



Coordination des Associations et des Particuliers pour la Liberté de Conscience

THE EUROPEAN COURT OF HUMAN RIGHTS INVALIDATES APPLICATION OF THE RUSSIAN LAW ON EXTREMISM TO PEACEFUL RELIGIOUS GROUPS

In a landmark decision, *Ibragim Ibragimov and others v. Russia* (28 August 2018),¹ the European Court of Human Rights has invalidated the Russian Extremism Law as far as the Law's definition of extremism allows the ban of religious publications even in the absence of any violence or hate speech.

The decision is extremely significant as the Human Rights Court found that any application of the Extremism Law must be based on actual incitement to hatred or violence in order to justify any restriction of freedom of expression of religious beliefs.

It is also significant that the Human Rights Court rejected the national courts' reliance and wholesale adoption of the findings of one-sided experts' reports to rule religious publications extremist, without any meaningful and independent analysis by the courts of materials characterized as extremist by experts retained by the government. The Human Rights Court also emphasized that the civil or criminal parties must be given an opportunity to adduce counter-evidence to counter extremist charges. The total process relied on by the courts in Russia in extremist cases has constituted a breach of the equality of arms principle, a practice of Russian courts which has become systematic in the recent years.

The case was referred to the Court by three applicants, a Russian national, a publisher and a religious association, who complained that the Russian courts had ruled in 2007 and

¹ *Ibragim Ibragimov and others v. Russia*, Nos 1413/08 and 28621/11.

2010 that books by Said Nursi, a well-known Turkish Muslim theologian and commentator of the Qur'an, were extremist and banned their publication and distribution.

The applicants relied both on Article 9 (freedom of religion or belief) and Article 10 (freedom of expression) of the Convention. As the case concerned a ban on the distribution of books, and the books at issue were a commentary on the Qur'an, the Court deemed that it had to be examined under Article 10, interpreted in the light of Article 9.

The Court found that the ban, which amounted to an interference by the Russian State with the right to freedom of expression of Nursi's followers' religious convictions, had not been justified by the Russian courts and was not necessary in a democratic society.

In doing so, the Court detailed its principles and case law on "hate speech" which must be characterized to allow restrictions of freedom of speech.²

1) Hate Speech

The Court noted that, under paragraph 2 of Article 10, the exercise of freedom of expression carries with it duties and responsibilities, and in particular, 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, including a duty to "avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs".

On the other hand, the Court has also emphasised that those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all 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.

This reasoning has been developed in its jurisprudence on so-called "blasphemy laws". In this line, the Court issued a decision on 18 July 2018 in the so-called "Pussy Riot" case³ where it defined clearly what can be considered "hate speech". In this case, the Court referred to the *General Policy Recommendation no. 15 on Combating Hate Speech* adopted by ECRI⁴ on 8 December 2015 which defined "hate speech" as follows:

"Considering that hate speech is to be understood for the purpose of the present General Policy Recommendation as the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of "race", colour, descent, national or ethnic origin, age, disability,

² *Gündüz v. Turkey*, No. 35071/97, para. 41.

³ *Mariya Alekhina v. Russia*, No. 38004/12.

⁴ ECRI, the European Commission against Racism and Intolerance, under the Council of Europe.

language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status;

(...)

Recognising also that forms of expression that offend, shock or disturb will not on that account alone amount to hate speech and that action against the use of hate speech should serve to protect individuals and groups of persons rather than particular beliefs, ideologies or religions;”

In the Pussy Riot case, the feminist applicants, wearing flashy clothes and balaclavas, burst into Moscow’s Christ the Saviour Cathedral and attempted to perform a song “Punk Prayer – Virgin Mary, Drive Putin Away” from the altar, in order to protest against the Orthodox Patriarch support of Putin’s politics. They were put in custody and found guilty by the District Court under Article 213 § 2 of the Russian Criminal Code of hooliganism for reasons of religious hatred and enmity and sentenced each of them to two years’ imprisonment. The trial court held that the applicants’ choice of venue and their apparent disregard for the cathedral’s rules of conduct had demonstrated their enmity towards the feelings of Orthodox believers, and that the religious feelings of those present in the cathedral had therefore been offended.

In contrast, the European Court found that, although certain reactions to the applicants’ actions might have been warranted by the demands of protecting the rights of others on account of the breach of the rules of conduct in a religious institution, the applicants actions and speech did not rise to the level of hate speech as **the applicants’ actions neither contained elements of violence, nor stirred up or justified violence, hatred or intolerance of believers.**

The Court reiterated that, in principle, peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence or criminal sanctions and concluded to a violation of Article 10 of the Convention since the sanctions were not proportionate to the legitimate aim pursued.

2) Russian Extremism Law in the Context of Religious Literature

In the Said Nursi’s followers’ case, the ban of religious books as extremist publications by national courts was based on the Extremism Law, specifically on its definition of extremist activity at Article 1, and in particular incitement of religious discord (Article 1.1.3) and propaganda about people’s superiority or deficiency on the basis of their attitude to religion (Article 1.1.4).

The Court underlined from the outset that the Extremism Law does not require any element of violence or incitement to violence for such an activity to constitute “extremist activity”, a point which has been criticized by the Venice Commission⁵ in its 2012 Opinion.⁶

⁵ European Commission for Democracy through Law (the Venice Commission), under the Council of Europe.

⁶ Opinion of the Venice Commission on the Federal Law on Combating Extremist Activity, adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012).

Regarding Article 1.1 point 3 of the Law, the Venice Commission stated that “in order to qualify ‘stirring up of social, racial, ethnic or religious discord’ as ‘extremist activity’, the definition should expressly require the element of violence.”

Regarding Article 1.1 point 4 of the Law ‘propaganda of the exceptional nature, superiority or deficiency of persons on the basis of their social, racial, ethnic, religious or linguistic affiliation or attitude to religion’, the Commission found:

“In the view of the Venice Commission, to proclaim as extremist any religious teaching or proselytising activity aimed at proving that a certain worldview is a superior explanation of the universe, may affect the freedom of conscience or religion of many persons and could easily be abused in an effort to suppress a certain church thereby affecting not only the freedom of conscience or religion but also the freedom of association. The ECtHR protects proselytism and the freedom of the members of any religious community or church to ‘try to convince’ other people through ‘teachings’. The freedom of conscience and religion is of an intimate nature and is therefore subject to fewer possible limitations in comparison to other human rights: only manifestations of this freedom can be limited, but not the teachings themselves.”

And the Commission concluded:

“It therefore appears that under the extremist activity in point 4, not only religious extremism involving violence but also the protected expressions of freedom of conscience and religion may lead to the application of preventive and corrective measures. This seems to be confirmed by worrying reports of extensive scrutiny measures of religious literature having led, in recent years, to the qualification of numerous religious texts as ‘extremist material’.”

The European Court actually followed the same line and found that the application of these provisions of the Law to Said Nursi publications violated the right to freedom of expression of religious beliefs of its followers since the Russian authorities had not demonstrated any incitement to violence or hatred.

3) Systematic Reliance on One-Sided Experts’ Reports

The Court first noted that the national courts simply endorsed the overall findings of one-sided experts’ reports to declare the religious books extremist, without making any meaningful assessment of those findings. They instructed linguists and psychologists, who were not expert in religions, to examine the religious texts and to provide the courts with a report on their qualification of extremist publications. This alone was not conform to what experts’ reports are supposed to provide. The Court stated:

“The Court notes that the District Court endorsed the experts’ conclusions without making any meaningful assessment of them, stating simply that it had no reason to doubt them. (...) Moreover, the relevant expert examinations went far beyond resolving merely language or psychology issues. Rather than restricting themselves to defining the meaning of particular words and expressions or explaining their potential psychological impact, they provided in essence a legal qualification of the texts. Indeed, it is evident from the judgment that it was not the court which made

the crucial legal findings as to the extremist nature of the books, but the linguistics and psychology experts. The Court stresses that all legal matters must be resolved exclusively by the courts.”

The Court also noted that the national courts ignored the fact that Nursi’s books belonged to moderate, mainstream Islam. It observed that Said Nursi is a well-known Turkish Muslim theologian and commentator of the Qur’an. Muslim authorities both in Russia and abroad, as well as Islamic studies scholars, all affirm that Said Nursi’s texts belong to moderate mainstream Islam, advocate open and tolerant relationships and cooperation between religions, and oppose any use of violence.

However, the national courts denied the applicants the possibility to provide evidence in this regard and rebut their experts’ reports. The Court found:

It is also significant that the applicants were unable to contest the findings of the expert reports or to effectively put forward arguments in defence of their position. Indeed, the District Court summarily rejected all evidence submitted by them, including the opinions of Muslim authorities and Islamic studies scholars who explained the historical context in which the books had been written, their place in the body of Islamic religious literature, in particular the fact that they belonged to moderate rather than radical Islam, their importance for the Russian Muslim community and their general message of tolerance, interreligious cooperation and opposition to violence (...). Although the above facts were plainly relevant for the assessment of whether banning the books was justified, the Koptevskiy District Court did not make any meaningful analysis of that material, **holding that it should be disregarded because the persons cited by the applicants were not linguists or psychologists** and were therefore not competent to establish the meaning of the contested texts. (emphasis added)

The European Court previously found a violation of Article 10 of the Convention on account of a **breach of equality of arms** in freedom-of-expression cases, in particular in situations where the applicants had been hindered in adducing evidence in support of their position or where the domestic courts had dismissed all the arguments in the applicant’s defence in a summary manner, thereby stripping him of the procedural protection that he had been entitled to enjoy by virtue of his rights under Article 10 of the Convention.

The Court reached the same conclusion in the present case and concluded that the domestic courts did not apply standards which were in conformity with the principles embodied in Article 10.

The Court also found that the national court took terms and expressions out of context to declare the books extremist.

Relying on the experts’ reports, the domestic court noted, in particular, that Muslims were described in the book positively as “the faithful” and “the just”, while everyone else was described negatively as “the dissolute”, “the philosophers”, “the idle talkers” and “little men”. The book also proclaimed that not to be a Muslim was an “infinitely big crime”. The domestic court concluded from those expressions that the book treated non-Muslims as inferior to Muslims.

Although the European Court accepted that some people might be offended by such statements, it reiterated that **merely because a remark may be perceived as offensive or**

insulting by particular individuals or groups does not mean that it constitutes “hate speech”.

Whilst such sentiments are understandable, they alone cannot set the limits of freedom of expression. For the Court, the key issue in the present case was thus **whether the statements in question, when read as a whole and in their context, could be seen as promoting violence, hatred or intolerance.**

The Court found that the domestic court did not assess the statements in question in the light of the book as a whole; it quoted them out of their immediate textual context and failed to examine which idea they sought to impart. In particular, it did not take into account the fact that they were part of a religious text and that, according to the experts, **such statements were common in religious texts because any monotheistic religion was “characterised by a psychologically based belief in the superiority of its world-view over all other world-views,** which made it necessary to substantiate the choice of that world-view”, in particular by claiming that it was better than the others.

Although the impugned statements clearly promoted the idea that it was better to be a Muslim than a non-Muslim, the Court found significant that they did not insult, hold up to ridicule or slander non-Muslims; nor did they use abusive terms in respect of them or of matters regarded as sacred by them.

Furthermore, there was no indication in the judgment that the domestic court perceived those expressions as capable of leading to public disturbances. Neither the domestic courts nor the Government referred to any circumstances indicative of a sensitive background at the material time – such as existence of interreligious tensions or an atmosphere of hostility and hatred between religious communities in Russia – against which the impugned statements could risk unleashing violence, giving rise to serious interreligious frictions or leading to similar harmful consequences.

In view of the above, the Court considered that the above-mentioned statements were not shown to be capable of inciting violence, hatred or intolerance.

4) Denial of Proselytism Rights

Lastly, the domestic court endorsed the experts’ finding that the books in question could influence the reader by making him adopt the author’s religious ideology and that that was indeed the author’s intention.

In this regard, the European Court reiterated that freedom to manifest one’s religion **includes the right to try to convince one’s neighbour, for example through “teaching”,** failing which “freedom to change [one’s] religion or belief”, enshrined in Article 9, would be likely to remain a dead letter, and stressed that, in the absence of improper proselytism, e.g. through the use of violence, **the mere fact that the author’s intention was to convince the readers to adopt his religious beliefs was insufficient, in the Court’s view, to justify banning the book.**

In particular, the Court could not discern any element in the domestic courts' analysis which would allow it to conclude that the book in question incited violence, religious hatred or intolerance, that the context in which it had been published was marked by heightened tensions or special social or historical background in Russia or that its circulation had led or could lead to harmful consequences. The Court concluded that it was not necessary, in a democratic society, to ban the book in question.

In conclusion, the Court found that there has been a violation of Article 10 of the Convention.

Conclusion

The findings of the European Court in the Said Nursi case invalidated the provisions of the Russian Extremism Law in the following way.

It found that in order to qualify religious publications as 'extremist activity' on the basis that they were '*stirring up of religious discord*', the national courts must demonstrate that the publications in question, when read as a whole and in their context, could be seen as promoting violence, hatred or intolerance.

It also found that the expression of the belief in the superiority of its world-view over all other world-views, which makes it necessary to substantiate the choice of that world-view, in particular by claiming that it was better than the others, is common to all religions and does not suffice for accusing religious publications of being an 'extremist activity' based on '*propaganda about people's superiority or deficiency on the basis of their attitude to religion*'.

The same goes with proselytism, which is a right protected by the European Convention. The mere fact that the author's intention was to convince the readers to adopt his religious beliefs is insufficient to justify banning a book.

As long as there is no element which would allow the Court to conclude that the book in question incited violence, religious hatred or intolerance, that the context in which it had been published was marked by heightened tensions or that its circulation had led or could lead to harmful consequences, the Court found that the ban of the book violated Article 10 interpreted in the light of Article 9 of the Convention.

The Court also found that the systematic and wholesale reliance by Russian courts on the findings of one-sided experts' reports, without any possibility for the defendants to bring contradictory evidence, breached the principle of equality of arms and violated the standards which were in conformity with the principles embodied in Article 10.

Those findings should entail further developments since, as the Venice Commission already noted back in 2012, the Russian authorities have qualified numerous religious texts as 'extremist materials' in recent years and numerous applications are pending at the

European Court, filed by various religious groups such as Jehovah's Witnesses, Scientologists and others.

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