

New offence in the Danish penal code: inappropriate treatment of the holy text (Stefano Testa Bappenheim)

Following the recent Koran burnings, Denmark has legislated by introducing an ad hoc provision in its penal code.

According to the new provision contained in Article 110e, paragraph 2, of the Copenhagen Penal Code, therefore, it is an offence for ‘anyone who, publicly or with the intention of disseminating it to a wider circle, is guilty of inappropriate treatment of a writing that has significant religious significance for a recognized religious community, or of an object reproducing or referring to such a sacred text’.

Until now, the reference legal framework was Article 110 sexies of the penal code, Article 266 bis of the penal code and Article 139 paragraph 2 of the penal code.

According to 110 sexies: ‘anyone who publicly insults a foreign nation, a foreign state, its flag or other recognized national emblem, or the flag of the United Nations or the European Council (hereinafter: the EU) shall be punished by a fine or imprisonment of up to two years’; for Art. 266 bis of the Criminal Code, then, it is punishable “whoever, publicly or with the intent to disseminate to a wider circle, makes a statement or formulates another message whereby a group of persons is threatened, mocked or humiliated on account of their race, color, national or ethnic origin, convictions, disability, sexual orientation, gender identity or other characteristics of the group to which they belong: also here, fine or imprisonment of up to two years”.

For Article 266 bis of the Criminal Code to apply, however, it is necessary for the statement or message to be made publicly or with the intention of making it widely known, and in addition the statement must be threatening, mocking, or denigrating in nature.

Finally, Article 139(2) of the Criminal Code states that: “anyone guilty of indecent treatment of things belonging to a confessional body and used for ecclesiastical use shall be punished by a fine or imprisonment of up to six months”.

This provision, however, only applies to *res sacrae* belonging to a confessional body, and not also to those owned by the offender himself (who, therefore, could purchase a sacred object or text and vilify it), and likewise it is necessary for the vilified objects to be used for religious or cult use (it is therefore necessary for the vilified object, if it has no intrinsic sacred value, to be inside a cult building).

In principle, therefore, until now it was not punishable under the Criminal Code to publicly burn, for example, a Koran or another religious text, which was not the property of a religious body, unless this took place in circumstances in which a group of people were simultaneously threatened, mocked, or humiliated on account of their faith, in accordance with Article 266 bis of the Criminal Code.

The legislative innovation has thus introduced a provision into the Criminal Code that makes such insults, such as the public burning of the Koran, criminally relevant, protecting writings with a religious significance relevant to registered religious communities, as recognized by the Religious Communities Act (Act No. 1533 of 19 December 2017 on Religious Communities outside the National Church, as amended).

The provision will apply to writings with relevant religious significance, i.e. texts that, within the faith tradition in question, are considered particularly relevant because of their inherent sacredness or the teachings they contain, so that a text used for religious reasons or as an ancillary part of an act of worship, such as a generic hymnbook to accompany religious services, will not be protected per se, nor will writings that, for cultural or political reasons, are related but not central to the profession of faith to which they relate.

The definition of ‘inappropriate treatment’ evidently includes not only the burning of the sacred text, but also cases where it has been trampled, kicked, soiled, torn, cut into pieces, etc.

According to Danish case law, therefore, the decisive factor will be whether the treatment in question can be considered inappropriate from a general social point of view: wrapping a sacred text in pork is therefore, for example, considered inappropriate, regardless of the religious affiliation of the scripture, whereas, on the contrary, wrapping it in a rainbow flag will not constitute inappropriate treatment.

The provision only covers inappropriate treatment of physical writings, so verbal or written statements are excluded, and criticism of religion expressed even in a heated manner remains free.

Similarly, artistic performances remain free, if the otherwise inappropriate treatment constitutes a minor part of an overall larger artistic work, whereas an artistic work that has inappropriate treatment as its sole or central component will be prohibited: it follows, therefore, that it will not be punishable to burn a sacred text in a movie, nor will it be punishable to tear it up in a concert, opera or play that develops a story in which mistreatment of a sacred text is reasonably related (e.g. a film about Nazism in which there is mistreatment of Jewish sacred texts), while

movies, concerts, etc., in which the mistreatment of the sacred text is an end in itself will be prohibited.

This new provision respects Article 77 of the Danish Constitution, according to which everyone has the right to publish their thoughts in the press, in writing and in words, subject to legal limits for cases of defamation, etc.

With regard, then, to Article 10(1) of the ECHR, according to which everyone has the right to freedom of expression, Strasbourg case law has made it clear that this freedom does not include statements that threaten or incite violence, nor those that express extreme hatred or insults against other groups of people, identified on a religious basis.

It is true that the protection of freedom of expression encompasses not only the content of the ideas and opinions expressed, but also the form in which they are communicated (*affaire De Haes et Gijssels v. Belgium*, no. 48), but the protection of freedom of expression under Art. However, the protection of freedom of expression within the meaning of Article 10(2) ECHR is not absolute: limits may be imposed if they are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, to prevent disorder or crime, to protect health or morals, to protect the name, honor or rights of others, to prevent the dissemination of confidential information and, finally, to ensure the authority and impartiality of the judiciary.

It follows that the exercise of the right to freedom of expression entails duties and responsibilities which, in relation to expressions of religious belief, include the duty to avoid, as far as possible, offensive, and blasphemous expressions in relation to objects treated with reverence by others (*affaire Wingrove v. Royaume Uni*, no. 52).

However, the Strasbourg Court, at the same time, recognizes that freedom of expression protects criticism, even very harsh criticism, of religion if it is a matter of public interest and if the statements in question cannot be considered blasphemous or unnecessarily offensive (*affaire Tagiyev et Huseynov v. Azerbaïdjan*, nos. 42-50, and *affaire Yefimov et alii v. Russie*, nos. 40-48), and in each case establishes that a State has a wide margin of appreciation in assessing individual cases.

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Parole chiave:
Commenti:
Data creazione: 15/12/23 18:30:00
Numero revisione: 7
Data ultimo salvataggio: 15/12/23 18:37:00
Autore ultimo salvataggio: Testa Bappenheim Stefano
Tempo totale modifica 5 minuti
Data ultima stampa: 15/12/23 18:40:00
Come da ultima stampa completa
Numero pagine: 3
Numero parole: 1.219
Numero caratteri: 6.324 (circa)