news, history, science, poetry, art or even humour. The national case law of different countries shows the need for a case-by-case approach in determining whether such categories of discourse prevent their being categorized as incitement to hatred or not.³²

2.3.2 In view of the practical difficulty of undertaking purely textual approaches, the case law of almost every country focuses on the need to analyse context (perpetrator, target, framework, social impact, public disturbances etc.)

Such discussion of context has the effect, first of all, of forcing a re-examination of how far the criterion of intent is required for an offence. The contextual impact may compound the evidence of malicious intent or it may lead to a charge of negligence, since the person concerned should have known that such statements would have or might have a given effect of incitement on a given section of the population.

Regional case law is aware of the importance of the local nature of such contextual evaluation. There still, however, appear to be frequent examples of bias, particularly in the disconnect between both common knowledge and legal culture and the specific characteristics of the section of the population thought to be aroused by the incitement to hatred against a protected category. The varying degrees of volatility in a population often seem to be insufficiently discussed. Reference has already been made to the position of the Special Rapporteur on freedom of religion or belief concerning the case of Bishop Jovan’s conviction for incitement to hatred in the former Yugoslav Republic of Macedonia (A/HRC/13/40/Add.2, para. 47): “An opinion by the OSCE/ODIHR Panel of Experts on Freedom of Religion or Belief expressed concerns about the judgement’s approach which seemed to suggest that any form of religious activity that has the effect of challenging the legitimacy and supremacy of the Macedonian Orthodox Church as the dominant religion was to be considered as causing religious hatred. In addition, according to the ODIHR opinion, the fact that Bishop Jovan had conducted religious services that prompted a hostile response by opposing believers could not amount to the commission of the criminal offence of incitement to religious hatred.”

³¹ Correctional Court of Brussels, 11 April 1991, *Jurisprudence de Liège, Mons et Bruxelles*, 1991, pp. 804-811.

³² See, for example, C. Ruet, “L’expression artistique au regard de l’article 10 de la Convention européenne des droits de l’homme: analyse de la jurisprudence européenne”, *Revue trimestrielle des droits de l’homme*, 2010, pp. 917-937.

Here again, incitement to hatred can be countered properly only when it can be considered separately from incitement to violence, so that it can target more broadly the other two issues provided for in the International Covenant on Civil and Political Rights, article 20: incitement to discrimination or hostility. Assessing the context is made particularly complicated where there is no assessment of the danger of physical violence. Regional case law does, however, make it possible to take into account other kinds of contextual impact, such as those which are so close to a denial of the freedoms of a protected category that it loses its right to be tolerated by society. Such a re-evaluation of the role of the social context and the impact of hate speech still clearly leaves a whole range of questions open, but this time specific to incitement to hatred as distinct from incitement to violence.

Two more general questions also remain. The first to be noted is the issue of the transnationalization of contexts.

The mobility of populations and the growing importance of a transnational information society, thanks largely to the Internet and satellites, raises new questions, with which courts subject to national sovereignty are hardly familiar and which they are legally ill-equipped to deal with. The difference in the level of sensitivity to hate speech exacerbates the difficulties inherent in the diversity of Europe's political structures. The fact that some sectors of the population are gradually rendered immune by the progressive liberalization of some kinds of polemical language while others are protected by living in a more controlled social context leads to conflicts of interpretation which become more noticeable when these different geographical approaches come into contact with each other.

3. Scope and limits of new public policies in Europe

Two preliminary points should be made at the outset. The first relates to the massive overlaps between the various provisions against intolerance of every kind: against various forms of direct and indirect discrimination, against hate crimes and against various forms of hate speech, from racism, followed by various forms of incitement to hatred, to incitement to violence. The same is true of the progressive extension of these provisions to a number of protected categories in addition to national, religious and racial ones. It is particularly difficult to separate policies for penalizing incitement to hatred from other aspects of the whole body of provisions. Moreover, as case law shows, criminal law is not the most efficient public strategy. The emergence of national and regional anti-discrimination institutions is certain to ensure closer integration between these various provisions on the basis of relatively integrated responsive guidance.

The second comment relates to the determining role of regional bodies (the Council of Europe, the European Union, OSCE) not only in establishing regional conventions and monitoring bodies but also in promoting and piloting an enormous variety of public policies affecting not only the various protected categories but also the different social and occupational sectors of society in each country. Most national initiatives nowadays form part of regional programmes supported by various forms of public incentive.

3.1 Laboratories, experiments, genealogy and geography of humiliations

Europe is turning into a vast laboratory running multiple experiments aimed at progressively forestalling any shift downstream in the direction of intolerance, while at the same time analysing its causes upstream in order to neutralize or, at least, mitigate them. From these various points of view, the phenomenon of incitement to hatred is merely an indication of a social and economic pathology rather than of cultural, national, ethnic or religious diversity. Public social and economic policies undoubtedly contribute to the growing number of incidents of incitement to hatred, but it would seem too facile to believe that eliminating social and economic inequalities would provide an immediate and absolute solution to hate phenomena. First, hate phenomena are related to the genealogy of social humiliation, which has persisted over several generations and will not fade away until well after the present afflictions have ceased. Secondly, the transnational dimension referred to above also prevents purely local policies from taking effect quickly. With apparent synchronicity, the phenomenon of globalization, whether geographical through immigration or virtual through the Internet or the media, interweaves the historic genealogies of humiliation and power at a rate and on a scale quite different from case to case with profoundly damaging mutual effects.

A particularly significant aspect of these spatial and temporal shifts lies in the changing perceptions of minority/majority relations. The status of some groups, or at least of the social recognition that they do or do not enjoy, varies in time and space. It may thus be noted from public debate in Europe that it is possible for a group to be seen simultaneously as either dominant or dominated. An obvious example is religious groups, but it applies to other protected categories, too. Thus Muslim believers may consider themselves to be seen as both minorities (on European territory) and majorities (in relation to the large numbers located geopolitically outside Europe). The same applies to Jewish issues, where the perception shifts by reference to European sociology or Near Eastern geopolitics. Similarly, European's relationship with Catholicism, or indeed Christianity, may put Christians into the majority category, generally inherited from the past, or as the minority in terms of the local perspective or certain exo-European data. All these intersections complicate, in their turn, current perceptions of domination/humiliation and are liable to throw public policy off course.

The resurgence of public debate on the principle of reciprocity in international law with regard to cultural tolerance or religious freedom runs the risk of reinforcing the counterproductive effects noted above, at any rate if they take the form of reprisals rather than establishing a virtuous circle.

In this introductory section of the report, there is no question of drawing up in a few pages an exhaustive inventory of the massive total of public policies put in place, ranging from the regional to the more local and from central public authorities to private neighbourhood initiatives. The annexes to the report provide a broad record of new public policies, which will simply be mentioned here, in order to place greater emphasis on some of the legal limits to the new experimental provisions and the need for a responsive assessment of the process.

3.2 Varieties and limits of the new experimental provisions

It is hard to find or isolate significant provisions in Europe aimed specifically at the question of incitement to hatred. Most new provisions relating to social interaction or citizenship training are targeted at the wider picture of social cohesion or building resilience to intolerance.

Of the specific, overall provisions, those based on Council of Europe Parliamentary Assembly Resolution 1754 (2010) "on the fight against extremism: achievements, deficiencies and failures" are particularly noteworthy. The Resolution invites Council of Europe member States to:

- 13.1. address the root causes of extremism as a priority in the fight against this phenomenon by:
 - 13.1.1. continuing to take resolute action against discrimination, in all fields;

13.1.2. setting up consultation processes involving civil society and non-governmental organisations representing a broad spectrum of society, including categories that are most at risk of radicalisation, and thus ensuring the involvement of civil society in the elaboration and implementation of anti-extremist policies;

13.1.3. putting an emphasis on education for democratic citizenship;

13.1.4. devising clear and sustainable immigration policies, accompanied by appropriate integration policies;

13.1.5. strengthening their activities in the field of intercultural and inter-religious dialogue, also by endorsing the Council of Europe White Paper on Intercultural Dialogue;

13.1.6. developing an international legal mechanism with a view to stopping all forms of financial support to extremist groups;

13.1.7. implementing socio-economic policies aimed at contributing to efforts for the eradication of racism, xenophobia and intolerance within society, including the elimination of any manifestation of discrimination on grounds of religious beliefs in access to education, in employment and at the workplace, relating to access to housing in mixed areas, in public services and also as regards democratic participation through citizenship;

13.2. continue to fight terrorism and other forms of violent extremism, while ensuring the strictest respect for human rights and the rule of law, in compliance with the Council of Europe Guidelines on human rights and the fight against terrorism, adopted by the Committee of Ministers in 2002, and ECRI's General Policy Recommendation No. 8 on combating racism while fighting terrorism;

13.3. ensure that anti-extremism legislation is applied systematically and consistently to all forms of extremism and avoid all risk of arbitrariness in its implementation;

13.4. ensure that measures limiting or prohibiting the activities of extremist political parties are consistent with the case law of the European Court of Human Rights and the 1999 Guidelines on prohibition and dissolution of political parties and analogous measures of the European Commission for Democracy through Law (Venice Commission), in particular as regards the exceptional character of the dissolution of parties and the requirement to explore alternative sanctions before applying such a measure;

13.5. enforce the penalties foreseen by their legislation against public incitement to violence, racial discrimination and intolerance, including Islamophobia;

13.6. introduce in their criminal legislation provisions against incitement to racial hatred or hate speech, implement the Committee of Ministers Recommendation No. R (97) 20 on hate speech, if they have not yet done so, and endorse the good practices and recommendations laid down in the Council of Europe publication *Manual on hate speech* (2009);

13.7. step up appropriate information measures to encourage victims of extremist acts to report them to the relevant authorities;

13.8. strengthen the oversight by national parliaments of the activities of intelligence agencies, in line with the recommendations set out in Assembly Recommendation 1713 (2005) on the democratic oversight of the security sector in member States;

13.9. improve the analysis of the phenomenon of extremism and the collection and comparability of relevant data;

13.10. strengthen international co-operation in order to counter the spread of extremist propaganda on the Internet;

13.11. ensure full co-operation with ECRI and support its activities.

14. In addition, the Assembly asks its members, the political parties which they represent and its political groups to:

14.1. promote or endorse the Charter of European Political Parties for a Non-Racist Society;

14.2. follow the suggestions made by ECRI in its Declaration on the use of racist, antisemitic and xenophobic elements in political discourse and its General Policy Recommendation No.5 on combating intolerance and discrimination against Muslims;

14.3. promote the setting-up of ethics committees within political parties and parliaments, with the right to sanction their members for racist, antisemitic, xenophobic or Islamophobic behaviour or discourse.

15. Finally, the Assembly encourages the Commissioner for Human Rights to devote increasing attention to all forms of extremism, including Islamophobia.

A large number of national initiatives, sometimes in the form of extensive national plans on integration, racism or sometimes more specific areas, such as inclusion for Roma, focus on a particular sector in order to counter the tendencies of a particular political discourse, often through charter or personal commitment. A similar approach is adopted by the media and journalists, who may, for example, run competitions and award prizes for respecting tolerance. This technique of competitions and awards is also a way of identifying best public practices. Codes of ethics for police forces or prosecutors are a further resource.

A considerable number of public policies involve neighbourhood programmes to deradicalize young people, set up neighbourhood centres and introduce local pilot schemes to encourage victims to lodge complaints and establish contact with the relevant ministries.

An extremely substantial body of measures has been adopted at the European and national level against cyber hate on the Internet, particularly within the framework of the Council of Europe Convention on Cybercrime and its Additional Protocol concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems. The introduction of these measures is due not only to the emergence of new modes of anonymous communication but even more to new forms of virtual society, to which the youngest generation is particularly attuned. Data from contemporary psychology make it possible to assess the effects of the loss of physical proximity on the depersonalization of human relations and thus on the new forces behind the reduced levels of hate speech. Encouraging people to learn self-regulation and take responsibility will make it possible to avoid overheating or snowballing effects.

Some initiatives take the form of pilot projects or interactive laboratories. By way of illustration, the multidisciplinary analyses of new educational approaches to the experience of conflict are most useful.³³ The idea of transforming the school into a laboratory and exposing students to situations of cultural or ethnic tension or to hate speech, in which they would act the victims or perpetrators, has been progressively studied and tested in various countries. The challenges in these tests provide a valuable learning process. It is not for this report to assess these initiatives but it should be

³³ See, for example, the studies by I. ter Avest, D. P. Josza, T. Knauth, J. J. Rosón, G. Skeie (eds.), *Dialogue and Conflict on Religion. Studies of Classroom Interaction in European Countries*, Münster, New York, Waxmann, 2009. These experiments are not part of the Toledo Guiding Principles, however, which were written in response to requests from the United Nations and other intergovernmental bodies to facilitate teaching about religions and beliefs in order to promote tolerance and understanding and are published by ODIHR. www.osce.org/publications/odihr/2007/11/28314_993_en.pdf.

emphasized that European case law has already had to set certain limits to fundamental rights in relation to certain role-playing experiments owing to the collateral or lingering harm that they may cause to more impressionable people.³⁴

More generally, the attention paid by a number of States to multicultural — or indeed multi-faith — initiatives is also a new challenge, which brings in new participants and public institutions and has aroused interest from the fields of law, sociology, psychology and political science, as well as the “theologies”.³⁵ The very location of inter-faith dialogue takes on importance from the point of view of both social policy and education.

The attempt at an experimental approach to the issue of tolerance is particularly sensitive with regard not only to the individual fundamental rights of the schoolchildren concerned but also to the requirement of neutrality on the part of the public authorities. Perhaps any obstacle could be removed by the simple expedient of making this experimental approach multilateral, opening up a dialogue that is inter-faith as well as multicultural or, indeed, of making it an integral part of responsible citizenship.

³⁴ See, for example, European Court of Human Rights (Grand Chamber), judgement of 29 June 2007 (*Folgerø and others v. Norway*), No. 15472/02.

³⁵ See, for example, P. Floris, “Laicità e collaborazione a livello locale. Gli equilibri tra fonti centrali e periferiche nella disciplina del fenomeno religioso” *Rivista telematica: Stato, Chiese e pluralismo confessionale* , www.statoechiese.it, 2010, or C. Timmerman and B. Segaert (eds.), *How to Conquer the Barriers to Intercultural Dialogue: Christianity, Islam and Judaism, Gods, Humans and Religions* 5, Brussels, Bern, Berlin, Peter Lang, 2005.

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