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Blasphemy, religious insults and hate speech against persons on grounds of their religion

Opinion[1]
Committee on Equal Opportunities for Women and Men
Rapporteur: Mr John DUPRAZ, Switzerland, Alliance of Liberals and Democrats for Europe

I. Conclusions of the Committee

The Committee considers that neither the state nor religions themselves should be authorised to penalise religious offences in a way which threaten the life, physical integrity, liberty or property of an individual. In particular, women's civil and human rights need to be respected in this sphere, both by religions and the state. The Committee thus agrees with the draft opinion and the draft amendments presented by Mr Bartumeu Cassany (SOC, Andorra) to the Committee on Legal Affairs and Human Rights, and itself proposes a number of amendments to integrate the gender equality perspective into the draft recommendation.

II. Proposed amendments to the draft recommendation

Amendment A:

In paragraph 4, replace "and does not constitute incitement to disturb the public peace or to discriminate against adherents of a particular religion" with:

"or hate speech and does not constitute incitement to disturb the public peace or to violence against adherents of a particular religion".

Amendment B:

In the last sentence of paragraph 11, delete ", discrimination".

Amendment C:

In the second sentence of paragraph 12, add after "property of an individual":

"or women's civil and human rights".

[1] See Doc 11296 tabled by the Committee on Culture, Science and Education.

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Amendment D:

Add at the end of paragraph 12:

"No state has the right to itself impose such penalties for religious offences, either."

Amendment E:

In paragraph 16.2.2., delete ", discrimination".

III. Explanatory memorandum by Mr John Dupraz, Rapporteur

1. The report drawn up by Mrs Hurskainen for the Committee on Culture, Science and Education makes recommendations on how to deal with both blasphemy and hate speech against persons on grounds of their religion, both in Council of Europe member states and worldwide.

2. It is important to note in this context that blasphemy and hate speech against persons on grounds of their religion are not the same thing – and the way both phenomena are dealt with vary widely both in Europe and worldwide. As Mrs Hurskainen has rightly pointed out in her report, "blasphemy can be defined as the offence of insulting or showing contempt or lack of reverence for god and, by extension, toward anything considered sacred"[2]. In contrast, hate speech "is always directed against persons or a group of persons"[3], even if the motivation is religious.

3. In a democratic society which respects human rights and the rule of law, it will rarely, if ever, be necessary for the state to penalise blasphemy. Hate speech, however, is a crime the state should penalise – and, in fact, does, in most Council of Europe member states.

4. Most religions reserve the right to themselves penalise blasphemy and related "religious offences" (non-respect of religious dogmas or rules) in a religious sense, for example by excommunicating members or denying them communion in the Christian faith. Unfortunately, not all "religious penalties" imposed by religions worldwide are solely religious in nature – some of these penalties may violate a person's civil or, even worse, human rights. In addition, such penalties sometimes differ on the grounds of whether the "sinner" is a man or a woman. Thus, for example, not being veiled properly is an exclusively feminine "religious offence" in some strands of Shia Islam.

5. Some states outside Europe accept either religious jurisdiction in such matters that goes very far (imposing, for example, the death sentence for blasphemy or adultery), or impose such penalties themselves. There have been several cases in the past years (for example in Nigeria) where death sentences for "adultery" have been imposed on women by *Sharia* courts for bearing a child out of wedlock – whether as a result of rape or of an amorous liaison. In such cases, the men involved are rarely punished, because, for a man to be found guilty of adultery, he has to be surprised in the act by several witnesses – while for a woman, bearing a child out of wedlock suffices as evidence.

6. In these circumstances, it does not seem sufficient to me to simply state in the draft recommendation that religious penalties for religious offences "must not threaten the life, physical integrity, liberty or property of an individual" (paragraph 12). Such penalties should also not threaten women's civil or human rights. In addition, no state should have the right to itself impose such penalties for religious offences, either. This is why I am proposing *Amendments C* and *D*.

7. When it comes to penalising hate speech against persons on grounds of their religion, the European Court of Human Rights, whilst emphasizing the paramount importance of freedom of expression under Article 10 of the European Convention on Human Rights, accepts a certain margin of appreciation for states, as the draft recommendation rightly points out in paragraph 7. Thus, in the Gündüz vs Turkey judgment (final version of 14/6/2004), the Court ruled that "… as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including

[2] Doc. 11296, paragraph 5 of the explanatory memorandum.
[3] Ibid, paragraph 9 of the explanatory memorandum.

religious intolerance), provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued".

8. It is thus generally accepted in Council of Europe member states that the public incitement to hatred, intolerance or violence should be penalised by the state, including when this incitement is directed against adherents of a particular religion. However, the question of whether "incitement to discrimination" should constitute a criminal offence is open to debate. While the preliminary report of the Venice Commission of 16-17 March 2007 on the subject favours this approach, as does ECRI (in its General Policy Recommendation No. 7[4]), the European Court of Human Rights does not.

9. The Committee on Equal Opportunities for Women and Men often has to deal with discrimination on the grounds of gender. The widely accepted definition of discrimination is exemplified by ECRI's definition of discrimination: "… any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."[5]

10. In a society which respects human rights and the rule of law, criminalising (and thus penalising) any conduct is only possible when the crime can be clearly described. In other words, a person must be able to know if he/she is committing a crime. Criminalising (and thus penalising) "incitement to discrimination" is very difficult, because not all differential treatment constitutes discrimination.

11. To take a practical example, public universities in Turkey do not admit women and girls who choose to wear the Islamic headscarf. This is clearly differential treatment on the grounds of religion – but is it discrimination? This particular case made its way right up to the European Court of Human Rights (Leyla Şahİn vs. Turkey), which ruled that, while there had been interference with freedom of religion as protected by Article 9 of the ECHR, the interference "was justified in principle and proportionate to the aim pursued"[6]. However, to arrive at this conclusion, the Court relied heavily on the specific national, legal and historical context – which are not the same across the whole of Europe.

12. Thus, if someone in a different country with a different national, legal and historical context called for women and girls who choose to wear the Islamic headscarf not to be admitted to university, they could not be sure of whether or not they were "inciting to discrimination" – since they could not be sure of whether the differential treatment they were calling for was justified or not. In a country which criminalised "incitement to discrimination", they would thus not know if they were committing a crime or not.

13. The general principle of the necessity for legal certainty in penal law (every person must be able to know if he/she is committing a crime) would thus call for "incitement to discrimination" **not** to be criminalised and penalised by the state. In contrast, the clearer – and practically universally accepted – "incitement to hatred" or "incitement to violence" should be. This is why I am proposing *Amendments A, B* and *E.*

[4] General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination adopted by ECRI on 13 December 2002, Article 18: "The law should penalise the following acts when committed intentionally: a) public incitement to violence, hatred or discrimination,
b) public insults and defamation or
c) threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;"

[5] Ibid, Article 1 b).

[6] Leyla Şahİn vs. Turkey, final judgment of 10 November 2005, paragraph 122.

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Secretariat of the Committee: Ms Kleinsorge, Ms Affholder, Ms Devaux, Mr Diallo