

RESTRICTION OF RELIGIOUSLY INSENSITIVE EXPRESSIONS IN THE CONTEXT OF THE DANISH CARTOONS OF THE PROPHET MOHAMMED – WHEN EXPERIENCE IS NOT ENOUGH

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Abstract: The ECtHR, when assessing religiously offensive, inappropriate or blasphemous speech under Article 10 of the ECHR, uses the protection of religious peace as a legitimate reason for restricting freedom of expression. It associates this concept with the protection of the religious feelings of believers. The approach chosen by the ECtHR to the concept of the protection of religious peace is not appropriate. This article identifies conditions under which religiously offensive, inappropriate or blasphemous ways of exercising freedom of expression can constitute a disruption of peaceful coexistence. It discusses reactions to the Danish cartoons of the Prophet Mohammed, which gradually led to the violent expression of disagreement among Muslims with their publication. The case draws attention to the question of whether it should be possible to restrict freedom of speech based on mere experience of violent reactions to religiously insensitive speech.

Keywords: freedom of expression; religious peace; protection of the religious feelings of believers; religiously offensive speech; the Danish cartoons of the Prophet Mohammed; caricature; public debate; violence

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INTRODUCTION

According to ECtHR “one of the principal characteristics of democracy is the possibility it offers of resolving a country’s problems through dialogue, without recourse to violence, even when they are irksome”.¹ The task of the state is “to ensure that the competing groups tolerate each other”.² There is no doubt that it can be difficult for believers to tolerate an improper attack on an object of religious veneration. The ECtHR, when assessing religiously offensive, inappropriate or blasphemous speech under Article 10 of the ECHR, uses the protection of religious peace as a legitimate reason

¹ *Socialist Party and Others v. Turkey* [1998-05-25]. ECtHR, No. 21237/93, par. 45; *United Communist Party of Turkey and Others v. Turkey* [1998-01-30]. ECtHR, No. 19392/92, par. 57; *Ukraine v. Russia (re Crimea)* [2024-06-25]. ECtHR, No. 20958/14, 38334/18, par. 1066.

² *S.A.S. v. France* [2014-07-01]. ECtHR, No. 43835/11, par. 127; *Serif v. Greece* [1999-12-14]. ECtHR, No. 38178/97, par. 53; *Leyla Şahin v. Turkey* [2005-11-10]. ECtHR, No. 44774/98, par. 107.

for restricting freedom of expression. It associates this concept with the protection of the religious feelings of believers.

In the case of *Otto-Preminger-Institut v. Austria*, the ECtHR primarily pointed to the number of believers who could have been affected by the speech.³ The key for it was the presence of the Catholic faith among the “overwhelming majority of Tyroleans”.⁴ Without the need to produce any further evidence, it made it an argument favouring the protection of religious peace in Austria.⁵ In the case of *Murphy v. Ireland*, Ireland emphasised the religious sensitivity of its people and pointed out that the religious beliefs of the vast majority of the Irish population are very similar.⁶ Considering those factors, the ECtHR held that there had been no violation of Article 10 of ECHR.⁷ In the case of *E.S. v. Austria*, the ECtHR explicitly stated that the religious sensitivity could potentially lead to a disturbance of religious peace.⁸

The main claim of this article is that it is entirely absurd to combine the protection of religious peace with the protection of the religious feelings of believers. It should not be possible that the ECtHR does not consider other circumstances of the case when assessing religiously insensitive speech. In this article, I will describe the reactions to the Danish cartoons of the Prophet Mohammed, which gradually led to the violent expression of disagreement among Muslims with their publication. In this case, it was “only” about unleashing global unrest, attacks and condemnation of the publication of the Danish cartoons. This is the reason why among religiously insensitive manifestations, this case stands out. The purpose of the analysis of this reaction will be to try to determine when it is possible to restrict freedom of expression guaranteed by Article 10 of the ECHR with reference to its possible danger. At the same time, I will also consider whether it should be possible to restrict freedom of speech based on mere experience of violent reactions to religiously insensitive speech.

REACTION TO THE DANISH CARTOONS OF THE PROPHET MOHAMMED

In Danish cartoons of the Prophet Mohammed in 2005⁹ were combined violence and non-violence reactions. The founder of Islam was depicted in cartoons published by Jyllands-Posten, for example, in front of the gates of heaven, speaking to several suicide bombers: “*Stop! Stop! We have run out of virgins!*”¹⁰ The initial reactions

³ *Otto-Preminger-Institut v. Austria* [1994-09-20]. ECtHR, No. 13470/87, par. 56.

⁴ Ibid.

⁵ Ibid.

⁶ *Murphy v. Ireland* [2003-07-10]. ECtHR, No. 44179/98, par. 12, 38.

⁷ Ibid., par. 82.

⁸ *E.S. v. Austria* [2018-10-25]. ECtHR, No. 38450/12, par. 50, 57.

⁹ BRABANT, M. Cartoons controversy 10 years on. In: *DW* [online]. 30. 9. 2015 [cit. 2024-09-20]. Available at: <https://www.dw.com/en/free-speech-at-issue-10-years-after-muhammad-cartoons-controversy/a-18747856>.

¹⁰ NOORLANDER, P. In Fear of Cartoons. *European Human Rights Law Review* [online]. 2015, No. 2, p. 116 [cit. 2023-04-20]. Available at: https://www.mediadefence.org/wp-content/uploads/2020/06/Noorlanderpp115-122_2015_EHRLR_Issue_2_Print_FINAL.pdf.

of Muslim public to this way of freedom of expression were rather indifferent.¹¹ The violent reactions were initiated by the involvement of 11 diplomats (ambassadors, Chargé d'affaires and other leading state officials in charge of diplomacy) from Turkey, Iran, Egypt, Algeria, Libya, Palestine, Saudi Arabia, Pakistan, Indonesia, Bosnia and Herzegovina and Morocco.¹² Representatives of these states requested a meeting with the then Prime Minister of Denmark, Anders Fogh Rasmussen, in a letter.¹³ The meeting was intended to help stop the “*on-going smearing campaign in Danish public circles and media against Islam and Muslims*”.¹⁴ At the same time, it was intended to help Danish society to remember the value of tolerance that is inherent to it. According to the opinion of the 11 mentioned representatives of states, this value has been neglected.¹⁵

The caricature was also identified by others in this case as a source of some danger for Muslims. For example, Peetush believed that some of the cartoons incite hatred against Muslims and support prejudice against this religious minority in Denmark.¹⁶ In the context of these cartoons, Holder spoke about the fact that it is not about exercising freedom of expression but about exercising the power to speak about Islam in a way that is insensitive to Muslims, regardless of their feelings.¹⁷ According to him, Muslims are therefore excluded from the debate regarding the limits of this freedom in cases where expressions are religiously insensitive towards them.¹⁸ Potentially, the cartoons in question could have affected the freedom of religion of Muslims at the level of forum internum and at the level of forum externum. They could thus discourage believers from publicly manifesting their religion. Another possibility is that they could even raise doubts about the correctness of their chosen religious beliefs. However, it is necessary to mention that although individual believers may profess the same religion, their approach to religion and the depth of their convictions may differ. Whether, and what pain they may have felt when confronted with the cartoons, remains unverifiable. The consequences mentioned in both the forum internum and forum externum could nevertheless be related to the hatred and prejudice mentioned by Peetush, or may generally result from various circumstances of the case.¹⁹

The Danish Prime Minister ignored the request for a meeting with the diplomats in question. He referred to the guarantee of freedom of speech and the legal means

¹¹ AMMITZBØLL, P. – VIDINO, L. After the Danish Cartoon Controversy. *Middle East Quarterly* [online]. 2007, Vol. 14, No. 1 [cit. 2023-04-20]. Available at: https://www.meforum.org/1437/after-the-danish-cartoon-controversy/#_ftn33.021502865.html.

¹² Letter to His Excellency Mr. Anders Fogh Rasmussen Prime Minister Kingdom of Denmark. In: *Roger Buch* [online]. [cit. 2023-04-20]. Available at: <https://www.rogerbuch.dk/jpabrev.pdf>.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ PEETUSH, A. K. Caricaturizing Freedom: Islam, Offence, and The Danish Cartoon Controversy. *Studies in South Asian Film and Media* [online]. 2009, Vol. 1, No. 1, p. 174 [cit. 2025-03-13]. Available at: <https://philarchive.org/archive/PEECF1>.

¹⁷ HOLDER, C. Debating the Danish Cartoons: Civil Rights or Civil Power? *UNB Law Journal* [online]. 2006, Vol. 55, p. 183 [cit. 2025-03-13]. Available at: <https://philpapers.org/archive/HOLDTD-6.pdf>.

¹⁸ Ibid.

¹⁹ TSAKYRAKIS, S. Proportionality: An assault on human rights? *International Journal of Constitutional Law* [online]. 2009, Vol. 7, No. 3, p. 480 [cit. 2025-03-13]. Available at: <https://doi.org/10.1093/icon/mop011>.

available in Denmark as a democratic state.²⁰ Danish imams were not happy with such a reaction.²¹ They sent a delegation to the Middle East to obtain aid that would enable them to restore respect for Islam in Denmark.²² As a tool to convince that Islam is in danger, they brought pictures of cartoons of the Prophet Mohammed. However, these not only included those published in Denmark by *Jyllands-Posten*, which gave rise to their trip. There were also some other cartoons that were never published in the press, but which were allegedly only sent to them anonymously by e-mail.²³ The publication of the Danish cartoons with the substantial contribution of Danish imams²⁴ eventually led to a number of serious consequences, such as attacks on Danish embassies,²⁵ attacks on almost a thousand Danish websites²⁶ and the sparking of protests worldwide.²⁷ These protests in some countries caused the deaths of many people, partly in connection with their internal political situations.²⁸

THE ECtHR'S APPROACH TO ASSESSING RELIGIOUSLY INSENSITIVE EXPRESSIONS AND THE PUBLIC INTEREST THEORIES

Freedom of expression guaranteed by Article 10 of the ECHR and freedom of religion guaranteed by Article 9 of the ECHR are not absolute rights. Therefore, when assessing religiously insensitive expressions, the ECtHR must consider whether the conditions under which freedom of expression exercised through religiously insensitive expressions can be restricted have been met. The classic five-step test is addressed, consisting of determining whether the expression falls within the scope of Article 10 of the ECHR, whether the restrictive measures have interfered with this freedom, whether the interference with freedom of expression was in accordance with or prescribed by law, whether it pursued one of the legitimate aims set out in Article 10(2) of the ECHR and whether the interference was necessary in a democratic society.²⁹ The ECtHR links the necessity of an interference with a right guaranteed by the ECHR to the question

²⁰ See KLAUSEN, J. *The Cartoons That Shook the World*. New Haven: Yale University Press, 2009, p. 66.

²¹ SHADID, A. – SULLIVAN, K. Anatomy of the Cartoon Protest Movement. In: *The Washington Post* [online]. 15. 2. 2006 [cit. 2023-06-20]. Available at: <https://www.washingtonpost.com/wp-dyn/content/article/2006/02/15/AR2006021502865.html>.

²² Ibid.

²³ Ibid.

²⁴ AMMITZBØLL – VIDINO, c. d.

²⁵ See, e.g., 6 killed in blast at Danish Embassy in Pakistan. In: *NBC News* [online]. 2. 6. 2008 [cit. 2024-07-20]. Available at: <https://www.nbcnews.com/id/wbna24926365>.

²⁶ WARD, M. Anti-cartoon protests go online. In: *BBC News* [online]. 8. 2. 2006 [cit. 2023-06-20]. Available at: <http://news.bbc.co.uk/2/hi/technology/4692518.stm>.

²⁷ The Cartoon Crisis – how it unfolded. In: *Jyllands-Posten* [online]. 11. 3. 2008 [cit. 2024-07-25]. Available at: <https://jyllands-posten.dk/international/ECE3931398/The-Cartoon-Crisis-%E2%80%93-how-it-unfolded/>.

²⁸ POLGREEN, L. Nigeria Counts 100 Deaths Over Danish Caricatures. In: *The New York Times* [online]. 24. 2. 2006 [cit. 2024-06-20]. Available at: <https://www.nytimes.com/2006/02/24/world/africa/nigeria-counts-100-deaths-over-danish-caricatures.html>.

²⁹ KOSAŘ, D. – BOBEK, M. Kapitola IV: Omezení práv a svobod zaručených v Úmluvě [Chapter IV: Restrictions on the rights and freedoms guaranteed by the Convention]. In: KMEC, J. – KOSAŘ, D. – KRATOCHVÍL, J. – BOBEK, M. (eds.). *Evropská úmluva o lidských právech* [European Convention on Human Rights]. Praha: C. H. Beck, 2012, pp. 99–116.

of establishing a pressing social need and the proportionality of the interference to the legitimate aim pursued.³⁰ This approach is intended to ensure that measures restricting freedom of expression are only adopted to the extent necessary to protect them. However, the ECtHR does not always proceed in its case-law in the same precise manner. It often only focuses on establishing the lawfulness of the interference, identifying the legitimate aim pursued by the measure and assessing the necessity of the restriction of the right or freedom to achieve that aim.³¹

In the context of the limitation clause in Article 10(2) of the ECHR, the ECtHR also emphasises that freedom of expression carries with it certain duties and responsibilities.³² In general, the ECtHR accepts expressions that are offensive, shocking or disturbing.³³ However, in the case of expressions that are religiously insensitive, it sees the fulfilment of the mentioned duties and responsibilities as already avoiding any gratuitously offensive expressions.³⁴ Gratuitously offensive expressions must, as far as possible, give way to the protection of the rights of others, and thus the protection of the religious feelings of believers.³⁵ Bearing in mind the “*fair balance that has to be struck between the general interest of the community and the interests of the individual*”,³⁶ the ECtHR infers from Article 9 of the ECHR a positive obligation of the state to ensure that there are no offensive, inappropriate or blasphemous attacks on the objects of religious veneration of believers.

The ECtHR also links the religious feelings of believers with the issue of maintaining religious peace. In the case of *Otto-Preminger-Institut v. Austria*, the ECtHR did not examine the actual harm to believers. From the fact that the vast majority of Tyroleans was Catholic, it concluded that the restriction of freedom of expression was necessary to protect religious peace in Austria.³⁷ In the case of *I.A. v. Turkey*, and in the case of *E.S. v. Austria*, the ECtHR did not refer to the possible harm to the religious feelings of the “vast majority” of believers in the given state. In the case of *I.A. v. Turkey*, however, the Turkish government argued that the majority of society was harmed. In this case, the ECtHR was thus confronted with an analogous situation as in the case of *Otto-Preminger-Institut v. Austria*. However, in the case of *E.S. v. Austria* it was clearly a matter of harming a religious minority. The potential impact on the religious feelings of believers, or religious peace, thus acquired an even more abstract dimension in this decision.

In all the cases mentioned, the ECtHR balanced freedom of expression and the protection of religious feelings of believers as part of the freedom guaranteed by Article 9 of the ECHR, or as part of the legitimate aim of protecting the rights of others.

³⁰ Ibid.

³¹ See, for example, *Wingrove v. The United Kingdom* [1996-11-25]. ECtHR, No. 17419/90; *E.S. v. Austria*.

³² *Handyside v. The United Kingdom* [1976-12-07]. ECtHR, No. 5493/72, par. 49.

³³ Ibid.

³⁴ *E.S. v. Austria*, par. 43; *Otto-Preminger-Institut v. Austria*, par. 49; *I.A. v. Turkey* [2005-09-13]. ECtHR, No. 42571/98, par. 24.

³⁵ *E.S. v. Austria*; *Otto-Preminger-Institut v. Austria*; *I.A. v. Turkey*.

³⁶ *Ozgur Gundem v. Turkey* [2000-03-16]. ECtHR, No. 23144/93, par. 43; *Appleby and Others v. The United Kingdom* [2003-05-06]. ECtHR, No. 44306/98, par. 40.

³⁷ *Otto-Preminger-Institut v. Austria*, par. 56.

Article 10(2) of the ECHR does not explicitly mention the protection of the public interest in the list of legitimate aims, but contains more specific legitimate aims, such as the protection of national security, territorial integrity, public safety, the prevention of disorder or crime, the protection of morals or the mentioned protection of the rights of others. In most cases, however, these aims serve the interests of society, i.e., specific public interests. In the mentioned cases, the ECtHR thus balanced freedom of expression with the public interest. The approach to assessing the public interest may be based on one of many theories of public interest. Among the most important ones, the procedural theory, the aggregative or preponderance theory, the unitary theory or the civic theory can be mentioned.

The procedural theory of assessing the public interest is linked to the democratic decision-making procedure.³⁸ It conditions the identification of public interest to the implementation of a public debate.³⁹ This approach considers the conflicting opinions, interests and values of individual members of society. The determination of the public interest in each case is therefore always the result of a clash of different beliefs. It is therefore not possible to specify the public interest precisely in advance. This fact represents a significant weakness of this theory.

In the case of the aggregative or preponderance theory of public interest, the key to fulfilment of this content is to determine which individual interests prevail in society.⁴⁰ In this approach, the interests of the minority are subordinated to the interests of the majority.⁴¹ Interests of the majority then become the public interest.⁴² We can find a suitable analogy to capture the essence of this theory in Dolot. He mentions an ant and an anthill.⁴³ He asks: “*Who cares about a stray, single ant? What really counts is the anthill, for in it the ant’s life is protected and perpetuated [...] An ant is inconceivable without that society.*”⁴⁴ However, protecting the majority at the expense of the minority is not the essence of democracy. On the contrary, as the ECtHR emphasises, in a democratic society “*a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position*”.⁴⁵

The approach to protecting the public interest through aggregative theory does not correspond to the principle of pluralism either. The ECtHR speaks of pluralism as one

³⁸ BOOT, E. R. The Public Interest: Clarifying a Legal Concept. *Ratio Juris* [online]. 2024, Vol. 37, No. 2, pp. 116–117 [cit. 2025-03-11]. Available at: <https://doi.org/10.1111/raju.12401>.

³⁹ O’FLYNN, I. Deliberating About the Public Interest. *Res Publica* [online]. 2010, Vol. 16, p. 302 [cit. 2025-03-12]. Available at: <https://doi.org/10.1007/s11158-010-9127-x>.

⁴⁰ BOOT, c. d., p. 117; MANSBRIDGE, J. On the Contested Nature of the Public Good. In: POWELL, W. W. – CLEMENS, E. S. (eds.). *Private Action and the Public Good*. New Haven, London: Yale University Press, 1998, p. 9; MCHARG, A. Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights. *The Modern Law Review* [online]. 1999, Vol. 62, No. 5, p. 675 [cit. 2025-03-13]. Available at: <https://www.jstor.org/stable/1097381>.

⁴¹ Ibid.

⁴² Ibid.

⁴³ DOLOT, M. *Execution by Hunger: The Hidden Holocaust*. New York, London: W.W. Norton & Company, 1985, pp. 70–71.

⁴⁴ Ibid.

⁴⁵ *Young, James and Webster v. The United Kingdom* [1981-08-13]. ECtHR, No. 7601/76, 7806/77, par. 63.

of the pillars of a democratic society.⁴⁶ The essence of pluralism, as Nieuwenhuis states, is to ensure that one concept of the good, an opinion or an idea espoused by a particular group of people does not gain dominance over all others.⁴⁷ The creation of a society in which one prevailing religion exclusively determines the direction of the state could result in certain opinions and beliefs being excluded from the public space.

Of course, this would not lead to their disappearance. On the level of non-religious beliefs and worldviews, the only consequence would be to silence the unheard. Their interests and needs would not have to be given space. They might, therefore, get the impression that they are not welcome in society because they do not have the opportunity to participate in shaping its rules. At the same time, religious minorities could be oppressed. In view of the obvious shortcomings and dangers of the aggregative theory of public interest, it is striking that in the mentioned case of *Otto-Preminger-Institut v. Austria*, and in the case of *I.A. v. Turkey*, the ECtHR leaned towards this concept of public interest.

In the case of *E.S. v. Austria*, the Austrian government cited the need to prevent disorder by safeguarding religious peace and the protection of religious feelings of believers as a legitimate aim for restricting freedom of expression.⁴⁸ In this case, the ECtHR did not require specification of the number of believers who could be affected by the expression. Nevertheless, it expressed that the restriction of freedom of expression was necessary in the interest of protecting religious peace.⁴⁹

Let us consider two facts. First, in the two previously mentioned cases the ECtHR approached the assessment of the public interest from the perspective of the aggregative theory. Second, that in this case the ECtHR did not question the legitimate aims claimed by the Austrian government. We are led to conclude that the majority interest in question is seen as a public interest under certain conditions even in the case of a minority being affected.

It is worth considering whether this could not be the case due to the specific characteristics of this minority. In the context of the Danish cartoons of the Prophet Muhammad case mentioned at the beginning of this article, this assumption could be appropriate. The reason is that for Muslims, speech affecting the Prophet Muhammad is a particularly sensitive issue. As the Palestinian historian Khalidi states, for example, believers deem him to be a model of virtues.⁵⁰ The fact that Muslims regularly and visibly react to religiously insensitive speech, and that these reactions can sometimes be violent, could therefore lead to a worrying conclusion. Freedom of speech would, as Jones states, be “*placed at the mercy of others’ willingness to react in violent and disorderly ways*”.⁵¹

⁴⁶ See, e.g., *Handyside v. The United Kingdom*, par. 49.

⁴⁷ NIEUWENHUIS, A. The Concept of Pluralism in the Case-Law of the European Court of Human Rights. *European Constitutional Law Review* [online]. 2007, Vol. 3, No. 3, pp. 367–368, 371, 374, 383–384 [cit. 2023-05-05]. Available at: <https://www.cambridge.org/core/journals/european-constitutional-law-review/article/concept-of-pluralism-in-the-case-law-of-the-ecthr/67A17EC85489CDEBBE3AD9F0853D3EF5>.

⁴⁸ *E.S. v. Austria*, par. 41.

⁴⁹ *Ibid.*, par. 57.

⁵⁰ KHALIDI, T. *Images of Muhammad. The Evolution of Portrayals of the Prophet in Islam Across the Centuries*. New York: Doubleday, 2009, p. 10.

⁵¹ JONES, P. Respecting Beliefs and Rebuking Rushdie. *British Journal of Political Science* [online]. 1990, Vol. 20, No. 4, p. 435 [cit. 2025-03-16]. Available at: <https://www.jstor.org/stable/193804>.

The unitary theory of public interest is based on the premise that individual interests cannot conflict with each other or with the public interest.⁵² This requires finding a solution that either sacrifices certain interests or is accepted positively by all.⁵³ Only the second option remains. However, as Boot points out, finding consensus is very problematic in pluralistic society.⁵⁴

Civic theory of public interest emphasises that as a member of society we must not give priority to our individual interests, but to the interests of society.⁵⁵ According to Boot, the public interest, from the perspective of this concept, represents what is “*good for all of us qua members of the public, in the sense of increasing our opportunities to pursue and realize the (permissible) ends we share qua equal members of the public*”.⁵⁶ He cites the guarantee of freedom of expression as an example.⁵⁷ In view of the ECHR’s premise that it is not the duty of states “*to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other*”,⁵⁸ the public interest inherent in this guarantee can be further specified.

According to Tsakyrakis, freedom of expression is threatened “*whenever the state prohibits one view in order to support another*”.⁵⁹ I therefore believe that according to this theory it is in the public interest to maintain a certain diversity of communication. It should also be in the public interest to thoroughly assess the nature of the expression, for example, the use of satire or caricature. In these cases, it is not only about the mentioned diversity, but also about the possible significance of the use of these specific means. I also agree with Puppink that criticism will always be in the public interest, if it is not misleading.⁶⁰ The speech must also not incite hatred and intolerance, in a given context, towards believers. However, protecting freedom of speech from the perspective of the number of believers affected would not be in the public interest in the context of this theory. Even in the case of considerations of hatred and intolerance of speech, it would be necessary to look for criteria other than the subjective feelings of believers. However, these other criteria should also take the requirement to preserve the mentioned communication diversity into account.

CARICATURE, SOCIALLY VALUABLE PURPOSE AND PUBLIC DEBATE

In the case of the Danish caricatures of the Prophet Mohammed, in the context of the case law of the ECHR and in the context of the presented theories of public interest, it is possible to note several facts. These facts could be important for establishing criteria for the purpose of restricting freedom of expression to maintain peaceful

⁵² BOOT, *c. d.*, pp. 118–119; MCHARG, *c. d.*, p. 675.

⁵³ Ibid.

⁵⁴ BOOT, *c. d.*, p. 119.

⁵⁵ Ibid., pp. 10–15.

⁵⁶ BOOT, *c. d.*, 122.

⁵⁷ Ibid.

⁵⁸ *S.A.S. v. France*, par. 127; *Serif v. Greece*, par. 53; *Leyla Şahin v. Turkey*, par. 107.

⁵⁹ TSAKYRAKIS, *c. d.*, p. 489.

⁶⁰ PUPPINCK, G. The censorship of speech about Islam before the European Court of Human Rights: the appalling case of E. S. v. Austria. *Journal of the Catholic Social Thought*. 2020, No. 24, p. 106.

coexistence. At the beginning of that speech there was a caricature. It is characterised by a certain degree of provocativeness⁶¹ and inaccuracy.⁶² This way of expressing oneself can also have the ambition to awaken society from its lethargy. It can also be the bearer of a certain message, often an important one. Due to the use of simplified language, it is likely that the message from the caricature will be more accessible to the addressees. As part of the ECtHR's requirement to consider all relevant facts,⁶³ it should therefore always first be assessed whether the speech may carry a certain socially beneficial value.

A socially valuable purpose was also claimed by the then editor of *Jyllands-Posten* in the case of the Danish cartoons.⁶⁴ Rose said the publication of the cartoons had two goals.⁶⁵ First, to ensure that the believers of the contested religion become fully-fledged members of Danish society.⁶⁶ The second reason was to try to change the supposedly emerging state of self-censorship.⁶⁷ It is not always possible to agree with the factual existence of such reasons. For example, Mahmood also mentions the painful reactions of Muslims to the caricatures of the Prophet Muhammad.⁶⁸ However, this does not in any way diminish the need to examine whether the speech could have constituted a contribution to the public debate, or whether it pursued another publicly beneficial purpose.

The issue of public debate is also considered extremely important by the ECtHR. On the one hand, when assessing the preservation of respect for religion, it does not exclude expressions denying the religious beliefs, or expressions promoting thinking hostile to this belief.⁶⁹ Although this requirement may not be perceived by everyone as a question of the breadth of permissible discussion, certain elements of an exchange of views do appear here. Moreover, given the context of religion, proselytism also comes to the fore.

⁶¹ See, for example, JOHNSON, I. S. Cartoons. *The Public Opinion Quarterly* [online]. 1937, Vol. 1, No. 3, p. 35 [cit. 2023-06-20]. Available at: <https://doi.org/10.1086/265090>.

⁶² STREICHER, H. L. On a Theory of Political Caricature. *Comparative Studies in Society and History* [online]. 1967, Vol. 9, No. 4, p. 435 [cit. 2023-04-20]. Available at: <https://doi.org/10.1017/s001041750000462x>; PATRICK, J. The Curious Persistence of Blasphemy. *Florida Journal of International Law* [online]. 2011, Vol. 23, No. 2, p. 211 [cit. 2024-02-26]. Available at: <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1542&context=fjil>; DOUGLAS, R. 19th Century Ireland and the Cartoonists. In: *The Policial Cartoon Society* [online]. [cit. 2023-04-20]. Available at: <https://www.original-political-cartoon.com/cartoon-history/19th-century-ireland-and-cartoonists/>.

⁶³ *Mouvement raëlien Suisse v. Switzerland* [2012-07-13]. ECtHR, No. 16354/06, par. 4; *Morice v. France* [2015-04-23]. ECtHR, No. 29369/10, par. 124; *Međžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [2017-06-27]. ECtHR, No. 17224/11, par. 75.

⁶⁴ ROSE, F. Why I Published Those Cartoons. In: *The Washington Post* [online]. 19. 2. 2006 [cit. 2023-06-20]. Available at: <https://www.washingtonpost.com/wp-dyn/content/article/2006/02/17/AR2006021702499.html>; ROSE, F. Why I Published the Muhammad Cartoons. In: *Spiegel International* [online]. 31. 5. 2006 [cit. 2023-08-15]. Available at: <https://www.spiegel.de/international/spiegel/opinion-why-i-published-the-muhammad-cartoons-a-418930.html>.

⁶⁵ Ibid.

⁶⁶ ROSE, *Why I Published the Muhammad Cartoons*.

⁶⁷ ROSE, *Why I Published Those Cartoons*.

⁶⁸ MAHMOOD, S. Religious Reason and Secular Affect: An Incommensurable Divide? In: ASAD, T. – BROWN, W. – BUTLER, J. – MAHMOOD, S. (eds.). *Is Critic Secular? Blasphemy, Injury, and Free Speech*. Berkeley: The Townsend Center for the Humanities University of California, 2009, pp. 74–75.

⁶⁹ *I.A. v. Turkey*, par. 28; *Otto-Preminger-Institut v. Austria*, par. 47; *E.S. v. Austria*, par. 42; *Aydin Tatlav v. Turkey* [2006-05-02]. ECtHR, No. 50692/99, par. 27; *Rabczewska v. Poland* [2022-09-15]. ECtHR, No. 8257/13, par. 51.

At the same time, when assessing religiously insensitive speech, the ECtHR emphasises that expressions that “*do not contribute to any form of public debate capable of furthering progress in human affairs*”⁷⁰ are not eligible for protection under Article 10 of the ECHR. The ECtHR does not allow a “*malicious violation of the spirit of tolerance*”.⁷¹ According to the ECtHR, maliciousness can be seen in offensive, inappropriate and blasphemous attacks on things, objects and figures considered sacred.⁷² As a concrete example of meeting the criterion of malevolence, or an example of speech crossing the line of “*denial by others of their religious beliefs*”,⁷³ the ECtHR cites the provocative depiction of the objects of worship of believers⁷⁴. Although some of the ECtHR’s statements are not very well formulated,⁷⁵ this does not change the importance that the ECtHR attaches to the discussion.

VIOLENCE AS A REASON TO RESTRICT RELIGIOUSLY INSENSITIVE EXPRESSIONS?

The mere possible danger of religiously insensitive speech should not automatically prevent its realisation. This conclusion is particularly important in the specific ways of realisation of freedom of expression. This is especially the case where the inherent feature of which is the ability to arouse strong resentment in persons who have been the subject of speech. See, for example, the caricature mentioned above. At the same time, it is quite natural that the more provocative a speech the believers face, the more serious their reaction to such a speech may be for society.

It cannot be overlooked that violence does not have to be an immediate reaction but can be linked to other circumstances. For example, it may be a response to other reactions to a given speech, or it may be a statement relating to a subsequent open debate on the limits of freedom of expression. Such a debate, however, does not have to be the result of religiously insensitive speech. This is an extremely fundamental issue. The search for the limits of freedom of speech can be a topic regardless of any events that are of fundamental importance to society. Restricting freedom of expression could therefore defeat the purpose for which it can serve in a democratic state.

⁷⁰ See, for example, *Otto-Preminger-Institut v. Austria*, par. 49.

⁷¹ See, for example, *ibid.*, par. 47; *E.S. v. Austria*, par. 53; *Murphy v. Ireland*, par. 50.

⁷² *I.A. v. Turkey*, par. 24, 29, 30; *Otto-Preminger-Institut v. Austria*, par. 47; *E.S. v. Austria*, par. 43; *Rabczewska v. Poland*, par. 51.

⁷³ *I.A. v. Turkey*, par. 28; *Otto-Preminger-Institut v. Austria*, par. 47; *E.S. v. Austria*, par. 42, 43; *Rabczewska v. Poland*, par. 51; *Aydin Tatlav v. Turkey*, par. 27.

⁷⁴ *E.S. v. Austria*, par. 53; *Rabczewska v. Poland*, par. 51.

⁷⁵ For example, the ECtHR stated that “*whoever exercises the rights and freedoms enshrined in the first paragraph of that Article (art. 10-1) undertakes ‘duties and responsibilities’*. Amongst them [...] may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others [...]”, see, e.g., *Otto-Preminger-Institut v. Austria*, par. 49; *Rabczewska v. Poland*, par. 47; *Murphy v. Ireland*, par. 65; *I.A. v. Turkey*, par. 24. In the case of *Handyside v. The United Kingdom*, the ECtHR stated that “*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 [...]*”, see *Handyside v. The United Kingdom*, par. 49. See also, e.g., *I.A. v. Turkey*, par. 23; *E.S. v. Austria*, par. 42. The question is how these two thesis can be reconciled.

The key to precisely defining situations potentially problematic from the point of view of security for a state governed by the rule of law cannot be violent responses to religiously offensive, inappropriate or blasphemous speeches. The reason is the use of violence in response to a certain speech is unpredictable in advance. In the context of, for example, the case of the Charlie Hebdo attack, it was a retaliation by Islamic fundamentalists for exercising freedom of speech in a way that was potentially offensive, inappropriate or blasphemous. In the case of fundamentalists, as Almond, Appleby and Sivan argue, it is not a conservative adherence to the original ideological foundations of religion.⁷⁶ On the contrary, their religious convictions are based on skilfully extracted articles of faith capable of meeting current requirements.⁷⁷ Moreover, the interpretation of passages selected in this way does not always have to correspond with the traditional interpretation.⁷⁸ These theses only reinforce the expressed presumption of subjectivity present in any assessment of religiously insensitive expressions.

However, the danger is not only posed by “stray” individuals committing terrorist attacks in the name of a particular religion, but also by crowds mobilised by an inaccurate information. In this context we can mention, for example, repeated demonstrations with a huge number of participants. Based on experience to date, such gatherings have a high probability that they can degenerate into violence. The mentioned danger was also evident in the approximate reaction to the Danish cartoons of the Prophet Mohammed. With the involvement of mass crowds, speech can lose its capacity to be a means of communication. Starting from the work of the French social psychologist Le Bon, *“a crowd is at the mercy of all external exciting causes, and reflects their incessant variations. It is the slave of the impulses which it receives [...]”*.⁷⁹ However, even such risk cannot be an argument in favour of restricting freedom of expression with reference to the possible danger that mobilised crowds can cause.

To restrict religiously offensive, inappropriate or blasphemous speech whenever we feel that subsequent reactions to it could lead to a certain danger is also not the best solution. Such a starting point would primarily be based on the subjective attitude of the evaluating subject. This would stem from the assumption of a certain degree of probability of danger, which is uncertain in advance. At the same time, it could send a signal that the primary means of asserting one’s own opinion are not legal means, such as the election of representatives to the legislature, with whom the citizens of a certain state agree in their ideas. They also find in them a certain probability of trying to translate the private opinion of the citizen into a legal regulation. In this concept, the only important thing would be the degree of violence that the proponents of a certain belief would be willing to implement to achieve their goal.⁸⁰ Moreover, violence in this concept could become a means of preventing the exercise of freedom of speech in a completely

⁷⁶ ALMOND, G. A. – APPLEBY, R. S. – SIVAN, E. *Strong religion: The Rise of Fundamentalism Around the World*. Chicago, London: The University of Chicago Press, 2003, pp. 17, 18, 240.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ LE BON, G. *The Crowd: A Study of the Popular Mind*. In: *Project Gutenberg* [online]. 1996 [cit. 2024-09-20]. Available at: <https://www.gutenberg.org/cache/epub/445/pg445.html>.

⁸⁰ See also VIRGILI, T. *Rabczewska v. Poland and blasphemy before the ECtHR: A neverending story of inconsistency*. In: *Strasbourg Observers* [online]. 21. 10. 2022 [cit. 2023-02-15]. Available at: <https://>

legitimate way. Gradually, the restriction of freedom of expression because of the expectation of a violent or mob reaction could lead to the disintegration of a pluralistic society.

THE SERIOUSNESS OF THE INTERFERENCE WITH THE RELIGIOUS BELIEFS AND SPECIFIC CIRCUMSTANCES OF THE CASE

A certain importance in assessing the possible danger of reactions to religiously insensitive manifestations must always be attributed to the question of the seriousness of the interference with the religious belief in the context of the specific circumstances of the case. The ECtHR often subjectively perceive this question through the lens of the incomprehensible religious feelings of believers.⁸¹ However, rather than this, the assessment should be focused on the search for objective criteria.

The concept of justified indignation of believers, as used by the ECtHR in the case of *E.S. v. Austria*, cannot be a solution. Objects of religious veneration of believers, such as the Prophet Muhammad, have extraordinary significance in the lives of believers. If we were to assess the limits of freedom of expression based on whether believers of a certain religion were justifiably indignant, we would probably never be able to conclude that there was no justifiable indignation. I agree with Puppínck that, given the influence of these objects of veneration of believers, we would thus fundamentally limit expressions potentially affecting the public interest.⁸² The mentioned case of *E.S. v. Austria* concerned the labelling of the Prophet Muhammad as a paedophile at a seminar at the educational institute of an Austrian political party.⁸³ The event, which therefore had a certain political overtone, was attended by only a limited number of participants.⁸⁴ Hauksdóttir is quite right to think that, with this concept, it would be impossible to express a negative opinion about the fact that the prophet's wife Aisha was a minor at the time of marriage.⁸⁵ Existence of this marriage is nevertheless a historically substantiated fact.⁸⁶ The issue of child marriage should undoubtedly be part of the public interest. However, given the number of areas in which the faith can guide believers, the application of the concept of justified indignation could involve a full range of issues where the discussion would become problematic. We cannot exclude that this would also limit

strasbourgobservers.com/2022/10/21/rabczewska-v-poland-and-blasphemy-before-the-ecthr-a-never-ending-story-of-inconsistency/.

⁸¹ *Otto-Preminger-Institut v. Austria*, par. 56; *Murphy v. Ireland*, par. 12, 38, 75; *I.A. v. Turkey*, par. 28–30; *E.S. v. Austria*, par. 50, 57; *Rabczewska v. Poland*, par. 51, 64.

⁸² PUPPINCK, c. d., p. 106.

⁸³ *E.S. v. Austria*, par. 7.

⁸⁴ *Ibid.*, par. 8.

⁸⁵ HAUKSÓTTIR, E. Restricting Freedom of Expression for Religious Peace: On the ECHR's Approach to Blasphemy. *The European Convention on Human Rights Law Review* [online]. 2021, Vol. 2, No. 1, p. 116 [cit. 2025-03-12]. Available at: <https://doi.org/10.1163/26663236-bja10008>.

⁸⁶ ROGERSON, B. *The Prophet Muhammad: A Biography*. London: Abacus, 2004, p. 137.

expressions that represent “critical denial of the religious beliefs of believers”, which are permissible according to the ECHR.⁸⁷

Jones also draws attention to two important facts.⁸⁸ First, he asks how to determine when the indignation of believers is justified, even regarding the number of possible religions that this assessment would concern⁸⁹. As Milanovic points out, the ECtHR has not answered this question in any way.⁹⁰ Moreover, no universal approach would be possible. Ward recalls the alleged words of Jesus Christ: “*Pray for your persecutors and those who abuse you.*”⁹¹ He similarly infers that taking offence may contradict a believer’s faith.⁹² The question therefore necessarily arises as to whether, for example, Christians could even feel justified indignation. One can therefore agree with Vajda that there is no way to objectively determine whether the criterion of justified indignation is met.⁹³ Jones also considers that a violent reaction because the offending of believers could occur even if their indignation were unjustified.⁹⁴ He also fears that the distinction between: “*a belief’s being mine in the trivial sense that it is what I believe and (ii) a belief’s being mine such that what I believe in comes to belong exclusively to me*” could be blurred.⁹⁵ Such a simplification would be quite tragic if it excluded any discussion of the objects of religious veneration of believers. Moreover, as Hauksdóttir points out, indignation is quite common in everyday life.⁹⁶ She mentions, for example, various protests or acts of civil disobedience.⁹⁷ There is as such no limit beyond which restricting religiously insensitive speech through the lens of this approach would no longer be necessary in a democratic society.

The specific facts surrounding the problematic speech may be crucial in drawing a conclusion about a threat to peaceful coexistence. For example, it could be important whether the believers of the contested religion had the opportunity to effectively challenge the statements that the speech evoked. The more serious a statement is, the more visible the possibility of reaction should be given to the believers of the attacked religion. If Muslims had interpreted the massively used “*Je suis Charlie*” slogan in the context of the terrorist attack at the offices of Charlie Hebdo magazine as an attack on their identity because of the alleged connection between Islam and terrorism in some of

⁸⁷ See, e.g., *E.S. v. Austria*, par. 43.

⁸⁸ JONES, *c. d.*, p. 436.

⁸⁹ *Ibid.*, pp. 432, 436.

⁹⁰ MILANOVIC, M. Legitimizing Blasphemy Laws Through the Backdoor: The European Court’s Judgment in *E.S. v. Austria*. In: *EJIL: Talk! Blog of the European Journal of International Law* [online]. 29. 10. 2018 [cit. 2025-03-09]. Available at: <https://www.ejiltalk.org/legitimizing-blasphemy-laws-through-the-backdoor-the-european-courts-judgment-in-e-s-v-austria/>.

⁹¹ WARD, K. Third Introductory Paper. In: Commission for Racial Equality. *Law, Blasphemy and the Multi-Faith Society: Report of a seminar* [online]. Discussion Papers 1. London: Commission for Racial Equality, 1990, p. 34 [cit. 2025-03-11]. Available at: <https://www.jstor.org/stable/community.28327875>.

⁹² *Ibid.*

⁹³ VAJDA, M. M. The Right to Mock, Ridicule and Criticize Religion—Exploring The Limits of Free Speech in a Democratic and Just Society. *Gonzaga Law Review* [online]. 2020, Vol. 55, No. 2, p. 273 [cit. 2025-03-12]. Available at: <https://gonzaga-law-review.scholasticahq.com/article/12074-the-right-to-mock-ridicule-and-criticize-religion-exploring-the-limits-of-free-speech-in-a-democratic-and-just-society>.

⁹⁴ JONES, *c. d.*, p. 436

⁹⁵ *Ibid.*, p. 428.

⁹⁶ HAUKSÓTTIR, *c. d.*, p. 104.

⁹⁷ *Ibid.*

the published caricatures, representatives of this religion should have been given a space to address all those who identified with this slogan. The reaction of the religion allegedly attacked should not be limited to condemning the caricatures and the subsequent terrorist attack under the circumstances. The insulting speech and violent act were to be used as a means of greater understanding of the believers of this religion. It would be appropriate to debate the various offshoots of the attacked faith and their compatibility with the democratic character of the state.

However, it also depends on the content of the speech, which is supposed to lead to a better understanding of the suffering of believers through religiously offensive speeches. After the publication of the caricatures by Charlie Hebdo in the wake of the terrorist attack at the magazine's offices, Pope Francis said that any provocative speech insulting and ridiculing the faith of believers is incompatible with preserving the dignity of the religion under attack.⁹⁸ Although it was a speech in support of Islam and Muslims emotionally affected by the published caricatures, the content of the speech could be related to any faith. It is doubtful whether it is appropriate to utter such words in the context of the actions of homicidal maniacs masquerading as the only orthodox defenders of Islam. We can nevertheless agree with Knechtle that the Pontiff's speech was not entirely pointless.⁹⁹ On the contrary, it represented a deliberate effort to support the religion attacked by inappropriate caricatures in such a way as to discourage potential future infidels from any similar manifestations.¹⁰⁰ However, the speech in question could not contribute to the mutual understanding of the warring parties. If a religion claims to be the least offensive, inappropriate or blasphemous of speech directed against that religion in a society where it is a matter of course to provide protection to speech capable of offending, shocking or disturbing,¹⁰¹ it would be more than desirable to strive for some mutual understanding.

Therefore, if believers were allowed an adequate response in the indicated direction, they should not primarily have the need to implement themselves in ways potentially endangering peaceful coexistence. They should not feel that they are excluded from the process of forming answers to essential societal questions. In this context, it could be a question of the limits of freedom of expression and freedom of religion. The question of the extent of the possible influence of religion on society is also under consideration. It is possible to mention, for example, the question of a certain shining through of religious rules into legislation, such as when considering the introduction of marriage for same-sex couples.

⁹⁸ Pope Francis on Freedom of Speech: 'One Cannot Make Fun of Faith'. In: *NBC News* [online]. 15. 1. 2015 [cit. 2023-06-20]. Available at: <https://www.nbcnews.com/storyline/paris-magazine-attack/pope-francis-freedom-speech-one-cannot-make-fun-faith-n286631>.

⁹⁹ KNECHTLE, J. C. Blasphemy, Defamation of Religion and Religious Hate Speech: Is There a Difference That Makes a Difference? In: TEMPERMAN, J. – KOTLAY, A. (eds.). *Blasphemy and Freedom of Expression*. Cambridge, New York: Cambridge University Press, 2017, pp. 194–195.

¹⁰⁰ *Ibid.*

¹⁰¹ See, for example, *Fressoz and Roire v. France* [1999-01-21]. ECtHR, No. 29183/95, par. 45; *Nit S.R.L. v. The Republic of Moldova* [2022-04-05]. ECtHR, No. 28470/12, par. 177; *Animal Defenders International v. The United Kingdom* [2013-04-22]. ECtHR, No. 48876/08, par. 100.

However, restrictions on freedom of expression would have to be allowed in a certain case. Namely when the non-adoption of restrictive measures would lead, with a probability approaching certainty, to a situation that would be difficult to manage by the security forces of the state. But these should only be extreme cases. For example, there would be an imminent risk of civil war, or when the security forces of the state would be tied to another important large-scale event and would not be able to suppress potential violence in response to religiously insensitive manifestations. The state approaching certainty is to a certain extent conditioned by previous experience.

If a terrorist attacks and attempts to carry them out regularly occur on the territory of a country in the interest of allegedly protecting a religion, this is not a reason to restrict freedom of speech. On the contrary, freedom of expression should be allowed to the widest possible extent, even in an offensive, inappropriate or blasphemous way for the religion in question. Only in this way can a discussion be truly defined, covering even violent acts in the interest of the alleged protection of a particular religion. The situation in society may be so tense that any personal meetings of persons of different convictions will automatically lead to violence at any place where they meet. It can then be reasonably expected that if a certain religiously offensive speech is depicted, for example, in a national newspaper, such a reaction will also appear at the national level. Moreover, if local violence is only manageable with security forces from other areas of the state where there are no riots now, it is logical that in the event of potential nationwide unrest, no such addition of security forces would be considered.

The same conclusion would be offered in the case of a state that has repeatedly faced extremely serious religiously motivated violent attacks in the past, always following the realisation of a religiously insensitive speech consisting in the depiction of a historically significant figure of a given religion. However, the second condition for restricting freedom of expression in this case would be that such a state is paralysed by a natural disaster at the time of such speech and thus cannot make the necessary efforts to protect the lives, health and property of people. These would most likely be endangered if restrictive measures were not adopted. In the absence of such exceptional situations, it would still be possible to consider restricting freedom of expression due to a fear of violent reactions in a situation where a religiously offensive speech was made in a newly emerging democratic state. The population of such a state does not yet have the belief that the appropriate response lies in the use of legal means, such as freedom of expression or freedom of assembly. Not restricting freedom of speech should therefore be the rule even if we assume a violent reaction to a religiously insensitive speech.

CONCLUSION

The ECtHR, when evaluating religiously insensitive speech, does not pay sufficient awareness to the characteristics of the speech and the potential importance of such speech for society. The ECtHR uses the protection of religious peace as a legitimate reason for restricting freedom of expression. It associates this concept with the protection of the religious feelings of believers. This approach can cause speech

restriction to be sanctioned, even when the subject of the speech is an issue of fundamental importance to society.

In assessing religiously insensitive speech, one cannot limit oneself to the question of the possible danger of violent or mass reaction to such a way of exercising freedom of expression. As the real example of the perception of the Danish cartoons of the Prophet Mohammed showed, there can be several circumstances that can cause situations dangerous for a democratic state. The offensive speech itself can play a completely marginal role in the possible emergence of danger. Therefore, even if we know from experience that a particular religiously offensive speech is usually met with criminal activity, we should not limit our assessment to taking this fact into account. It is necessary to consider other circumstances of the case, for example, the place and time of the speech or the content of the speech. In the context of the Danish cartoons of the Prophet Mohammed we should take into consideration contribution of Danish imams, the nature of caricature or a socially valuable purpose of the speech. This is the only way to properly ensure a fair balance between the interests of society and the requirements for the protection of human rights and freedoms.

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