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Dutch approve move to scrap blasphemy law

BBC News (28.11.2012) - Dutch authorities have decided to approve a motion abandoning a law under which it is a crime to insult God.

A majority of parties in parliament said the blasphemy law was no longer relevant in the 21st Century.

The legislation, introduced in the 1930s, has not been invoked in the last half century.

However, it still remains illegal under Dutch law to be disrespectful to police officers or to insult Queen Beatrix, the country's monarch.

Freedom of speech is a much-cherished right in the liberal and traditionally tolerant Netherlands.

The BBC's Anna Holligan, in The Hague, says that there was much debate about the issue after a Dutch court ruled that the far-right anti-Islam politician Geert Wilders should be allowed to criticise Islam, even if his outspoken opinions offended many Muslims.

In 2008, a coalition government decided against repealing the blasphemy law in order to maintain support from an orthodox Christian political party.

Gender equality and religious freedom in politics; Dutch SGP case declared inadmissible

By Alexandra Timmer

Strasbourg Observers (23.08.2012) - The ECtHR has brought a turbulent Dutch legal saga to a close. In the highly interesting *Staatkundig Gereformeerde Partij v. the Netherlands* (<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112340>) the Court has declared the complaint by the Dutch political party 'SGP' inadmissible. The SGP is, in the words of the Court, "a confessional political party firmly rooted in historical Dutch Reformed Protestantism" (par. 4). The party does not allow women to stand for election, as it believes that God teaches that men and women have different roles in life. It believes that "man is the head of the woman" and "participation of women in both representative and administrative political organs" is "incompatible with woman's calling" (par. 9). After a prolonged debate and legal struggle in the domestic courts, the Dutch Supreme Court ruled that, on the ground of Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW'), the State is obliged to ensure that political parties allow women to exercise their right to stand for election. The SGP

complained to the Strasbourg Court that this ruling of the Supreme Court infringed Articles 9 (right to freedom of religion), Article 10 (right to freedom of expression) and Article 11 (right to assembly) of the ECHR.

Frankly, what I expected to find was a terse decision, basically referring to the State's margin of appreciation. I was wrong. The reasoning is brief, but includes three steps that combine to make this a memorable ruling. I will discuss these steps below. By the way, this case has provoked a lot of controversy in the Netherlands over the past years (most of it is in Dutch, but see this article in the Human Rights Quarterly,

http://muse.jhu.edu/journals/human_rights_quarterly/summary/v033/33.1.oomen.html)

With this post, I cannot do justice to the whole debate; I just aim to give you my first impressions of the decision.

1) Explicit grounding of the decision in a commitment to democracy

The Court starts off by stressing that:

the Convention was designed to promote and maintain the ideals and values of a democratic society. Democracy . . . is the only political model contemplated in the Convention and the only one compatible with it. By virtue of the wording of the second paragraph of Article 11, and likewise of Articles 8, 9 and 10 of the Convention , the only necessity capable of justifying an interference with any of the rights enshrined in those Articles is one that may claim to spring from a "democratic society" (par. 70).

The Court does not often feel itself called upon to revisit the foundations of its human rights protection regime, which is why I reproduce this quote.

2) Discrimination Analysis

Next, the Court introduces Article 14 (the prohibition of discrimination) and Article 3 of Protocol 1 (the right to free elections) into the analysis. In some ways this is a rather unusual step, as the Court is not apt to invoke Article 14; especially when the applicant did not do so. However, the prohibition of discrimination has obviously played a crucial role in the domestic proceedings so it is no wonder that the Court relies on it.

The Court refers to the well-known 'very weighty reasons test': "very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention (par. 72)." More concretely, the Court holds that:

nowadays the advancement of the equality of the sexes in the member States of the Council of Europe prevents the State from lending its support to views of the man's role as primordial and the woman's as secondary (see, mutatis mutandis, Ünal Tekeli, cited above, § 63, and Konstantin Markin, cited above, ibidem). (par. 73)

Regular readers of this blog will appreciate how pleased I am with this statement that shows that the case of Konstantin Markin v. Russia is making school (see my post about Konstantin Markin at <http://strasbourgobservers.com/2012/03/22/gender-justice-in-strasbourg>) and here the amicus brief of Ghent's Human Rights Centre in that case at

[http://www.ugent.be/re/publiekrecht/en/departement/human rights/publications/amicus.pdf](http://www.ugent.be/re/publiekrecht/en/departement/human%20rights/publications/amicus.pdf))

The Court has clearly taken a stance against gender stereotyping, something that I have advocated in my own work (see my article "Towards an Anti-Stereotyping Approach for the ECtHR" at

<http://hrlr.oxfordjournals.org/content/11/4/707.full.pdf?keytype=ref&ijkey=OH1kPWcui9ZYcn5>)

3) No margin of appreciation argument, but an endorsement of the position of the Supreme Court

So what is the Court's conclusion out of all this? What I expected to find in this decision was a statement to the effect that since this issue has been thoroughly debated in the Netherlands - both in Parliament and at all levels of the domestic courts - the Court finds that the State has not overstepped its margin of appreciation in this delicate issue. But no! The Court actually says that - from the perspective of the Convention - it agrees with the Supreme Court of the Netherlands:

The Supreme Court, in paragraphs 4.5.1 to 4.5.5 of its judgment, concluded from Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women and from Articles 2 and 25 of the International Covenant on Civil and Political Rights taken together that the SGP's position is unacceptable regardless of the deeply-held religious conviction on which it is based (see paragraph 49 above). For its part, and having regard to the Preamble to the Convention and the case-law cited in paragraphs 70, 71 and 72 above, the Court takes the view that in terms of the Convention the same conclusion flows naturally from Article 3 of Protocol No. 1 taken together with Article 14. (par. 77)

Conclusion

From a women's rights perspective, this is a decision that includes some welcome and innovative reasoning. From the perspective of the right to freedom of religion, however, this decision might be unsatisfactory. The Court does not even use the whole "conflict of rights"-language that was used in the domestic proceedings; there is no weighing here between religious freedom and gender equality.

It remains to be seen what kind of action the Dutch Government will undertake. The Court refuses to mingle: "the Court must refrain from stating any view as to what, if anything, the respondent Government should do to put a stop to the present situation. The Court cannot dictate action in a decision on admissibility" (par. 78). So far, the Government has been extremely reluctant to actually comply with the Supreme Court's judgment. It had announced its decision to wait for the ruling of the Strasbourg Court; now the waiting-time is up.

This article was communicated to HRWF by Dr Aaron Rhodes

Banning the burqa and the European identity crisis

By Maurits Berger of Leiden University

Jurist Forum (10.02.2012) - The Dutch cabinet announced on January 27 that it will submit to parliament a bill banning burqas and niqabs, full casket helmets and balaclavas from Dutch streets. The latter are only meant to answer the need for non-discriminatory legislation, because the true intention of the bill was effectively a "burqa ban." If the bill becomes law, offenders will have to pay a €390 fine.

Whether the bill will pass the two houses of parliament remains to be seen. A burqa ban has been submitted twice in the Netherlands before, in 2007 and 2008, but both came to naught, not in the least because several committees, institutions and the State Council strongly advised against it.

This third time, however, there is more political clout to pass such a bill, because the burqa ban was made conditional to the formation of the current government. An example has been set by France, where their parliament passed the bill in 2010 despite the French State Council strongly advising against it.

It is clear that the burqa ban is not a legal necessity, but a political one. The exact number of women wearing the burqa is not known, but is estimated to be few: several hundred in the Netherlands (out of a population of 16 million) and about 2,000 in France (out of a population of 65 million). And while such attire may be a nuisance or a shocking experience to people encountering them, these women have not manifested themselves as a threat.

Although certain behavior creates disquiet in society, solid legal arguments must support any prohibitions. If, for example, people find it discomforting to stand in the schoolyard among several face-covered black-clad mothers when picking up their children, what exactly are the elements that make up this discomfort? We may not want it or like it, but there are lots of things we do not want or dislike. When do we cross the line where prohibitions are required in order to maintain society's sense of peace and comfort?

It comes as no surprise, then, that the law passed in France and Belgium, and those recently submitted in Netherlands and Spain, are a wondrous jumble of arguments justifying the burqa ban, ranging from a revival of the "social contract" that allegedly demands open-face encounters to condemnations of Islamic oppression of women. Central themes in the recent Dutch bill are integration and gender equality, with communication as a common denominator (interestingly, freedom of religion is not mentioned).

The integration argument, in short, is as follows: to advance one's situation one needs to participate in society, and because the Netherlands is "an open society" one can only successfully interact by means of open-face interaction. Covering one's face is an impediment that, even when self-inflicted, needs to be avoided at all costs — or at least at the cost of €390.

Gender equality is also a recurring theme, but with various twists. The Dutch legislature condemns the face veil as a symbol of women's oppression, as a means to set women apart from men as non-communicable objects, and as an indicator that men are sexual predators.

These arguments are feeble because their alleged object or aim of protection differs distinctively from the intention of that protection. The aim of the integration argument basically is that women need to be protected against themselves, because wearing the face veil cuts them off from society. The aim of the gender argument is the legislators' concern with the plight of oppressed women.

Quite awkward, then, to fine the women one wants to protect. However, the intention of the bill is not the welfare of these women, but society's discomfort with their behavior. Moreover, the ban's justification is based on the protection of women who have not asked for it.

This was also the main point of critique raised by the French State Council. It stated that the "principle of personal autonomy" is one of the fundamentals of French society, and as long as these women voluntarily choose to wear these garments, one needs to come up

with justifiable arguments to impose any prohibitions. And the State Council had not found such arguments.

The Dutch State Council, after its rejection of the burqa ban bill proposed in 2005, was quick in its rejection of the 2012 bill. In doing so it followed its French colleague: women have a basic right to wear what they want, and any legislation imposing a ban on certain garments must have a solid reason to do so.

All of these arguments are legal in nature, however, and will clearly not deter the political will of parliament. Neither does the distinct risk of such a ban being nullified by a higher court such as the European Court for Human Rights. Such a response would take years, and during that time one could successfully impose the ban. A legal loss, but a political gain.

The main political gain, to my mind, is national identity. It is not coincidental that the Dutch and French bills considered in 2005-2007 and 2009-2010, respectively, happened at exactly the same time that the two countries were involved in nationwide debates on their national identities. Since it's nearly impossible to define one's identity, it is easier to say what it is not. The burqa served that purpose: wearing the burqa was definitely not French or Dutch.

No wonder that the burqa bans have such feeble legal arguments. Laws are not suitable tools to shape or maintain identities. If one wants to eliminate the burqa — and it is perfectly understandable why one wants to do so — one needs to turn to other measures rather than legislation.

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