

Hate Speech, Religious Beliefs, and the Limits on Freedom of Expression

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The publication of the Muhammad cartoons in the Danish paper *Jyllands-Posten* in 2005 had huge repercussions in Europe and led to a profound reflection worldwide on the close relationship between two fundamental freedoms that can either reinforce each other or clash head on: religious freedom, and freedom of expression.

Other recent cases in which these two freedoms have come into conflict include the conviction of a Swedish protestant priest, Ake Green, for “hate speech”, after preaching a sermon criticizing homosexuality in which he quoted passages from the Bible. Another example is the 2003 exhibition entitled “Caution: Religion!” at the *Andrei Sakharov Museum* in Moscow, which included satirical depictions of certain Christian figures. The exhibition was vandalized by radical groups who spray-painted the walls and caused considerable damage. These vandals were released without charges, while the director of the museum and his assistant received fines. Elsewhere, deliberately mixing fiction and reality, certain recent films have portrayed the Catholic Church and its institutions as criminal organizations.

Freedom of expression and religious freedom can clash quite frequently, especially in environments that are becoming increasingly multicultural. We cannot forget the differences in the understanding of human rights by Islam and by the West. An illustrative example is this quotation from the Universal Islamic Declaration of the Rights of Man, which understands freedom of expression according to the Sharia:

“No one is entitled to disseminate falsehood or to circulate reports which may outrage public decency, or to indulge in slander, innuendo or to cast defamatory aspersions on other persons.”

The fundamental question is whether in the West, we have the right to have our religious beliefs protected from attack whether in the form of word or in the form of art.

In contrast to the broad protection existing in the United States regarding freedom of expression, if we look at the legislation within different European countries, we see that there is no clear consensus on the matter. In this talk I will focus on the judgments of the Court in Strasbourg referring to cases in which the freedom of expression has been called into question. As is well known, the European Convention on Human Rights protects religious freedom and the freedom of expression in two consecutive articles (articles 9 and 10). Evidently, neither of these rights is absolute.

Let us look at some of the European Court's main rulings on the question of freedom of expression.

In the 1990s the Court made two important judgments, the *Otto Preminger Institute* (1994) and *Wingrove* (1996). In both cases, the respective governments – Austria and the UK – had prohibited and removed an audiovisual display which depicted certain holy Christian figures in an insulting manner. However, the European Court ruled that these countries had restricted the freedom of expression, one of the fundamental elements of democratic society. In its resolutions, the Court held that this freedom applies not only to ideas or information that are considered inoffensive or may be favourably received, but also to ideas that may offend, shock or disturb the State or a part of the population (*Otto Preminger Institute*, n. 49). Nevertheless, it also stated that the freedom of expression is not absolute and that in order to protect religious freedom, national laws may penalize gratuitous attacks on the beliefs of its citizens. The Court ruled that whoever exercises rights and freedoms also assumes “rights and responsibilities” – for example, the responsibility to avoid expressions that may be offensive to others and do not contribute to a *public debate* which is able to aid progress in human affairs.

In summary, the European Court held that democratic societies had the power to penalize and seek to prevent attacks on religious objects or ideas. The main justification of this ruling was the fact that attacks on religion might inhibit citizens from expressing their beliefs and distort the spirit of tolerance that characterizes a democratic society. Therefore, freedom of expression could be limited, provided that the restrictive measure “is necessary in a democratic society”. Each national authority has wide leeway to decide whether, in its society, it is appropriate to restrict freedom of expression.

Although the criteria upheld by the European Court of Human Rights in these rulings have not been modified explicitly, in a number of later judgments the freedom of expression has been given priority over religious freedom; that is, the Court has applied these principles with a greater degree of flexibility.

An example is the *Patrel* case (2005) in France. The applicant was the author of a book which attacked malpractice by a Catholic anti-sect movement. The author accused the association and the Catholic Church of promoting exclusion based on hatred, religious discrimination, and equated their position with that of the Inquisition. The French courts found both the author and the publishing house guilty of defamation on the grounds that the claims were not substantiated with any “serious and objective proof” and that the accusations were expressed in “particularly violent and intemperate terms”. The European Court

considered, on the other hand, that the book dealt with a subject of general interest and that, as a result, the protection of freedom of expression was of particular importance. In addition, as the accusations were aimed at Catholic institutions, the judgment stated that “associations laid themselves open to scrutiny when they entered the arena of public debate and that, since they were active in the public domain, they ought to show a higher degree of tolerance to criticism”.

In *Giniewski v. France* (2006), the European Court examined the case of a journalist who had published an article entitled “The obscurity of error” concerning the encyclical *Veritatis Splendor* issued by John Paul II. In the article the journalist had claimed that Catholic doctrine was the origin of anti-Semitism and of the extermination of the Jews in the concentration camps. He was found guilty in France of public defamation against the Christian community, but was acquitted in the European Court.

In these two rulings, the European Court of Human Rights considered that the principle of freedom of expression had been violated, even though the same principles were applied as in the judgments on the *Preminger* and *Wingrove* cases. The difference in the result was due to an interpretation of the facts that prioritized freedom of expression over religious freedom. What is more, the Court applied new criteria which it had used previously in other cases related to freedom of expression.

First, the Court declared that in order to judge whether language was offensive, a distinction had to be made between value judgments and statements of fact. While statements of fact are objective and demonstrable, in the case of value judgments it is extremely difficult to demonstrate their objectivity and their truthfulness or falsity. It would be an unacceptable restriction on the freedom of expression if one were required to substantiate all subjective value judgments. For this reason, it is easier to restrict freedom of expression in the case of statements of fact than in the case of value judgments. The European Court also established that freedom of expression cannot be restricted when the opinions expressed are supported by a sufficient factual basis and deal with a question of general interest. In the *Paturel* case, in which the French courts had considered the article to be a grave slur on the reputation of Catholics, the European Court of Human Rights held that it presented a theory, a reflection on an important issue in our recent history.

Secondly, in both these cases, the European Court judged that the restrictions on freedom of expression were to be strictly construed when an author gives opinions on questions of general interest, so as to avoid what is known as a “chilling effect”, that is, an effect that discourages the press from freely expressing its ideas.

At this point, we should take stock of what we have said so far.

Religious freedom protects the autonomy of the individual to believe and to act in accordance with their beliefs; the content of these beliefs are of no consequence. The legislator and the courts protect the freedom to believe in and practise a religion, regardless of the content of the religion in question. In the case of the freedom of expression, on the other hand, it is not so much the action of expressing certain ideas that is protected, but the spread of opinions and ideas. It is the veracity of the data or the accuracy of the opinions that is judged: the ECtHR makes this clear by distinguishing between statements of fact and value judgments. Individuals have the right not only to form their own opinions, but also to contribute to the public debate in their societies.

Can it therefore be said that religious freedom is a legitimate limitation for freedom of expression?

In the case of the *Otto Preminger Institute*, the European Court of Human Rights declared:

“The respect for the religious feelings of believers as guaranteed in Article 9 can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society”. This judgment has not been subsequently revised. Therefore, the response to our question is affirmative, albeit with a series of important provisos.

Firstly, as I said above, any restriction on the freedom of expression must be justified as “necessary in a democratic society”, as established in art. 10.2 ECHR, and must be motivated by a “pressing social need”. In addition, as there is no uniform concept of the meaning of religion in Europe, the Court grants considerable leeway to States when they have to assess the need to restrict the freedom of expression.

Third, the Resolutions of the Council of Europe and the European Court in Strasbourg consider that two types of speech are offensive and should therefore be penalized, either due to their contents or due to the form in which they are disseminated. These types of speech are known as “hate speech” and “gratuitously offensive statements”.

In spite of the vast number of legal texts that refer to *hate speech*, there is no one universally accepted definition. The political scientist Bhikhu Parekh lists its three basic characteristics:

- a) It defines an individual or a group of individuals in accordance with certain characteristics. If someone says he hates all Humanity, this statement is not considered as “hate speech”.
- b) The speech stigmatizes its “target”, and attributes to it a series of features that are considered undesirable, immutable, and always present inside this group.
- c) It excludes this group from normal social relations. It holds that members of the group are unable to observe the normal rules of coexistence and defines their presence as hostile and unacceptable.

The Council of Europe defines *hate speech* as “any form of expression *spreading or promoting racial hatred, xenophobia, anti-Semitism or other forms of discrimination or hatred based on intolerance* including hatred on religious grounds”. Instead of incitement to hatred other international texts speak of *incitement to discrimination*, which, from the legal point of view, is easier to demonstrate. The European Court considers that the European Convention does not protect this type of speech in any circumstances and that all the countries that are members of the Council of Europe must penalize it.

When we speak of *hate speech* for religious reasons, we usually mean that this type of speech provokes a climate of violence or intolerance. However, in art. 4 a) of the Convention on the Elimination of Racial Discrimination, “the diffusion of ideas based on theories of superiority or racial hatred and discrimination in any form” is prohibited, regardless of the result of these declarations. Can it be said, then, that it is legitimate to criticize religion but not race? Certain authors answer this question in the affirmative, on the following grounds. Whereas race is inherited and cannot be changed, religion presupposes a choice; that is, whereas ideas regarding the superiority of a race are unacceptable, it is possible to express opinions on beliefs, reject certain religious ideas, or even change religious group. Nonetheless, the *European Commission for Democracy through Law (the Venice Commission)* declared in 2008 that this argument could not be used to blur the dividing line between a theoretical discussion on religious ideas and religious insults against believers on the grounds that their faith is “worthless”.

When speaking of *gratuitously offensive statements*, the Court considers that they *may* be penalized or restricted by national legislation. The first problem is that the Strasbourg Court has never defined what it understands by “gratuitously offensive statements”. Bearing in mind that freedom of expression also protects language that “offends, shocks or disturbs”,

the definition of the expression is complex and important. Professor Martínez-Torrón holds that an expression is *gratuitously offensive* when its exclusive aim is to proffer an insult.

It is clear that in many cases it is difficult to trace the dividing line between the types of offensive language: that is, statements that may disturb but are protected under freedom of expression, gratuitously offensive statements, and *hate speech*. In my view, the intentional element, the desire to provoke or to offend is a necessary requisite for considering an action as a criminal offence.

In judging gratuitously offensive statements, States have wide leeway for deciding whether a particular affirmation is justified and whether it should be penalized. So a State may prioritize freedom of expression by allowing verbal attacks against religious beliefs; this would allow attacks on individuals' reputations and would create an intolerable atmosphere incompatible with democracy and pluralism. Alternatively, a State might prioritize religious freedom, and punish any type of criticism of the prevailing religious ideas, so restricting the free circulation of ideas and limiting freedom of expression.

Which is the better option in a democracy? The European Court has not come down clearly on either side. With the exception of cases in which it is clear that there is genuine incitement to hatred, the Court has left it to the States to decide whether to penalize offensive expressions. In fact, today, more than half of the countries that are members of the Council of Europe consider religious insults as an offence, while incitement to hatred is included in all the European criminal codes.

In my opinion, the promotion of new laws that prohibit or restrict freedom of expression in order to avoid attacks on religion is ineffective. The Danish criminal code contains offences against religious sentiment, but that did not stop the conflict surrounding the Muhammad cartoons. In addition, we should not forget that criminal law should be a last resort, applied only in cases of particular gravity. It is the followers of religions, not the religions themselves, that should be protected against these serious attacks. However, in 2007, 2008, and 2009 the UN passed a series of resolutions regarding the defamation of religions, which quoted Islam almost exclusively.

So the Law is not the first or even the only solution. There is a clear need for the design of national and international policies that prevent outbreaks of intolerance. First, the public authorities should be sure not to provide any support, economic or otherwise, for activities that may be offensive to a part of the population. Furthermore, they should do their utmost to promote an atmosphere of dialogue that includes education in values, the full acceptance of the diverse identities present in a country, and above all a reflection on the

foundations of respect and social harmony: the equality and dignity of each man and woman on Earth. This Conference itself is clear proof that many of us are profoundly committed to the construction of a new, peaceful coexistence in our richly diverse world.