

The Test of Necessity in a European Context

The Case of Denmark

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Third session: Freedom of Expression and Sacred Values¹

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² The Danish Institute for Human Rights (DIHR) is a national human rights institution in accordance with the UN Paris Principles, more information is available at <http://www.humanrights.dk/>

Introduction

The title of the paper is *The Test of Necessity in a European Context*, since it seems to me that we often end up in this crucial assessment, when we talk about freedom of expression. I know we have discussed this guiding principle in general in a prior session, but we cannot avoid returning to this important issue in relation to a discussion on the limitation of freedom of expression on the basis of considerations for sacred values.

I will present an interpretation of the human rights" obligations and other considerations, one have to bear in mind when discussing said limitations and considerations. It is not always regulation and prohibition by Criminal law, which is the most adequate tool for limiting offending expressions and protecting the feelings of others in a democratic society.

In this context I will briefly present to you the relevant Danish legislative framework in relation to the Constitution and the Criminal Code as well as parliamentary and public discussions during the cartoon crisis. This overview is important for an "in depth" understanding of the Danish issues and traditions.

The Cartoon Crisis - The Facts

The article in Jyllands-Posten was published in the newspaper's Friday issue on 30 September 2005. The drawing was accompanied by text explaining that the newspaper had invited members of the Danish Newspaper Illustrators' Union to draw Mohammed as they see him; that 12 of about 40 had responded to the invitation; and that the drawings are published under the illustrators' names.

The article was entitled "The Face of Mohammed" and surrounded by twelve drawings. The introduction to the article is headed "Freedom of expression",

The article cited several examples of what the culture editor perceived as self-censorship e.g. "An illustrator who is to portray the Prophet Mohammed in a children's book wishes to do so anonymously. As do the Western European translators of a collection of essays critical of Islam. A leading art museum has removed a work of art for fear of reactions of Muslims".

The following section with the heading "The Ridicule" is an extract from the article:

"Some Muslims reject modern, secular society. They demand a special position, insisting on special consideration of their own religious feelings. It is incompatible with secular democracy and freedom of expression, where one has to be ready to put up with scorn, mockery and ridicule.

It is therefore no coincidence that people living in totalitarian societies are sent off to jail for telling jokes or for critical depictions of dictators. As a rule, this is done with reference to the fact that it offends people's feelings. In Denmark, we have not yet reached this stage, but the cited examples show that we are on a slippery slope to a place where no one can predict what self-censorship will lead to."

In the last column of the article under the heading "12 illustrators", it says: "That is why Morgenavisen Jyllands-Posten has invited members of the Danish Newspaper Illustrators' Union to draw Mohammed as they see him." Furthermore, it says that twelve illustrators, whose names are mentioned, have responded to the invitation and that their drawings are published.

Not all of the 12 cartoons depicted the Prophet Mohammed; the one which was considered most offending was one drawing showing the face of a grim-looking bearded man with a turban shaped like an ignited bomb.

An extended debate on the topic of freedom of speech vis-à-vis protection of religious feelings and protection of minorities has been a central part of the public debate in Denmark in 2006, especially after the torching of several Danish embassies in the Middle East and consumer boycott and mass-demonstrations.

The publication of the drawings caused a number of private associations to file a report with the police claiming that Jyllands-posten had committed an offence under section 140 (prohibition against blasphemy) and 266b (prohibition against hate speech) of the Danish Criminal Code. The Regional Public Prosecutor referring to section 749, subsection 2 of the Administration of Justice Act decided to discontinue the investigation. According to this provision it may be decided to discontinue an investigation, if there is not a reasonable suspicion that a criminal offence indictable by the state has been committed.

Furthermore it was noted: “In his decision the Regional Public Prosecutor also states, that when assessing what constitutes a offence under section 140 and section 266b the right to freedom of speech must be taken into consideration and that the right to freedom of speech must be exercised with the necessary respect for other human rights, including the right to protection against discrimination, insult and degradation. Based on an overall assessment of the article in Jyllands-posten, including the twelve cartoons, the Regional Public Prosecutor does not find that there is a reasonable suspicion that a criminal offence indictable by the state has been committed. In his decision the Regional Public Prosecutor states that he attaches importance to the fact that the article in question concerns a subject of public interest, which means that there is an extended access to make statements without these statements constituting a criminal offence. Furthermore, according to the Danish case law f.i. journalists have extended editorial freedom, when it comes to subjects of public interest. For these reasons the Regional Public Prosecutor finds no basis for concluding that the content of the article constitutes an offence under section 140 or section 266b of the Criminal Code.

A possible complaint against the decision can be lodged with the office of the Director of Public Prosecutions.”

A complaint against the decision of the Regional Public Prosecutor was lodged with the office of the Director of Public Prosecutions who came to a decision 15 March 2006.³

In his conclusion the Director of Public Prosecutions did not find any basis for changing the decision made by the Regional Public Prosecutor and concurred to discontinue the investigation with regard to section 140 of the Danish Criminal Code as well as section 266 b of the Danish Criminal Code. The Director of Public Prosecutions underlined that “the Danish Criminal Code – and also other criminal provisions, e.g. about defamation of character – contain a restriction of the freedom of expression. Section 140 of the Danish Criminal Code protects religious feelings against mockery and scorn and

³ File No. RA-2006-41-0151. 15 March 2006 Decision on Possible criminal proceedings in the case of Jyllands-Posten's Article "The Face of Muhammed" available at: http://www.rigsadvokaten.dk/media/bilag/afgorelse_engelsk.pdf

section 266 b protects groups of persons against scorn and degradation on account of i.a. their religion. To the extent publicly made expressions fall within the scope of these rules there is, therefore, no free and unrestricted right to express opinions about religious subjects.”

International Practice and the Test of Necessity

There is no doubt that article 10 of the ECHR protects the substantive freedom of expression. Restrictions may be applied if *prescribed by law*, and *necessary in a democratic society* for one of the reasons mentioned in article 10, subsection 2, such as e.g. national security or morality or for the protection of the rights of others. The European Court of Human Rights (ECtHR) has consistently declared that freedom of expression is of basic importance for a democratic society.

According to the case-law of the ECtHR freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for individual self-fulfillment. Article 10 is applicable not only to information or ideas that are favourable received or regarded as inoffensive or as a matter of indifference, but also to those who that offend, shock or disturb. Exceptions to this freedom must be construed strictly, and the need for any restrictions must be established convincingly.⁴

It also follows from the jurisprudence that every formality, condition, restriction or penalty imposed in this sphere must be proportionate to the legitimate aim pursued. (*Handyside v. UK*, 7.12.1976, pr. 48). This follows from the demands for pluralism, tolerance and openness, without which there can be no democratic society (pr. 49).

Prescribed by law

For fulfillment of this requirement, the legislation needs to be of a certain quality and preciseness since one have to foresee the consequences of ones actions.

Hence, to be "prescribed by law" a restriction must be "adequately accessible" and foreseeable, that is, "formulated with sufficient precision to enable the citizen to regulate his conduct. In order to have a "legitimate aim", a restriction must be in furtherance of, and genuinely aimed at protecting, one of the permissible grounds set forth in Article 10(2).

Necessary in a democratic society

To be "necessary" a restriction does not have to be "indispensable" but it must be more than merely "reasonable" or "desirable". A "pressing social need" must be demonstrated, the restriction must be

⁴ *Jerusalem v. Austria*, judgment of 21February 2001, referred to in the Government's comments to ECRI Third Report on Denmark paragraph 18 available at: http://www.humanrights.dk/upload/application/021e65df/2006_ecri_report_to_state.pdf In the opinion of the Danish Government the interpretation of the Freedom of Expression does not go beyond the case law of the ECtHR.

Please also refer to *Drawing the line*, About the Danish Mohammed drawings by Lisbeth Arne Pedersen, Copenhagen, 20.11.2006. and DIHR Brief on Freedom of Expression, Inspired by the Mohammed drawings in *Jyllands-Posten*”, 29.08.2006 (English translation) by, Christoffer Badse, Eva Ersbøl, Thomas Trier Hansen, Lisbet Ilkjær, Eddie O.R. Khawaja, Eva Maria Lassen, Lisbeth Arne Pedersen, to be found at (www.humanrights.dk).

proportionate to the legitimate aim pursued, and the reasons given to justify the restriction must be relevant and sufficient.

In the religious area, the ECtHR in the Otto Preminger case (*Otto Preminger Institute v. Austria*, 20.9.1994, pr. 49) stated the following:

“Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which do therefore not contribute to any form of public debate capable of furthering progress in human affairs.”

The Court has exposed itself to criticism due to the manner in which it included article 9 of the ECHR about freedom of religion in a case which concerned article 10 about freedom of expression, as it referred to “respect for the religious feelings of believers” as if this was an acknowledged right pursuant to article 9.

The relationship between article 9, concerning freedom of thought, conscience and religion, and article 10 has, however, been clarified in the *Wingrove* case (*Wingrove v. UK*, 1997) according to which there seems to be no grounds to assume that article 9 contains a general right to be protected against offensive expressions. In this case, the British authorities had refused to allow video distribution of a film depicting Jesus on the cross in a sexual manner.

The margin of appreciation

The Contracting States have a certain margin of appreciation in determining whether such a need exists, but this margin “goes hand in hand with a European supervision”. This supervision must be strict and is not limited to ascertaining whether the state has exercised its discretion reasonably, carefully and in good faith; rather, the necessity of any restriction “must be convincingly established” (*Sunday Times*).

No uniform European concept of “morality” exists and the State therefore enjoy a wide margin of appreciation, whether measures are required to protect moral standards (*Handyside* pr. 43). In other areas where there exist a European consensus, the margin is much more narrow (see *Sørensen and Rasmussen v. Denmark*, 2006, *Freedom of Association*). A wider margin of appreciation is generally available to states when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion, since the State authorities are in a better position than an international judge to assess what is likely to cause offence to believers in each country. (*Wingrove v. United Kingdom*).

Concluding Comments

It follows from the wording of article 10, subsection 2, that whoever exercises the freedom of expression assumes “duties and responsibilities”.

When discussing “sacred values” one needs to be very precise. It seems to me that the concept is very vague.

There is no question that the cartoons were offensive to many Muslims. They were against a convention in Islam that the Prophet should not be depicted. In addition some of the cartoons equated Islam with terrorism. It is not always a good idea to insult peoples religious beliefs but the cartoons did not violate Danish legislation or any other European country's legislation in which they were published. Since we have to do with sacred values, the State enjoys a wide margin of appreciation. If a State wants to prohibit such cartoons and can lift the burden of proof that the prohibition is necessary in a democratic society, the State can do so.

When deciding on how to balance considerations related to freedom of expression and sacred values, the Court provides states with a considerable margin of appreciation. If the state does not use the authority in article 10, subsection 2, to intervene, and the question of violation of other rights according to the ECHR does not arise, the question whether the duties and responsibilities inherent in freedom of expression have been respected cannot be judged by the ECtHR.

One also have to bear in mind that minority protection and prohibition against blasphemy stems from completely different historical backgrounds. The prohibition against blasphemy protected the majority, their religious dogmas and traditional thinking and public order. The tendency has until recently gone in the other direction, namely the discussion on the abolishment of the prohibition against blasphemy.

The Danish legislative framework

The Danish Constitution

Section 77

Anyone is entitled to publish his ideas in print, in writing and in speech, subject to the authority of the Courts.
Censorship and other preventive measures may never be reintroduced.

(Part eight of the constitution: citizens' rights and freedoms).

Explanation

Although the Constitutional Act guarantees freedom of expression for all, it may be limited in some situations. Limitations include: prohibition against hate speech, slander, prohibition against blasphemy, obligation of confidentiality and security of the state.

Other relevant provisions include section 70 of the Danish Constitution (Grundloven) provides that "no person shall be denied the right to full enjoyment of civil and political rights by reason of his creed or descent; nor shall he for such reasons evade any common civil duty" and section 78 (2) of the Constitution provides that "associations employing violence or attempting to attain their aims by violence, by instigation to violence or by exerting similar punishable influence on dissentients shall be dissolved by judgment of a court of law". In the same section, subsection 3, regarding intervention against the association itself, the Act stipulates that "no association may in principle be dissolved by government measure. However, an association may be temporarily prohibited, provided that immediate proceedings are initiated for its dissolution".

Method of interpretation

The section is considered a fundamental value or principle - guiding the legal interpretation unless other important considerations indicate otherwise. Section 77, should be interpreted in the light of ECHR art. 10 i.e. prescribed by law and deemed necessary in a democratic society.

In Practice

Freedom of expression is primarily considered a guiding principle and the section is rarely directly invoked in courts or used in the argumentation in the public debate. However, this guiding principle has a significant impact on the application of e.g. criminal provisions limiting the freedom of expression.

The Danish Criminal Code section 266b (Hate Speech)

Any person who publicly or with the intention of disseminating it to a wide circle of people, makes a statement or imparts other information threatening, insulting or degrading a group of persons on account of their race, colour, national or ethnic origin, belief or sexual orientation" might be sentenced to a fine or imprisonment for up to two years.

According to subsection 2 of Section 266 b, it shall be considered an aggravating circumstance if the conduct can be characterized as propaganda.

Explanation

Section 266 b of the Criminal Code (straffeloven) prohibits the dissemination of racist statements and racist propaganda. The provision was inserted in the Criminal Code in 1971 in connection with Denmark's ratification of the International Convention on the Elimination of All Forms of Racial Discrimination, to ensure full compliance with article 4 of ICERD. It is stated in the explanatory notes that, when applying the provision, due consideration for the freedom of expression must be shown.

Section 266 b of the Criminal Code prohibits the dissemination of statements or other information by which a group of people is threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual orientation. The inclusion of sexual orientation was added to the provision by amendment in 1987.

The terms "statement" and "other information" extend to written as well as oral means of expression, including pictures. The phrase "threatening, insulting or degrading" implies that the provision might also pertain to expressions or, for instance, drawings that are degrading without being insulting. It is a requirement that the statements are made publicly or with the intention of dissemination.

Racist propaganda

The maximum penalty for violation of section 266 b was increased in 1995 by the addition of subsection (2) of the provision, according to which it is an aggravating circumstance when the offence is in the nature of propaganda activities. Propaganda is understood to be systematic, intensive or continuous efforts with a view to influencing opinion formation. If the statements are made as part of the activities of an organisation, indications are that they will be considered as propaganda. The purpose of the amendment was to extend the enforcement of the provision to prevent Denmark from becoming a sanctuary for the dissemination of Nazi and racist propaganda. During the readings of the bill in the Danish parliament (Folketinget) it was declared that in these especially aggravated cases the prosecutors should not in future exhibit the same restraint with regard to prosecuting as previously. The prosecutors should be aware of the possibility of instituting proceedings on their own initiative although no complaint has been filed. This could happen, for example, when a case has been referred to in public. Approaches from NGOs, etc. should also be included in the considerations of the prosecutors concerning the issue of prosecution. However, the changed prosecuting practice does not change the fact that due consideration should still be given to freedom of speech when applying section 266 b of the Criminal Code. Whether "propaganda" is present in a specific case will depend on an overall assessment stressing in particular whether there has been a systematic dissemination of discriminating statements, etc., including dissemination to foreign countries, with a view to influencing public opinion.

Scientific theories

Scientific theories on racial, national or ethnic differences do not, however, fall within the scope of the offences described in section 266 (b) of the Criminal Code. Furthermore, statements which are not made in an actual scientific context but which otherwise form part of a serious debate will, according to the circumstances, be unpunishable. The same applies to statements of a less serious character.

Holocaust denial and revisionism are not crimes in Denmark, however anti-Semitic statements are prohibited in accordance with section 266 (b).⁵

In Practice

Pursuant to section 266 b, racist statements are punished by a fine, or imprisonment for up to two years. The sanction for violation of section 266 b of the Criminal Code is normally a fine. Under the present legal practice concerning dissemination of racist statements, the courts assess the consideration of freedom of expression and freedom of the press as opposed to the consideration of protection against racist statements when weighing up whether an offence has been committed. Particularly in criminal cases against journalists and editors, the courts have thus made a specific assessment of the purpose of reproducing the racist statements, including whether the protection of the persons who are exposed to gross contempt by the statements reproduced is stronger than the need for conveying the statements to the public (see the ECtHR Jersild case below).

By judgment of the Eastern High Court of 14 March 2003 a spokesperson for a religious movement was sentenced to sixty days' suspended imprisonment for having stated on a home page on the Internet and in a leaflet that was handed out: "Kill them wherever you find them and drive them away from the place that they drove you away from. The Jews are a slanderous group of people, and they betray and violate obligations and pacts, and they invent lies..." and "coward Jews..." and other similar statements.

By judgment of the District Court of Frederikshavn of 31 May 2001, a former editor was sentenced to 10 day-fines of DKK 200 for having shouted "Nigger" several times to the President of the Republic of South Africa visiting Denmark.

By judgment of the District Court of Hvidovre of 11 October 2002, four young politicians were sentenced to 7 days' suspended imprisonment for having placed an advertisement on the Internet and in several technical periodicals stating: "Mass rape, serious assault, insecurity, forced marriages, suppression of women, gang crime. This is what a multiethnic society has to offer." (accompanied by pictures). The District Court did not consider the advertisement to be a statement of a propaganda-like character. Two editors who had printed the advertisement in their periodicals were sentenced to 5 day-fines of DKK 500 each. The Eastern High Court characterized the advertisement as propaganda and increased the sentence of the four young politicians to 14 days' suspended imprisonment – the two editors did not appeal their sentences.

In September 1996, a local council decided to withdraw the broadcasting licence of Radio Oasen, run by a neo-Nazi association. The council had the impression that the radio's reading of Hitler's *Mein Kampf* on 7 August 1996 contained terms of abuse towards particular sections of the population. The decision was reversed by the Local Radio and Television Committee which found that the passages quoted made up only a small part of a long undramatic, unedited reading of a book which may be bought in a bookshop or borrowed from a public library. Considering the conflicting considerations regarding the freedom of expression and the fight against racism, the Committee was concerned to attach so much importance to the reading that it would justify a withdrawal of the licence.

⁵ Concerns were raised in ECRI's Third Report to Denmark paragraph 85-87, available at http://www.humanrights.dk/upload/application/021e65df/2006_ecri_report_to_state.pdf

Related articles

Section 121 (Chapter: Crimes against public authorities) concerns any person who attacks public officials with insults, abusive language or other offensive words or gestures while they are executing their office or function. In the vast majority of cases, these violations are punished with a fine, but with the possibility of imprisonment of 6 months.

Danish Criminal Code section 110e (Prohibition against insults targeted at foreign States)

Any person who publicly scorns a foreign State, its flag or recognised national symbols or the flag of the United Nations or the Council of Europe can be punished with a fine or imprisonment for up to two years.

Explanation

The provision is located in the chapter in the criminal code regarding Crimes against the independence and security of the state. It was introduced to protect Denmark's relations to other States or international organisations. The provision mainly limits the possibility to burn flags during demonstrations etc. The European Unions flag is not protected. The Minister of Justice shall accept public prosecution, before proceedings can be initiated.

After the publications of the cartoons, a Bill was proposed in Danish Parliament (Folketinget) amending the provision to also include the Danish flag.⁶ During the readings of the bill in the parliament the Minister of Justice could not support the proposal and argued that the intention of this provision was to protect the relationship to foreign powers and not domestic issues. Therefore a prohibition against burning the Danish flag should not be introduced in this provision. In addition she argued, that one should be able to freely criticize Denmark and the Danish society and that this right was central for the freedom of expression in a democratic society. Furthermore, issues could be raised in relation to article 10 in ECHR. The bill was not adopted.

In my opinion, the Danish parliament could introduce a prohibition against burning the Danish flag without infringing article 10 of the ECHR, since this would be assessed to be within the margin of appreciation of Denmark. However, this was not deemed necessary by the politicians.

Danish Criminal Code section 140 (Prohibition against Blasphemy)

Any person who, in public, mocks or scorns the religious doctrines or acts of worship of any lawfully existing religious community in this country shall be liable to imprisonment for any term not exceeding four months.

Explanation

The section prohibits blasphemy, which is defined as acts which publicly ridicule or insult in Denmark legally existing religious communities" dogmas or worship. There has been no conviction in relation to the provision since 1938. Recently there have been discussions and parliamentary proposals on the

⁶ Bill proposed 27 October 2005, L 44 Forslag til lov om ændring af straffeloven. (Danmark og Dannebrog sidestilles med andre nationer og deres flag).

abolishment of the provision. The provision is located in the chapter on Crimes against the public order and peace.