European Court of Human Rights: E.S. v. Austria

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Over the last 25 years the European Court of Human Rights (ECtHR) has been regularly asked to decide whether specific interferences with certain forms of religion, or specifically worded insults directed at a religion or the spreading of religious enmity were protected under the right to freedom of expression established by Article 10 of the European Convention on Human Rights (ECHR) (see, inter alia, Otto-Preminger Institut v. Austria, IRIS 1995-1/1; Wingrove v. the United Kingdom, IRIS 1997-1/8; I.A. v. Turkey, IRIS 2005-10/3; Giniewski v. France, IRIS 2006-4/1; Tatlav v. Turkey, IRIS 2006-7/2; Klein v. Slovakia, IRIS 2007-1/1; Fouad Belkacem v. Belgium, IRIS 2017-9/1; and Mariya Alekhina and Others v. Russia (Pussy Riot), IRIS 2018-8/2). In line with its earlier case law the ECtHR recently reiterated that expressions that seek to spread, incite or justify hatred on the basis of intolerance (including religious intolerance) do not enjoy the protection afforded by Article 10 of the ECHR. The ECtHR confirms that people with a religious conviction - irrespective of whether they belong to a religious majority or a minority - cannot expect to be exempt from criticism and must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, expressions that go beyond the limits of a critical denial of other people's religious beliefs and are likely to incite religious intolerance - for example in the event of an improper or even abusive attack on an object of religious veneration - may be legitimately considered as incompatible with respect for the freedom of thought, conscience and religion, as protected by Article 9 ECHR. In such situations the state can take proportionate restrictive measures. According to the ECtHR, there is a general requirement to ensure the peaceful enjoyment of the rights guaranteed under Article 9 of the ECHR by the holders of such beliefs - including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane.

In the case of E.S. v. Austria the ECtHR decided on whether a criminal conviction was necessary in respect of someone found guilty of disparaging religious doctrines in application of Article 188 of the Austrian Criminal Code. The applicant, E.S., held seminars entitled "Basic Information on Islam" at the right-wing Freedom Party Education Institute. At one such seminar, referring to the marriage that Muhammad concluded with Aisha, a six-year old, and consummated when she was aged nine, she stated, inter alia, that "Muhammad liked to do it with children". And she added: "What do you call that? Give me an example?

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What do we call it, if it is not paedophilia?" An undercover journalist who attended the seminar recorded these statements and requested that a preliminary investigation be opened against E.S. The Vienna Public Prosecutor brought charges against E.S., which eventually led to her criminal conviction for disparagement of religious precepts, pursuant to Article 188 of the Criminal Code. She was sentenced to pay a fine of EUR 480, or to serve 60 days' imprisonment in the event that she failed to pay the fine.

E.S. complained to the ECtHR that this conviction had violated her right to freedom of expression under Article 10 of the ECHR. She stressed that by stating that Muhammad had had sexual intercourse with a nine-year-old, she had cited a historically proven fact and questioned whether this could be regarded as paedophilia. Furthermore, through the impugned statements, she had expressed criticism concerning Islam, within the framework of an objective and lively discussion, which the domestic courts had failed to take into account. In essence, E.S. argued that the impugned statements had formed part of a criticism of a religion, contributing to a public debate, without the aim of defaming the Prophet of Islam.

The ECtHR, however, was of the opinion that the Austrian courts had extensively explained why they considered that the statements uttered by E.S. had been capable of arousing justified indignation, as they had not been made in an objective manner aimed at contributing to a debate of public interest, but in a manner that could only be understood as being intended to demonstrate that Muhammad was not a worthy subject of worship. The domestic courts found that (i) E.S. had subjectively labeled Muhammad as someone whose general sexual preference was that of paedophilia, and (ii) she had failed to neutrally inform her audience of the relevant historical background - consequently there could have been no serious debate on the issue. The ECtHR also referred to its findings in other cases where the impugned statements had not only offended or shocked, or had expressed a "provocative" opinion, but had amounted to an abusive attack on a religious group. In such cases a criminal conviction was considered necessary in order to protect the freedom of religion of others. Indeed, owing to their positive obligations under Article 9 of the ECHR, member states' authorities are to enable the peaceful co-existence of religious and non-religious groups and individuals under their jurisdiction by ensuring an atmosphere of mutual tolerance. The ECtHR agrees with the Austrian courts' approach - that is to say, that presenting objects of religious worship in a provocative way capable of hurting the feelings of the followers of that religion could be conceived as a malicious violation of the spirit of tolerance, which is one of the bases of a democratic society. Furthermore, the fine imposed was at the lower end of the statutory range of punishments, and could therefore not be considered as constituting a disproportionately severe sanction. In conclusion, the ECtHR found that the Austrian courts had comprehensively assessed the wider context of E.S.'s statements, and carefully balanced her right to freedom of expression with the

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rights of others to have their religious feelings protected and the need to have religious peace preserved in Austrian society. By considering the impugned statements as going beyond the permissible limits and containing elements of incitement to religious intolerance, the Austrian courts put forward relevant and sufficient justification for the interference with E.S.'s rights under Article 10 ECHR. Hence the interference corresponded to a pressing social need and was proportionate to the legitimate aim pursued, and the domestic courts did not overstep their wide margin of appreciation when convicting E.S. of disparaging religious doctrines. Accordingly, the ECtHR finds that there has been no violation of Article 10 of the ECHR.

Judgment by the European Court of Human Rights, Fifth Section, case of E.S. v. Austria, Application nos. 38450/12, 25 October 2018

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