

CHAPTER III

ANALYSIS

3.1. The Relationship between Freedom of Speech and Freedom of Religion

a. Freedom of Speech

Article 19 Universal Declaration of Human Rights stated,

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.

Freedom of expression is a right set out in Article 10 of the European Convention on Human Rights and the Human Rights Act 1998.¹³³ In the key case of *Handyside v UK* (1976) 1 EHRR (European Human Rights Reports) 737, the European Court of Human Rights declared that:¹³⁴

“Freedom of expression constitute one of the essential foundation of a democratic society, one of the basic condition for its progress and for the development of every man...it 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...such are the demand of that pluralism, tolerance and broad mindedness without which there is no ‘democratic society”

Convention Jurisprudence gives different weight to different kinds of expression. The most important expression –political speech- therefore is likely to be protected to a much greater extent than the least important – commercial speech-. Freedom of expression is a ‘qualified right’.¹³⁵

¹³³ Stated in Article 9 and Article 10 of Human Rights Act 1998

¹³⁴ James Einstein, 2017, Papers: *Hate Speech Bans, Democracy and Political Legitimacy*, University of Minnesota Law School, p.4

¹³⁵ Jonathan Law, *Op. cit.*, p.201

Islam also had stated about freedom of speech, in verses which related to the case, especially in term of speak properly, as stated in Quran:

(Al-Isra:53)

وَقُلْ لِعِبَادِي يَقُولُوا الَّتِي هِيَ أَحْسَنُ إِنَّ الشَّيْطَانَ يَنْزِعُ بَيْنَهُمْ
إِنَّ الشَّيْطَانَ كَانَ لِلإِنْسَانِ عَدُوًّا مُّبِينًا ﴿٥٣﴾

“And tell My servants to say that which is best. Indeed, Satan induces [dissension] among them. Indeed Satan is ever, to mankind, a clear enemy”

In Surah Al-Baqarah verse 104, stated:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَقُولُوا رَاعِنَا وَقُولُوا أَنْظِرْنَا وَأَسْمِعُوا
وَاللَّكَفِرِينَ عَذَابٌ أَلِيمٌ ﴿١٠٤﴾

“O you who have believed, say not [to Allah 's Messenger], "Ra'ina" but say, "Unthurna" and listen. And for the disbelievers is a painful punishment.”

b. Freedom of Religion

Article 18 Universal Declaration of Human Rights stated,

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance”

Freedom of thought, conscience and religion is a right set out in Article 9 of the European Convention on Human Rights and the Human Rights Act 1998. Freedom of thought is an absolute right, but the right to

manifest one's beliefs or religion is a qualified right. The right to proselytize is protected under the Convention.¹³⁶

Locke made the distinction between freedom to maintain or to change religion or belief on the one hand and freedom to manifest religion or belief on the other, and expressed the view that whereas freedom to maintain one's religion or belief cannot be restrained, freedom to manifest religion or belief is subject to limitation by the State "in the same manner, and no otherwise", as freedom to exercise any other civil right.¹³⁷ Although the concept of freedom of thought, conscience and religion emerged comparatively early in the writings of certain outstanding individuals, its recognition in national law took considerable time. The translation of the abstract concept into law and practice was a gradual process. Tolerance was accorded, in the beginning, to one or a few specified religions or beliefs; and only later was it extended to all such groups. Moreover, the measure of tolerance extended to various groups was often very narrow at first, and only by a gradual expansion was full equality achieved. Even today the stage reached is not the same as in various areas of the world. In Switzerland the right of the individual to profess the religion of his choice has gradually been recognized by national law.¹³⁸

Freedom of religion was also found in verses of Quran. The basic principle on Freedom of religion was found on Quran in Surah Al-Kafirun verse 6, it stated:

¹³⁶ *Ibid*, p.187

¹³⁷ Michael Arnheim, *Op. cit.*, p.168-169

¹³⁸ Arcot Krishnaswami, *Op. cit.*, p.3-4

لَكُمْ دِينُكُمْ وَلِيَ دِينِ ﴿١﴾

“For you is your religion, and for me is my religion.”

There is also Surah Al-Baqarah verse 256:

لَا إِكْرَاهَ فِي الدِّينِ قَدْ تَبَيَّنَ الرُّشْدُ مِنَ الْغَيِّ فَمَنْ يَكْفُرْ بِالطَّاغُوتِ
وَيُؤْمِنْ بِاللَّهِ فَقَدِ اسْتَمْسَكَ بِالْعُرْوَةِ الْوُثْقَىٰ لَا انْفِصَامَ لَهَا وَاللَّهُ سَمِيعٌ
عَلِيمٌ ﴿٢٥٦﴾

“There shall be no compulsion in [acceptance of] the religion. The right course has become clear from the wrong. So whoever disbelieves in Taghut and believes in Allah has grasped the most trustworthy handhold with no break in it. And Allah is Hearing and Knowing.”

c. Relationship

Right to freedom of religion and to manifest one’s religion and the right to freedom of expression are fundamental human rights guaranteed in all major global and European human rights instruments. But these rights can sometimes appear to be in conflict with each other. Freedom of expression applies not only to speech that is favorably received, but also to speech that offends, shocks or disturbs. The right includes criticizing beliefs.¹³⁹ Those who manifest their beliefs, although they have the right to do so under Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), cannot expect to be exempt from all

¹³⁹ Michael Arnheim, *Op. cit.*, p.170

criticism. On the contrary, the exercise of freedom of expression under Article 10 of the ECHR brings with it duties and responsibilities and these appear to include an obligation to avoid, as far as possible, speech that is gratuitously offensive to others and which does not contribute to any form of public debate.¹⁴⁰

3.2. The Decision of ECHR on the Case of Ms. ES v Vienna

a. Case Description

As mentioned shortly in chapter I, the case between Ms. ES v Vienna Regional Criminal Courts can be said as unique case. It can be categorized as private or civil case, not criminal case. There was neither victims nor person getting injured by the perpetrator and no damage and loss caused by her. However, something that Ms. ES had said in her seminars might cause public's sentiments towards certain religion, in this case was Islam and Moslem which was minority in Vienna.

Cited from article "*Freedom of Expression or Criminal Blasphemy; ES v Vienna*" by Frank Cranmer,¹⁴¹ let us try to understand more about this case, its background and deeper description of this case. Based on the article, the case begin From January 2008, Ms. ES had several seminars entitled "Basic Information on Islam" which were held at the right-wing Freedom Party Educational Institute [*Bildungsinstitut der Freiheitlichen Partei*

¹⁴⁰ Erica Howard, 2017, "Freedom of Speech v Freedom of Religion? The Case of Dutch Politician Geert Wilders", *Human Rights Law Review* 17, p. 313-337

¹⁴¹ Frank Cranmer, *Freedom of Expression or Criminal Blasphemy*, available at: <http://www.lawandreligionuk.com/2018/10/26/freedom-of-expression-or-criminal-blasphemy-es-v-Vienna/>, accessed on February 28th2019

Österreichs]. Advertisement of the seminars was made with the framework of a “free education package” and aimed to young voters. The head of the Freedom Party personally distributed the leaflets for advertisement, all while advertising the seminar as one of the top seminars held for free. However, from the seminar, Ms. ES who held it was questioned by the police for statements she had made during the seminars. The statements were suspected to oppose the doctrines of Islam and initially charged with inciting hatred (*Verhetzung*), under Article 283 of the Criminal Code,¹⁴² but found guilty of disparaging religious doctrines [*Herabwürdigung religiöser Lehren*] under Article 188 in a manner capable of arousing justified indignation [*geeignet, berechtigtes Ärgernis zu erregen*].¹⁴³

The statements which the court judged incriminating were as follows [*English translation*]:¹⁴⁴

“One of the biggest problems we are facing today is 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. This does not happen according to our social standards and laws. Because he

¹⁴² Article 283 Vienna Criminal Code incite about hatred and violence 1974, last Amend on 2011, it stated: “(1) Who publicly in a manner suited to jeopardize public order, or in a manner perceivable to the general public incites or instigates to violence against a church or religious denomination or any other group of persons defined by criteria of race, colour of skin, language, religion or ideology, nationality, descent or national or ethnic origin, sex, a disability, age or sexual orientation or a member of such a group, explicitly on account of his/her belonging to such a group, shall be punished with imprisonment of up to two years (2) Likewise, a person shall be punished, if he/she in a manner perceivable to the general public, stirs up hatred against one of the groups defined in paragraph 1 or who verbally harasses such groups in a manner violating their human dignity and who thereby seeks to decry them”

¹⁴³ Frank Cranmer, *Freedom of Expression or Criminal Blasphemy*, available at: <http://www.lawandreligionuk.com/2018/10/26/freedom-of-expression-or-criminal-blasphemy-es-v-Vienna/>, accessed on February 28th2019

¹⁴⁴ Frank Cranmer, *Freedom of Expression or Criminal Blasphemy*, available at: <http://www.lawandreligionuk.com/2018/10/26/freedom-of-expression-or-criminal-blasphemy-es-v-Vienna/>, accessed on February 28th2019

was a warlord, he had many women, to put it like this, and liked to do it with children. And according to our standards, he was not a perfect human. We have huge problems with that today, that Muslims. get into conflict with democracy and our value system...”

“The most important of all Hadith collections recognized by all legal schools: The most important is the Sahih Al-Bukhari. If a Hadith was quoted after Bukhari, one can be sure that all Muslims. will recognize it. And, unfortunately, in Al-Bukhari the thing with Aisha and child sex is written...”

“I remember my sister, I have said this several times already, when [S.W.] made her famous statement in Graz, my sister called me and asked: ‘For God’s sake. Did you tell [S.W.] that?’ To which I answered: ‘No, it wasn’t me, but you can look it up, it’s not really a secret.’ And her: ‘You can’t say it like that!’ And me: ‘A 56-year-old and a six-year-old? What do you call that? Give me an example? What do we call it, if it is not pedophilia?’ Her: ‘Well, one has to paraphrase it, say it in a more diplomatic way.’ My sister is symptomatic [sic ???sympathetic]. We have heard that so many times. ‘Those were different times’ – it wasn’t okay back then, and it’s not okay today. Full stop. And it is still happening today. One can never approve something like that. They all create their own reality because the truth is so cruel...”

Dissatisfied by Vienna Criminal court, Ms. ES tends to bring her case into European Court of Human Rights (ECtHR), to seek for ‘justice’. It happened because Ms. ES’s renewal request for the court decision was denied. Relying on Article 10 (freedom of expression), Ms.ES complained that the domestic courts failed to address the substance of the impugned statements in the light of her right to freedom of expression. If they had done so, they would not have qualified them as mere value judgments but as value judgments based on facts. Furthermore, her criticism of Islam occurred in the framework of an objective and lively discussion which contributed to a public

debate, and had not been aimed at defaming the Prophet of Islam. Lastly, Ms.ES submitted that religious groups had to tolerate even severe criticism.¹⁴⁵

b. Judgment of ECHR

In today's Chamber judgment in the case of Ms. ES v. Vienna (application no. 38450/12) the European Court of Human Rights held, unanimously, that there had been:¹⁴⁶

“No violation of Article 10 (freedom of expression) of the European Convention on Human Rights”

The case concerned the applicant's conviction for disparaging religious doctrines; she had made statements suggesting that Muhammad had had pedophile tendencies. The Court found in particular that the domestic courts comprehensively assessed the wider context of the applicant's statements and carefully balanced her right to freedom of expression with the right of others to have their religious feelings protected, and served the legitimate aim of preserving religious peace in Vienna. It held that by considering the impugned statements as going beyond the permissible limits of an objective debate, and by classifying them as an abusive attack on the Prophet of Islam which could stir up prejudice and threaten religious peace, the domestic courts put forward relevant and sufficient reasons.¹⁴⁷

¹⁴⁵ European Court of Human Rights Press Release, *Conviction for calling Muhammad a pedophile is not in breach of Article 10*, ECHR 360 (2018), issued by Registrar of the court

¹⁴⁶ *Ibid*

¹⁴⁷ ECtHR Press Release: ECtHR 360, 25/10/2018, 2018

Those who manifest their beliefs, although they have the right to do so under Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), cannot expect to be exempt from all criticism. On the contrary, the exercise of freedom of expression under Article 10 of the ECHR brings with it duties and responsibilities and these appear to include an obligation to avoid, as far as possible, speech that is gratuitously offensive to others and which does not contribute to any form of public debate.¹⁴⁸

The judgment

The Court noted that the domestic courts comprehensively explained why they considered that the applicant's statements had been capable of arousing justified indignation; specifically, they had not been made in an objective manner contributing to a debate of public interest (e.g. on child marriage), but could only be understood as having been aimed at demonstrating that Muhammad was not worthy of worship.¹⁴⁹ It agreed with the domestic courts that Ms. ES must have been aware that her statements were partly based on untrue facts and about to arouse indignation in others.

The national courts found that Ms. ES had subjectively labeled Muhammad with pedophilia as his general sexual preference, and that she failed to neutrally inform her audience of the historical background, which consequently did not allow for a serious debate on that issue. Hence, the

¹⁴⁸ Erica Howard, *Loc. cit.*

¹⁴⁹ ECtHR Press Release: ECtHR 360, 25/10/2018, 2018

Court saw no reason to depart from the domestic courts' qualification of the impugned statements as value judgments which they had based on a detailed analysis of the statements made.¹⁵⁰

The Court found in conclusion that in the instant case the domestic courts carefully balanced the applicant's right to freedom of expression with the rights of others to have their religious feelings protected, and to have religious peace preserved in Vienna society.

The Court held further that even in a lively discussion it was not compatible with Article 10 of the Convention to pack incriminating statements into the wrapping of an otherwise acceptable expression of opinion and claim that this rendered passable those statements exceeding the permissible limits of freedom of expression.¹⁵¹

Lastly, since Ms. ES was ordered to pay a moderate fine and that fine was on the lower end of the statutory range of punishment, the criminal sanction could not to be considered as disproportionate. Under these circumstances, and given the fact that Ms. ES made several incriminating statements; the Court considered that the Vienna courts did not overstep their wide margin of appreciation in the instant case when convicting Ms. ES of disparaging religious doctrines. Overall, there had been no violation of Article 10.

¹⁵⁰ See also, *Hate Speech Freedom of Expression and Freedom of Religion: a Dialog*, Released by Foreign and Commonwealth Office, on question number 6

¹⁵¹ ECtHR Press Release: ECtHR 360, 25/10/2018, 2018

c. The Conformity of the Judgment

The Regional Court had decided that all these statements giving the impression that Muhammad had pedophile tendencies and that anyone who wanted to exercise their rights under Article 10 had to be prevented from making statements which hurt others unreasonably and therefore did not contribute to a debate of public interest. A balancing exercise between the rights under Article 9 and those under Article 10 needed to be applied; and the applicant's statements were not statements of facts. The applicant's statements were derogatory value-judgments that exceeded the permissible limits. It is considered that she had no intention to objectively approach the topic, but intentionally aim to disrespect Muhammad.¹⁵² Although she possessed the freedom of expression, but interference is justified in accordance to the law and how it is required in a democratic society in order to keep the religious peace in Vienna. The appeals she submitted were dismissed.¹⁵³

Before the Fifth Section, she alleged that her criminal conviction for disparaging religious doctrines had violated Article 10 ECHR (freedom of expression). The Court held that the application was not manifestly ill-founded within the meaning of Article 353 (a) and declared it admissible.¹⁵⁴

¹⁵² Erica Howard, *Op. cit.*, p.316

¹⁵³ Bora Erdem, 2018, "The Elements of Freedom of Expression in the Light of the European Convention on Human Rights", *European Journal of Interdisciplinary Studies*, Vol.4 Issue 2, p.181

¹⁵⁴ ECtHR Press Release: ECtHR 360, 25/10/2018, 2018

Ms. ES countered that it is false for the domestic courts to disregard her statements as mere value-judgments. It is excessive value-judgments if there is no factual explanation included; however by the statement of Muhammad had had sexual intercourse with a nine-year-old she had been quoting a historically-proven fact and asked whether this could be regarded as pedophilia. It is permissible under the meaning of Article 10 to have a value-judgment based on facts.¹⁵⁵ Additionally, she was in the framework of “an objective and lively discussion, which the domestic courts had failed into account” when she criticized Islam and Muhammad. Therefore, it had been an objective criticism of religion, had contributed to a public debate and had not been aimed at defaming the Prophet of Islam. She also added that religious groups is bound to be regarded as public institutions and must be able to stand even the severe criticism directed to them. The only offensive expressions to others and thus an infringement of their rights, and which therefore did not contribute to any form of public debate, should be prohibited by law, whereas blasphemy laws providing for a criminal sanction should be avoided according to international law standards.¹⁵⁶

The Government referred that Article 188 of the Criminal Code had no prohibition on critical or offensive statements about a church or religious community *per se*, but merely regulated the manner in which such statements

¹⁵⁵ *Ibid*

¹⁵⁶ Arcot Krishnaswami, *Op. cit.*, p.27

could be made.¹⁵⁷ The purpose of this provision is to keep the religious peace. This is important because with the religious peace it also resulted in the general peace within a state. The applicant's criminal conviction had pursued the legitimate aim of maintaining order religious peace and protecting the rights of others, their religious feelings. The Supreme Court had accepted that the issue of adults having sexual contact with minors gave rise to a public debate and the limits of acceptable criticism were therefore wider. However, in the case where the applicant's statements accused Muhammad of pedophilia, and in accordance to that matter, it had insufficient factual basis; they were openly showing disdain towards Muhammad and therefore had not contributed to an objective public debate.¹⁵⁸

The Court noted that it was justified that the interference had been "prescribed by law" the applicant's conviction had been based on Article 188 of the Criminal Code and it resulted the Government's contention that the interference had had the legitimate purpose to prevent the disorder of peace by keeping the religious peace and protecting the religious feelings.

Freedom of expression was one of the most important foundations of a democratic society and, subject to Article 10 paragraph 2, applied not only to "information" or "ideas" that were favorably received or regarded as inoffensive but also to those that offend shock or disturb. Additionally, there

¹⁵⁷ Section 188 of the Viennan Criminal Code, called 'Vilification of Religious Teachings', criminalizes: "Anyone who publicly disparages a person or thing that is the object of worship of a domestic church or religious society, or a doctrine, [or other] behavior is likely to attract legitimate offense..."

¹⁵⁸ Bora Erdem, *Op. cit.*, p.184

was little scope under Article 10 paragraph 2 for restrictions on political speech or on debate on questions of public interest; and those who chose to exercise the freedom to manifest their religion under Article 9, whether members of a religious majority or a minority, could not expect to be exempt from criticism. However:¹⁵⁹

“...the exercise of the freedom of expression carries with it duties and responsibilities. Amongst them, in the context of religious beliefs, is the general requirement to ensure the peaceful enjoyment of the rights guaranteed under Article 9 to 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 ... 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 ... In addition, 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...”

“In examining whether restrictions on the rights and freedoms guaranteed by the Convention can be considered ‘necessary in a democratic society’, the Court has frequently held that the Contracting States enjoy a certain margin of appreciation. The absence of a uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions broadens the Contracting States’ margin of appreciation when regulating freedom of expression in relation to matters liable to offend personal convictions within the sphere of morals or religion ... And not only do they enjoy a wide margin of appreciation in that respect. They also have the positive obligation under Article 9 of the Convention of ensuring the peaceful co-existence of all religions and those not belonging to a religious group by ensuring mutual tolerance...”

¹⁵⁹ Frank Cranmer, *Freedom of Expression or Criminal Blasphemy*, available at: <http://www.lawandreligionuk.com/2018/10/26/freedom-of-expression-or-criminal-blasphemy-es-v-Vienna/>, accessed on February 28th 2019

“A State may therefore legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas, judged incompatible with respect for the freedom of thought, conscience and religion of others ... It is, however, for the Court to give a final ruling on the restriction’s compatibility with the Convention and it will do so by assessing it in the circumstances of a particular case.”

The issue before the Court was, therefore, a balancing exercise between the rights of the applicant to free expression and the right of others to respect for their freedom of thought, conscience and religion.

The matter subject is a sensitive matter and has the potential effect to the state depending on the location where the statements were made. The degree of resulting effect is also different with one another depend the country where it was made. Therefore, the domestic authorities had a wide margin if they face similar situation because they have better understanding to evaluate which statements were likely to disturb the religious peace in their own country.¹⁶⁰ The Court agreed with the domestic courts that the applicant must have been aware that her implication that Muhammad was a pedophile was partly based on:

“untrue facts and apt to arouse (justified) indignation in others [and it endorsed] the Regional Court’s statement in its judgment of 15 February 2011, 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 was one of the bases of a democratic society.”

¹⁶⁰ Peter G. Danchin, 2008, “Of Prophet and Proselytes: Freedom of Religion and the Conflicts of Rights in International Law”, *Harvard International Law Journal*, Vol.49 No.2, p.253

Clearly explained in Chapter II, part of international human rights law that there is no hierarchy in human rights. No rights higher and stronger than other because human rights are same equal and linked each others. It gives lots of meaning regarding to case, judges in ECtHR and VRCC gave the best decision to this case. Writer could not agree more with the decision, even though Islam as minority in Austria, it was not mean anyone could disparage important person in Islam, in this case Prophet Muhammad (PBUH). By saying Prophet Muhammad improper to be a perfect figure to follow just because he marry Aisha whom child at that time is a humiliation since Ms. ES directly called Prophet Muhammad (PBUH) a pedophile.¹⁶¹ It was totally very rude and any Muslim who heard this will absolutely going to rage. Improper words to be said in public, for worst Ms. ES said it during her seminar and discussion. If we look at the marriage between Prophet Muhammad with Aisha nowadays, we might be correctly to say it is part of pedophile act, breaching children's human rights also never be fit and the right thing to be done. However, we never really know what happened in the past, the time when Prophet Muhammad lived. It might be a common practice for parents to marry their underage kids with an adult or among underage (such kind of agreement or promise between parents that been made).

According to the writer opinion, Ms. ES is in the wrong. The writer does not mean to blame Ms. ES's idea or understanding of human rights.

¹⁶¹ Frank Cranmer, *Freedom of Expression or Criminal Blasphemy*, available at: <http://www.lawandreligionuk.com/2018/10/26/freedom-of-expression-or-criminal-blasphemy-es-v-Vienna/>, accessed on February 28th2019

What Ms. ES wrong according to the writer is that Ms. ES idea and understanding of human rights nowadays are brought to evaluate something happened in the past. It is a wrong thing to do. During 50 to 100 years of living, human rights went through lot of changes. Something that might be common during the past, it changes to be improper nowadays and vice versa. Human rights are no exception, especially when human rights were always be the part of human thinking or perspective's product, a principle that never stop to grow following the era.

