

BOŻENA GRONOWSKA \*

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### GLOSS

#### **On the judgment of the European Court of Human Rights of 25 October 2018 in case *E.S. v. Austria*, appl. no. 38450/12**

**“Criminal conviction and a fine for the applicant calling Muhammad and Aisha’s marriage a pattern of paedophilia did not amount to violation of freedom of expression in the meaning of Article 10 of the European Convention on Human Rights”**

#### BASIC FACTS OF THE CASE

Elisabeth Sabatitsch-Wolff (E.S.), an Austrian national and a professional in Islam,<sup>1</sup> in the period of January–November 2008 participated in several open seminars entitled “Basic Information on Islam”<sup>2</sup>. The presentations concerned different aspects of the religion at issue, and – consequently – took into account both public and private relations. Regarding the latter, the Islamic marriage model was analysed. Among others, the possibility of marriage between adult men and girls before puberty was discussed.

Two seminars which were held in October and November 2008 gathered around thirty participants, including an undercover journalist who asked for a preliminary investigation against E.S. As a result of the proceedings, on 18 January 2011 the Vienna Regional Court convicted E.S. of disparaging religious doctrines under Article 188 of the Criminal Code and ordered her to pay 480 euros in total (a fine and cost of the proceedings). As one of the most incriminating statements of E.S., the Regional Court found i.a. the following:

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<sup>1</sup> In fact, the applicant, having a diplomat family background, spent some years of her life in Arabic countries. Then, she started her professional studies on the Quran.

<sup>2</sup> All facts invoked in the present paper are published in the ECtHR judgment of 25 October 2018 in case of *E.S. v. Austria*, application no. 38450/12. In the Polish press the above case was presented by D. Bychawska-Siniarska, *Uczucia religijne nie zawsze ponad swobodą wypowiedzi*, *Dziennik Gazeta Prawna* No. 215(4965), 6 November 2018, p. E2.

“One of the biggest problems we are facing today is that Muhammad is seen as the ideal man, the perfect human, the perfect Muslim. (...) This does not happen according to our social standards and laws. Because he was a warlord, he had many women, to put it like this, and liked to do it with children. (...) A 56-year-old and a six-year-old? What do you call that? Give me an example? What do you call it, if it is not paedophilia?”

According to the Regional Court the above statements together with other opinions conveyed “the message that Muhammad had paedophilic tendencies”. Furthermore, the Regional Court considered that “the statements were not statements of fact, but derogatory value judgments which exceeded the permissible limits”. And still continuing, the Austrian Court stated that “the child marriages were not the same as paedophilia, and were not only a phenomenon of Islam, but also used to be widespread among the European ruling dynasties”<sup>3</sup> (Sic!).

The E.S.’s case was unsuccessfully referred to all the domestic judicial levels. The main argument of the applicant was that of participation in the important public debate in a democratic society, connected with historical and present facts. Finally, the domestic courts stressed that in the present case the nature of such debate was to be rejected as unconvincing and unpersuasive. Finally, on 6 June 2012, E.S. lodged her application with the European Court of Human Rights (ECtHR) claiming violation of her right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). These proceedings ended on 25 October 2018 with the unanimous judgment of the seven-judge Chamber in which a non-violation of Article 10 ECHR was found.

In their argumentation the judges of the ECtHR referred to its previous case law, mainly on the margin of appreciation doctrine. They stressed that they had already decided that the scope of this margin in cases like that, i.e. concerning a matter with a possibility to offend personal convictions within the sphere of morals or religion, broadened respectively.<sup>4</sup> The basic reason of this interpretation is “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”<sup>5</sup>.

Another point of the ECtHR reasoning, which seems worth recalling, is a traditional division of statements into those of facts and values. In the case of E.S. the latter category of statements was at stake. In this regard the ECtHR reminded that a value judgment “is not susceptible of proof (...) a value judgment is impossible to fulfil and infringes freedom of opinion itself (...). However, even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive”<sup>6</sup>.

Consequently, the Strasbourg judges accepted the opinion of domestic courts that the applicant’s statements were value judgments without sufficient factual basis. Moreover, the ECtHR reminded that the statements which are based on “manifestly”

<sup>3</sup> See *E.S. v. Austria*, § 14–15.

<sup>4</sup> *Ibid.*, § 44.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*, § 48.

untrue facts do not enjoy the protection of Article 10 of the ECHR.<sup>7</sup> Moreover, the ECtHR judges concluded that the impugned statements of the applicant “were not phrased in a neutral manner aimed at being an objective contribution to a public debate concerning child marriages (...) as going beyond the permissible limits (...) classifying them as an abusive attack on the Prophet of Islam, which was capable of stirring up prejudice and putting at risk religious peace”<sup>8</sup>.

At last, the ECtHR reminded that the impugned interference of the state authorities into individual freedom of expression should have been considered not only “in the light of the content of the statements at issue, but also the context in which they were made”<sup>9</sup>. It was obvious for the European judges that the case of E.S. was of “a particularly sensitive nature, and that the (potential) effects of the impugned statements, to a certain degree, depend on the situation in the respective country”<sup>10</sup> (emphasis added). Accordingly, the problem at issue in the present case was the preservation of religious peace in the Austrian society.

Additionally, in the opinion of the ECtHR, the sanction ordered was rather moderate, thus in the light of the circumstances of the case (especially the applicant’s repeated infringement as an aggravating factor) it could not be considered disproportionate.

## COMMENTARY

First of all, the presented judgment concerning the freedom of expression in the religious context is not the first under the ECtHR’s review. As early as in 1994 the ECtHR stated 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. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders.”<sup>11</sup>

For sure, one can argue that there are “different times and different social context”. I do not insist, like some other representatives of the human rights doctrine do,<sup>12</sup>

<sup>7</sup> Reference to *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*, judgment of Grand Chamber of 27 June 2017, application no. 17224/11, § 117.

<sup>8</sup> *E.S. v. Austria*, § 57.

<sup>9</sup> *Ibid.*, § 49.

<sup>10</sup> *Ibid.*, § 50. Actually, the reference to the particularity of the social situation in a state appeared in the Strasbourg case law earlier, see e.g. case of *Leila Şahin v. Turkey*, judgment of 29 June 2004, application no. 44774/98, § 107–109; judgment of Grand Chamber of 10 November 2005, § 115.

<sup>11</sup> Case of *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, application no. 13470/87, § 47.

<sup>12</sup> See more in S. Smet, *E.S. v. Austria: Freedom of Expression versus Religious Feelings, the Sequel*, Strasbourg Observers, 7 November 2018.

that there is no human right not to be offended in one's religious beliefs. I am simply of the opinion that every religious belief should be protected on a non-discrimination basis which takes into account the "fair balance" test. Furthermore, I also agree that a special attention should be given to the beliefs of minorities' groups.<sup>13</sup>

Nonetheless, the above-presented judgment provokes some difficult questions and bears controversies, at least as far as I am concerned. Taking the problem seriously, these dilemmas could be covered by the principle of a true "neutrality" of the European judges, while facing the problems of extremely sensitive nature, whether political or religious ones. With full understanding of the gravity of my previous statement, I should present my views by referring to facts which provoked me to touch on such a controversial question.

Firstly, let us consider the courts' interpretation of the lack of a factual background for the value judgment presented by E.S. According to the available and rather reliable sources, there is a common knowledge concerning the details of Muhammad's family life. Nonetheless, some official Sunni Muslim sources admitted that 54 or 56-year-old Muhammad married Aisha when she was around the age of six or seven and consummated the marriage approximately four years later. He left her a childless widow at the age of eighteen.<sup>14</sup> It is also true that the problem of legality of marriages between adult men and prepubescent girls in the light of Quran is open to discussions.

Of course, maybe it is better for human rights lawyers to leave the discussion on the religious details to the professionals in the field (as for sure E.S. can be qualified as such), but some social phenomena, evidently influenced by religious factor, like e.g. forced marriages and child marriages, have already entered Europe and focused a strong attention of important European organs.<sup>15</sup> It would be really difficult to deny the solid factual basis of the sentences formulated in 2018 by the Parliamentary Assembly of the Council of Europe that "Every day throughout the world, 39,000 young girls are married before reaching the age of majority. More than one third of them are younger than 15. (...) All countries in Europe are affected by these harmful practices, whether in the form of forced marriages concluded in Europe (...) These human rights violations (...) ruined lives, much wasted potential and serious health risks lie behind these figures. For young girls, marrying often

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<sup>13</sup> Actually, according to statistical data, the "religious" picture of Europe is changing in a very dynamic way (e.g. in Austria the Muslim community rose from 4.22% in 2001 to over 6% in 2010).

<sup>14</sup> This can be found in commonly available sources: Sahih al-Bukhari, Vol. 7, Book 62, No. 63–65, 88; the same author Vol. 5, Book 58, No. 234, 236; Vol. 9, Book 87, No. 139–140; Sahih Muslim, Book 008, No. 3309–3311; Sunan Abu Dawud, No. 2116, Book 41, No. 4915; the same author, Book 13, No. 2380.

<sup>15</sup> See Resolutions of the Parliamentary Assembly of the Council of Europe: Forced marriages and child marriages, RES 1468(2005), 5 October 2005; Forced marriage in Europe, RES 2233(2018), 28 June 2018. Actually, in both resolutions a similar attitude of the General Assembly of the UNO is invoked, according to which forced marriage can in no way be justified and declaring "certain customs, ancient laws and practices relating to marriage and the family to be inconsistent with the principles set forth in the Charter of the United Nations and in the Universal Declaration of Human Rights".

means (...) unprotected and forced sexual relations and unwanted pregnancies that endanger their health.”<sup>16</sup> (emphasis added).

Consequently, the Parliamentary Assembly called on Member States of the Council of Europe to start the fight against forced marriages in their national policies, including criminalising such practices. Is it not a solid proof that in the present-day European societies a serious debate on the topic at stake is needed and can be classified as a very important one?

Moreover, in Part III of its judgment the ECtHR enlisted, e.g. such international material like the Recommendation 1805(2007) of the Parliamentary Assembly of the Council of Europe on blasphemy, religious insults and hate speech against persons on grounds of their religion and the Resolution of the European Parliament of 27 February 2014 on the situation of fundamental rights in the European Union (2012) (2013/2078(INI)). In both documents the decriminalisation of blasphemy is strongly recommended as an evident pattern of restriction of expression concerning religious or other beliefs.<sup>17</sup> Unfortunately, one could hardly find any further reference to the above-mentioned documents in the ECtHR judgment in the present case. Likewise, the arguments of the third-party intervener – the European Centre for Law and Justice<sup>18</sup> – which submitted the factual basis for the E.S.’s value judgments were not taken into account in the final decision of the European judges.

In the context of the above-cited available sources only, it could be difficult to accept that the applicant’s statements were totally ungrounded as to the facts. In the case of the domestic courts, it seems that in order to justify their own interpretation (or to be honest “extra-interpretation”), they chose and separated some parts of E.S.’s speech. Accordingly, in my opinion, the careful reading of the whole E.S.’s presentation (relying on the version published in the judgment and taking this as an original) can lead to the conclusion that it was rather the criticism – from the present European standards perspective – of a certain custom sanctioned by Islam, important for a discussion in European democratic society, and not a direct “attack” on the Prophet as such. Moreover, one cannot forget that the whole event took place in the course of a “heated” discussion, full of emotional moments. Interestingly enough, the ECtHR quoted the arguments of the applicant that “the impugned statements had been made in the context of an objective and lively discussion, where they could not be revoked anymore”, but – contrary to the previous case law – it found them unconvincing.<sup>19</sup>

Maybe the above attitude of the ECtHR should be viewed in the context of a tragic and painful “lecture” that Europe experienced after the publication in 2005 of the article entitled *Muhammeds ansight* in the Danish journal “Jyllands-Posten”, which reprinted the Muslim cartoons by the French tabloid “Charlie Hebdo”<sup>20</sup>

<sup>16</sup> RES 2233(2018), paras. 1 and 2.

<sup>17</sup> *E.S. v. Austria*, § 26, 31.

<sup>18</sup> *Ibid.*, § 38.

<sup>19</sup> *Ibid.*, § 53. See also a reference to judgment in the case of *Gündüz v. Turkey* of 4 December 2003, application no. 35071/97.

<sup>20</sup> For more see: N. Cox, *The Freedom to Publish ‘Irreligious’ Cartoons*, Human Rights Law Review No. 16, 2016, pp. 195–221; K. Lemmens, *‘Irreligious’ Cartoons and Freedom of Expression: A Critical Reassessment*, Human Rights Law Review No. 18, 2018, pp. 89–109.

Bearing this in mind, however, one could risk a thesis that the European judges (like most of the Europeans nowadays) are simply afraid of provoking potential aggression on the part of some orthodox Muslim communities. If so, I dare say, Europe will be in trouble as its main human rights protectors appear to weaken.<sup>21</sup>

Secondly, there is also an additional side of the story, namely this connected with the equal protection of symbols of worship of another great religion, i.e. the Roman Catholicism. The ECtHR has already had several occasions to deal with cases which were “touching on” symbols considered sacred by Roman Catholics. This was the case of the Cross,<sup>22</sup> then the assumption that the Bible covers the “seeds of anti-Semitism”<sup>23</sup> and, lastly, using in the purely commercial context, such prominent religious figures as Jesus and Mary<sup>24</sup>. Let us stress that in all of those cases the state’s intervention into the freedom of particular applicants’ expression was found to be a violation of Article 10 ECHR. Thus, in all those cases the ECtHR accepted the special and crucial position of freedom of expression in a modern democratic society as it was found in earlier case law.<sup>25</sup>

Surely, it would be difficult to defend the thesis that the gravity or burden of each of the case is comparable. Dedications could, however, be a significant contribution to *ius commune europaeum* if they are justified by special reasons and provided with well-grounded *rationes decidendi*.<sup>26</sup>

Nonetheless, at least the problem of accusation and punishing of a professional researcher and journalist (*per analogiam* to the E.S. case) expressing an opinion that “the fulfilment of the Old Covenant in the New, and the superiority of the latter (...) led to anti-Semitism and prepared the ground in which the idea and implementation of Auschwitz took seed”<sup>27</sup> seems to be equally harmful to Catholics, even if this statement was published in the course of a historic and theological debate.<sup>28</sup>

Lastly, still another point is worth mentioning in the present paper which is connected with the test of proportionality of the state’s reaction in the cases under analysis, i.e. the level of severity of punishments. Both in *Giniewski* and *E.S.* cases the

<sup>21</sup> This can be easily expressed just by a question: Is Islamophobia knocking on Strasbourg’s door? Actually, several years ago I expressed some worries about a true neutrality of the ECtHR judges in cases of sensitive political content, see B. Gronowska, *The European Court of Human Rights and Potential Dangers for its Independence. Some Controversies*, [in:] J. Jaskiernia (ed.), *Uniwersalny i regionalny wymiar ochrony praw człowieka. Nowe wyzwania – nowe rozwiązania*, Warsaw 2014, pp. 693–702. This element of “fear behind the scene” was also invoked by G. Puppincq, *The ECtHR Holds Anti-Blasphemy Law*, <https://ecjl.org/free-speech/echr/blasphemy-crime-the-echr> (accessed on 8/12/2018).

<sup>22</sup> Case of *Lautsi v. Italy*, judgment of 3 November 2009, application no. 308114/08. The ECtHR changed its view and contested the Grand Chamber on 18 March 2011 in which it found non-violation of Article 10 ECHR.

<sup>23</sup> Case of *Giniewski v. France*, judgment of 31 January 2006, application no. 64016/00.

<sup>24</sup> Case of *Sekmadienis Ltd. v. Lithuania*, judgment of 30 January 2018, application no. 69317/14.

<sup>25</sup> The most relevant in this regard was the reference to possibility of expressing the “information” or “ideas” that also can “offend, shock or disturb”, see e.g. the case of *Handyside v. the United Kingdom*, judgment of 7 December 1976, application no. 5493/72, § 49.

<sup>26</sup> Compare with A. Paulus, *International Adjudication*, [in:] S. Besson, J. Tasioulas (eds), *The Philosophy of International Law*, Oxford 2010, p. 220.

<sup>27</sup> *Giniewski v. France*, § 14, p. 3.

<sup>28</sup> *Ibid.* § 51.

ECtHR faced quite similar situations but reached totally different final conclusions, the second of which was evidently to the detriment of E.S. It would be hard to find any additional arguments in the ECtHR reasoning included in the judgment.

Surely, I am able to express my apology and empathy to those who has felt hurt and abused by the whole situation caused by E.S.'s presentations.<sup>29</sup> Nonetheless, the European human rights justice system should be strong enough to eliminate any possible doubts concerning its impartiality and independence. Therefore, alike cases should be provided with alike justification. Otherwise, a very detrimental impression can be created that this system cannot defend itself against any sort of "blackmailing", depending on the pressure of extra-legal factors. Thus, it makes me wonder whether the strong foundations upon which the ECtHR was built are similarly strong in our present social realities.

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- Resolution of the Parliamentary Assembly of the Council of Europe: Forced marriage in Europe, RES 2233(2018), 28 June 2018.

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<sup>29</sup> The case met with an immediate reaction of other writers who deal with the problem, still with other arguments, connected with the classic case of *Otto-Preminger-Institute v. Austria*, see e.g. S. Smet, *E.S. v. Austria...*; G. Puppinc, *The ECtHR...*



**ECtHR case law**

*Handyside v. the United Kingdom*, judgment of 7 December 1976, application no. 5493/72.

*Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, application no. 13470/87.

*Gündüz v. Turkey*, judgment of 4 December 2003, application no. 35071/97.

*Leila Şahin v. Turkey*, judgment of 29 June 2004, application no. 44774/98; judgment of Grand Chamber of 10 November 2005.

*Giniewski v. France*, judgment of 31 January 2006, application no. 64016/00.

*Lautsi v. Italy*, judgment of 3 November 2009, application no. 308114/08; judgment of Grand Chamber of 18 March 2011.

*Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*, judgment of Grand Chamber of 27 June 2017, application no. 17224/11.

*Sekmadienis Ltd. v. Lithuania*, judgment of 30 January 2018, application no. 69317/14.

*E.S. v. Austria*, judgment of 25 October 2018, application no. 38450/12.

GLOSS ON THE JUDGMENT OF THE EUROPEAN COURT  
OF HUMAN RIGHTS OF 25 OCTOBER 2018 IN CASE *E.S. V. AUSTRIA*,  
APPL. NO. 38450/12

**Summary**

The gloss deals with the judgment issued by the ECtHR on 25 October 2018 concerning freedom of expression as provided for in Article 10 ECHR. In the case of *E.S. v. Austria* the ECtHR agreed with domestic courts that the applicant's statements concerning the marriage life style of Muhammad were "inciting hatred or religious intolerance" read in the light of Article 188 of the Austrian Criminal Code. During the public debate, the applicant made a reference to "paedophilia", while talking about 56-year-old Muhammad having sexual intercourse with his 9-year-old wife Aisha. The main thesis of the author of this gloss is contrary to the ECtHR judges' viewpoint, especially in the context of the facts of the case and the previous Strasbourg case law. Going further, the author presents her fears that the visible and ongoing Islamisation of Europe starts to have its potential impact on the judicial authorities and their attitudes in cases connected with some sensitive issues of Islam. The author's opinion concerns both the domestic and regional courts' attitudes.

Keywords: freedom of expression, margin of appreciation, religious tolerance, paedophilia, Muhammad

GŁOSA DO WYROKU EUROPEJSKIEGO TRYBUNAŁU PRAW CZŁOWIEKA  
Z DNIA 25 PAŹDZIERNIKA 2018 R. W SPRAWIE *E.S. PRZECIWKO AUSTRII*,  
SKARGA NR 38450/12

**Streszczenie**

Głosa dotyczy wyroku wydanego przez Europejski Trybunał Praw Człowieka (ETPCz) w dniu 25 października 2018 r., dotyczącego swobody wypowiedzi w rozumieniu art. 10 Europejskiej Konwencji Praw Człowieka. W sprawie *E.S. przeciwko Austrii* ETPCz zaakceptował stanowisko



sądów krajowych, które uznały stwierdzenia powódki dotyczące stylu życia małżeńskiego Mahometa jako „wzniecające nienawiść lub nietolerancję religijną” w rozumieniu art. 188 austriackiego kodeksu karnego. W trakcie debaty publicznej powódka nawiązała do „pedofilii”, rozważając fakt seksualnego współżycia 56-letniego Mahometa z jego 9-letnią żoną Aiszą. Główna teza autorki niniejszej glosy jest odmienna, szczególnie w kontekście okoliczności analizowanej sprawy oraz w świetle dotychczasowej strasburskiej linii orzeczniczej. W dalszej kolejności, autorka wyraża swoje obawy o to, że widoczna i postępująca islamizacja Europy zaczyna wywierać potencjalny wpływ na władze sądowe i ich postawy w sprawach dotyczących szczególnie drażliwych zagadnień Islamu. W opinii autorki zjawisko to dotyczy postaw zarówno sądów krajowych, jak i regionalnych.

Słowa kluczowe: swoboda wypowiedzi, margines swobody oceny, tolerancja religijna, pedofilia, Mahomet

COMENTARIO A LA SENTENCIA DEL TRIBUNAL EUROPEO  
DE DERECHOS HUMANOS DE 25 DE OCTUBRE DE 2018 EN LA CAUSA  
*E.S. CONTRA AUSTRIA*, CASO NÚM. 38450/12

Resumen

El comentario se refiere a la sentencia dictada por el Tribunal Europeo de Derechos Humanos (TEDH) el 15 de octubre de 2018 relativo a la libertad de expresión conforme con el art. 10 de la Convención Europea de Derechos Humanos. En el caso *E.S. contra Austria*, el TEDH aceptó la posición de tribunales nacionales que consideraron que afirmaciones de la demandante relativos al estilo de la vida matrimonial de Mahomet “suscitaron odio o intolerancia religiosa” de acuerdo con art. 188 del código penal austriaco. Durante el debate público la demandante hizo referencia a “pedofilia” refiriéndose a las relaciones sexuales de Mahomet (56 años) con su mujer Aisha (9 años). La principal tesis de la autora es diferente, en particular en el contexto de circunstancias del caso analizado y a la luz de la línea jurisprudencial de Estrasburgo. La autora demuestra su preocupación que la manifiesta y progresiva islamización de Europa empieza a tener influencia potencial a las autoridades judiciales y a su postura en casos que versan sobre cuestiones particularmente delicadas de islam. A juicio de autora, este fenómeno afecta tanto a los tribunales nacionales como a los regionales.

Palabras claves: libertad de expresión, margen de juicio libre, tolerancia religiosa, pedofilia, Mahomet

ГЛОССА К ПОСТАНОВЛЕНИЮ ЕВРОПЕЙСКОГО СУДА  
ПО ПРАВАМ ЧЕЛОВЕКА ОТ 25 ОКТЯБРЯ 2018 ГОДА  
ПО ДЕЛУ *Е.С. В ОТНОШЕНИИ АВСТРИИ*, ЖАЛОБА № 38450/12

Резюме

Глосса касается постановления, принятого в Европейском суде по правам человека от 25 октября 2018 года, в отношении свободы высказывания в толковании ст. 10 Европейской конвенции о правах человека. По делу *Е.С. в отношении Австрии* ЕСПЧ принял позицию национальных судов, которые признали утверждения истицы, касающиеся стиля семейных отношений Мухаммеда, как «разжигание ненависти или религиозной нетерпимости» в понимании ст. 188 Уголовного кодекса Австрии. Во время публичных дебатов истица упоминала о факте «педофилии», ссылаясь на сексуальную связь 56-летнего Мухаммеда с его 9-летней женой Аишей. Основной тезис автора настоящей глоссы имеет отличительный характер, в особенности в контексте обстоятельств рассматриваемого дела и в свете нынешней страсбургской прецедентной судебной практики. Далее автор выражает опасения, что заметная и прогрессирующая исламизация Европы начинает оказывать потенциальное воздействие на судебные органы и их отношение к вопросам, касающимся наиболее чувствительных вопросов ислама. По мнению автора, это явление касается позиций как национальных, так и региональных судов.

Ключевые слова: свобода высказывания, предел свободы оценки, религиозная терпимость, педофилия, Мухаммед

GLOSSE ZUM URTEIL DES EUROPÄISCHEN GERICHTSHOFES  
FÜR MENSCHENRECHTE VOM 25. OKTOBER 2018  
IN ZIVILSACHE *E.S. GEGEN ÖSTERREICH*, KLAGE NR. 38450/12

Zusammenfassung

Die Glosse betrifft das am 25. Oktober 2018 seitens des Europäischen Gerichtshofes für Menschenrechte (EGM) veröffentlichten Urteils betreffend der Aussagefreiheit in Anbetracht des Art. 10 der Europäischen Konvention zum Schutz der Menschenrechte (EKSM). In Zivilsache *E.S. gegen Österreich* hat der EGM die Meinungen der Landesgerichte akzeptiert und anerkannt, welche die Feststellungen der Klägerin bezüglich des Ehelebensstils von Mahomet als „Hass- und Religionsintoleranz entfachendes“ im Sinne von Art. 188 des österreichischen Strafgesetzbuches. Im Verlauf einer öffentlichen Debatte nahm die Klägerin Bezug auf „Pädophilie“, die Tatsache des Geschlechtsverkehrs vom 56-jährigen Mahomet mit seiner 9-jährigen Frau Aisha erwogen zu haben. Die Hauptthese der Autorin dieser vorliegenden Glosse ist unterschiedlich, besonders im Zusammenhang der Gegenstände der erkundeten Zivilsache und angesichts der bisherigen Straßburger Rechtsprechungsgrundlinie. Im Nachhinein äußert die Autorin ihre Befürchtungen, dass die sichtbare und fortschreitende Islamisierung Europas potenziellen Einfluss auf die Gerichtsgewalt und deren Standpunkt in Sachen besonders empfindlicher Islamangelegenheiten einzuprägen gewinnt. Nach Meinung der Autorin betrifft dieses Phänomen sowohl Landes-, als auch Amtsgerichte.

Schlüsselwörter: Aussagefreiheit, Aussagefreiheitsspanne, Religionstoleranz, Pädophilie, Mahomet

GLOSE À L'ARRÊT DE LA COUR EUROPÉENNE DES DROITS DE L'HOMME  
DU 25 OCTOBRE 2018 DANS L'AFFAIRE *E.S. C. AUTRICHE*,  
PLAINTÉ N° 38450/12

Résumé

La glose concerne l'arrêt rendu par la Cour européenne des droits de l'homme (CEDH) le 25 octobre 2018, concernant la liberté d'expression au sens de l'article 10 de la Convention européenne des droits de l'homme. Dans le cas de *E.S. contre l'Autriche*, la Cour européenne des droits de l'homme a accepté la position des tribunaux nationaux qui ont considéré les affirmations de la demanderesse concernant le style de mariage de Mohammed comme «incitant à la haine ou à l'intolérance religieuse» au sens de l'article 188 du code pénal autrichien. Au cours du débat public, la demanderesse s'est référé à «la pédophilie», en considérant le fait de la coexistence sexuelle de Mohammed, âgé de 56 ans, avec son épouse Aisha, âgée de 9 ans. La thèse principale de l'auteur de cette glose est différente, notamment dans le contexte des circonstances de l'affaire analysée et à la lumière de la jurisprudence actuelle de Strasbourg. Ensuite, l'auteur exprime ses craintes que l'islamisation visible et progressive de l'Europe commence à exercer une influence potentielle sur les autorités judiciaires et leur attitude dans les affaires concernant des questions particulièrement sensibles de l'islam. L'auteur est d'avis que ce phénomène concerne les attitudes des tribunaux nationaux et régionaux.

Mots-clés: liberté d'expression, marge de liberté d'évaluation, tolérance religieuse, pédophilie, Mohammed

GLOSSA ALLA SENTENZA DELLA CORTE EUROPEA DEI DIRITTI  
DELL'UOMO DEL 25 OTTOBRE 2018 NELLA CAUSA *E.S. CONTRO AUSTRIA*,  
RICORSO N. 38450/12

Sintesi

La glossa riguarda la sentenza della Corte europea dei diritti dell'uomo (CEDU) del 25 ottobre 2018 sulla libertà di espressione ai sensi dell'articolo 10 della Convenzione europea dei diritti dell'uomo. Nella sentenza *E.S. contro Austria*, la Corte europea dei diritti dell'uomo ha accettato la posizione dei tribunali nazionali, i quali hanno riconosciuto che le dichiarazioni della ricorrente relative allo stile di vita coniugale di Maometto che "incita all'odio religioso o all'intolleranza" ai sensi dell'articolo 188 del codice penale austriaco. Durante il dibattito pubblico, la ricorrente ha fatto riferimento alla "pedofilia" quando si considera il rapporto sessuale di Maometto di 56 anni con sua moglie Aisha di 9 anni. La tesi principale dell'Autrice di questa glossa è diversa, soprattutto nel contesto delle circostanze del caso di specie e alla luce dell'attuale linea giurisprudenziale di Strasburgo. Di seguito, l'Autrice esprime la sua preoccupazione per il fatto che l'islamizzazione visibile e progressiva dell'Europa comincia ad avere un impatto potenziale sulle autorità giudiziarie e sui loro atteggiamenti in questioni riguardanti argomenti particolarmente delicati dell'Islam. Secondo l'Autrice, questo fenomeno riguarda sia gli atteggiamenti dei tribunali nazionali che regionali.

Parole chiave: libertà di espressione, margine di discrezionalità, tolleranza religiosa, pedofilia, Maometto

**Cytuj jako:**

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