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## **СВОБОДА ВИРАЖЕННЯ ПОГЛЯДІВ ТА ІСЛАМ: УРОКИ CHARLIE HEBDO**

**Анотація.** *Стаття присвячена дослідженню особливостей ісламського розуміння свободи вираження поглядів і наявності у цьому зв'язку значних відмінностей з європейським розумінням змісту цієї свободи. В ісламі свобода вираження поглядів також визнається, але при цьому має свої суттєві та усталені особливості. Зокрема, в ісламі існує абсолютна заборона на зображення Пророка Мухаммеда, і тим більше на його карикатурне зображення. Так, з точки зору мусульман, зображення Пророка Мухаммеда із собачою головою є особливо цинічним, оскільки в ісламі собака вважається нечистою твариною, контакти з якою небажані. Також в ісламі сформувалося своє усталене сприйняття гумору та прийнятності його застосування. Наприклад, в ісламі не можна жартома вигадувати небиліці або лякати іншу людину; не слід жартувати із особою, старшою за віком, із вчителями, науковцями, керівництвом, з особою, яка не розуміє жартів, із незнайомими між собою чоловіком і жінкою; жарт має бути необразливим, таким, що не принижує гідність людини або її сім'ї; не можна жартувати на заборонені теми, розповідати вульгарні історії, розголошувати інтимні подробиці, використовувати наклеп тощо. Підкреслюється, що зображення європейцями карикатур на Пророка сприймається ними як прояв свободи вираження поглядів, натомість для мусульман такі карикатури порушують низку заборон, що встановлені в ісламі, а тому завдають глибокої образи релігійним і культурним почуттям мусульман. Як наслідок, такі образи можуть спровокувати релігійні конфлікти з людськими жертвами, як це сталося у січні 2015 р. в будівлі редакції французького сатиричного щотижневика Charlie Hebdo. Задля запобігання подібним і більш тяжким трагедіям у майбутньому і зняття напруги у відносинах між мусульманами та європейцями, насамперед, в Європейському регіоні, у статті досліджуються правові підстави та умови для можливих легальних обмежень свободи вираження поглядів, що сформульовані в універсальному міжнародному праві, у Конвенції про захист прав людини і основоположних свобод 1950 р., а також у доречній практиці Європейського суду з прав людини. Акцентовується увага на необхідності підвищення обізнаності суддів як національних судів європейських країн, так і суддів Європейського суду з прав людини з особливостями ісламу як релігії та особливостями власне ісламського права. Для досягнення поставлених завдань дослідження автори статті використали низку загально-наукових і спеціальних методів пізнання, зокрема, соціологічний, статистичний, діалектичний, формально-стилістичний, аксіологічний, герменевтичний, системний порівняльно-правовий, формально-юридичний та ін.*

**Ключові слова:** *скандал з карикатурами, доктрина ісламу, Коран, ісламське право, обмеження свободи вираження поглядів, практика ЄСПЛ*

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## FREEDOM OF EXPRESSION AND ISLAM: CHARLIE HEBDO'S LESSONS

**Abstract.** *This article studies specifics of Islamic understanding of freedom of expression and significant differences between Islamic and European understanding of that concept. Freedom of expression is recognized in Islam; however, it has significant and deeply-rooted peculiarities. In particular, Islam strictly prohibits imaging Prophet Muhammad, let alone making cartoons of him. For instance, from the perspective of Muslims, imaging Prophet Muhammad as a dog is extremely cynical, since a dog in Islam is an unclean animal inadvisable to contact with. Also, there is long-established perception of humour and its admissibility in Islam. For example, under Islamic law one shall not tell lies or scare another person; one shall not joke with an older person, a teacher, a scientist, a manager, a person who does not understand jokes, an unknown man or woman; a joke shall not be offensive or degrading a man or a family; one shall not joke about prohibited issues, tell dirty stories, disclose intimate details, resort to insults or slander. The article points out that Europeans perceive drawing cartoons of the Prophet as freedom of expression. However, in the eyes of Muslims such cartoons constitute violation of a number of prohibitions existing in Islam and therefore deeply insult their religious and cultural feelings. Such insults may cause religious conflicts with many victims, like the one that happened in the January of 2015 in the office of Charlie Hebdo French satirical weekly newspaper. To prevent similar and even more terrible tragedies in the future and release tension between Europeans and Muslims, primarily in Europe, the article explores the legal framework and conditions for restriction of freedom of expression set out in universal international law, the European Convention on Human Rights and relevant case-law of the ECHR. The set of the general and specific scientific methods of research were used by the authors according to the subject and scope of the study: sociological, statistical, dialectical, formal stylistic, axiological, hermeneutic, systemic, comparative legal method etc.*

**Keywords:** *cartoon scandal, doctrine of Islam, Quran, Islamic law, restriction of freedom of expression, case-law of the ECHR*

### INTRODUCTION

On 7 January 2015, the international community was deeply shocked by the tragedy at the office of Charlie Hebdo (Charlie Weekly) French satirical weekly newspaper. That day at about 11:30 am, two brothers, Saïd and Chérif Kouachi, forced their way into the editorial office and killed 12 people and injured 11 others with firearms. Among the killed were two police officers Franck Brinsolaro, 49, and Ahmed Merabet, 42, and 10 editorial staff members, including the top journalists and cartoonists of the weekly: Cabu (Jean Cabut), 76, Elsa Cayat, 54, Charb (Stéphane Charbonnier), 47, Philippe Honoré, 73, Bernard Maris, 68, Mustapha Ourrad, 60, Michel Renaud, 69, Tignous (Bernard Verlhac), 57, Georges Wolinski, 80. 42-year-old Frédéric Boisseau was on his first day at work at Charlie Hebdo office.

Following the tragedy, hundreds of thousands of people all over the world took to the streets with the slogan “Je suis Charlie” (“I am Charlie”) to show solidarity and support the freedom of expression [1].

Charlie Hebdo newspaper was founded in 1970. Since then, its editorial policy has been based on the premise that humour knows no taboos. The newspaper constantly published offensive cartoons targeting famous politicians, public figures and representatives of various religions. The key motive for the armed attack on the office was the repeated publishing of offensive cartoons of Islam, Muslims and Prophet Muhammad in Charlie Hebdo. Also, it is worth noting that the Charlie Hebdo offices were attacked after Muslim public organizations had brought

numerous lawsuits for public offences and incitement to religious hatred against the newspaper, all of which had resulted in acquittal of the journalists by French courts.

That is why plenty of world media outlets, including the top-ranking ones, published articles under a common title “I am not Charlie”. In particular, David Brooks, an Op-Ed columnist for The New York Times, directly accused Charlie Hebdo of “deliberately offensive humour that newspaper specializes in” [2]. Writer Josh Healy stated: “Charlie Hebdo is cruel, vulgar, and what in their eyes would be the harshest criticism possible, just not funny” [3]. Even Pope Francis commented on the tragedy: “You cannot provoke. You cannot insult the faith of others. You cannot make fun of the faith of others” [4].

In this regard K. Giaxoglou studies the emergence and circulation of hashtags #CharlieHebdo and #JeSuisCharlie in their polylingual instantiations [5]. F. Giglietto and Ye. Lee reveal that users of the hashtag #JeNeSuisPasCharlie employed various discursive strategies and tactics to challenge the mainstream framing of the shooting as the universal value of freedom of expression being threatened by religious extremism, while protecting themselves from the risk of being viewed as disrespecting victims or endorsing the violence committed [6]. D. Ghilani et al. draw historical analogies between the Paris attacks and past events [7]. Y. Horsman aims to outline the precise nature of the journal’s sense of humour and its implicit critique of religion [8]. G. Julin provides a rough guide for assessing constructive from destructive satire in a world where satire’s reach and impact can have catastrophic consequences [9]. F. Peonidis argues that no basic rights of French Muslims were violated, and no violent actions were committed against them as a result of their publication [10]. M.N. Politzer and A.O. Alcaraz examine representations of Islam and Muslims by analyzing The New York Times and The Wall Street Journal headlines two months before and after the Charlie Hebdo attack indicating covert Islamophobia [11]. J. Sumiala et al. study the relationship between media events and the idea of liveness and conclude that incidents are interpreted ‘en direct’, but within the framework of older mnemonic schemes and mythologization of certain positions (e.g. victims, villains, heroes) in the narrative. This condition, they claim, further accelerates the conflict between the different participants that took part in the event [12]. A. Godioli analyses the cartoon controversies at the European Court of Human Rights and discusses how forensic humour studies can set the basis for a consistent treatment [13].

Authors of this article *express their deepest and sincerest condolences* to the people, who were killed and injured in the tragedy, and aiming to prevent similar incidents in the future, would like to raise the following questions: What were the causes of the tragedy? How could it have been avoided? Could the offensive cartoons (or other similar content) cause more serious consequences? And what legal formalities, conditions or restrictions in modern society may apply to freedom of expression? In our article, we will deal with these complex issues and try to find appropriate solutions.

## 1. MATERIALS AND METHODS

The set of methodological instruments used by the authors was determined by the subject and scope of the study. Using sociological and statistical methods, we have found that the modern European society is undergoing significant ethnic and religious changes, in part due to the substantial growth of Muslim populations in most European countries. An analysis of these changes enables us to make a scientific prediction regarding the stable trend towards further growth of the Muslim community and its increasing effect on pan-European issues. Using philosophical methods, such as the dialectical approach, we highlight the correlation between quantitative changes in the structure of society and its qualitative features. The European society is becoming ever more multicultural, encompassing the values of different ethnic and religious social groups. An analysis of classical European values and Islamic values in regard to freedom of expression and potential restrictions thereof was done through the axiological method. It enabled us to identify significant differences, revealing their historical origins and the different approaches to legal regulations in this realm. Specifically, in Europe the concept of freedom of expression has taken shape alongside the gradual development of the Western legal tradition, which for centuries implemented Christian values, and later a secular doctrine of human rights. Whereas in Islam the concept of human rights stems from the conviction that only the Almighty is the author of law and the source of all human rights.

The comparative legal method was used to analyse the differences between legal regulations of freedom of speech in European law and Islamic law. The authors utilized macro- and microcomparison, synchronic and diachronic comparison, regulatory and operational comparison. The comparative analysis found that both systems recognize the fundamental freedom of expression and its importance for personal and social progress. However, the system of restrictions on this freedom is markedly different. Thus, in Islam the divine origin of human rights means they cannot be restricted or overturned by the state, society or individual persons. No one has the right to change their number, content or limitations at their discretion. Depicting any living creatures and humans, much less the Prophet Muhammad is strictly prohibited by Islamic law. An analysis of the operating principles of Islamic law, namely the personal nature of the law, found that a Muslim must to obey its norms regardless of the country of residence or temporary stay. Thus, we have revealed fundamental and systemic contradictions between both the values of the two social systems and their legal regulations. Misunderstanding mutual differences is the key reason for numerous religious conflicts in modern Europe.

The formal stylistic method was used to analyse the cartoons of Muslims and the Prophet Muhammad published in some European outlets, including the French satirical weekly Charlie Hebdo, that have led to numerous religious conflicts. Hermeneutic methods were used to interpret this artistic imagery and conclude that the magazine follows a specific editorial policy to create and publish Islam-themed cartoons. The technical legal method and the

systematic method were used to examine the development of the practice of the European Court of Human Rights regarding restrictions on freedom of expression in relation to the norms and principles of Islamic law. We prove that at present the ECHR practice remains inconsistent, and in our opinion one of the reasons for such inconsistency is that the judges of both national European courts and the ECHR lack sufficient understanding of Islam as a religion and the specifics of Islamic law as a separate legal system. The authors recommend ways of improving the relevant current laws, which should protect society from further religion-motivated conflicts.

All the general and specific scientific methods of research were used in conjunction to accomplish different objectives within the specified scientific purpose. The authors have also described a number of unsolved scientific problems that should form the subject of further scholarly research.

## 2. RESULTS AND DISCUSSION

### 2.1. Muslim factor in 21<sup>st</sup> century Europe

First of all, it is worth mentioning that due to external migration, the structures of national and religious communities in Europe have significantly changed over the last decades. The Islamic community shows the fastest growth rate in all European countries.

According to the Pew Research Centre, the number of Muslims in Europe exceeded 25.5 million people (which is 5% of the total population of European countries) back in 2016. These figures exclude about 20 million Muslims residing in Russia. The size of the Islamic community is about 1.2 million people in the Netherlands, 2.8 million people in Italy, 4.1 million people in the UK, 4.9 million people in Germany and 5.7 million people in France. Moreover, the Islamic population grows not only in absolute numbers – the share of Muslims in the total population of European countries also increases. For instance, the Islamic community accounts for 4.8% of the population in Italy, 6.1% in Germany, 6.3% in the UK, 7.1% in the Netherlands and 8.8% in France [14; 15]. According to social predictions, the trend towards increase of the Islamic population and its share in the society will persist in the next decades. According to the Pew Research Centre forecast, the Islamic community in Europe may reach 14% in 2050. In his turn, Philip Jenkins of Pennsylvania State University estimates that by 2100, Muslims will comprise about 25% of Europe's population and their influence on the social relations will become more and more meaningful [16]. At the same time, the last few decades saw an increase in the number and scale of social conflicts between the Islamic and other communities in Europe. For instance, in February 2005, a law prohibiting the wearing of any signs demonstrating religious affiliation of a person in public and educational institutions was adopted in France. Specifically, Muslim women were prohibited from wearing the hijab, i.e. the traditional

headscarf covering the head and neck except the face. This led to mass demonstrations by Muslims, who claimed it was a violation of their rights. In September 2005, Danish daily Jylland-Posten published 12 cartoons of the Prophet Muhammad. Some of them showed the prophet with a bomb on his head. Many European newspapers reproduced the cartoons, which resulted in numerous victims, economic and political losses for many European countries. In 2007, Swedish artist Lars Vilks created a series of drawings that depicted the Prophet Muhammad as a dog. This led to protests, two terrorist attacks in Stockholm and repeated attempts upon the life of the author, who now lives under permanent police protection. A referendum resulting in banning the construction of new minarets was held in 2009 in Switzerland.

When the first drawings controversy broke out Charlie Hebdo took a firm stand on protecting of freedom of expression and against its restriction. As regards the interaction between European and Muslim cultures, the newspaper began to pursue a policy of fuelling Islamophobia. On 1 March 2006, for instance, Charlie Hebdo published the so-called “Manifest of the Twelve” (“Manifeste des douze”) calling on all the people of Europe to oppose to the Islamic threat. Islamism was placed on a par with Fascism, Nazism, and Stalinism as a major totalitarian global threat for Europe [17].

It is necessary to mention that in 2006, following the publishing of the first cartoons of the Prophet Muhammad, Islamic public organizations Paris Great Mosque and the Union of Islamic Organizations of France accused the editors of Charlie Hebdo of inciting to inter-ethnic hatred and sued them. They claimed that the weekly had insulted Muslims by publicly abusing a group of people because of their religion and therefore violated the Law on the Freedom of Press<sup>1</sup>. Pursuant to French legislation such violation is punishable by imprisonment for up to 6 months and a fine of EUR 22,500. In the first instance, the case was heard by Tribunal de grande instance de Paris (High Court of Paris). Three cartoons of the Prophet Muhammad were subject to examination, in particular the one representing Muhammad wearing a turban with a bomb in it. During the hearings in the aforementioned case, the newspaper was supported by famous national politicians, namely Nicolas Sarkozy, François Bayrou and François Hollande, who publicly defended the weekly. The trial ended on 22 March 2007 with acquittal.

The appeal did not result in a review of the first instance decision. On 12 March 2008, the Court of Appeal of Paris<sup>2</sup> ruled that the cartoons were aimed at a certain group of people and not at the Islamic community in general, did not represent offences or personal and direct insults against a group of people because of their religion and did not exceed the admissible limit of freedom of expression. The Court of Appeal observed that French society is secular and pluralistic, which requires respect for all the opinions as well as the freedom to criticise of religions.

1. Law on the Freedom of the Press. (1881, July). Retrieved from <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEX T000006070722&dateTexte=vig>.

2. Paris Court of Appeal, 11<sup>th</sup> Chamber, section A. Judgment. (2008, July). Retrieved from <http://www.exculturae.com/charlie-hebdo-caricatures/>.

Special attention should be paid to Charlie Hebdo's 2015 response to the death of Alan Kurdi, a 3-year-old refugee Syrian boy, who drowned crossing the Mediterranean Sea. His lifeless body was washed ashore near the Turkish city of Bodrum. The photo of the dead boy shocked the entire world. However, a week later Charlie Hebdo published another issue mocking the death of Muslim children. The cartoon published in the newspaper depicted Alan lying on the beach and featured the caption 'So close to the aim'. Next to the boy was an advertisement for McDonald's that read 'Two children's menus for the price of one'. It would be interesting to know how Charlie Hebdo's journalists would feel if they were the dead boy's parents. Would they dare to mock the death of their own child? Could the death of a child ever be the subject of a cartoon? What kind of feelings towards Europeans could such a publication call up in the child's parents, Syrians, and Muslims in general? We strongly believe that the answers to these questions are *blatantly obvious*.

## 2.2. Peculiarities of understanding of freedom of expression in the Islamic world

Unfortunately, it has to be admitted that we, Europeans, *barely* understand the doctrine of Islam, specifically the peculiarities of the Islamic concept of freedom of expression, which significantly differs from the European one. This misunderstanding, in its turn, leads to conflicts between representatives of different cultures. In Islam, the human rights concept is based on the belief that God is the author of law and the source of every human right [18]. Due to the divine origin, human rights granted by Allah may be neither amended nor cancelled by state, society or individuals. No one has the right to change them at his/her own discretion. Freedom of expression is one of the fundamental rights of a Muslim. Islam considers the human being a creature that God endowed with a mind which is necessary to find truth. Freedom of expression is an essential tool on the path towards truth. In view of this, the assumption that Islam is a religion hostile to knowledge, science, discussions and art is completely wrong. The advances made by Islamic countries in mathematics, astronomy, medicine and other areas contributed significantly to laying the foundation for modern European and global science. Admissibility of different views is recognized even in the matters of theology and Sharia, which results in the division of Muslims into Sunni and Shia, as well as numerous religious-law schools (madhhabs) (madhhabs) [19]. However, it is believed that, given the limited abilities of man, Allah himself has set forth some truths. According to Islam, learning such truths independently is beyond the limits of the human mind and thinking. These basic doctrines are set out in the Quran and the Sunnah. They must be believed and not assessed subjectively. Therefore, from the point of view of a devout Muslim, the issues categorized as prohibited under the Sharia need no rational reasoning or proof. At the same time, Islamic theology attempts to explain the existing prohibitions at the doctrinal level. Islam requires people to exercise freedom of expression in cases where it is beneficial to people. If these freedoms harm people, the prohibition is in place.

In the framework of legal consequences all Muslim activities may be divided into five categories: obligatory, recommended (encouraged), permissible (neutral), reprehensible (but not punishable) or forbidden (punishable) [20]. Making images and statues of animate beings is a prohibited action; specifically it is one of the 76 major sins in Islam [21]. This prohibition is clearly established in the Quran and derives from the Hadiths of the Prophet. For instance, the hadith collection Fath al-Bari tells of a man who came to Ibn Abbas and said: "O Abu Abbas, I am a man who lives by what his hands make, and I make these images". Ibn Abbas said: "I will only tell you what I heard the Messenger of Allah say. I heard him say: "Whoever makes an image, Allah will punish him until he breathes life into it, and he will never be able to do that". The man became very upset. So, Ibn Abbas said to him: "Woe to you! If you insist on making images, then make images of these trees and everything that does not have a soul (994 (2225))" [22]. The collection of hadiths (Sunnah) is one of the primary sources of Islamic theology and law along with the Quran. The practice established by the Prophet Muhammad is sacred and must be strictly followed by all devout Muslims. To make it more understandable to a Western reader, it may be compared to case law in the English legal system. Islamic theology explains the origin of this rule as the prohibition against imitating Allah, who has created everything, as well as the prohibition against worshiping idols and other gods, who almost always had a certain artistic representation. Over the years, the prohibition against depicting people and animals ceased to be strict, especially among the Shia.

These rules used to be interpreted quite ambiguously when it came to photographic images of animate beings. Lately Islamic theologians authorized to issue fatwas have acknowledged that photographic images are permitted, subject to certain limitations. For instance, according to a fatwa by Yusuf al-Qaradawi, one of the most respected modern Islamic theologians and chairman of the International Union of Muslim Scholars, photography is not an act of creation prohibited in hadiths, but only a mirroring of reality. Therefore, the scholar has concluded that photography is unlike the work performed by sculptors and painters [23]. The same applies to depicting the Prophet Muhammad. For the majority of Muslims, the prohibition is *absolute*, i.e. any images of Muhammad and any other Islamic prophets are unconditionally prohibited and considered idolatry. They are considered perfect and immaculate figures and therefore may not be subject to any artistic interpretation, particularly if it may lead to disrespect or insult to the prophets. A key to understanding the angry response of Muslims to cartoons of the prophet is the perception of roles and limitations in Islamic humour. Islam encourages bringing joy to other people through humour and jokes. However, no one may exceed the limits established by God. The joke shall be truthful; one shall not tell lies or scare another person; one shall not joke with an older person, a teacher, a scientist, a manager, a person who does not understand jokes, an unknown man or woman; a joke shall be smart, relevant and understandable, it shall not be offensive or degrading a man or a family;

one shall not joke about prohibited issues, tell dirty stories, disclose intimate details, resort to insults or slander [24]. It is important to realize that the cartoons by Lars Vilks depicting the Prophet Muhammad as a dog were perceived by Muslims as extremely cynical, since a dog in Islam is an unclean animal that should not be touched.

Therefore, we can conclude that cartoons of the Prophet Muhammad violated a number of prohibitions existing in Islam and hurt the innermost feelings of Muslims. Faith and religious shrines are at the top of the hierarchy of values protected by Islam. All other values protected thereby, namely life, mind, family and wealth are subordinate to the major values [25; 26]. The nature and magnitude of Muslims' negative response to the aforementioned situation equally stem from Islamic premises. Islam obliges Muslims to protect their faith and beliefs using the force of arms if necessary. So may the freedom of expression be absolute? Obviously not, since absolute freedom of expression may provoke a religious (civilizational) war between Muslims and Christians. One can only imagine how long such a war may last, what forms and consequences it may have. Therefore, by *protecting absolute* freedom of expression the European society may cause significant human losses and lose all its rights and freedoms (including the freedom of expression) and, possibly, its own civilization. Hence, we suggest considering the legal framework and conditions for restricting freedom of expression in Europe and globally.

### **2.3. Legal framework and conditions for restriction of freedom of expression in Europe and globally**

The legal framework and conditions for restriction of freedom of expression globally are set out primarily in Article 29(2) of the Universal Declaration of Human Rights<sup>1</sup>, which states that "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". Article 19(2) of the International Covenant on Civil and Political Rights<sup>2</sup> also contributes to such a framework. Article 19(3) of the Covenant stipulates that "The exercise of the rights provided for in para 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are

provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals".

The key to restricting of freedom of expression is the "necessity" of such restriction in a democratic society. In particular, according to para 10 of Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights<sup>3</sup>, whenever a limitation is required in the terms of the Covenant to be "necessary", this term implies that the limitation: "(a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant, (b) responds to a pressing public or social need, (c) pursues a legitimate aim, and (d) is proportionate to that aim. Any assessment as to the necessity of a limitation shall be made on objective considerations". However, the scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned (para 2) and in applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation (para 11). The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the state (para 12). In turn, Principle 1.3 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information<sup>4</sup> proclaims that: "to establish that a restriction on freedom of expression or information is necessary to protect a legitimate national security interest, a government must demonstrate that: (a) the expression or information at issue poses a serious threat to a legitimate national security interest; (b) the restriction imposed is the least restrictive means possible for protecting that interest; and (c) the restriction is compatible with democratic principle".

General Comment No. 34 "Article 19: Freedoms of opinion and expression"<sup>5</sup> stipulates that restrictions must be "necessary" for a legitimate purpose (para 33) and restrictions must not be overbroad (para 34). What is more, when a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat (para 35). For instance, para 7.3 of the Communication No. 926/2000, *Shin v. Republic of*

1. Universal Declaration of Human Rights. (1948, December). Retrieved from [https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf).

2. International Covenant on Civil and Political Rights. (1966, December). Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

3. Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights. Annex, UN Doc E/CN.4/1984/4. (1984, September). Retrieved from <https://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/SiracusaPrinciples.pdf>.

4. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information. (1995, October). Retrieved from <https://www.article19.org/wp-content/uploads/2018/02/joburg-principles.pdf>.

5. General Comment No. 34. "Article 19: Freedoms of opinion and expression". (2011, July). Retrieved from <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

6. Communication No. 926/2000 "Case Shin v. Republic of Korea". (2004, March). Retrieved from <https://www.ohchr.org/Documents/Publications/SDecisionsVol8en.pdf>.

*Korea*<sup>6</sup> states that the State party must demonstrate in specific fashion the precise nature of the threat to any of the enumerated purposes caused by the author's conduct, as well as why seizure of the painting and the author's conviction were necessary. Preamble of the Human Rights Council Resolution 7/36<sup>1</sup> stresses the need to ensure that invocation of national security, including counter-terrorism, is not used unjustifiably or arbitrarily to restrict the right to freedom of opinion and expression. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression<sup>2</sup> in para 19 emphasizes that Governments must "demonstrate the risk that specific expression poses to a definite interest in national security or public order, that the measure chosen complies with necessity and proportionality and is the least restrictive means to protect the interest, and that any restriction is subject to independent oversight".

#### **2.4. Legal framework and conditions for restriction of freedom of expression in the practice of the European Court of Human Rights**

Article 10(2) of the European Convention on Human Rights<sup>3</sup> provides the legal framework and conditions for restriction of freedom of expression: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary". The application of the above provision is described in the relevant documents of the Council of Europe and case-law of the ECHR. In particular, para 19 of the Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis<sup>4</sup> stipulates that "member states should not use vague terms when imposing restrictions of freedom of expression and information in

times of crisis. Incitement to violence and public disorder should be adequately and clearly defined". On the other hand, para 23 thereof envisages that "media professionals need to adhere, especially in times of crisis, to the highest professional and ethical standards, having regard to their special responsibility in crisis situations to make available to the public timely, factual, accurate and comprehensive information while being attentive to the rights of other people, their special sensitivities and their possible feeling of uncertainty and fear".

Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media<sup>5</sup> sets out in para 68 that "any action sought against media in respect of content should respect strictly applicable laws; above all international human rights law, in particular the provisions of the European Convention on Human Rights, and comply with procedural safeguards. There should be a presumption in favour of freedom of expression and information and in favour of media freedom". The purpose of the Recommendation has been to ensure the highest protection of media freedom and to provide guidance on duties and responsibilities. At the same time, the aforementioned Recommendation envisages that the development of professional and ethical standards to a large extent reflects people's expectations (para 53), and that media content creators, editors and distributors should adhere to relevant professional standards, including those designed to combat discrimination and stereotypes and to promote gender equality. They should exercise special care to ensure ethical coverage of minority and women's issues also by associating minorities and women to creation, editorial and distribution processes (para 86). Case-law of the ECHR affirms the right of a state to restrict freedom of expression. At the same time, limitation of human rights and freedoms is recognized admissible only if it is provided for by law and respects the essence of those rights and freedoms (*Rekvenyi v. Hungary*<sup>6</sup>, *Refah Partisi (The Welfare Party) and Others v. Turkey*<sup>7</sup>). Considering the nature of the assessed freedom, the ECHR also repeatedly stated that necessity for restricting rights must be convincingly established (*Autronic AG v. Switzerland*<sup>8</sup>, para 61; *Worm v. Austria*<sup>9</sup>, para 47).

1. Human Rights Council Resolution 7/36 "Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression". (2008, March). Retrieved from [http://ap.ohchr.org/Documents/E/HRC/resolutions/A\\_HRC\\_RES\\_7\\_36.pdf](http://ap.ohchr.org/Documents/E/HRC/resolutions/A_HRC_RES_7_36.pdf).
2. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. (2016, September). Retrieved from [https://www.un.org/ga/search/view\\_doc.asp?symbol=A/71/373&Lang=E](https://www.un.org/ga/search/view_doc.asp?symbol=A/71/373&Lang=E).
3. European Convention on Human Rights. (1950, November). Retrieved [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).
4. Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis. (2007, September). Retrieved from <https://rm.coe.int/foe-crisis-eng/16809e43e5>.
5. Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media. (2011, September). Retrieved from <https://www.osce.org/odihr/101403?download=true>.
6. Judgment of The European Court of Human Rights No. 25390/94 "Case of *Rekvenyi v. Hungary*". (1999, May). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-58262%22%7D>.
7. Judgment of The European Court of Human Rights No. 41340/98, No. 41342/98, No. 41343/98 and No. 41344/98 "Case of *Refah Partisi (The Welfare Party) and Others v. Turkey*". (2003, February). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-60936%22%7D>.
8. Judgment of The European Court of Human Rights No. 12726/87 "Case of *Autronic AG v. Switzerland*". (1990, May). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-57630>.
9. Judgment of The European Court of Human Rights No. 83/1996/702/894 "Case of *Worm v. Austria*". (1997, August). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-58087>.

In *Társaság a Szabadságjogokért v. Hungary*<sup>1</sup> (para 27) the ECHR ruled that in view of the interest protected by Article 10, the law cannot allow arbitrary restrictions which may become a form of indirect censorship. In its practice, the ECHR elaborated a legal position according to which 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 a part of the population. Such are the demands of that pluralism, tolerance and broad mindedness without which there is no “democratic society” (*Gawęda v. Poland*<sup>2</sup>, para 33; *Handyside v. The United Kingdom*<sup>3</sup>, para 49).

In *Öztürk v. Turkey*<sup>4</sup> (para 49), the ECHR pointed out that Article 10 of the Convention applies not only to the content of information, but also to the means of dissemination, since any restriction imposed on the means necessarily interferes with the right to receive and impart information. The ECHR practice demonstrates that admissibility of restriction of freedom of expression is established considering the content of the disseminated information and the threat it poses to interests in respect of which Article 10 of the Convention allows restriction of the aforesaid freedom (including the interests of national security), i.e. it shall be established whether the aforementioned restriction is really necessary.

The test of necessity in a democratic society requires the ECHR to determine whether the “interference” complained of corresponded to a “pressing social need”, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it were relevant and sufficient. In assessing whether such a “need” exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. In doing so, the ECHR has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions

on an acceptable assessment of the relevant facts (*Grinberg v. Russia*<sup>5</sup>, para 27). In the case of *Kommersant Moldova v. Moldova*<sup>6</sup> regarding a ban on publishing of a periodical endangering national security and territorial integrity the ECHR ruled that the domestic courts did not give relevant and sufficient reasons to justify the interference, limiting themselves essentially to repeating the applicable legal provisions. In particular, the courts did not specify which elements of the applicant’s articles were problematic and in what way they endangered the national security and the territorial integrity of the country. The ECHR found that the aforesaid approach demonstrated that the restrictions had not “based themselves on an acceptable assessment of the relevant facts” (paras 36-38). In *Lyashko v. Ukraine*<sup>7</sup> (para 47), the ECHR ruled that justifiability of an interference and the necessity thereof in a democratic society are defined considering, in particular, the relevance and sufficiency of the reasons given by the national authorities in justification for such interference.

Inadmissibility of the bans on the future publishing of entire newspapers whose content was unknown at the time of a national court’s decision was established by the ECHR in *Ürper and Others v. Turkey*<sup>8</sup> (paras 42-44). The Court noted that the state could apply less restrictive measures and that the practice of banning the future publishing of entire periodicals went beyond any notion of “necessary” restraint in a democratic society and, instead, amounted to censorship. However, there are a number of cases, in which the ECHR acknowledged the necessity of restriction of freedom of expression. For instance, in the 1994 case of *Otto-Preminger-Institut v. Austria*<sup>9</sup>, the ECHR considered as lawful the measures applied by the Austrian government, specifically the seizure of the film showing collusion between Jesus and the devil to punish of humanity by syphilis before the premiere. In the 1996 case of *Wingrove v. The United Kingdom*<sup>10</sup> a similar decision was taken in relation to the ban on dissemination a film showing sex fantasies about Jesus. In the 2005 case of

1. Judgment of The European Court of Human Rights No. 37374/05 “Case of *Társaság a Szabadságjogokért v. Hungary*”. (2009, April). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-92171>.
2. Judgment of The European Court of Human Rights No. 26229/95 “Case of *Gawęda v. Poland*”. (2002, March). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-60325>.
3. Judgment of The European Court of Human Rights No. 5493/72 “Case of *Handyside v. The United Kingdom*”. (1976, December). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-57499>.
4. Judgment of The European Court of Human Rights No. 22479/93 “Case of *Öztürk v. Turkey*”. (1999, September). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-58305>.
5. Judgment of The European Court of Human Rights No. 23472/03 “Case of *Grinberg v. Russia*”. (2005, July). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-69835>.
6. Judgment of The European Court of Human Rights No. 41827/02 “Case of *Kommersant Moldova v. Moldova*”. (2007, January). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-78892>.
7. Judgment of The European Court of Human Rights No. 21040/02 “Case of *Lyashko v. Ukraine*”. (2006, August). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-76714>.
8. Judgment of The European Court of Human Rights No. 14526/07, No. 14747/07, No. 15022/07, No. 15737/07, No. 36137/07, No. 47245/07, No. 50371/07, No. 50372/07 and No. 54637/07 “Case of *Ürper and Others v. Turkey*”. (2009, October). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-95201>.
9. Judgment of The European Court of Human Rights No. 13470/87 “Case of *Otto-Preminger-Institut v. Austria*”. (1994, September). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-57897>.
10. Judgment of The European Court of Human Rights No. 17419/90 “Case of *Wingrove v. The United Kingdom*”. (1996, November). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-58080>.

İ. A. v. Turkey<sup>1</sup> the ECHR called a book containing blasphemous comments about the Prophet Muhammad “an abusive attack on the Prophet of Islam”. In *Axel Springer AG v. Germany*<sup>2</sup> (para 95) the ECHR considered that the nature and severity of the sanctions imposed are also factors to be taken into account when assessing the proportionality of an interference with the exercise of freedom of expression.

Unfortunately, we must conclude that at present the ECHR practice under Article 10 of the European Convention on Human Rights remains inconsistent, and in our opinion one of the reasons for such inconsistency is that the judges of both national European courts and the ECHR lack sufficient understanding of Islam as a religion and the specifics of Islamic law itself.

## CONCLUSIONS

The Charlie Hebdo tragedy was primarily the result of cultural and religious differences between European and Islamic cultures. In light of the fact that Europeans (Christians) and Muslims have to coexist in their already-common Europe, it is necessary to explore and understand those differences and search for a new balance of tolerance for each other. It is important to prevent such tragedies in the future. The mass media, which are the most powerful tool of influencing society, should implement an appropriate editorial policy, while the state should efficiently perform its regulatory and supervisory functions. Unfortunately, the clearly inefficient and untimely actions of the French government contributed to an escalation of the conflict

with the Islamic community in Europe. An appropriate court ruling at an early stage of the conflict would have facilitated its peaceful resolution, saved human lives and prevented a major estrangement of the Islamic community from the European one.

The legal framework should reflect the actual relationships within the society. Thus, changes in the ethnic, religious and cultural composition of the European population due to the current migration processes should result in a different proper regulation or at least in changes in interpreting the existing legal framework. In the areas prone to serious inter-religious conflicts adequate regulatory instruments, including bans and restrictions, should be used. According to Article 10(2) of the European Convention on Human Rights, relevant case-law of the ECHR and universal international law, freedom of expression is not absolute; it carries with it duties and responsibilities and may be subject to restrictions. Cases involving Muslims should be examined by officials and judges who understand the specifics of Islam. This also applies to the ECHR judges. In the absence of judges with relevant expertise, experts and representatives of the Islamic community should be involved.

Finally, it may be noted with cautious optimism that in July 2015, Laurent Sourisseau, chief editor of Charlie Hebdo, stated that his periodical would no longer publish cartoons of the Prophet Muhammad [27]. This decision may be interpreted both as a certain confession of guilt of offending the Islamic community and as a step towards reconciliation with all Muslims.

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