



FREEDOM OF EXPRESSION
THE LEGAL CHALLENGE: HOW DOES IT WORK?
EU AND COUNCIL OF EUROPE

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Freedom of expression

Article 19 of the Universal Declaration of Human Rights

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

Council of Europe

- International organization
- 1949
- 47 member-states
- European Convention for Human Rights (1950)



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European Convention on Human Rights

Article 10

*1. Everyone has the right to freedom of expression. This right shall **include freedom to hold opinions and to receive and impart information** and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

European Convention on Human Rights

Article 10

*2. The exercise of these freedoms, since it carries with it **duties and responsibilities**, may be subject to such formalities, conditions, restrictions or penalties as are **prescribed by law** and **are necessary in a democratic society**, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

European Court of Human Rights

- Created as a permanent Court in 1998
- By Protocol no. 11 to the European Convention on Human Rights
- Strasbourg
- It has the competence to judge every question related to the interpretation and application of the European Convention on Human Rights and its Protocols
- States can also present complaints about possible violations of the Convention against other States
- Applications to the Court can also be made by individuals



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Admissibility to the Court

1. Victim status
2. Exhaustion of domestic remedies
3. Six-month time-limit
4. The facts should not be considered by the Court before or by any other international Court or similar
5. Well-founded

ECtHR and freedom of expression

The 3-stage test

1. The interference in freedom of expression must be prescribed by law
2. The interference must pursue a legitimate aim (*national security, territorial integrity or public safety, disorder or crime, health or moral, etc*)
3. The interference must be necessary in a democratic society, which implies verifying whether the national intervention corresponds to a “pressing social need” – the, it must pass the proportionality test:
 - Appropriateness of the measure to achieve the aim
 - Possibility of adopting less intrusive measures by a State

“Margin of appreciation”

Article 17 ECHR

Prohibition of abuse of rights

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



European Union

- *Sui generis* international organization
- 28 Member-States (yet)
- It includes several institutions:
 - European Parliament
 - European Commission
 - European Council
 - Council of Ministers

The treaties

Article 2 of Treaty of the European Union

“The Union is founded on the values of **respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights**, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

The treaties

Article 6 of Treaty of the European Union

1. The Union recognises the rights, freedoms and principles set out in the **Charter of Fundamental Rights of the European Union** of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

(...)

The treaties

Article 6 of the Treaty of the European Union

3. Fundamental rights, , as guaranteed by the **European Convention for the Protection of Human Rights and Fundamental Freedoms** and as they **result from the constitutional traditions common to the Member States**, shall constitute general principles of the Union's law.

Charter of Fundamental rights

The first “bill of rights” of the European Union

It was only part of European Law in 2009, with the entry into force of the Lisbon Treaty

Its application is monitored by the Court of Justice of the European Union

Article 11

1. Everyone has the **right to freedom of expression**. This right shall include **freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers**.
2. The **freedom and pluralism of the media** shall be respected.

Article 52

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter **must be provided for by law and respect the essence of those rights and freedoms.** Subject to the **principle of proportionality**, limitations may be made only if they are **necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.** (...)

3. In so far as this Charter contains rights which correspond to rights *guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms*, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Limitations on freedom of expression

1

Have a legitimate aim –
general interest
recognised by the Union;
aimed at protecting the
rights and freedoms of
others

2

Be necessary to the
objective

3

Be proportional to the
objective

Emblematic cases dealing with freedom of Expression (ECtHR)

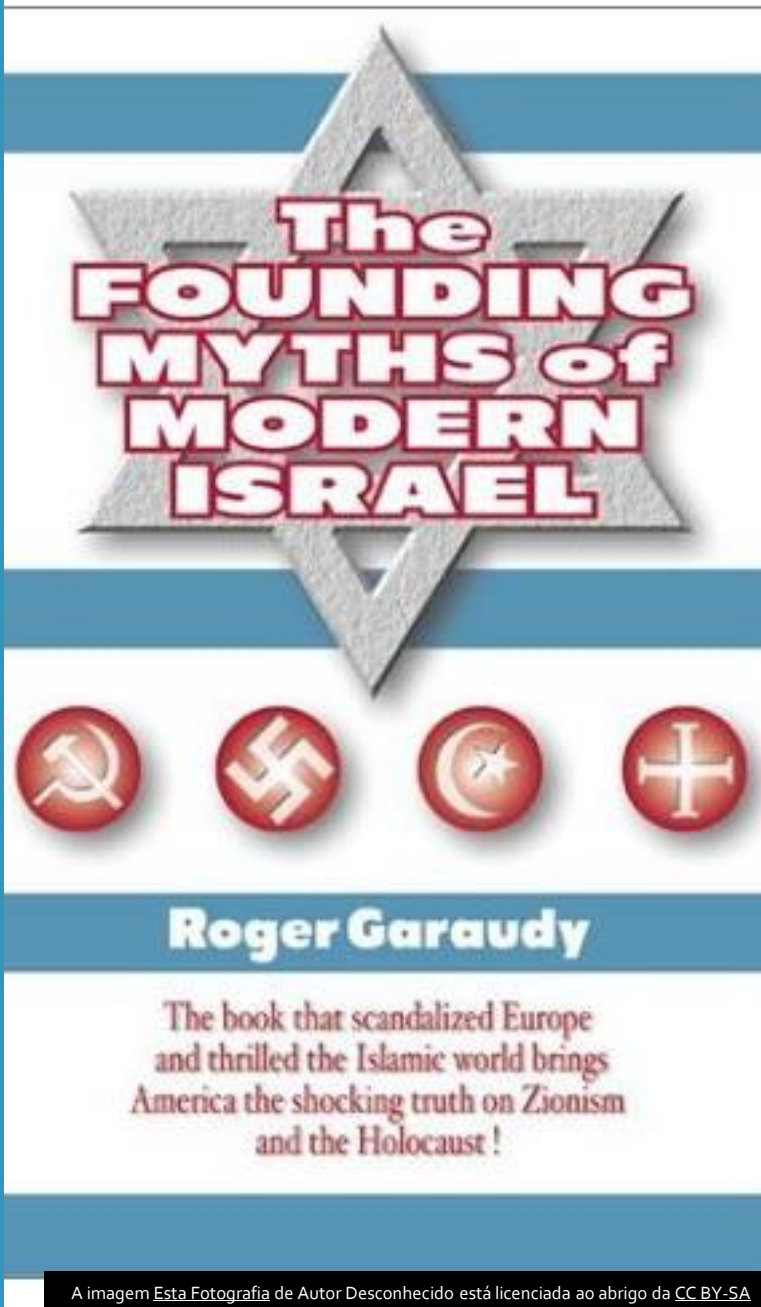
Garaudy v. France (ECtHR – 2003)

Facts:

- Mr Garaudy was the author of the book “The Founding Myths of Modern Israel”
- The book was distributed through non-commercial outlets in 1995 and then republished in 1996
- Five separate sets of criminal proceeding were brought against the author under Freedom of the Press Act of 1881



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Emblematic cases dealing with freedom of Expression (ECtHR)

Garaudy v. France (ECtHR – 2003)

Facts:

- The Paris Court of Appeal found Mr Garaudy guilty of disputing the existence of crimes against humanity, public defamation of a group of people and incitement to discrimination and racial hatred
- The convictions were upheld by the Court of Cassation in five judgments in 2000
- He was convicted to a prison sentence and fines in the total of 25.900€



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Emblematic cases dealing with freedom of Expression (ECtHR)

Garaudy v. France (ECtHR – 2003)

Complaint:

- Mr Garaudy directed a complaint to the European Court of Human Rights under article 10 of ECHR
- He claimed that his right to freedom of expression was infringed with there convictions by the French Court

Emblematic cases dealing with freedom of Expression (ECtHR)

Garaudy v. France (ECtHR – 2003)

Court's decision:

- Regarding Mr Garaudy's convictions for disputing the existence of crimes against humanity, the Court referred to article 17 (prohibition of abuse of rights)
- Regarding the argumentation of the domestic court – the denial or rewriting of historic facts constituted a serious threat to the public order, and it was incompatible with democracy and Human Rights and it was inadmissible under article 17.



Emblematic cases dealing with freedom of Expression (ECtHR)

Garaudy v. France (ECtHR – 2003)

Court's decision:

- Regarding Mr Garaudy's convictions for racial defamation and incitement to racial hatred – the Court found that they could constitute an interference with his right to freedom of expression
 - The interference was prescribed by law, aiming to prevent disorder or crime and protect the reputation or rights of others.
 - The Court had doubts that the passages on the book that lead to these convictions could be qualified under Article 10



Emblematic cases dealing with freedom of Expression (ECtHR)

Garaudy v. France (ECtHR – 2003)

Court's decision:

- The complaint on the violation of article 10 related to the conviction of racial defamation and incitement to racial hatred was considered ill-founded

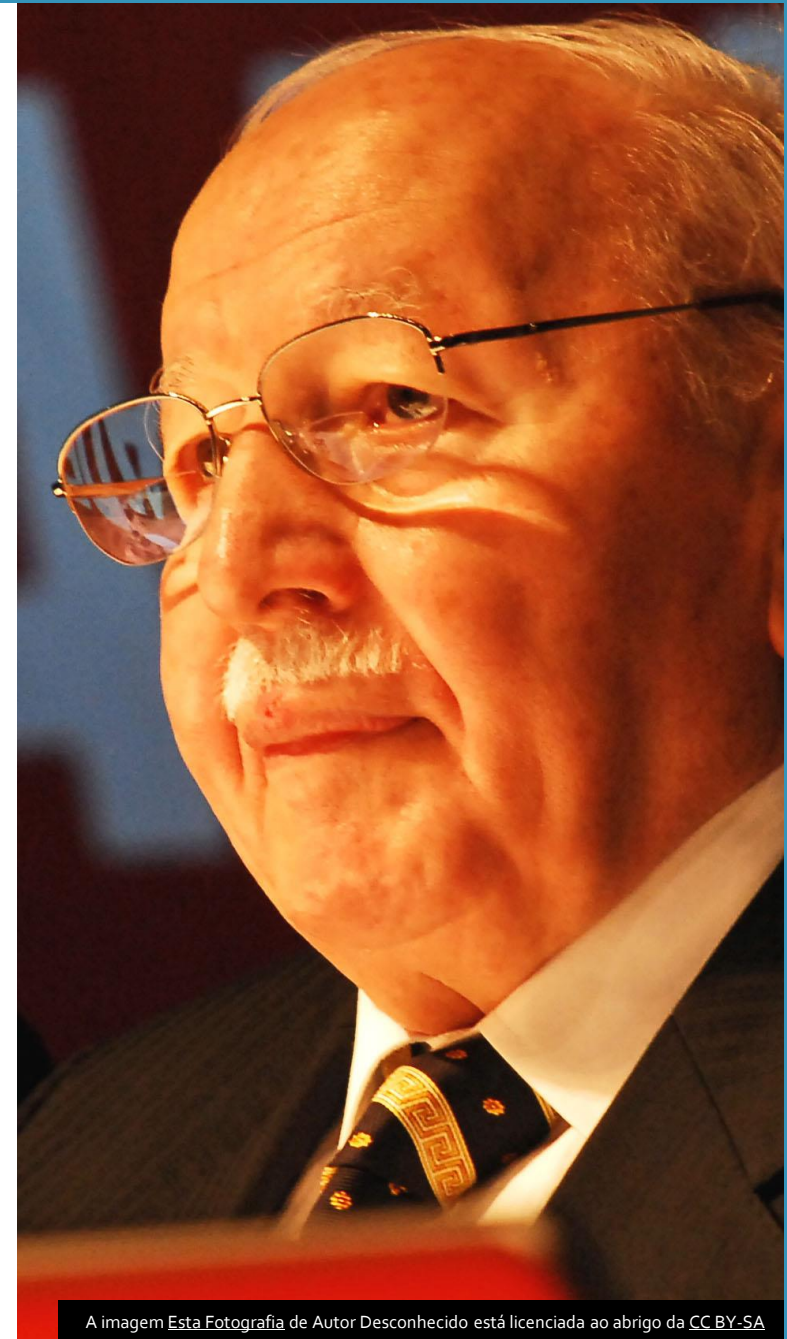


Emblematic cases dealing with freedom of Expression (ECtHR)

Erbakan v. Turkey (ECtHR 2006)

Facts:

- Mr Erbakan is a Turkish national and politician
- He was prime minister of Turkey (1996/1997)
- He was the Chairman of the “Welfare Party” that was dissolved in 1998 for engaging in activities contrary to the principles of secularism.

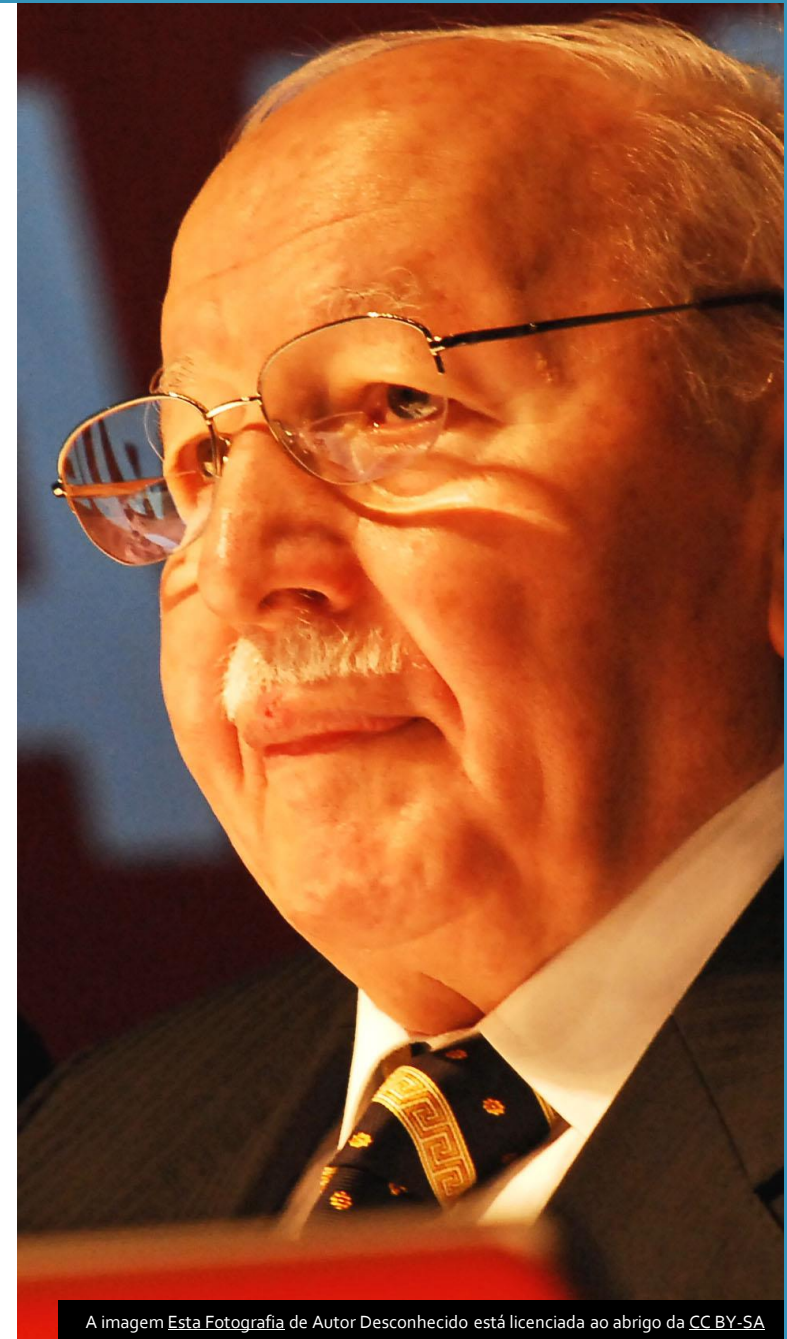


Emblematic cases dealing with freedom of Expression (ECtHR)

Erbakan v. Turkey (ECtHR 2006)

Facts:

- In 1994 during the local election campaign, Mr Erbakan gave a public speech in South-East Turkey – no official recording of the speech was made
- In 1998 criminal proceedings were brought against Mr Erbakan for having incited the people to hatred or hostility through comments made in the 1994 speech about the distinction between religions, races and regions
- In 2000, Mr Erbakan was convicted by the State Security Court – one year of prison and a fine
- The Court of Cassation upheld the conviction (2000)



Emblematic cases dealing with freedom of Expression (ECtHR)

Erbakan v. Turkey (ECtHR 2006)



Complaint:

- Mr Erbakan complaint that his conviction infringed his right to freedom of expression
- He also claimed that his case had not been heard by an independent and impartial tribunal on account of the presence of a military judge on the State Security Court
- He argued a violation of article 10 and article 6, §1 ECHR

Emblematic cases dealing with freedom of Expression (ECtHR)

Erbakan v. Turkey (ECtHR 2006)

Court's decision:

- Regarding the comments attributed to the applicant – the Court considered that by using religious terminology in his speech, he had, among other things, reduced diversity to a simple division of “believers” and “non-believers” and created a political line formed on the basis of religious affiliation.





Emblematic cases dealing with freedom of Expression (ECtHR)

Erbakan v. Turkey (ECtHR 2006)

Court's decision:

- The Court also took into account that at the material time the region's inhabitants had been victims of a number of tragic acts perpetrated by fundamentalist movements
- The Court also noticed that the authorities had not sought to establish the content of the speech until 5 years after the event

Emblematic cases dealing with freedom of Expression (ECtHR)

Erbakan v. Turkey (ECtHR 2006)

Court's decision:

- The Court considered that the criminal proceedings instituted against a politician 4 years and 5 months after the alleged facts had not been reasonably proportionate to the legitimate aims pursued
- It was important for the Court to take into account the interest of a democratic society and the importance of ensuring and maintaining freedom of political debate



Case Study

- The applicant, Mr A, is a chairman of a political party “National Front” and the editor in chief of the party’s publication and website owner.
- He is also a member of the House of Representatives.
- During the electoral campaign leaflets from Mr A’s party were distributed. Those leaflets claimed to **“oppose to the Islamization of the country”, “return non-European unemployed”, “stop the pseudo-integration policy”, “reserve for country’s citizens and Europeans priority in Social Security”**.
- Criminal proceedings were held against Mr A. This interference to freedom of expression was provided by law on racism and xenophobia, and Mr A was convicted to 250 hours of community service related to the integration of immigrants and to a 10-year suspended prison sentence. The Court also declared him ineligible for 10 years. He also was ordered to pay one euro to each of the civil parties.
- The domestic court found that the offending conduct of Mr A had not fallen within his parliamentary activity and the leaflets contained passages that represented a clear and deliberate incitation of discrimination, segregation or hatred and violence based on race, colour or national or ethnic origin.
- The subsequent appeal was dismissed on points of law.

Case Study

The Complaint:

Mr A complaint to the European Court of Human Rights relying on article 10, alleging that his conviction for the content of his political party's leaflets represented an excessive restriction on his right to freedom of expression.

Case Study

Is the application admissible considering the ECtHR's admissibility criteria?

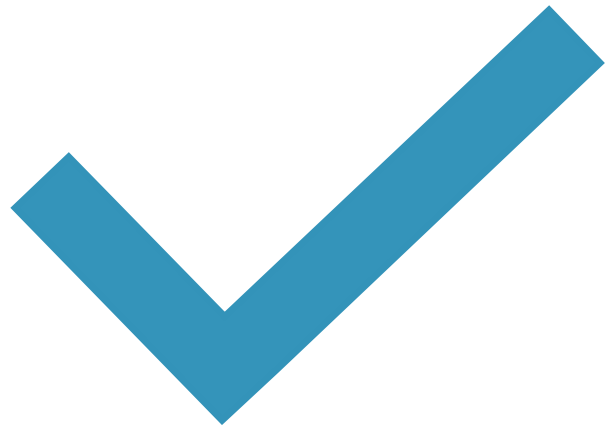
- Alleged violation of a right enshrined in the European Convention of Human Rights
 - Victim status
 - Exhaustion of domestic remedies
 - Well-founded
-
- Is there a confrontation with different fundamental rights?
 - Is the 3-stage test applicable in this situation? What do you infer?
 - Was there a violation of article 10 as claimed by the applicant?

Case Study

Ferét v. Belgium

- The applicant, Mr Ferét, is a chairman of a political party “National Front” and the editor in chief of the party’s publication and website owner. He is a Belgian national.
 - He is also a member of the House of Representatives.
 - During the electoral campaign leaflets from Mr A’s party were distributed. Those leaflets claimed to **“oppose to the Islamization of the country”, “return non-European unemployed”, “stop the pseudo-integration policy”, “reserve for country’s citizens and Europeans priority in Social Security”**.
- Criminal proceedings were held against Mr Ferét. This interference to freedom of expression was provided by law of 1981 on racism and xenophobia, and Mr A was convicted to 250 hours of community service related to the integration of immigrants and to a 10-year suspended prison sentence. The Court also declared him ineligible for 10 years. He also was ordered to pay one euro to each of the civil parties.
 - The domestic court found that the offending conduct of Mr Ferét had not fallen within his parliamentary activity and the leaflets contained passages that represented a clear and deliberate incitation of discrimination, segregation or hatred and violence based on race, colour or national or ethnic origin.
 - The subsequent appeal was dismissed on points of law.

Case Study



Is the application admissible considering the ECtHR's admissibility criteria? YES

- Alleged violation of a right enshrined in the European Convention of Human Rights
 - Victim status
 - Exhaustion of domestic remedies
 - Well-founded
-
- Is there a confrontation with different fundamental rights? YES – freedom of expression and protection of the people to intolerant speech (dignity and respect)

Case Study

- Is the 3-stage test applicable in this situation? What do you infer?
 1. The interference must be prescribed by law
 2. The interference must pursue a legitimate aim
 3. The interference must be necessary in democratic society and it passes the proportionality test:
 - Appropriateness of the measure to achieve the aim
 - Possibility of adopting less intrusive measures by a State
- Was there a violation of article 10 as claimed by the applicant? The ECtHR ultimately deciding there was no violation of article 10!

Final Remarks

Freedom of expression
is essential for the
existence of a plural,
free democracy

It is important to
maintain contrary
ideas in discussion –
respecting the others
point of view



Thank you

"I disapprove of what you say,
but I will defend to the death
your right to say it"

(Hall portraying Voltaire)

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