Blasphemy – religious feelings – freedom of expression – proportionality – margin of appreciation

Rabczewska v Poland, Application No. 825713, decision of the European Court of Human Rights, 15 September 2022

European Court of Human Rights

The facts and domestic proceedings in *Rabczewska*

The applicant, a pop singer in Poland known as Doda, gave an interview for a news website, which was published in August 2009. Part of the interview was subsequently reprinted in a tabloid under the title "Doda: I don't believe in the Bible." During the interview, the interviewer said: "You say that the Pope is an authority figure for you, you are a religious person, so why you are seeing somebody who desecrates the Bible and conveys anti-Christian sentiment?" In reply, she described her relationship with her then partner, explaining that the biblical message did have some value; however, the facts depicted in it were not reflected in scientific discoveries. The applicant believed in a higher power (*siła wyższa*), she had had a religious upbringing, but had her own views on those matters. She stated that she was more convinced by scientific discoveries, and not by what she described as "the writings of someone wasted from drinking wine and smoking some weed" When asked who she meant, the applicant replied "all those guys who wrote those incredible [biblical] stories."

After publication of the interview, two individuals complained to a public prosecutor that the applicant had committed an offence proscribed by Article 196 of the Criminal Code, which provides: "Whoever offends the religious feelings of other persons by publicly insulting an object of religious worship, or a place designated for public religious ceremonies, is liable to pay a fine, have his or her liberty restricted, or be deprived of his or her liberty for a period of up to two years."

The Warsaw District Court convicted the applicant and fined her 5,000 Polish zlotys (approximately 1,160 euros). The court observed that the legislature had balanced the two conflicting freedoms in Article 196 and stated that it was impossible to accept that the applicant did not understand the meaning of the words she used and, accordingly her statements did not fall within the margins of freedom of expression. The court noted that the applicant's comments had been made public and they had reached a wide audience and that the question of whether her statements amounted to insult had to be examined taking into account the average person's sensibility in Poland; noting that the Bible, along with the Torah, was considered in the different Christian religions and in Judaism to be inspired by God and was an object of veneration. Dismissing the appeal, the Constitutional Court noted that the insulting of an object of religious worship deliberately offends the religious feelings of other people, and that public debate should take place in a civilised and cultural manner, without any detriment to human and civil rights and freedoms.

The decision of the European Court of Human Rights

The applicant complained that her criminal conviction for offending religious feelings had given rise to a violation of Article 10, in particular that the necessity to protect the religious feelings of others should not be safeguarded at all costs, that the criminal law should not

have been employed to protect subjective religious feelings, and that the penalty imposed on her was excessive and thus disproportionate.

The Court reiterated that Article 10 was applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb (para 46, citing *Handyside v United Kingdom* (1979) 1 EHRR 737). However, it carries with it duties and responsibilities, including, in the context of religious beliefs, the general requirement to ensure the peaceful enjoyment of the rights guaranteed under Article 9 to the holders of such beliefs. This includes a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane The Court thus reiterated that there may also be a positive obligation requiring the adoption of measures to ensure respect for freedom of religion, even in the relations between individuals.

The Court stated that those who chose to manifest their religion cannot expect to be exempt from criticism; they must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith (citing *Otto-Preminger-Institut v. Austria* (1994). However, where such expressions 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, a State may legitimately consider them to be incompatible with respect for the freedom of thought, conscience and religion and take proportionate restrictive measures. 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 Thus, 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.

Further, the fact that there is no uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions means that States have a wider margin of appreciation when regulating freedom of expression in connection with matters liable to offend intimate personal convictions within the sphere of morals or religion. Thus, in cases involving the conflicting interests of the exercise of two fundamental freedoms, the assessment of the (potential) effects of the impugned statements depends, to a certain degree, on the situation in the country where the statements were made at the time and the context in which they were made.

Having established that the restriction was prescribed by law and pursued a legitimate aim, the Court reiterated that a religious group must tolerate the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith, as long as the statements at issue do not incite to hatred or religious intolerance. Looking at her statements as a whole, the Court observed that the applicant did not develop her arguments and did not base them on any serious sources or a specific doctrine. The applicant did not claim to be an expert on the matter, a journalist, or a historian. She had been answering the journalist's question about her private life, addressing her audience in a language consistent with her style of communication, deliberately frivolous and colourful, with the intention of sparking interest. The Court then moved on to attack the domestic courts' reasoning, noting that the domestic courts failed to assess properly whether the impugned statements constituted factual statements or value judgments. Further, it noted that the domestic courts failed to identify and carefully weigh the competing interests at stake, or discuss the permissible limits of criticism of religious doctrines under the Convention versus their disparagement.

In particular, the domestic courts did not assess whether applicant's statements had been capable of arousing justified indignation or whether they were of a nature to incite to hatred or otherwise disturb religious peace and tolerance in Poland. The Court also noted that it was not argued before the domestic courts, or before the Court, that the applicant's statements amounted to hate speech. Thus, the Court finds that the domestic courts had not established that the applicant's actions contained elements of violence, or elements susceptible of stirring up or justifying violence, hatred or intolerance of believers. Further, the domestic courts did not examine whether the actions in question could have led to any harmful consequences. There was thus nothing to suggest that Article 196 contains a criterion that the insult should threaten public order; rather, it appears that it incriminates all behaviour that is likely to hurt religious feelings.

Finally, the Court observed that the applicant was convicted in criminal proceedings originating from a bill of indictment lodged by a public prosecutor upon a complaint by two individuals, the proceedings continuing even after the applicant had reached a friendly settlement with one of the complainants. The applicant was sentenced to a fine equivalent to 1,160 euros, fifty times the minimum and thus the criminal sanction imposed on the applicant was not insignificant.

In conclusion, the domestic courts had failed to comprehensively assess the wider context of the applicant's statements and carefully balance her right to freedom of expression with the rights of others to have their religious feelings protected and religious peace preserved in the society. It has not been demonstrated that the interference in the instant case was required, in accordance with the State's positive obligations under Article 9 of the Convention, to ensure the peaceful coexistence of religious and non-religious groups and individuals under their jurisdiction by ensuring an atmosphere of mutual tolerance. Further, the expressions under examination did not amount to an improper or abusive attack on an object of religious veneration, likely to incite religious intolerance or violating the spirit of tolerance. Thus, despite the wide margin of appreciation, the domestic authorities failed to put forward sufficient reasons capable of justifying the interference with the applicant's freedom of speech.

Commentary

Although the UK law of blasphemy and blasphemous libel was abolished by s.79 of the Criminal Justice and Immigration Act 2008, many legal systems regulate speech or other actions in order to protect either the tenets of the country's religion, or the sensibilities of the followers of that religion. The European Convention permits such laws provided they are necessary and proportionate in relation to a legitimate aim *(Otto-Preminger Institute* v *Austria* (1994) 19 EHRR 34; *Wingrove* v *United Kingdom* (1996) 24 EHRR 1). The European Court has indicated that member states would be provided with a wide margin of appreciation in this area. For example, in *Otto-Preminger Institute,* the Court held that that speech causing gratuitous offence may be restricted, and that the concept of blasphemy could not be isolated from the society against which it is being judged, as well as the population where the showings were due to take place, which were strongly Catholic. In contrast, in *Tatlav* v *Turkey*, Decision of the European Court, 2 May 2006 (Application No 50692/99). there had been a violation of Article 10 when the applicant had been prosecuted after publishing a book entitled the *Reality of Islam*, which claimed that religion had the effect of legitimising social injustices in the name of 'God's will'. The Court held that although the book contained strong criticism of the religion, it did not employ an offensive tone aimed at believers or an abusive attack against sacred symbols.

It is clear, therefore, that states are still allowed to operate moderate blasphemy laws. Thus, in *IA* v *Turkey* (2007) 45 EHRR 30, there had been no violation of Article 10 when the applicant had been fined for publishing a novel which, *inter alia*, alleged that the prophet Mohammad did not prohibit sexual intercourse with a dead person or a living animal. The book was not merely provocative and shocking but constituted an abusive attack on the Prophet of Islam. Notwithstanding a degree of tolerance of criticism of religious doctrine within Turkish Society, believers could legitimately feel that certain passages of the book constituted an unwarranted and offensive attack on them. Further, in *Gay News* v *United Kingdom*, (1983) 5 EHRR 123, the European Commission decided that a prosecution of a poem which described, *inter alia*, acts of sodomy and fellatio with the body of Christ immediately after his crucifixion was necessary in a democratic society. The Commission held that it might be necessary in a democratic society to attach criminal sanctions to material that offends against religious feelings, provided the attack is serious enough and that the application of the law is proportionate to the appropriate aim. The Commission also held that the fact that the offence was one of strict liability and is, thus, committed irrespective of the publisher's intention and the intended audience did not make it disproportionate *per se*. This aspect of the Commission's judgment now appears to be in question, for in the present case the Court was clearly influenced by the singer's intention and all the other circumstances of the expression in reaching its conclusion on necessity and proportionality.

The decision in the present case suggests that states are still allowed to maintain proportionate blasphemy laws, although several extracts of the Court's judgment mean that the legitimate aims of such laws appear uncertain. In other words, is it sufficient that the words or actions cause gratuitous and gross offence to religious followers, or must those words evidence religious intolerance or hatred? This requires clarification from the European Court, but whatever the scope of that aim, each state must ensure that blasphemy laws accommodate free speech norms, and that the law and judicial decisions of each state consider the context in which the words were spoken.

Dr Steve Foster, Coventry Law School, Coventry University.
