

## ANALYSIS

by Grégor Puppink

**T**he European Centre for Law and Justice (ECLJ), of which I am the Director, is a non-governmental organization (NGO) dedicated to the promotion of life, family values, and the freedoms of expression and religion before international institutions, such as the Council of Europe and the United Nations (UN). The ECLJ intervenes in many cases with the European Court of Human Rights (ECHR), through a mechanism called “*third-party intervention*.”<sup>1</sup> We do not represent one or another party to the dispute as advocate or adviser, but we share our legal expertise to the Court.

In the *E.S. v. Austria* case, the ECLJ was the only third-party intervenor at the Court. We also intervened in the press, because the case became more political than juridical. A civilizational challenge was at stake in this case.

### **Our juridical intervention at the European Court of Human Rights**

In our intervention, we reminded the Court that freedom of thought, conscience and religion, and freedom of expression are complementary; they serve one another in their interactions, although this interaction can sometimes be difficult. Without freedom of thought and conscience, there is just no message to convey, and without freedom of expression, it would be impossible to share and change one’s convictions.

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<sup>1</sup> The written observations of the ECLJ can be read in full on our website (<https://eclj.org/>). They are also summarized by the Court in the judgment itself: ECHR, *E.S. v. Austria*, no. 38450/12, 25 October 2018, § 38.

In a famous case, the Court held that freedom of expression “*is 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 the State or any sector of the population.*”<sup>2</sup> It also applies to “*controversial*” statements.<sup>3</sup>

However, the Court also considers that “*whoever exercises his freedom of expression undertakes ‘duties and responsibilities’ the scope of which depends on his situation and the technical means he uses.*”<sup>4</sup> The Court thus usually accepts the legitimacy of restrictions of freedom of expression against “*provocative portrayals of objects of religious veneration*”<sup>5</sup> that are “*gratuitously offensive to others,*” when such portrayals can be regarded as a “*malicious violation of the spirit of tolerance, which must also be a feature of democratic society.*”<sup>6</sup> The Court also considers that it is legitimate to protect beliefs, and finds the criminalization of blasphemy acceptable when it sanctions a “*high degree of profanation,*”<sup>7</sup> especially against obscene portrayals that have “*a very aggressive sexual connotation*”<sup>8</sup> likely to have an impact on the views of believers (e.g. public display). The Court distinguishes obscenity, which generally has a sexual connotation<sup>9</sup> from debates.<sup>10</sup> We concluded from the case-law, and our own appreciation, that the propagation of gratuitously offensive and unnecessary obscenities can be restricted; the rest should be tolerated.

Elisabeth Sabaditsch-Wolff’s case was not about defending a right to the expression of blasphemous obscenities, but to preserve the faculty of telling the truth and denouncing errors, even if it displeases others.

Of course, comparing the union of Muhammad (56 years old) to Aisha (9 years old) to pedophilia may be intended to provoke a neg-

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2 ECHR, *Handyside v. the United Kingdom (Plenary)*, no. 5493/72, 7 December 1976, § 49.

3 ECHR, *Lehideux and Isorni v. France [GC]*, no. 24662/94 23 September 1998, § 52.

4 ECHR, *Handyside*, op. cit., § 49.

5 ECHR, *Otto-Preminger-Institut v. Austria*, no. 13470/87, 20 September 1994, § 49.

6 Ibid., § 47.

7 ECHR, *Wingrove v. the United Kingdom*, no. 17419/90, 25 November 1996, § 60.

8 See: Gérard Gonzalez, « Les excès de la liberté d’expression et le respect des convictions religieuses selon la Cour européenne des droits de l’homme », *RDLF*, 2015, chronique n°10.

9 For example: ECHR, *Otto Preminger*, op. cit.; *Wingrove*, op. cit.; *I.A v. Turkey*, no. 42571/98, 13 September 2005.

10 ECHR, *Giniewski v. France*, no. 64016/00, 31 January 2006.

ative value judgment, but that is not enough reason to make this presentation (even generalized) a wrongful judgment of values. Elisabeth Sabaditsch-Wolff's statements questioned Mohammed's sexuality, but they were not obscene. They were based on real events that enable one to reasonably establish a link with pedophilia. They made reference to facts, and "*it is an integral part of freedom of expression to seek historical truth.*"<sup>11</sup> The denial of "*established historical facts*"<sup>12</sup> may be condemned, but not their reminder—even if they were unpleasant.

Moreover, Mrs. Sabaditsch-Wolff's statements were intended to contribute to a "Basic knowledge of Islam," which is clearly a question of public interest. The case-law of the Court usually protects statements touching a "*question of indisputable public interest in a democratic society.*"<sup>13</sup> Islam cannot be excluded from the scope of the debate of ideas on the grounds that its whole set of doctrines has an important religious dimension. Islam also has social, political and historical dimensions that must be freely discussed. Muhammad was also a political figure who continues to exert a strong influence, hence, it should be widely possible to criticize him within the context of a political debate.<sup>14</sup> The facts criticized by Elisabeth Sabaditsch-Wolff are directly related to the on-going practice of marriage of prepubescent girls in countries influenced by Muslim culture.<sup>15</sup>

Certainly, one can condemn remarks that directly incite to violence against a religious group, but not those which, although reasonable, are likely to provoke the concerned religious group to violence. Otherwise, the limits of freedom of expression are being set by the violence of "believers." In this case, not only did Mrs. Sabaditsch-Wolff's statements not incite to imminent violence, but they did not even create a real disturbance to the public order.

For all these reasons, we considered that Elisabeth Sabaditsch-Wolff's statements were part of her right to freedom of expression, under Article 10 of the European Convention of Human Rights.

Beyond this case, we explained to the Court that Article 188 of the

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11 ECHR, *Chauvy and others v. France*, no. 64915/01, 29 June 2004, § 69.

12 ECHR, *Garaudy v. France*, (Dec.), no. 65831/01, 24 June 2003.

13 ECHR, *Giniewski*, op. cit., § 51.

14 ECHR, *Lingens v. Austria*, no. 9815/82, 8 July 1986.

15 According to the United Nations Population Fund (UNFPA), between 2011 and 2020, 50 million girls under 15 years old are estimated to be married. This phenomenon is also marginally present in Europe.

Austrian Criminal Code,<sup>16</sup> criminalizing the denigration of religious doctrine would have a “chilling effect,” which would develop into a sense of insecurity obstructing free debate. As highlighted by the three dissenting judges in the *I.A. v. Turkey* judgment: “Such a risk of self-censorship is very dangerous for this freedom, which is essential in a democracy, to say nothing of the implicit encouragement of blacklisting or ‘fatwas’.”<sup>17</sup> If obscenity and incitement to violence must be censored, such should not be the case of mere criticism.

### A political and worrying Chamber’s judgment

The fifth section of the European Court of Human Rights, to everyone’s surprise, accepted the arguments of the Austrian courts and validated the conviction by a unanimous judgment on 25 October 2018. The seven European judges considered that Elisabeth Sabaditsch-Wolff did not so much seek to inform the public objectively than “*demonstrate[e] that Muhammad was not a worthy subject of worship*.”<sup>18</sup> In support of this conviction, the Court held that insinuating that Muhammad was a “*paedophile*” would be a “*generalisation without a factual basis*”<sup>19</sup> on the grounds that he continued his relationship with Aisha for several years and had also married older women. According to the Court, these remarks were “*likely to arouse justified indignation*” of the Muslims and constituted “*a malicious violation of the spirit of tolerance, which was one of the bases of a democratic society*” capable of “*stirring up prejudice*” and “*putting at risk religious peace*.”<sup>20</sup> These remarks could therefore be condemned for inciting religious intolerance.

Rarely a judgment of the Court has been criticized so unanimously. Most Western commentators—both conservative and free-thinkers—were shocked by this decision. I wrote articles and was interviewed in the main French newspapers, magazines and information websites. I

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16 Article 188 of the Criminal Code – “Denigrating religious doctrines:” “*Whoever, in circumstances where his behaviour is likely to arouse justified indignation, disparages or insults a person who, or an object which, is an object of veneration of a church or religious community established within the country, or a dogma, a lawful custom or a lawful institution of such a church or religious community, shall be liable to a prison sentence of up to six months or a fine of up to 360 daily rates.*”

17 ECHR, *I.A.*, op. cit., Joint Dissenting opinion of Judges Costa, Cabral Barreto and Jungwiert.

18 ECHR, *E.S. v. Austria*, no. 38450/12, 25 October 2018, § 52.

19 *Ibid.*, § 57.

20 *Ibid.*

denounced the fact that the only true reason for this decision is the fear of Muslims.<sup>21</sup> This judgment allows the muzzling of criticism of Islam in the name of *living-together*. This goes against Western modernity, which, on the contrary, requires Islam to be subjected to historical criticism, without fear of upsetting the beliefs of its followers or even of provoking tensions. This decision of the ECHR would have justified the conviction of the cartoons of Charlie Hebdo, but also of Voltaire's book on Muhammad. Whereas the Court's logic rests on the absurd dogma of the equality of religions, I am convinced that it is urgent to criticize and compare religions in the light of their contributions to the good of humanity.

I also revealed that Al-Azhar University, Pakistan and the Arab press welcomed the Court's judgment, which allowed them to justify their own repression of freedom of expression in religious matters.<sup>22</sup> These statements are not surprising; in fact, the Organization of Islamic Cooperation (OIC)—gathering 57 Muslim States—has fought since 1999 in order to obtain an international ban on “*defamation of religions*,” that is to say on blasphemy.<sup>23</sup>

The Observatory of Islamophobia of the prestigious Cairo's Al-Azhar University, the highest authority of Sunni Islam, expressed its support to the Court's decision and described it as “*courageous*.”<sup>24</sup> It saw in it a general condemnation of “*blasphemies against the Prophet*” contributing “*to reduce the problems of Islamophobia*” while “*the number of Muslims in Europe could reach 14% in 2050*.” Accordingly, the Secretary General of the largest world federation of Koranic schools (10,000 madrassas), Qari Hanif Jalandhari, saw in this decision “*a very important step*” and asked the United Nations to elaborate global legislation “*condemning anyone who commits a blasphemy against divine books or sacred persons*”

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21 Grégor Puppincq, « Délit de blasphème : « La CEDH n'est pas Charlie ! » », interview by Paul Sugy, *Figaro Vox*, 26 October 2018. Cf. the expression “*I am Charlie*” following the Islamic attack in the satirical newspaper Charlie Hebdo in January 2015.

22 Grégor Puppincq, « Blasphème contre Mahomet : Al-Azhar et le Pakistan se félicitent de la décision de la Cour européenne des droits de l'homme », *Valeurs actuelles*, 1er mars 2019.

23 ECLJ, Grégor Puppincq, « Lutter contre la diffamation des religions », Rapport en réponse à la consultation du Bureau du Haut-commissaire aux droits de l'homme des Nations Unies sur le suivi par la France de la Résolution 7/19 du Conseil des droits de l'homme du 27 mars 2008 sur « la lutte contre la diffamation des religions », Rapport soumis en Juin 2008 et actualisé en juin 2010.

24 See the website of the Observatory of Islamophobia of Al-Azhar University (Article published on 30 October 2018): <http://gate.ahram.org.eg/News/2029268.aspx>

of all religions.”<sup>25</sup> In the Arab press, this judgment was also greeted with enthusiasm and presented as a “*historical decision*,” or as “*a victory for the Islamic world after the crisis of the cartoons published several times by several European newspapers*.”

Pakistan’s Prime Minister Imran Khan “*welcomed the recent decision of the European Court of Human Rights not to authorize acts of profanity under the guise of freedom of expression*.”<sup>26</sup> Addressing the President of the European Parliament, he expressed “*the hope that European countries will comply with the decision of the European Court and take measures to strengthen respect for religions and interreligious harmony*.” He also expressed the “*serious concerns of the Government and people of Pakistan regarding the blasphemous caricatures of the Holy Prophet, stressing the need to redouble efforts in European countries to avoid such provocative incidents; to raise awareness of the religious sensitivity of Muslims, especially the respect of the Prophet Muhammad*.” Indeed, in Pakistan, in addition to the emblematic Asia Bibi case, about 1,500 persons were accused of blasphemy between 1987 and 2016 according to the Centre for Social Justice, and more than 70 persons were murdered since 1990 on such crime allegations. In 2017, a thirty-year-old man was sentenced to death for allegedly “*insulting Prophet Muhammad*” on Facebook.<sup>27</sup> Prime Minister Imran Khan declared again, in June 2018, before an audience of imams, his will to “*support and defend article 295c*” of the Penal Code which punishes by death or life imprisonment anyone who “*defiles the sacred name of the Holy Prophet Muhammad*.”<sup>28</sup>

The decision of the Court and all these reactions led us to fight in favor of a referral at the Court.

### **The dashed hope for a referral to the Grand Chamber**

After the Chamber judgment was delivered, we recommended to Elisabeth Sabaditsch-Wolff’s lawyers to request a referral of the case to

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25 “EU court lauded for upholding verdict against blasphemy,” *The Nation* (Pakistan), 27 October 2018.

26 Government of Pakistan, Ministry of Information, Broadcasting & National Heritage, Press Information Department, “Prime Minister Underscores the Importance of Respecting Religious Sentiments of all,” Press release No. 70, 13 November 2018.

27 Sune Engel Rasmussen, “Pakistan: man sentenced to death for blasphemy on Facebook,” *The Guardian*, 11 June 2017.

28 Memphis Barker, “Imran Khan criticised for defence of Pakistan blasphemy laws,” *The Guardian*, 9 July 2018.

the Grand Chamber. This most solemn formation of the Court is composed of seventeen judges and its judgments are final and cannot be appealed against. Requests for referral are accepted on an exceptional basis (5% of the cases), when the Court considers that what is at stake is “*a serious question affecting the interpretation or application of the Convention or the Protocols thereto or a serious issue of general importance.*” The Grand Chamber can then sometimes reverse the prior judgment of the Chamber. A reversal had been obtained in some cases in which the ECLJ intervened.

We hoped that the Court would accept to re-try the *E.S. v. Austria* case in the Grand Chamber. Indeed, the judgment of the Chamber stood out clearly from the Court’s case-law. Previously, the Court had established the principle that freedom of expression protects words that “*offend, shock or disturb*”<sup>29</sup> and that freedom of religion does not confer the right “*to see religion protected from negative comment.*”<sup>30</sup> Moreover, it had recognized that believers had the obligation to “*tolerate and accept the rejection by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.*”<sup>31</sup> On that basis, the Strasbourg judges guaranteed the freedom of expression of anti-religious messages. Last year, it gave its protection to the famous “*Pussy Riot,*” a punk band condemned in Russia for organizing a “*performance*” in the choir of the Moscow Cathedral with cries including “*shit, shit, shit L\*\*\**”<sup>32</sup> It also held that Lithuania could not sanction the dissemination of blasphemous advertisements presenting Christ and the Virgin Mary as tattooed and lascivious junkies.<sup>33</sup> Thus the Court protected obscenity against Christian symbols in Lithuania and Russia.

However, in 2018, the European Court did precisely the opposite: it censored the criticism of Islam, with *E.S. v. Austria*. The fact that rational criticism of religion is less protected than antireligious obscenity seems particularly unfair. That is why we encouraged the Grand Chamber to reconsider the judgment on *E.S. v. Austria*, in order to clarify its case-law. In a high-level seminar organized by the ECLJ at the Council of Europe on freedom of expression in religious matters,<sup>34</sup> several speak-

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29 ECHR, *Handyside*, op. cit., §49.

30 <https://eclj.org/free-speech/echr/la-cedh-reviendra-t-elle-sur-la-condamnation-dune-personne-qui-avait-taxe-mahomet-de-pedophilie>

31 ECHR, *Otto-Preminger-Institut*, § 47.

32 ECHR, *Mariya Alekhina and others v. Russia*, no. 38004/12, 17 July 2018.

33 ECHR, *Sekmadienis Ltd. v. Lithuania*, no. 69317/14, 31 January 2018.

34 ECLJ, “New challenges to the Freedom of Religion in Europe in the Light of the

ers pointed out the inconsistency of this recent case law, which gives an impression of “double standards” depending on whether the offended believers are Christians or Muslims. Obscenity and incitement to violence must be censored, but not criticism.

The appeal to the Grand Chamber was supported by the 62,000 signatories of the ECLJ petition for the right to criticize Islam in Europe. Twenty French personalities also co-signed a tribune I wrote for the defense of the freedom of expression in religious matters. Among them were former Muslims, Catholic researchers and intellectuals, feminists and non-religious writers. The signatories included Waleed Al-Husseini, Rémi Brague, Chantal Delsol, Zineb El-Rhazoui, Annie Laurent, Boualem Sansal, Pierre-André Taguieff and Michèle Tribalat. All of them, for their job, research and private reflection, need to benefit from extensive freedom of expression about religion, especially about Islam. According to the tribune, these personalities consider that the Chamber judgment of 25 October 2018 violated the freedom of expression of Mrs. Sabaditsch-Wolff. Our tribune was concluded by the following statement: “*we wish to express to the Court our attachment to reason-based debate, whether political or scientific, and the right to criticize religions. The future of our civilization is at stake.*”<sup>35</sup>

Seized with an “appeal,” the European Court could have corrected its previous judgment; it has chosen not to do so and has even granted it the authority of a “*key case*” intended to enlighten all national jurisdictions. The unfair judgment against Elisabeth Sabaditsch-Wolff was thus not accidental but indicates a new orientation of the Court.

### **A distorted “religious peace” to the detriment of truth and justice**

The Court did not give any reason for refusing to refer the case to appeal. We are thus left to making conjectures. I see it as a shift towards multiculturalism, willing to sacrifice freedom of expression to the demands of *living together* and multiculturalism. Such a judgment renounces the ideal of truth-based justice and prefers the arbitrary one of “*tolerance.*” In doing so, it is the judge who decides what can be said according to his own conception of *living together* and to his fear of the reactions of those who might feel offended by these remarks. The ideal of “*religious peace*” promoted by the judgment of the Chamber is ap-

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Recent Judgments of the ECHR” seminar organized at the Council of Europe, 13 December 2018.

35 ECLJ, “Defend the right to criticize Islam,” petition of 61,615 signatures.



pealing, but its price is the freedom to speak the truth. It implies that any statement, even true, is condemnable as intolerance and incitement to violence as soon as threatening people declare themselves offended in their religious feelings.

Of course, it is true that peace is the greatest good of society; and it is therefore right that, in order to preserve it, the authorities must sometimes limit individual freedoms. But society must be well threatened to sacrifice even the freedom to speak the truth; or then, not believe in it anymore. “*What does the truth matter towards peace?*” relativists from all sides will say. If truth does not exist, then, indeed, freedom of expression is of little value, and a mandatory “*tolerance*” should be imposed upon all. True peace should not be reduced to the superficial absence of violent conflict, and it is vain to pretend to establish it on lies or relativism.

The European tradition teaches that there is no lasting peace without truth and justice. Because Europe is the heir, since ancient times, of a civilization that identifies God with truth and love, and not with arbitrariness and force, we place those at the top of our values and do not conceive that truthfulness could offend God or society. Seeking the truth and knowing God are one. This is certainly the origin of our attachment to rational research and criticism. We want a society in which “*Love and faithfulness meet together; righteousness and peace kiss each other*” (Psalm 85:10). Righteousness and peace, which characterize the ideal of every society, need both love and truth.

Elisabeth Sabaditsch-Wolff told the truth. She is criticized above all for having done so in a “*malicious*” way, that is to say, without love. What do we know about it, and is it justice’s role to assume one’s intentions? Moreover, to make this reproach is to forget that the denunciation of evil, to protect society, beneath its apparent roughness, is an act of love.

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