Free speech – restrictions – public morality – proportionality

Bourton v France

European Court of Human Rights

The facts and domestic proceedings in *Bouton v France*

The applicant, Eloise Bouton, is a French national and who at the time of the events in question was a member of the Femen movement, an international women's rights organisation set up in Ukraine in 2008 and known for its provocative actions. On 20 December 2013, she staged a protest in the church of La Madeleine in Paris (but not during mass), by standing in front of the high altar while exposing her breasts, revealing slogans daubed across her body, and pretending to carry out an abortion using raw beef liver as a prop. The performance was brief and she left the church when requested by the choirmaster. The protest received media coverage, and in an interview with the magazine *Le Nouvel Observateur* on 23 December 2013, she explained the meaning of her action: that she had held "two pieces of beef liver in her hands, symbolising the aborted baby Jesus", and painted on her torso and back were "the slogans '344th slut' ... referring to the manifesto of 343 initiated by pro-abortion feminists in 1971 and 'Christmas is cancelled.'"

The parish priest filed a criminal complaint and applied to join the proceedings as a civil party, and on 7 January 2014, while in police custody, she explained that she had been designated by the Femen movement to stage her protest in France at the same time as similar protests by other Femen activists in various countries, and that the church of La Madeleine was chosen in France for "its international symbolism". The investigators entered in evidence a publication from the Femen-France website containing photographs with the captions: "Christmas is cancelled from the Vatican to Paris; on the altar of the church of La Madeleine, Holy Mother Eloise has aborted Jesus".

After a hearing on 15 October 2014, the Paris Criminal Court refused to refer to the Court of Cassation a priority question of constitutionality raised by the applicant, and dismissed the applicant's pleas alleging a failure to define the offence of sexual exposure and a violation of Article 10 of the Convention. Article 222-32 provides that sexual exhibition imposed in the sight of others in a place accessible to the public gaze is punishable by one year's imprisonment and a fine of 15,000 euros. When the facts are committed to the detriment of a minor under the age of fifteen, the penalties are increased to two years' imprisonment and a fine of 30,000 euros. It also rejected the argument that her action had been exclusively political and fell within the scope of her freedom of expression. The Criminal Court sentenced the applicant, on the charge of sexual exposure, to a suspended term of one month's imprisonment and, on the civil interests, ordered her to pay the parish representative 2,000 euros in respect of non-pecuniary damage and to contribute 1,500 euros to the other party's costs. The Paris Court of Appeal upheld the judgment in all respects. The applicant appealed on points of law against that judgment, but the Court of Cassation dismissed her appeal.

The decision of the European Court of Human Rights

Relying on Article 10, the applicant complained of her criminal conviction and, relying on Article 7 (no punishment without law), she complained of the vagueness and expansive interpretation of the offence of "sexual exposure".

With respect to foreseeability, the Court concluded that the applicant could reasonably have expected her conduct to entail consequences under the criminal law. Accordingly, the interference with the applicant's right to freedom of expression could be regarded as sufficiently foreseeable and therefore "prescribed by law" within the meaning of Article 10(2) of the Convention. The question therefore was whether the interference with her Article 10 rights was necessary in a democratic society.

The Court stressed that the imposition of a prison sentence for an offence in the area of political speech would be compatible with freedom of expression as guaranteed by Article 10 only in exceptional circumstances, as, for example, in the case of hate speech or incitement to violence. It noted that the sole aim of the applicant, who had not been accused of any insulting or hateful conduct, had been to contribute to the public debate on women's rights. However, the criminal sanction imposed on her for the offence of sexual exposure had not sought to punish an attack on freedom of conscience or religion, but rather the fact that she had bared her breasts in a public place. It then noted that while the circumstances related to the place and the symbols she used had to be taken into account, in order to assess the diverging interests at stake the domestic courts had not been required to weigh in the balance the applicant's right to freedom of expression against the right to freedom of conscience and religion.

Lastly, while the domestic courts had not ignored the applicant's statements during the criminal investigation, they had confined themselves to examining the fact that she had bared her breasts in a place of worship, without considering the underlying message of her performance or the explanations given by Femen activists about the meaning of their topless protests. In those circumstances, the Court found that the grounds given by the domestic courts had not been sufficient for it to consider that the sentence imposed on the applicant, in view of its nature and the severity of its effects, was proportionate to the legitimate aims pursued. The Court thus concluded that the domestic courts had not struck a balance, in an appropriate manner, between the interests at stake and that the interference with the applicant's freedom of expression had not been "necessary in a democratic society". There had thus been a violation of Article 10 of the Convention.

On the issue of Article 7, having found a violation of Article 10, the Court took the view that it was not necessary to rule separately, in the circumstances of the present case, on that complaint. On the issue of just satisfaction (under Article 41), the Court held that France was to pay the applicant 2,000 euros (EUR) in respect of non-pecuniary damage and EUR 7,800 in costs and expenses.

Commentary

The case law of the European Court accepts that Article 10 is wide enough to cover morally offensive speech (*Handyside v United Kingdom* (1976 1 EHRR 737), broadmindedness, tolerance and pluralism being the hallmarks of a democratic society, and that Article 10 covers speech that shocks and offends. However, in that case the Court made it clear that such speech is more susceptible to interference than, for example, political expression, and that the domestic authorities would be given a wide margin of appreciation in regulating

speech that causes harm to the morals of a particular state or the interests of particular individuals.

Thus, not only has the Court accepted that the protection of public morality and the sensibilities of others are legitimate aims for the purpose of Article 10(2), it has also made it clear that each member state has a wide discretion in deciding what laws to adopt and how to apply them. This approach was evident in *Handyside,* and in *Müller* v *Switzerland* (1988) 13 EHRR 212). In that case, several paintings portraying various unnatural sexual acts, crudely depicted in large format, had been displayed in an art exhibition and were seized by the authorities. The applicants, the artists and promoters, were subsequently prosecuted and fined for displaying obscene materials and the paintings were held to be examined, the paintings being returned to the owners eight years later. The European Court held that offensive and indecent material could be regulated by domestic law, provided it caused more than mere shock to the public, and that in the present case, it was not unreasonable for the domestic courts to find that the paintings were likely to '*grossly offend* the sense of sexual propriety of persons of ordinary sensibility'. The proceedings therefore fell within the state's margin of appreciation as being necessary in a democratic society and accordingly there had been no violation of Article 10.

However, the Court has displayed less tolerance to the interference of indecent speech when such expression serves a political purpose and constitutes political satire. Thus, in *Kunstler* v *Austria* (Application No 68354/01)*,* it was held that there had been a violation of Article 10 when the applicants' painting – depicting several outrageous sexual acts being performed by political and religious figures – was the subject of an injunction and an action for damages brought by a politician who claimed to have been debased by the painting. The European Court held that although states were given a wide margin of appreciation with respect to obscene and blasphemous material, in this case the painting had depicted political satire and that the law and the victims should be more tolerant of such depictions. It should be noted, however, that the reasons for interference in *Kunstler* were not based on public morals, but on the desire to protect individuals from attacks on their reputation and honour.

A more liberal approach towards immoral speech and acts has been evident in recent years. Thus, in *Tatar v Hungary* (Application nos. 26005/08 and 26160/08), decision of the Court 12 June 2012, the Court upheld political expression that was allegedly immoral. Here the applicants were fined for illegal assembly after staging a performance that involved exposing items of dirty clothing on a fence surrounding the Parliament building in Budapest. The applicants stated that the event was a political performance symbolising "hanging out the nation's dirty laundry". The Court found a violation of Article 10, ruling that the applicant's performance amounted to a form of "political expression" and that the authorities had not given "relevant and sufficient" reasons for the interference. More recently, in *Peradze and Others v. Georgia* (application no. 5631/16), the European Court of Human Rights held that there had been: a violation of Article 11 (freedom of assembly and association) of the European Convention on Human Rights read in the light of Article 10 (freedom of expression) where the applicants had been arrested and convicted for brandishing a banner likening Panorama Tbilisi, an urban development project, to a human penis during a public demonstration. The Court noted that the applicants' conduct had been peaceful and passive, and the slogan had not been used to insult or to denigrate anyone in particular; rather it had been used as a stylistic tool to express the applicants' high degree of disapproval of the urban development project. Thus, its controversial form was in itself no justification for restricting speech in a public demonstration that had aimed to highlight a matter of considerable public interest.

The decision in the present case very much reflects this more liberal approach in this area; requiring the state to provide sufficiently clear legal regulation of indecent and obscene material, and to accommodate political and other public interest values when balancing the regulation of such acts and the exercise of free speech. Failure to consider the free speech aspects of actions regarded as indecent or immoral, as was clear in this case, will attract the Court's rigorous approach with respect to political and public interest speech. This will result in the state's wide margin of appreciation in these cases being lost. On the other hand, the Court noted that the protest took place in a church, and, had the domestic courts considered her free speech rights as well as the aims of the law, it might have provided the domestic courts with a wider margin of appreciation in balancing those values.

In other words, there is no evidence that the Court has decided not to protect religious or public morality *per se*, or that such aims are no longer legitimate in modern democratic societies. The surprising element in the case, therefore, is why the domestic courts, being informed by European Convention principles and case law, should not fully consider the free speech and public debate interests in a case such as this. Had they done so, rather than dogmatically applying the law and finding a breach simply on evidence of nudity in a religious setting, then they might have decided the case differently. Alternatively, they might still have decided that the law had been broken, but that such a breach was necessary and proportionate; inviting the European Court to offer them an appropriate level of discretion in balancing all rights and interests.

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