



Sharia, Democracy, and Freedom of Expression: Unpacking the ECtHR's Stance

Question(s) at stake:

Whether statements made in a television broadcast criticizing democracy and secularism, calling for the establishment of a sharia-based order, and describing children born of civil marriages as illegitimate are protected by freedom of expression.

Outcome of the ruling:

The ECtHR ruled that merely defending sharia, without calling for the use of violence to establish it, could not be considered a form of hate speech. In this particular case, the applicant had been convicted of incitement to hatred based on religious intolerance. The Court considered the television programme as a means to inform the public about a matter of general interest in Türkiye, and the applicant's views were expressed within the context of a pluralistic debate. The Court concluded that the interference with the applicant's freedom of expression was not "necessary in a democratic society" and found a violation of Article 10.

Topic(s):

- [Crime and Punishment under State Law](#)

Keywords:

- [Freedom of expression](#)
- [Hate speech](#)

Tag(s):

- [Sharia](#)
- [Secularism](#)

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Country:

[Turkey](#)

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Link to the decision:

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ECLI:

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Date:

04 December 2003

Jurisdiction / Court / Chamber:

European Court of Human Rights

Remedy / Procedural stage:

Final

Previous stages:

- Court of Cassation (25 September 1996)
- İstanbul National Security Court (1 April 1996)

Subsequent stages:

None

Branches / Areas of law:

Criminal Law

Facts:

On 12 June 1995, Mr Gündüz (the applicant) took part in his capacity as the leader of Tarikat Aczmendi (a community describing itself as an Islamic sect) in a television programme. The purpose of the programme was to discuss the views of this particular religious group with the applicant, including their ideas on secularism, Kemalism, sharia, and other related issues. During the programme, debates were initiated by callers who wanted to challenge the ideas that were presented. This was the usual format of the television programme.

During the programme, the applicant spoke of Kemalism as a religion that aims to destroy Islam and replace it. He went on to say that Kemalism and secularism are irreligious and that being a democrat also meant “having no religion”.

A caller then joined the programme and challenged the applicant’s views. The applicant maintained his position and stated that people who identify as Kemalists adhere to the Kemalist religion.

He went on to say: “I’m not insulting anyone. I am just saying that anyone calling himself a democrat, secularist or Kemalist has no religion. [...] Democracy in Turkey is despotic, merciless and impious [*dinsiz*]. [...] Because two days ago, six or seven of our friends were taken away while on the sect’s premises [*dergah*] [...]. This secular democratic system is hypocritical [*ikiyüzlü ve münafık*] [...]; it treats some people in one way and others in another way. In other words, we do not share democratic values”.

The caller and the applicant then entered into a debate on Islam and democracy. The applicant stated that according to his understanding of Islam there can be no distinction between an individual’s beliefs and the administration of the state. He stated that a child born of a civil marriage will be a “*piç*” (bastard).

The caller went on to say that people like the applicant are trying to destroy democracy and set up a regime based on sharia. The applicant answered: “Of course, that will happen, that will happen”.

On 5 October 1995, the public prosecutor at the Istanbul National Security Court instituted criminal proceedings against the applicant on the ground that he had breached Article 312 §§ 2 and 3 of the Criminal Code by making statements during the television programme that incited the people to hatred and hostility on the basis of a distinction founded on religion.

On 1 April 1996, the National Security Court, after ordering an expert opinion, found the applicant guilty as charged and sentenced him to two years' imprisonment and a fine of 600,000 Turkish liras, pursuant to Article 312 §§ 2 and 3 of the Criminal Code.

The domestic court noted that during the debate, in which the participants had the opportunity to discuss the dysfunctionality, usefulness, and problems of institutions such as secularism and democracy in the context of social cohesion, human rights, and freedom of expression, Mr Gündüz made comments and used expressions contrary to that purpose. The Court drew attention to some of Mr Gündüz's statements, such as his characterization of the concepts of Kemalism, democrat, or secularist as irreligious, of democracy in Türkiye as despotic, brutal, and irreligious, of the secular system as hypocritical, and of children born of a civil marriage authorized by the Republic of Türkiye as "*piç*" (illegitimate).

The Court stated that Mr Gündüz also affirmed during the debates that his group wants to destroy democracy and set up a regime based on sharia. In the end, the Court was satisfied beyond reasonable doubt that the defendant intended openly to incite the people to hatred and hostility on the basis of a distinction founded on religion.

On 15 May 1996, the applicant appealed to the Court of Cassation. In his notice of appeal, referring to Article 9 of the European Convention on Human Rights (ECHR) and Articles 24 (freedom of religion) and 25 (freedom of expression) of the Turkish Constitution, he relied on the protection of his right to freedom of religion and freedom of expression. On 25 September 1996, the Court of Cassation upheld the judgment at first instance.

Ruling:

On 12 June 1995, Mr Gündüz (the applicant) took part in his capacity as the leader of Tarikat Aczmendi (a community describing itself as an Islamic sect) in a television programme. The purpose of the programme was to discuss the views of this particular religious group with the applicant, including their ideas on secularism, Kemalism, sharia, and other related issues. During the programme, debates were initiated by callers who wanted to challenge the ideas that were presented. This was the usual format of the television programme.

During the programme, the applicant spoke of Kemalism as a religion that aims to destroy Islam and replace it. He went on to say that Kemalism and secularism are irreligious and that being a democrat also meant “having no religion”.

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Main quotations on cultural or religious diversity:

"The second passage is the following: '... if [a] person has his wedding night after being married by a council official authorised by the Republic of Turkey, the child born of the union will be a piç ...' In Turkish, 'piç' is a pejorative term referring to

children born outside marriage and/or born of adultery and is used in everyday language as an insult designed to cause offence. Admittedly, the Court cannot overlook the fact that the Turkish people, being deeply attached to a secular way of life of which civil marriage is a part, may legitimately feel that they have been attacked in an unwarranted and offensive manner. It points out, however, that the applicant's statements were made orally during a live television broadcast, so that he had no possibility of reformulating, refining or retracting them before they were made public (see *Fuentes Bobo v. Spain*, no. 39293/98, § 46, 29 February 2000). Similarly, the Court observes that the Turkish courts, which are in a better position than an international court to assess the impact of such comments, did not attach particular importance to that factor. Accordingly, the Court considers that, in balancing the interests of free speech and those of protecting the rights of others under the necessity test in Article 10 § 2 of the Convention, it is appropriate to attach greater weight than the national courts did, in their application of domestic law, to the fact that the applicant was actively participating in a lively public discussion (see, *mutatis mutandis*, *Nilsen and Johnsen*, cited above, § 52)." (para. 49) "As regards the relationship between democracy and sharia, the Court reiterates that in *Refah Partisi (the Welfare Party) and Others v. Turkey* ([GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 123, ECHR 2003-II) it noted, among other things, that it was difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia. It considered that sharia, which faithfully reflected the dogmas and divine rules laid down by religion, was stable and invariable and clearly diverged from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervened in all spheres of private and public life in accordance with religious precepts. The Court would point out, however, that *Refah Partisi (the Welfare Party) and Others* concerned the dissolution of a political party whose actions seemed to be aimed at introducing sharia in a State party to the Convention and which at the time of its dissolution had had the real potential to seize political power (*ibid.*, § 108). Such a situation is hardly comparable with the one in issue in the instant case. Admittedly, there is no doubt that, like any other

remark directed against the Convention's underlying values, expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10 of the Convention. However, the Court considers that the mere fact of defending sharia, without calling for violence to establish it, cannot be regarded as 'hate speech'." (para. 51)

Main legal texts quoted in the decision:

Domestic law

- Articles 311 and 312 of the Turkish Criminal Code
- Articles 134, 143, and 144 of the Turkish Civil Code

International treaties

- Paragraph 2 of the Preamble to the 1945 Charter of the United Nations
- Articles 1(3), 13(1) (b), 55 (c), and 76 (c) of the 1948 Universal Declaration of Human Rights
- Articles 1, 2, and 7 of the 1966 International Covenant on Civil and Political Rights
- Articles 2(1), 20(2), and 26 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination
- Articles 4 and 5 of the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief Vienna Declaration
- Resolution No. 52/122 on the Elimination of All Forms of Religious Intolerance, adopted by the General Assembly of the United Nations on 12 December 1997
- Recommendation No. R (97) 20 on "Hate Speech", adopted on 30 October 1997 by the Committee of Ministers of the Council of Europe European Commission against Racism and Intolerance General Policy
- European Commission against Racism and Intolerance, General Recommendation No. 7 adopted on 13 December 2002 on National

European Convention on Human Rights

- (Art. 10) Freedom of expression (general)
- (Art. 10-1) Freedom of expression
- (Art. 10-2) Interference
- (Art. 10-2) Necessary in a democratic society
- (Art. 10-2) Prevention of disorder
- (Art. 10-2) Prevention of crime
- (Art. 10-2) Protection of morals
- (Art. 10-2) Protection of the rights of others
- (Art. 41) Just satisfaction (general)

Cases cited in the decision:

- *Colacioppo v. Italy*, judgment of 19 February 1991, Series A no. 197-D
- *Fressoz and Roire v. France*, App. no. 29183/95, judgment of 21 January 1999
ECLI:CE:ECHR:1999:0121JUD002918395
- *Fuentes Bobo v. Spain*, App. no. 39293/98, judgment of 29 February 2000
ECLI:CE:ECHR:2000:0229JUD003929398)
- *Handyside v. the United Kingdom*, judgment of 29 April 1976, Series A no. 24
- *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298
- *Müller and Others v. Switzerland*, judgment of 24 May 1988, Series A no. 133
- *Murphy v. Ireland*, App. no. 44179/98, judgment of 10 July 2003
ECLI:CE:ECHR:2003:0710JUD004417998
- *Nilsen and Johnsen v. Norway*, App. no. 23118/93, judgment of 25 November 1999
ECLI:CE:ECHR:1999:1125JUD002311893
- *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, Series A no. 295

- *Refah Partisi (The Welfare Party) and others v. Turkey*, App. nos. 41340/98, 41342/98, 41343/98, 41344/98, judgment of 13 February 2003
ECLI:CE:ECHR:2003:0213JUD004134098
- *Skalka v. Poland*, App. no. [43425/98](#), judgment of 27 May 2003
ECLI:CE:ECHR:2003:0527JUD004342598
- *Sunday Times v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30
- *Sürek v. Turkey (no.1)*, App. no. 26682/95, judgment of 8 July 1999
ECLI:CE:ECHR:1999:0708JUD002668295
- *Wingrove v. the United Kingdom*, judgment of 25 November 1996, Reports 1996-V

Commentary

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Freedom of expression is a cornerstone of human rights, deeply intertwined with individual dignity. The *Handyside v. the United Kingdom* case underlines this importance by confirming that freedom of expression extends beyond ideas that are generally accepted in a given society to include ideas that may challenge or even shock some sections of that society. However, as the Court established in the landmark case of *Otto Preminger Institute v. Austria*, this freedom bears accompanying responsibilities. Particularly in matters concerning religious beliefs, it is expected that parties refrain from unnecessarily offensive statements that infringe on the rights of others, as such expressions fail to foster constructive dialogue.

In the context of regulating sensitive moral or religious issues, the ECtHR grants states a margin of appreciation. However, this does not mean that states can avoid oversight by the Court regarding limits on freedom of expression, as the Court assesses whether such limits are necessary in a democratic society. Such scrutiny hinges on whether the restriction addresses a pressing social need, maintains proportionality, and is supported by relevant justifications from national authorities.

In the case at hand, the Court observed that the television programme in question, in which the applicant made the statements that led to him being convicted of incitement, aimed to delve into the activities of a sect whose practices had garnered public attention. The applicant, regarded as the sect's leader, was invited to participate in the programme to explain the sect's views, including its assertion that democratic values were incompatible with its interpretation of Islam.

Furthermore, the Court noted that the programme's format was tailored to stimulate discourse, ensuring a balanced exchange of views that would captivate viewers. Prominent figures who disagreed with the applicant were invited to the show to debate him. The ECtHR concurred with the domestic courts that, insofar as the debate centred on the presentation of a sect and its implications for democracy, it aimed to inform the public about a topic of significant relevance to Turkish society.

Following its review of the national courts' ruling and its established stance, the ECtHR noted that the conclusions drawn by the Turkish courts primarily revolved around the applicant's characterization of contemporary secular institutions as "impious", his critique of concepts like secularism and democracy, and his open advocacy for sharia. From their analysis of specific statements made by the applicant, the Turkish courts concluded that he was not entitled to protection under freedom of expression. However, the ECtHR held that the remarks of the applicant reflect a strong stance and deep-seated dissatisfaction with contemporary Turkish institutions, including the principles of secularism and democracy, and within their contextual framework they cannot be construed as incitements to violence or as hate speech rooted in religious intolerance.

In their rulings, domestic courts also highlighted the use of the term "*piç*" by the applicant during the television debate. In Turkish, the term "*piç*", by which the applicant referred to children born of civil marriages, carries a pejorative connotation, referring to children born outside wedlock or from adulterous relationships, and is commonly used as a derogatory insult. The ECtHR did not dismiss the potential offence caused to the Turkish public by the applicant's use

of the term in this context. However, it stated that the applicant's statements were delivered orally during a live television broadcast, affording the applicant no opportunity to amend or retract them before public dissemination.

In weighing the scales between the interests of freedom of expression and the imperative of safeguarding the rights of others, the Court deemed it fitting to accord more significance than the national courts did to the fact that the applicant was actively engaged in a robust public discourse. Here the Court noted that especially in the context of a live TV programme retractions are hard to make and discourse can become heated.

Turkish Judge Rıza Türmen, in his dissent, strongly criticized the majority ruling. He contended that in Turkish, "*piç*" constitutes a severe insult and qualifies as hate speech. He argued that the applicant could have articulated his critiques on democracy and secularism without resorting to such language, thereby fostering a more constructive dialogue. Furthermore, he highlighted the applicant's assertion that his vehement stance against democracy and secularism, coupled with his advocacy for a sharia-based regime, was aligned with divine will. Consequently, those who espoused contrary views and defended democracy and secularism were depicted as irreligious. Judge Türmen perceives this as yet another manifestation of hate speech.

Domestic courts also sought to establish how exactly the applicant was campaigning for a sharia-based regime. It was clear that the applicant did campaign for sharia during the television programme, but there was no reference to violence. He also stated before the domestic courts that the regime based on sharia would be established not by force or violence but by convincing and persuading the public. The domestic court concluded that it was unclear how the applicant wished to establish sharia.

Here the ECtHR referred to the landmark *Refah Partisi v. Turkey* case and reiterated its position regarding the relationship between sharia and democracy. The Court noted that there is an inherent contradiction in professing allegiance to democracy and human rights while advocating for a regime grounded in sharia

law. It asserted that sharia, being founded upon religious doctrines and divine mandates, diverges significantly from the values enshrined in the Convention.

However, the Court clarified that the case at hand differs markedly from the scenario in the *Refah* case. In that instance, the dissolution of a political party was prompted by its apparent aspirations to implement sharia within a Convention state, coupled with its credible potential to attain political power. Such a context presented a situation distinct from the present case under consideration. The Court found that merely advocating for sharia, in the absence of incitement to violence for its establishment, does not constitute “hate speech”.

The Court’s essentializing views on Islam and sharia have been subject to many criticisms over the years. One such criticism came from Judge Kovler in his concurring opinion in the *Refah* case. He stated that the Court used terms borrowed from “politico-ideological” discourses in its ruling, which he found very troubling. He also found that the Court dismissed the significance of Islamic thought with a reductionist presentation of “a legal tradition going back thousands of years”.

Normally, there is nothing controversial about the ECtHR referring to its previous rulings and repeating legal principles to ensure consistency within its jurisprudence. However, if instead of reiterating legal principles courts repeat opinions that are not supported by evidence, these may become pseudofacts that gain weight and credibility over time. This type of “self-referentialism” is problematic because in such situations it will be difficult for courts in future cases to recognize and correct mistakes made in past decisions (Skeet 2023).

Another noteworthy aspect of this case is the Court’s differentiation between the *Refah* case and the present one. Beyond the distinction in the articles invoked (Article 11 in *Refah* and Article 10 in this case), the Court highlighted that the Refah Party possessed “real potential to seize political power” for the establishment of sharia, whereas Mr Gunduz’s views, unless advocating violence, were not deemed dangerous to democracy. This juxtaposition raises questions. What if Mr Gunduz were to establish a political party that aims to establish a

sharia-based regime through peaceful and democratic methods and also had “real potential to seize political power”? Would that be a threat to democracy? Are some expressions within public debates only protected if they cannot garner political power?

Lastly, there is an interesting dilemma in the Court’s ruling. Initially, the Court acknowledges that the applicant was asked to appear on Turkish television to express the beliefs of a particular sect, notably their claim that Islam does not align with democratic principles. However, as the judgment progresses, the Court adopts a homogenous and totalizing view of Islam, and the applicant’s views are presented as reflective of all beliefs in Islam (Skeet 2023). In fact, within the same TV programme, there were prominent figures from other Muslim communities from Türkiye who joined the debate and disagreed with Mr Gunduz’s views on Islam. Ironically, the Court’s perspective on sharia seems to align more with the viewpoint of Mr Gunduz, as both parties see sharia as incompatible with democracy.

Literature related to the main issue(s) at stake:

- Moe, Christian. 2016 . “Refah Revisited”. In W. Cole Durham and R. Torfs (eds), *Islam, Europe and Emerging Legal Issues*, 235-272. London: Routledge.
- Özbudun, Ergun and Füsün Türkmen. 2013. “Impact of the ECtHR Rulings on Turkey’s Democratization: An Evolution”. *Human Rights Quarterly* 35 (4): 985-1008.
- Skeet, Charlotte H. 2019. “Orientalism in the European Court of Human Rights”. *University of Sussex*, available at < <https://hdl.handle.net/10779/uos.23466611.v1>> accessed 19 May 2026
- Spielmann, Malte. 2021. “Kemalism, the Judiciary, and Human Rights Diffusion: The ECHR in Turkey”. *Max Planck Institute for Comparative Public Law and International Law (MPIL)*. Research Paper No. 2021-18.

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