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The censorship of speech about Islam before the European Court of Human Rights: the appalling case of E. S. v. Austria

Abstract: The European Court of Human Rights has often issued judgments protecting individuals who have been accused of blasphemy, especially against the Christian religion. Meanwhile, he upheld the condemnation of the conviction decision of the blasphemy Elisabeth Sabaditsch-Wolff by Austrian courts, who publicly described Mohammed's known marriage to a minor girl as pedophilia. The Austrian court officially confessed that it had to condemn these words in the name of religious peace. The ECtHR upheld this judgment in the name of religious tolerance, somewhat suspending previous case law and not censoring any statements criticizing Islam, even if they were true. This violation of freedom of expression is justified by a new positive obligation imposed on you by the Tribunal, consisting in "ensuring peaceful coexistence of all religions and those who do not belong to any religious group, by ensuring mutual tolerance." In this way, any statement, even a true one, can be considered reprehensible as an expression of religious intolerance, if it could lead to social tensions.

Keywords: Austria, European Court of Human Rights [ECHR], freedom of speech, Islam, Muhammad

Abstrakt: Europejski Trybunał Praw Człowieka nierzadko wydawał wyroki chroniące osoby, którym zarzucano bluźnierstwo zwłaszcza przeciwko religii chrześcijańskiej. Tymczasem postanowił utrzymać w mocy potępienie przez austriackie sądy decyzji skazującej za bluźnierstwo Elisabeth Sabaditsch-Wolff, która publicznie opisała znany fakt zawarcia przez Mahometa ślubu z nieletnią dziewczynką jako pedofilię. Sąd austriacki oficjalnie wyznał, że musiał te słowa potępić w imię pokoju religijnego. ETPC podtrzymał ten wyrok w imię tolerancji religijnej, niejako zawieszając wcześniejsze orzecznictwo i cenzurując wszelkie

¹ ECLJ was the only organization authorized to intervene in the E.S. v. Austria by submitting written observations to the European Court of Human Rights.

wypowiedzi krytykujące islam, choćby były one zgodne z prawdą. To naruszenie wolności wypowiedzi usprawiedliwia się nowym pozytywnym obowiązkiem nałożonym na Państwa przez Trybunał, a polegającym na „zapewnieniu pokojowej koegzystencji wszystkich religii i tych, którzy nie przynależą do żadnej grupy religijnej, poprzez zapewnienie wzajemnej tolerancji”. W ten sposób każda wypowiedź, nawet prawdziwa, może zostać uznana za naganną jako wyraz nietolerancji religijnej, jeżeli mogłaby prowadzić do napięć społecznych.

Słowa kluczowe: Austria, Europejski Trybunał Praw Człowieka [ETPC], islam, Mahomet, wolność słowa

In 2013, the Austrian Supreme Court sentenced Elisabeth Sabaditsch-Wolff for publicly questioning: “*a man of fifty-six with a six-year-old girl (...) What is it, if not paedophilia?*” [ECHR 2018: no. 38450/12, 13]. The speaker, recalling proven historical facts about the life of Muhammad, spoke in front of thirty people at a seminar entitled “*Basic knowledge of Islam*”. She wanted to warn about the practice of marrying prepubescent girls in the Muslim culture, following the example of Muhammad who had married six-year-old Aisha and consummated this marriage when she reached 9 years. Following a complaint from a journalist present in the room, Mrs. Sabaditsch-Wolff was convicted on the basis of a criminal provision prohibiting blasphemy in substance².

She then turned to the European Court of Human Rights (ECHR), which, to everyone’s surprise, accepted the arguments of the Austrian courts and validated the conviction by a unanimous Chamber judgment on 25 October 2018. The seven European judges then considered that this woman did not so much seek to inform the public objectively as “*demonstrating that Muhammad was not a worthy subject of worship*” [ibid.: 52]. In support of this conviction, the Court held that insinuating that Muhammad was a “*paedophile*” would be a “*generalisation without a factual basis*” [ibid.: 57] on the grounds that he continued his relationship with Aisha for years and had also married older women. According to the Court, these remarks were “*likely to arouse justified indignation*” of the Muslims

² “*Disparagement of religious doctrines*”, “*Whoever, in circumstances where his or her behaviour is likely to arouse justified indignation, publicly disparages or insults a person who, or an object which, is an object of veneration of a church or religious community established within the country, or a dogma, a lawful custom or a lawful institution of such a church or religious community, shall be liable to up to six months’ imprisonment or a day-fine for a period of up to 360 days*” [Austrian Criminal Code, Section 8, Article 188].

and constitute “*a malicious violation of the spirit of tolerance, which was one of the bases of a democratic society*” capable of “*stirring up prejudice*” and “*putting at risk religious peace*” [ibid.]. These remarks could therefore be condemned for inciting religious intolerance.

On 19 March 2019 [ECHR 2019], the Court rejected the demand of the applicant to refer the case to the Grand Chamber. The criminal conviction of Elisabeth Sabaditsch-Wolff was thus final.

Rarely has a judgment of the Court been criticised so unanimously. Most Western commentators – both conservative and free-thinkers – were shocked by this decision of the fifth section of the Court. Its argumentation was deemed to be particularly poor (I). The judgment was however welcomed by Sunni authorities who are supportive of anti-blasphemy laws (II). The case was not referred before the Grand Chamber despite of the public pressure (III). Finally, the ECHR has preferred, in this case, to support “religious peace” to the detriment of truth and justice (IV).

I. The inadequacies of the argumentation of the Chamber

According to the Court, “*the applicant’s statements had been capable of arousing justified indignation, on the grounds that they had not been made in an objective manner aimed at contributing to a debate of public interest.*” [ECHR 2018: no. 38450/12, 52.] However, the “*basic knowledge of Islam,*” to which these statements were intended to contribute, is clearly of public interest. Islam cannot be excluded from the scope of the debate of ideas on the grounds that this whole set of doctrines has an important religious dimension. Islam also has social, political and historical dimensions that must be freely discussed [Ahmari 2018]. Given the scale of this phenomenon, the public needs to be informed, and this information can legitimately be critical as long as it is not misleading. Muhammad is also a political figure who continues to exert a strong influence; hence, it should be widely possible to criticise him within the context of a political debate.

In addition, it must be noted that the objections raised by the applicant are directly related to the ongoing practice of marriage of prepubescent girls in countries influenced by Muslim culture. The applicant related this practice to the fact that “*Muhammad is seen as the ideal man, the perfect human, the perfect Muslim. That means that the highest commandment for a male Muslim is to imitate Muhammad, to live his life*” [ECHR 2018: no. 38450/12, 13]. According to the United Nations Population Fund (UNFPA), between 2011 and 2020, 50 million girls under 15 years

old will be married. This phenomenon is also marginally present in Europe, so seeking its causes is a question of public interest. There is a public interest in open debate about pedophilia in religious contexts, not only in the Church but also in other religions. Pedophilia in the Muslim world should not be treated any different from that of other religions.

The Court also considered that insinuating that Muhammad was a “*paedophile*” would be “*value judgments not having a sufficient factual basis*” [ibid.: 54]. It therefore agrees with the Austrian jurisdictions that Elisabeth Sabaditsch-Wolff “*subjectively labelled Muhammad with a general sexual preference for paedophilia and had failed to neutrally inform her audience of the historical background.*” Critics rightly argued that by this judgment the Strasbourg judges relativized the violence imposed on a 9-year-old girl.

As noticed by some critics, even though the consummation of the marriage between Muhammad and Aisha is the subject of historical controversy [see for example: Francois-Cerrah 2012], the Austrian courts and the ECHR did not dispute that it was factual truth [Bougiakiotis 2018]. They focused on the question of the right label to describe this reality, that is to say the debate on the use of a modern word (“pedophilia”) to qualify a historical fact (the consummation of a marriage with a child in the 7th century). The professor Stijn Smet regretted the Court’s “*exceedingly narrow view of the case*”, reduced to the question “*is having sex with one child 1,400 years ago enough to be labelled a pedophile today?*” [Smet 2018] Another commentator wrote: it is “*nothing more than a matter of petty semantics over the term pedophile.*” [Armstrong 2018] In fact, it should not be the role of the ECHR to decide about the legitimacy of a language anachronism.

Furthermore, we can wonder what “*degree of factual proof which has to be established*” [ECHR 2018: no. 38450/12, 48] in order to achieve a “*sufficient factual basis*” for a value judgment [ibid.: 54]. According to the case-law of the Court, “*while the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof,*” since “*the requirement to prove the truth of a value judgment is impossible to fulfil*” [see for example: ECHR, 2018: no. 18597/13, § 68]. However, even a value judgment cannot be without any factual basis. In this case, the applicant had referred in her speech to a source recognised by Sunni Islam, the *hadith* according to *Sahih al-Bukhari* [Bukhari: book 58, number 234]. It is at least factual that most Sunni Muslims believe that this source amounts to facts. By requiring a higher “*degree of factual proof*”, the Court asked the impossible and deviated from its own case-law.

II. An endorsement of blasphemy laws welcomed by Sunni authorities

Since the mid-2000s in Europe, there has been a strong trend in favour of abolishing the criminalisation of blasphemy. This trend emerges in particular from a series of statements from political bodies. The Parliamentary Assembly of the Council of Europe (PACE) recommended in 2007 that “*blasphemy, as an insult to a religion, should not be deemed a criminal offence*” and that “*national law should only penalize expressions about religious matters which intentionally and severely disturb public order and call for public violence*” [PACE 2007: 4, 15]. In 2016, the Special Rapporteur on freedom of religion or belief, Professor Heiner Bielefeldt, submitted to the Council of Human Rights a thematic report in which he recommended the repeal of blasphemy laws, contradicting both the freedoms of expression and religion [Council for Human Rights 2015: 84].

By the acceptance of blasphemy law, the ECHR goes clearly against this trend. Some commentators highlighted the coincidence that only two days after the *E.S. v. Austria* judgment, Ireland voted by referendum to remove a long-standing blasphemy law from their constitution, following the same trend as most European countries [Wood 2018]. The Londoner barrister Matthew Scott considered that “*by supporting Austria’s blasphemy law, [the ECHR] has given succor to the world’s oppressors and done nothing for those oppressed.*” [Scott 2018]. This decision of the ECHR would have indeed justified the conviction of the cartoons of Charlie Hebdo, as well as Voltaire’s book on Muhammad [Puppinc 2018]. Another European professor qualified this judgment as “*a historic move*”, considering “*the current political climate in Europe, where only the most courageous cartoonist would dare to make fun of the Prophet Muhammad*” [Cotte 2018].

In fact, Al-Azhar University, Pakistan and the Arab press welcomed the Court’s judgment, which allows them to justify their own repression of freedom of expression in religious matters [Puppinc 2019]. Their statements are not surprising; indeed, the Organisation of Islamic Cooperation (OIC) – gathering 57 Muslim States – has fought since 1999 in order to obtain an international ban on “*defamation of religions,*” that is to say on blasphemy [ECLJ 2008-2010]³.

³ « Lutter contre la diffamation des religions », Rapport en réponse à la consultation du Bureau du Haut-commissaire aux droits de l’homme des Nations Unies sur le suivi par la France de la Résolution 7/19 du Conseil des droits de l’homme du 27 mars 2008 sur « la lutte contre la diffamation des religions ».

The Observatory of Islamophobia of the prestigious Cairo's Al-Azhar University, the highest authority of Sunni Islam, expressed its support to the Court's decision and described it as "*courageous*" [2018]. It saw in it a general condemnation of "*blasphemies against the Prophet*" contributing "*to reduce the problems of Islamophobia*" while "*the number of Muslims in Europe could reach 14% in 2050*" [ibid.]. Based on this decision, it urged "*governments around the world and international human rights institutions to take measures to counter attempts to defame others on the grounds of freedom of opinion or freedom of expression*" [ibid.]. It also called for "*dissuasive legislation and sanctions against all those who attempt to attack religious forces*" [ibid.]. Accordingly, the Secretary General of the largest world federation of Koranic schools (10,000 madrassas), Qari Hanif Jalandhari, saw in this decision "*a very important step*" and asked the United Nations to elaborate global legislation "*condemning anyone who commits a blasphemy against divine books or sacred people of all religions*"⁴. As for the Vice-chancellor of Bahauddin Zakariya University, Dr. Tahir Amin, he also stated that the verdict of the European Court is "*undoubtedly a major and historical decision*".

Pakistan's Prime Minister Imran Khan "*welcomed the recent decision of the European Court of Human Rights not to authorize acts of profanity under the guise of freedom of expression*" [Government of Pakistan et al. 2018]. Addressing the President of the European Parliament, he expressed "*the hope that European countries will comply with the decision of the European Court and take measures to strengthen respect for religions and interreligious harmony*" [ibid.]. He also expressed the "*serious concerns of the Government and people of Pakistan regarding the blasphemous caricatures of the Holy Prophet, stressing the need to redouble efforts in European countries to avoid such provocative incidents; to raise awareness of the religious sensitivity of Muslims, especially the respect of the Prophet Muhammad*" [ibid.]. His Minister for Human Rights echoed him, "*urging the Western world to show respect for religions*" [Government of Pakistan et al. 2019]. She also added that "*freedom of expression does not protect blasphemy*" [ibid.]. Indeed, in Pakistan, in addition to the emblematic Asia Bibi case, about 1,500 people were accused of blasphemy between 1987 and 2016 according to the Centre for Social Justice, and more than 70 people were murdered since 1990 on such crime allegations. In 2017, a thirty-year-old man was sentenced to death for allegedly "*insulting Prophet Muhammad*" on Facebook [Rasmussen 2017]. Prime Minister Imran Khan declared again, in June 2018, before an audience of imams,

⁴ "EU court lauded for upholding verdict against blasphemy", [The Nation 2018].

his will to “*support and defend article 295c*” of the Penal Code which punishes by death or life imprisonment anyone who “*defiles the sacred name of the Holy Prophet Muhammad*” [Barker 2018].

The decision of the Court and all these reactions led many European actors to fight in favour of a referral at the Court.

III. The Court ignored the public pressure against the preferential status given to Islam

Elisabeth Sabaditsch-Wolff’s lawyers requested a referral of the case to the Grand Chamber. Requests for referral are accepted on an exceptional basis (5% of the cases), when the Court considers that is at stake “*a serious question affecting the interpretation or application of the Convention or the Protocols thereto or a serious issue of general importance*”.

The Court could have accepted to re-try the *E.S. v. Austria* case in the Grand Chamber. Indeed, the judgment of the Chamber stood out clearly from the Court’s case-law. Previously, in the famous case *Handyside v. the United Kingdom* [1976: nr 5493/72, 49], the Court had established the principle that freedom of expression “*is applicable not only to ‘information’ or ‘ideas’ that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population*”. Moreover, it had acknowledged to believers the obligation to “*tolerate and accept the rejection by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith*” [ECHR 1994, no. 13470/87, 47]. On that basis, the Strasbourg judges guaranteed many times the freedom of expression of anti-religious messages against Christianity. In July 2018, it gave its protection to the famous “*Pussy Riot*,” the punk band condemned in Russia for organising a “*performance*” in the choir of the Moscow Cathedral with cries including “*shit, shit, shit L****” [ECHR 2018: 38004/12]. It also held that Lithuania could not sanction the dissemination of blasphemous advertisements presenting Christ and the Virgin Mary as tattooed and lascivious junkies [ECHR 2018: 69317/14, 31].

However, in 2018, the European Court did precisely the opposite with *E.S. v. Austria* [no. 38450/12, 57-58]: it condemns Ms. Sabaditsch-Wolff by considering that she did not seek so much to inform the public as to “*disparage*” Muhammad and to demonstrate “*he was not a worthy subject of worship*” [ibid.: 52]. The fact that rational criticism of Islam is less protected than anti-Christian obscenity in

Lithuania and Russia seems particularly unfair. That is why many philosophers and lawyers encouraged the Grand Chamber to reconsider the judgment on *E.S. v. Austria*, in order to clarify its case-law. In a high-level seminar organised by the *European Centre for Law and Justice* (ECLJ) at the Council of Europe on freedom of expression in religious matters [ECLJ 2018], several speakers pointed out the inconsistency of this recent case-law, which gives an impression of “double standards” depending on whether the offended believers are Christians or Muslims. For example, the professor Karine Bechet-Golovko compared the cases *E.S. v. Austria* and *Mariya Alekhina and others v. Russia* (Pussy riots): “One could (...) think that there are already some criteria: the context (the place of the performance, its repetition, its content) and the weight of the sentence, the two being linked. But here too, objectivity is struggling to find its way. Since on the one hand it is only a non-vulgar speech held outside a sacred place [E.S.], when on the other hand the level of vulgarity is indisputable and is uttered in the sacred place [Pussy riots]” [ibid.⁵].

The appeal to the Grand Chamber was supported by the 62,000 signatories of a petition for the right to criticise Islam in Europe⁶. Twenty French personalities also co-signed an editorial in a national newspaper for the defence of the freedom of expression in religious matters, at the initiative of the ECLJ⁷. Among them were former Muslims, Catholic researchers and intellectuals, feminists and non-religious writers. The signatories included Waleed Al-Husseini, Rémi Brague, Chantal Delsol, Zineb El-Rhazoui, Annie Laurent, Boualem Sansal, Pierre-André Taguieff, Michèle Tribalat and myself. All of us, for our job, research and private reflection, need to benefit from a large freedom of expression about religion, especially about Islam. According to the text, these personalities consider that the Chamber judgment of 25 October 2018 violated the freedom of expression of Mrs. Sabaditsch-Wolff. The tribune was concluded by the following statement: “we wish to express to the Court our attachment to reason-based debate, whether political or scientific, and the right to criticize religions. The future of our civilization is at stake”.

Seized with this referral request, the European Court could have corrected its previous judgment; it has chosen not to do so and has even granted it the authority

⁵ Intervention of Karine Bechet-Golovko, “Freedom of expression in the field of religion.”

⁶ See: ECLJ, “Defend the right to criticize Islam”, petition with 61,615 signatures.

⁷ «Pour la défense de la liberté d’expression en matière religieuse», *Valeurs actuelles*, 15 March 2019.

of a “*key case*” intended to enlighten all national jurisdictions. The judgment against Elisabeth Sabaditsch-Wolff was thus not accidental but indicates a new orientation of the Court, which has civilisational challenges.

IV. A “religious peace” to the detriment of truth and justice

The Court did not give any reason for refusing to refer the case to the Grand Chamber. We are thus left to making conjectures about the judgment of the Chamber. It can be seen as a shift towards multiculturalism, willing to sacrifice freedom of expression to the demands of the *living together* and multiculturalism. The Court indeed claimed to protect “*the spirit of tolerance*” and “*the religious peace*” [ECHR 2018: no. 38450/12, 57].

However, such a judgment renounces the ideal of truth-based justice and prefers to it the relativistic one of “tolerance”. In doing so, it is the judge who decides what can be said according to his own conception of the *living together* and to his fear of the reactions of those who might feel offended by these remarks. The ideal of “religious peace” promoted by the judgment of the Chamber is appealing, but its price is the freedom to speak the truth. It implies that any statement, even true, is condemnable as intolerance and incitement to violence as soon as threatening people declare themselves offended in their religious feelings.

Of course, it is true that peace is the greatest good of society; and it is therefore right that, in order to preserve it, the authorities must sometimes limit individual freedoms. But as professor Marko Milanovic recalled, “*the applicant’s remark was also not made in a context where it could directly and imminently provoke the audience to violence – for example, the applicant did not go to a mosque on Friday and start preaching to those gathered there about the folly of Muhammad’s marriage to Aisha*” [Milanovic 2018]. Moreover, the proceedings emanated solely on the instigation of a journalist rather than an Islamic organisation. That is why the Court, while restricting freedom of speech, did nothing meaningful for religious tolerance.

More fundamentally, “what does the truth matter towards peace?” relativists from all sides will say. If truth does not exist, then, indeed, freedom of expression is of little value, and a mandatory “tolerance” should be imposed upon all. True peace should not be reduced to the superficial absence of violent conflict, and it is vain to pretend to establish it on lies or relativism.

The European tradition teaches that there is no lasting peace without truth and justice. Because Europe is the heir, since ancient times, of a civilisation that identifies God with truth and love, and not with arbitrariness and force, we place those at the top of our values and do not conceive that truthfulness could offend God or society. Seeking the truth and knowing God are one. This is certainly the origin of our attachment to rational research and criticism. We want a society in which “*Love and faithfulness meet together; righteousness and peace kiss each other*” [Psalm 85:10]. Righteousness and peace, which characterise the ideal of every society, need both love and truth.

Elisabeth Sabaditsch-Wolff told the truth. She is criticised above all for having done so in a “malicious” way, that is to say without love. What do we know about it, and is it justice’s role to judge one’s intentions? Moreover, to make this reproach is to forget that the denunciation of evil, to protect society, under its apparent roughness, is an act of love.

Conclusion

This decision severely limits the freedom of expression in religious matters, which makes it possible to convict a person not because of the content of his speech, but because of the intentions that are attributed to him. Is it not absurd to subject freedom of expression to benevolence? Especially when benevolence is likened to harmlessness.

This infringement of freedom of expression is justified by a new positive obligation imposed by the Court on States “of ensuring the peaceful coexistence of all religions and those not belonging to a religious group by ensuring mutual tolerance”. Thus, any statement, even true, would become reprehensible as religious intolerance as long as it would be likely to provoke social tensions... This is an abdication of the European critical spirit; the support of a potential condemnation of any secular or Christian proselytism against Muslims. Yet this proselytism is more necessary than ever!

This decision is also sad news for all those who, among Muslims, hope to find in Europe the protection to brave the Islamic ban on criticising Islam and reinterpreting the Qur’an and hadith.

Finally, this decision was dictated by a fear of Muslims. The Court expressly says so: the Austrian authorities were right to condemn these remarks in order to

preserve the “religious peace” in Austrian society. The criterion of acceptability of a speech is no longer the truth but the violence it can arouse. Moreover, it is not so much the violence of the contentious statement as the potential of those who claim to be offended which delimits the freedom of expression. On this account, a few excited only have to declare themselves offended and to be threatening to justify the censorship of their opponents.

Of course, there is no reason to elevate blasphemy and vulgarity to a human right. There is no “right to blasphemy” but a right to freedom of expression with responsibilities and limitations. Only the dissemination of free offensive obscenities as well as the incitement to immediate violence should be restricted. Obscenity and incitement to violence must be censored, but not criticism. However, in this case, the European Court did precisely the opposite: it censored the criticism of Islam while it previously protected obscenity against Christian symbols. It endorsed censorship in an unprecedented way.

Time will tell whether the ECHR persists on this ‘liberticidal’ path.

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