GHENEFF - RAMI - SOMMER
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To the
Grand Chamber
European Court of Human Rights
Council of Europe
F-67075 Strasbourg cedex France

22.01.2019/2/27

AZ 221/12 – please always indicate

App. no. 38450/12

Applicant: **Elisabeth Sabaditsch-Wolff**
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regarding: **Article 10 ECHR**

Request for referral of the case to the Grand Chamber of the European Court of Human Rights (Article 43 ECHR)

Contents

1. Facts

1 The applicant was convicted of publicly "denigrating a person who is an object of veneration", namely "Muhammad" the Prophet of Islam, **in a way likely to arouse justified indignation**, in violation of Article 188 of the Austrian Criminal Code.

2 The contentious remarks were made during a series of lectures entitled "Basic Knowledge on Islam" at the Institute of Education of the political party "Bildungsinstitut Freiheitlichen der Partei Österreichs" (FPÖ, the Austrian Freedom Party), which had thirty participants.

3 **The applicant was alleged in substance to have said that Mohammad had pedophile tendencies (he "enjoyed doing it with children") because he married a girl of six (Aisha) and consummated that marriage when she was nine – which is, according to the majority of traditional hadith sources, an accepted fact.**[1]

4 The applicant had **not** been advocating violence, hate or discrimination against Muslims. Quite the contrary, the Courts **acquitted** her of the initial charge of *Incitement to Hatred* (Article 283 of the Austrian Criminal Code).

5 A criminal case was initiated by the Prosecutor of Vienna, **following a complaint from a journalist**.

6 The Regional Court of Vienna on 15 February 2011, distinguishing between child marriage and pedophilia, considered that the applicant intended to wrongfully accuse Muhammad of having pedophile tendencies, that her remarks were not factual but offensive value judgments, beyond permissible limits, made without the intention of approaching the topic objectively but to denigrate Muhammad. Sanctioning such remarks was considered "necessary" to protect the religious sensibilities of Muslims and "religious peace" in Austria. The applicant was ordered to pay 480 euros or serve sixty days in prison in default of payment.

[1] Sahih Bukhari, Volume 7, Book 62, Hadith 64: „Narrated 'Aisha: that the Prophet married her when she was six years old and he consummated his marriage when she was nine years old, and then she remained with him for nine years (i.e., till his death)."

7 The Court of Appeal of Vienna, on 20 December 2011, rejected the appeal of the applicant, saying her remarks showed her intention to denigrate and ridicule Muslims unnecessarily, exceeding, according to the Court, the permissible limits of freedom of expression regarding religious belief or a person who is an object of worship.

8 The Supreme Court, on 11 December 2013, upheld the judgment of the Court of Appeal. It held that the interference pursued the legitimate aim of ensuring the protection of religious peace and the religious feelings of others. It concluded that in this case the remarks were not intended to help open a serious debate, but simply to defame Muhammad and portray him as unworthy of worship. A criminal conviction was therefore considered necessary in a democratic society within the meaning of Article 10 of the Convention.

9 By judgment of 25 October 2018, no. 38450/12, the Fifth Section of the European Court of Human Rights (ECtHR) held that the applicant's complaint was admissible, **but that there was no violation of Article 10 ECHR**.

2. Legislation concerned

2.1 Article 10 ECHR

10 Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to § 2 of Article 10 ECHR, it 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.[2] The ruling of 25 October 2018 constitutes an ideological straitjacket in that it proscribes the mention of factual occurrences. Yet the quest for and treatment of historical truth indisputably involve freedom of speech. Article 10 ECHR protects not only the substance of the ideas and information expressed but also the form in which they are conveyed. This freedom is subject to the exceptions set out in Article 10 § 2 ECHR, which must,

[2] ECtHR 7.12.1976, *Handyside v. United Kingdom*, No.5493/72; ECtHR 23.5.1991, *Oberschlick v Austria*, No.11662/85; ECtHR 26.2.2002, *Unabhängige Initiative Informationsvielfalt v. Austria*, No.28525/95.

however, be construed strictly.[3]

11 According to the generally accepted jurisprudence of the ECtHR, people involved in public life can legitimately be the subject of more critical remarks. To this category of "public figures" belong also legal persons and communities such as religious communities.[4]

12 The right to freedom of expression can however be restricted when it is necessary in the spirit of a democratic society.

13 This necessity requires an **essential social demand** for a restriction of this sort. The exceptions to article 10 section 2 ECHR are therefore to be interpreted very narrowly.[5]

2.2 Article 9 ECHR

14 Article 9 ECHR protects the right of every person to practise his religion freely.

15 It is possible for two freedoms of the ECHR to clash. In such cases, the national authorities are obliged to carry out a particularly precise balancing of interests.[6]

2.3 Balancing Article 10 ECHR and Article 9 ECHR

16 It has been argued that the necessity of restriction of rights guaranteed by Article 10 should be balanced and examined with regard to the provisions of Article 9. However, what Austria invokes is the theoretical emotional reaction of a hypothetical listener. Let us observe, however, that no Islamic organization became involved in the case and that the proceedings emanated solely from the Austrian Prosecutor's office on the instigation of journalists politically opposed to the Freedom Party.

17 In other words, it is a contrived legal case: not a single fact has been proven to es-

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[3] ECtHR 7.12.1976, *Handyside v. United Kingdom*, No.5493/72; ECtHR 25.3.1985, *Barthold v. Germany, No.8734/79*; ECtHR 12.7.2001, *Feldek v. Slovakia*, No.29032/95.

[4] ECtHR 8.7.1986, *Lingens v. Austria*, No.9815/82; ECtHR 12.7.2001, *Feldek v. Slovakia*, No.29032/95, ECtHR 25.1.2007, *Association of visual artists v. Austria*, No.68354/01.

[5] ECtHR 8.7.1986, *Lingens v. Austria*, No.9815/82; ECtHR 23.9.1998, *Lehideux et al v. France*, No.24662/94, ECtHR 25.11.1999, *Nilsen et al v. Norway* No.23118/93; ECtHR 12.7.2001, Feldek v. Slovakia, No.29032/95.

[6] OGH 15.2.2017, 15 Os 82/16x.

tablish that a problem threatening religious peace occurred. The repressive sanction therefore constitutes an unjustified interference by the public authorities in freedom of speech in general terms as well as in the freedom to criticize all religions, including Islam. The objective pursued by the Austrian public authorities was therefore neither legitimate nor necessary.

18 The Fifth Section attempted to embark on an exercise of balancing the applicant's Article 10 rights with the Article 9 rights of unnamed persons (as did the Austrian courts). However, it is questionable as to whether such cases should be seen as involving a 'clash' that needs to be balanced. As one leading academic has stated,

> A fallacy lies at the heart of the ECtHR's anti-religious speech jurisprudence: that cases of this kind involve clashes between freedom of expression and religious liberty. For the most part, however, the religious offence caused by such attacks does not prevent or deter anyone from believing as they choose, or practising or manifesting their religious beliefs. The Strasbourg Court's tendency to expand the scope of Article 9 by reference to illusory rights to 'respect' or 'peaceful enjoyment' of freedom of religion risks unbalancing the Convention scheme and reading-in a right not to be offended where none is present in the text. When freedom of religion is properly understood, it is confined to tangible harm to specific victims. It follows that there is generally no clash between it and freedom of expression in most religious offence cases.[7]

19 This is the inevitable result when a tribunal seeks to decide, on a case by case basis, what is offensive, in what settings, when directed at whom, and through what means of publication. There exists no legal certainty and the effect is a regrettable chilling of freedom of expression.

20 This case presents the Grand Chamber with the opportunity to revisit its jurisprudence and re-establish the high bar of 'necessity' as set out in the ECHR in the context of freedom of expression. Given there is no specific individual whose Article 9 rights are said to have been violated by the applicant, given the political training context of the impugned statements, and the factual basis advanced, the case provides a stable point of departure for a new line of decisions which will provide greater legal certainty and clarity in the Court's jurisprudence, while affording appropriate

[7] Ian Leigh, "Damned if they do, damned if they don't: the European Court of Human Rights and the protection of religion from attack" (2011) 17 (1) Res Publica 55, 70.

protection to the rights protected by Article 10.

21 If, however, the Court is minded to follow certain previous decisions, expressions can only be restricted on the basis of religious feelings, under one line of cases, when they are gratuitously offensive or constitute baseless blasphemy.[8]

22 In the Otto-Preminger case in 1994, the ECHR ruled that the broadcast of a film constituting "an abusive attack against the Roman Catholic religion" could be banned (§ 56). Similarly, in the I.A. v. Turkey case, the ECHR accepted a sanction for an "abusive attack against the person of the Prophet of Islam", saying that Muslims could "legitimately" feel themselves to be objects of "unwarranted and offensive" attacks by certain passages of the article (§ 29). The ECHR considered that the conviction was "intended to provide protection against offensive attacks on matters regarded as sacred by Muslims" (§ 30).

23 In fact, what these cases have in common is sexually portraying people who are objects of worship. Thus, the protection of members of a religious community seems legitimate against obscene portrayals that have a very aggressive sexual connotation, particularly in the context of a public display. The case-law of the Court distinguishes obscenity, which generally has a sexual connotation (Otto Preminger, Wingrove and I. A. v. Turkey) from debates (Giniewski). According to the applicant in this case, this means that under this line of decisions, propagation of gratuitously offensive and unnecessary obscenities can be restricted; the rest should be tolerated.

3. Admissibility of a request for referral to the Grand Chamber of the ECtHR

3.1 General

24 A request for referral to the Grand Chamber of the ECtHR is admissible in exceptional cases (Article 43 § 1 ECHR). Such exceptional cases are either **serious questions affecting the interpretation or application** of the Convention or the protocols thereto or **serious issues of general importance** (Article 43 § 2 ECHR).

[8] ECtHR 20.09.1994, *Otto-Preminger-Institut v. Austria*, Nr. 13470/87.

25 A serious question affecting the interpretation or application of the Convention or the protocols thereto exists when the Court has not yet ruled regarding a point of law of this sort or when it has **with its ruling deviated from its previous jurisprudence**. Cases may also qualify where they are suitable for **the further development of the jurisprudence**.[9]

26 A serious question of general importance is present when the answer thereto is fundamental for the current political situation or as presenting an important issue of policy.[10]

27 As is to be shown, this request is admissible and justified in terms of its content.

3.2 Serious issues of general importance, also affecting the interpretation of the Convention

28 The approach of this Court has not been consistent in evaluating claims of freedom of expression in this context. The general trend has been for the ECtHR to extend legal protection to all those who have expressed themselves "in blasphemical manner" regarding Christianity[11], but evidently applies other, stricter standards of judgment with respect to Islam. This gives rise to a serious question affecting the interpretation of the Convention and this ambiguity ultimately leads to a chilling of the fundamental right to freedom of expression.

29 The judgment in this case also raises a serious issue of general importance because it places as a positive obligation the objectives of "mutual tolerance" and "peaceful coexistence" (unlisted in the ECHR as they are), over freedom of thought and expression. This has the practical effect of muzzling criticism of Islam in the name of living together.

30 It is therefore significant that this stands in contrast with the position of a wide array of other international bodies dealing with fundamental rights. As far back as 2007, in

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[9] ECtHR 18.10.2006, *Üner v. Netherlands*, No.46410/99; ECtHR 15.05.2007, *Ramashai et al v. Netherlands*, Nr. 52391/99.

[10] Explanatory report regarding protocol No. 11, section 102.

[11] ECtHR 17.07.2018, *Mariya Alkehina et al v. Russia*, No.38004/12, ECtHR 30.01.2018, *Sekmadienis Ltd v. Lithuania*, No.69317/14.

its recommendation no. 1805, the Parliamentary Assembly of the Council of Europe adopted the following position: "the Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence."[12] Similarly, the Venice Commission, in its Study 406/2006 of 23 October 2008 concluded "in the Commission's view…criminal sanctions are inappropriate in respect of insult to religious feelings and, even more so, in respect of blasphemy."[13] Further, the European Parliament, in its Resolution of 27 February 2014, considered that blasphemy laws "can have a serious inhibiting effect on freedom of expression and on freedom of religion or belief; recommends that the Member States decriminalise such offences".[14]

31 Furthermore, the UN Human Rights Committee was, in its 102nd session and General Comment No. 34, critical of criminal sanctions of this sort. Similarly, the Special Rapporteur on Freedom of Expression, Frank La Rue, affirmed in his report regarding the promotion and protection of the right to freedom of speech, which was presented to the Human Rights Council according to resolution 16/4, A767/357, that it is crucial to examine precisely the context of the remark in order to establish whether there is the risk of a clear and present danger of violence.[15]

32 At a national level, Ireland has only recently voted regarding the abolition of the law of blasphemy. The decision was clear: 69% voted for the abolition of the law. This is now a topic of much discussion internationally and considered to be a step in the "right" direction.[16]

33 The judgment in this case, on the other hand, is a clear step backward since, as discussed, incomprehensibly strict standards were applied to the applicant.

34 A criminal conviction should constitute the ultima ratio. The remarks of the applicant per se as well as the chosen form and accessibility demonstrate the clear disproportionality of the response of the authorities.

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12 Recommendation 1805 (2007)

13 Venice Commission Study 406/2006 of 23 October 2008, para. 92.

14 European Parliament resolution of 27 February 2014 on the situation of fundamental rights in the European Union (2012).

15 ECtHR 17.07.2018, *Mariya Alkehina et al v. Russia*, No.38004/12.

16 https://www.deutschlandfunk.de/blasphemie-abstimmung-in-irland-keine-angst-vor-gott.886.de.html?dram:article_id=431563

35 The judgment in this case is certainly ground-breaking for Europe: the question is whether the ECtHR will follow the general tendency towards the abolition of blasphemy laws and therewith the delimiting of freedom of speech, or whether freedom of speech should remain restricted.

36 In addition to the clear legal relevance of the decision, the important and pressing nature of the questions raised in this case can be seen in the worldwide reaction to the judgment. This makes clear the fact that this ruling raises a serious question of general interest, even a global one.

37 Immediately after the publication of the judgment, the decision was internationally criticised in a broad range of places. Among others, Simon Cottee (visiting professor in the Faculty of Law at the University of Copenhagen) published an article in *The Atlantic* entitled "A Flawed European Ruling on Free Speech"[17], Sohrab Ahmari in *Commentary Magazine* argued that "The [ECtHR] is suggesting that discussing the history of Islam…is *not* in the 'public interest'",[18] and *The Economist* reported that "Blasphemy bans are struck out in Ireland and reinforced in Austria".[19]

38 It is clear therefore that this case raises a serious issue of general importance, and that it further raises a serious question affecting the interpretation of the Convention.

3.3 Time limit for a request for referral to the Grand Chamber of the ECtHR

39 Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber (Article 43 § 1 ECHR).

40 The request is therefore timely.

3.4 Permissible limitations on rights protected by the ECHR:

[17] See Appendix, below.

[18] See Appendix, below.

[19] Economist, "Blasphemy bans are struck out in Ireland and reinforced in Austria", 29 October 2018, https://www.economist.com/erasmus/2018/10/29/blasphemy-bans-are-struck-out-in-ireland-and-reinforced-in-austria

41 The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.[20]

42 Any interference with a legally protected right is subject to a rigorous examination and requires the following preconditions:

- Prescribed by law;
- Legitimate aim;
- Necessary in a democratic society;
- Proportionality.

3.4.1 "Prescribed by law"

43 The applicant does not dispute that the interference was "prescribed by law".

3.4.2 "Legitimate aim"

44 The Court endorsed the Austrian Government's assessment that the impugned interference pursued the aim of preventing disorder by safeguarding religious peace, as well as protecting religious feelings, which corresponds to protecting the rights of others within the meaning of Article 10 § 2 of the Convention (§ 41 of the judgment).

45 This has been criticized by Marko Milanovic:[21]

> While the applicant stressed that her remarks had never been aimed at disparaging Muhammad, she did not dispute the legitimate purpose of criminal convictions under Article 188 of the Criminal Code, namely to protect religious peace. The Court endorses the Government's assessment that the impugned interference pursued the aim of preventing disorder by safeguarding religious peace, as well as protecting religious feelings, which corresponds to protecting the rights of others within the meaning of Article 10 § 2 of the Convention.

[20] ECtHR 13.5.1980, *Artico v. Italy*, No. 6694/74; ECtHR 24.6.2004, *Von Hannover v. Germany*, No.59320/00.

[21] https://www.ejiltalk.org/legitimizing-blasphemy-laws-through-the-backdoor-the-european-courts-judgment-in-e-s-v-austria/

Look carefully what happens here: 'religious peace' and 'religious feelings', which are not mentioned as legitimate aims for the limitation of the freedom of expression in Article 10(2) of the Convention, become such under the guise of 'protecting the rights of others.' According to the government's own formulation of these aims, which, recall, is expressly endorsed by the Court (para. 36):

Article 188 of the Criminal Code did not prohibit critical or offensive remarks about a church or religious community per se, but merely regulated the manner in which such remarks could be made. As the explanatory notes on the Government bill (Erläuternde Bemerkungen zur Regierungsvorlage, RV 30 BlgNR XIII. GP, pg. 326 et seq.) stated, the primary purpose of that provision was to protect religious peace, which was an important element of general peace within a State. Religious peace was to be understood as the peaceful co-existence of the various churches and religious communities with each other, as well as with those who did not belong to a church or religious community. The Government concluded that the applicant's criminal conviction had pursued the legitimate aim of maintaining order (protecting religious peace) and protecting the rights of others (namely their religious feelings).

Note the first confusing point about how the purpose of the Austrian law was not to regulate the content of criticism of religion, but the manner in which such criticisms were made. But this case is precisely about the content of the applicant's message, rather than the manner of its expression – again, she did not go to a mosque or shout directly into a devout Muslim's face about Muhammad's supposed moral failings. The problem with her speech was that she didn't simply say that Muhammad had intercourse with a child (arguably true), but that he was by his general proclivities a pedophile (false). 'Religious peace' is then defined not simply as an absence of violence – which the applicant's remarks were not held to provoke in the first place – but as some more nebulous idea of peaceful co-existence. Then, finally, a person's religious feelings are neatly subsumed under the person's rights, i.e. I have a right for my religious feelings not to be hurt. And all this, right or wrong, is simply taken by the Court at face value, without any kind of critical reflection.

46 The argument that § 188 of the Austrian Penal Code does not prohibit blasphemy, but only expressions which are likely to excite justified indignation, is not viable, as Anastasia Colosimo emphasises:[22]

The difficulty lies in the translation process which, in most European countries, shifted the understanding of blasphemy from an insult to a deity, to an insult to believers or a

[22] https://www.institutmontaigne.org/en/blog/blasphemy-france-and-europe-right-or-offense

breach of the public order. The concept of "preservation of religious peace" defended by the ECHR in its judgment must thus also be understood from the perspective of the preservation of public order. **The word "blasphemy" mostly disappeared from European legislation, yet it has been translated into secular terms, which has often made it possible to perpetuate its condemnation by other means.** […] The translation process, which the European Court, like many European courts, seems to be completely fooled by, is still at stake here. It is true that the argument is subtle. **By stripping the offense of blasphemy of any religious character, faith groups have achieved a masterstroke.**

47 Marko Milanovic takes a very similar view:[23]

The Court reiterates that a religious group must tolerate the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith, as long as the remarks at issue do not incite hatred or religious intolerance. Article 188 of the Criminal Code (see paragraph 24 above) in fact does not incriminate all behaviour that is likely to hurt religious feelings or amounts to blasphemy, but additionally requires that the circumstances of such behaviour were able to arouse justified indignation, therefore aiming at the protection of religious peace and tolerance. The Court notes that the domestic courts extensively explained why they considered that the applicant's remarks had been capable of arousing justified indignation, namely that they had not been made in an objective manner aiming at contributing to a debate of public interest, but could only be understood as having been aimed at demonstrating that Muhammad was not a worthy subject of worship (see paragraph 22 above). The Court endorses this assessment.

This is probably the single most important paragraph of the judgment, and also the one most internally inconsistent. The Austrian law is not a blasphemy law, says the Court, because it not only requires that a remark offends or hurts religious feelings but also that the remark was able to arouse 'justified indignation' in the followers of the religion in question (just by the way, recall that in this case the criminal complaint against the applicant was not brought by any Muslim faithful, but by a newspaper). It is entirely unclear what, in the Court's view, makes real or hypothetical indignation justified or not. Imagine if the applicant did not accuse Muhammad of being a pedophile, but simply said that 'Muhammad is not a worthy subject of worship' (even if, again just by the way, Muslims do not actually worship Muhammad). Would the indignation suffered by any Muslim believer now somehow not be justified?

[23] https://www.ejiltalk.org/legitimizing-blasphemy-laws-through-the-backdoor-the-european-courts-judgment-in-e-s-v-austria/

[…]

> The Court's attempt to distinguish the Austrian law from blasphemy is completely unpersuasive – every blasphemous utterance could easily be said to cause indignation in the faithful, and the supposed justifiability of that indignation is an entirely subjective standard. Note also how this goes beyond the Otto-Preminger-Institut's insistence on the 'gratuitously offensive' nature of the expression, unless the justifiability standard is simply reduced to the test from that case (which the Court does not seem to be doing, at least not expressly).

3.4.3 "Necessary in a democratic society"

48 The test of necessity means, according to the jurisprudence of the ECtHR, that the measure corresponds to a pressing social need.[24] In the examination of this need, the ECtHR therefore always examines whether the legitimate aim is in in danger, and whether such a danger means that it is absolutely necessary to act.[25] In addition thereto, the measure specifically used must be that which is also actually necessary. This is based on the idea that the measure is supposed to constitute a fair compensation for the injury sustained.[26] In judging all these questions, the states are subject to the control by the ECtHR despite their margin for discretion.[27]

3.4.4 Proportionality

49 As is the case in any restriction of a basic right, prior to the restriction, an intensive test must take place of the proportionality between the interference with the right and the objective pursued.[28]

50 The jurisprudence of the ECtHR has principally shown that this proportionality test is to be especially strictly carried out when the interference is a **criminal** penalty.[29]

51 The margin for discretion which is permitted to the individual member states in paragraph 2 of Article 10 ECHR is per se already very small. However, it becomes still

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24 ECtHR 30.05.2013, *Malofeyeva v. Russia*, Nr. 36673/04.
25 ECtHR 09.07.2013, *Vona v. Hungary*, Nr 35943/10.
26 ECtHR 30.05.2013, *Malofeyeva v. Russia*, Nr. 36673/04.
27 ECtHR 14.12.2010, *Hadep et al v. Turkey*, No.28003/03.
28 ECtHR 7.12.1976, *Handyside v. United Kingdom*, No.5493/72.
29 ECtHR 7.12.1976, *Handyside v. United Kingdom*, No.5493/72.

smaller when restrictions in political discussion or affairs of public interest are concerned. In such cases, there is de facto no room for restrictions provided regarding the importance of being able to freely express critical remarks to the public in a democratic society[30].

4. Deviations from the previous jurisprudence

52 For the judgment of so-called "blasphemy offences", the ECtHR has established several essential principles.

4.1 Public realm

53 Already in the case Otto-Preminger-Institut v. Austria the ECtHR ruled that it is to be considered **which public had access to the content**:

> It is true that no particular restrictions of access were foreseen for the projection of the film on 13 May 1985 at 22.00 h. However, as the applicant association has emphasised, its "cinema of art" addressed a specially interested public, an admission fee was charged and in view of the late hour it was unlikely that any small children would attend. Most important of all, a warning was given to the public as to the contents of the film in the above-mentioned public announcement, which in the Commission's view sufficiently described what was to be expected without itself giving rise to offence.[31]

54 Although no measures were taken by the applicant himself at the time to restrict the "public", the court found that there were external circumstances which effectively governed who has access to certain content, and that these are to be taken into consideration during the necessity test in the case of an interference with Article 10 ECHR.

55 Thus, in the case *Otto-Preminger-Institut v. Austria* the screening in a cinema identified as a "cinema of art" was already sufficient for the ECtHR to consider that the viewers of the film would view critical content in a more tolerant manner and are therefore more difficult to offend.

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[30] ECtHR 25.11.1996, *Wingrove v. United Kingdom,* No.17419/90; ECtHR 25.11.1999, *Nilsen et al v. Norway*, § 23118/93; ECtHR 12.7.2001, *Feldek v. Slovakia*, No.29032/95; ECtHR 2.11.2006, *Kobenter et al v. Austria*, No.60899/00.

[31] ECtHR 20.09.1994, *Otto-Preminger-Institut v. Austria*, No.13470/87 (§ 77).

56 In the present case, a test of this sort was not carried out by the ECtHR. The ECtHR ruled in § 51 of its decision only that the seminar was publicly advertised and membership of the organizing party was not a condition for participation. For this reason, it must have been clear to the applicant that she would not only find "like-minded people" in the room:

> The Court notes that the domestic courts considered the applicant's remarks as having been made "public" (see paragraph 14 in fine above). Indeed, the seminars were widely advertised to the public on the Internet and via leaflets. The latter were sent out by the head of the right-wing Freedom Party, addressing them especially to young voters and praising them as "top seminars" in the framework of a "free education package". The applicant's intervention was entitled "Basic information on Islam" and was meant to be a critical analysis of Islamic doctrine, allowing for a discussion with the participants of the seminars. The title gave the – in hindsight misleading – impression that the seminars would include objective information on Islam. It appears that anyone interested was able to enrol; there was no requirement to be a member of the Freedom Party. The applicant therefore could not assume that there would only be like-minded people in the room who would share her very critical views of Islam, but had to expect that there could also be people among the audience who might be offended by her remarks. It is of little relevance that only thirty people attended on average. The applicant's remarks were in fact recorded by a journalist, who had participated in the seminar, and whose employer subsequently reported them to the public prosecutor (see paragraph 9 above).

4.1.1 Definition of "like-minded people"

57 The ECtHR has neglected to define which meaning should be accorded in the present case to "like-minded people". In particular, it has not been clearly explained why the subject of "like-minded people" cannot also be taken into consideration in just the same way in reverse.

58 As the Court obviously very well appreciates, the Austrian Freedom Party stands for a specific attitude which is not further defined in the present case. The applicant must have been aware that not all participants in the seminar necessarily share this attitude. It leaves the question open, however, as to why people who were interested in this seminar should not themselves have reckoned with finding an apparently "more critical" approach with the subject of "Islam". In that sense, even those who were not necessarily like-minded had willingly attended a seminar in this particular context. Thus, these were more difficult to offend in this regard.[32]

[32] ECtHR 20.09.1994, *Otto-Preminger-Institut v. Austria*, Nr. 13470/87.

59 It is correct that the event was publicly advertised, since it could be found online. However, when one now takes into account the consideration of "like-minded people", it is to be assumed that it was actually only a very restricted group of people, that is, people who were interested in the Austrian Freedom Party, who even acquired knowledge of the seminar.

4.1.2 Actual injury to religious feelings

60 Disregarded by the Fifth Section, in this context, is also the fact that the informant was an undercover journalist who by definition took part in this seminar with another intention.

61 If one disregards this informant in the group of participants, there remain around 30 persons who did not feel offended, because they either must have belonged to the "like-minded people" (see above), or with their knowledge of the organiser reacted from the very start with a greater degree of tolerance to possible critical remarks.

62 The remarks only became public – in the sense of a broad general public – when the journalist published them in a printed medium, the newspaper NEWS. As was discovered in the proceedings before the Austrian courts, the journalist had arbitrarily strung together remarks of the applicant "for journalistic reasons", which were per se absolutely harmless, and thus drew a distorted picture of the applicant and her remarks. The applicant was for this reason acquitted with respect to almost all remarks, apart from the three which form the present subject-matter.

63 The Court has left this aspect entirely disregarded in its judgment regarding the "public realm".

64 As also discussed in *I.A. v. Turkey*[33], it is indispensable for the proportionality test to clarify how public the remark actually was in practice. The Court therefore in its deliberations indeed regularly distinguishes cases on the basis of to whom the remark was actually made.

4.1.3 To be able to evade

[33] ECtHR 13.09.2005, *I.A. v. Turkey*, No.42571/98, joint dissenting opinion of Judges Costa, Cabral Barreto and Jungwiert (§ 5).

65 In *I.A. v. Turkey* it was argued in a dissenting opinion that in judging the "public realm", a relevant factor is whether any random person could be confronted with the content or whether an autonomous decision of the person was necessary for this to happen:[34]

> Moreover, nobody is ever obliged to buy or read a novel, and those who do so are entitled to seek redress in the courts for anything they consider blasphemous and repugnant to their faith – in other words, a breach of their rights under both Article 9 and Article 10, paragraph 2, of the Convention. But it is quite a different matter for the prosecuting authorities to institute criminal proceedings against a publisher of their own motion in the name of "God, the Religion, the Prophet and the Holy Book" (see paragraph 6 of the judgment); a democratic society is not a theocratic society.

66 This argument was also taken up in the case of *Mariya Alkehina et al v. Russia.*[35]

67 The Court discussed the fact that the **selection of the location**, defined by its functionality (the Christ Redeemer Cathedral in Moscow), can absolutely require compliance with certain rules of conduct.

68 Even the Russian national authorities had already argued that in this case the external circumstances were of particular weight. A critical remark at any publicly accessible place is to be differently evaluated from remarks made in this particular church.

69 Further, the ECtHR assumed that the rules of conduct recognised in this case were not adhered to and that for this reason a protection of the freedoms mentioned in Article 9 ECHR could be warranted.

70 The court furthermore found that at the relevant time of the crime neither was a service taking place in the Christ Redeemer Cathedral in Moscow, nor were several persons present in the interior of the church, and thus there was no injury to persons or ecclesiastical property.

71 Again, the Court took into account the **actual** circumstances and not the simple **possibility** that the wider public could have experienced that which took place in the Cathedral in Moscow.

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[34] ECtHR 13.09.2005, *I.A. v. Turkey*, No.42571/98, joint dissenting opinion of Judges Costa, Cabral Barreto and Jungwiert (§ 5).

[35] ECtHR 17.07.2018, *Mariya Alkehina et al v. Russia*, No.38004/12.

4.2 Selection of the medium

72 The ECtHR also differentiated in its judgments with regard to the selection of the medium for the publication.

73 Hitherto, cases were distinguished in which remarks were printed (in written form) and presented to the public realm[36], or photographs were used as advertising material[37], or the medium was a film[38], or the remark took place by means of a performance[39] or, like in the present case, the opinion was only an oral presentation.

74 The selection of the medium is of absolute significance, since depending on how "long-lived" the form of propagation is, any possible interference with religious freedom can be stronger or weaker:

75 In the dissenting opinion in I.A. v. Turkey, the consideration was made that a small circulation of books weighs less heavily than a publication as a film.

76 The remarks in the present case were made in the context of several hours of seminar units in a lively discussion.

77 Such remarks are not reproducible according to general life experience and are therefore a **one-off**. As stated previously, those remarks have only become subject-to these proceedings because an undercover journalist secretly taped them.

78 Considered in a regular context, this form of propagation must constitute one of the weakest, since the public was limited to only approximately 30 persons and a remark spoken in a discussion is no longer reproducible for other persons at a later point in time.

79 The Austrian jurisprudence has followed, in numerous judgments, the jurisprudence of the ECtHR regarding Article 10 ECHR. In particular with respect to podium discussions, the Austrian Supreme Court has ruled that in these discussions the protection

[36] ECtHR 13.09.2005, *I.A. v. Turkey*, No.42571/98.
[37] ECtHR 30.01.2018, *Sekmadienis Ltd v. Lithuania*, No.69317/14.
[38] ECtHR 20.09.1994, *Otto-Preminger-Institut v. Austria*, No.13470/87.
[39] ECtHR 17.07.2018, *Mariya Alkehina et al v. Russia*, No.38004/12.

of Article 10 ECHR is particularly far-reaching.[40]

4.3 Absence of any Call to violence or hatred

4.3.1 General

80 In accordance with the established case law of the Court, the protection of the freedoms listed in Article 9 ECHR also serves for the **prevention of a disturbance of public order**. For this reason, the ECtHR has also regularly examined whether the remarks are able to be **fairly interpreted** and in their **direct or broad context** viewed **as a direct or indirect call to violence**.[41]

81 The ECtHR has already on many occasions ruled that remarks which incite to violence and hate against a religious community may be restricted.

82 The Court in the current case has entirely neglected to carry out an examination of this sort, or it has followed the judgment of the Austrian Courts, contrary to its previous jurisprudence.

83 Even if every conceivable interpretation method is used on the three relevant remarks of the applicant, no call to violence or hatred can be found. On the contrary, the applicant contrasted the problem by explaining that according to Islamic teachings Mohammed constitutes a role model which devout Muslims should emulate, although nowadays other societal values prevail than at the time of the life of the historical person Mohammed (see below).

84 In the Pussy Riot case, the ECtHR confirmed that criminal prosecution and imprisonment for non-violent speech may have a chilling effect and amount as such to a disproportionate interference of the right to freedom of expression in a democracy. The ECtHR considers indeed "that according to international standards for the protection of freedom of expression, restrictions on such freedom in the form of criminal sanctions **are only acceptable in cases of incitement to hatred**" (§ 223, emphasis added). It reiterates that, in principle, "peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence (..),

[40] Austrian Supreme Court of Justice 01.06.1995, No.6 Ob 22/95; 18.12.1996, No.6 Ob 2300/96w.

[41] ECtHR 17.07.2018, *Mariya Alkehina et al v. Russia*, No.38004/12, § 219.

and that interference with freedom of expression in the form of criminal sanctions may have a chilling effect on the exercise of that freedom, which is an element to be taken into account when assessing the proportionality of the interference in question" (§ 227).

4.3.2 Principles of examination

85 In the examination as to whether a remark incites violence and hate, the ECtHR lists six criteria which must be taken into consideration:[42]

86 i. Context

Compare in this regard 4.4.3.

ii. Capability of the person making the remark to exert influence on others

As stated previously, only approximately 30 persons were able to take part in the seminars. The wider public was not involved. The applicant held no position with which she was able to influence a broad mass of people. She was only engaged as a speaker for these seminars which were held on a small scale.

iii. Type and strength of the language used

The language used could be seen as provocative, yet still in the bounds of general everyday language. The applicant used no strong language such as was used in other cases which are known to the ECtHR.[43]

iv. Medium used

See above, 4.2.

v. Type of audience

See above, 4.1.1.

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[42] ECtHR 17.07.2018, *Mariya Alkehina et al v. Russia*, No.38004/12, § 222.

[43] ECtHR 17.07.2018, *Mariya Alkehina et al v. Russia*, No.38004/12, ECtHR 13.09.2005, *I.A. v. Turkey*, No.42571/98.

4.3.3 Fair interpretation

87 The ECtHR has failed to examine whether the interpretation of the Austrian courts was "fair".[44]

4.3.4 Clinical definition (ICD-10:F65.4)

> "A sexual disorder occurring in a person 16 years or older and that is recurrent with intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child (generally age 13 or younger)."[45]

88 The **clinical definition** for "pedophilia" thus describes a sexual interest on the part of an adult person in children who have not yet reached puberty.[46]

4.3.5 The term in everyday linguistic usage

89 When one reads through numerous reports in the media it becomes clear that the term pedophilia in its everyday use may be far broader than the medically correct ICD-10 definition.

90 Here, diverse "abuse scandals" on the part of the Catholic church are regularly boldly brought into connection with "pedophilia".[47] However, it is regularly unclear whether the persons concerned actually suffer from the medical disorder called pedophilia. In 2018, an online movement titled "Married to a pedophile" gained strength. This began after the outing of a woman whose husband was convicted of child abuse after they had been married for 20 years.[48] This came entirely unexpectedly for his wife and daughters. Since this situation occurs far more frequently than assumed, the story was turned into a film.[49] Whether in all these cases the actual medical disease of pedophilia was involved remains unclear.

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44 ECtHR 17.07.2018, *Mariya Alkehina et al v. Russia*, No.38004/12, § 219.

45 ICD-10, https://www.icd10data.com/ICD10CM/Codes/F01-F99/F60-F69/F65-/F65.4

46 https://www.zeit.de/wissen/2014-02/pedophilie-faq-edathy

47 http://www.spiegel.de/panorama/missbrauch-in-der-katholischen-kirche-pedophiler-priester-versetzt-neuer-missbrauch-a-1240753.html

48 https://www.vice.com/en_us/article/9kmxqe/i-was-married-to-a-pedophile

49 https://www.telegraph.co.uk/women/life/husbands-pedophile-still-love/

91 Therefore it is generally known that the description usually referring to sexual intercourse of an adult with a prepubescent child is, in non-technical circles, "pedophilia".

92 It remains unsubstantiated by the Courts why the applicant in this case would have had to take the precise medical definition into consideration.

93 Thus an especially strict standard was used here in the interpretation of the remarks, which does not correspond to those of the normal jurisprudence of the Court. If this standard were to be used regularly, all remarks, for example, which refer to a medical term (such as depression, burn-out etc.) would have to be judged equally strictly. This would however miss the mark of a fair interpretation.

94 The ECtHR has to date not yet had to make a decision about pedophilia accusations in connection with Article 10 ECHR. This judgment is for this reason considered internationally to be ground-breaking[50], not least because "pedophilia" is a frequent accusation in media reports about abuse cases, without the formal medical definition having been adequately demonstrated.[51]

95 With its judgment, the ECtHR thus lays the foundation for a legal precedent which will in the future be authoritative for journalists across Europe. After this judgment, the term "pedophilia" may only be used when the person concerned verifiably satisfies the clinical definition.

4.4 Value judgment "pedophilia"

4.4.1 General

96 It is common jurisprudence that value judgments are not subject to proof of truth, but that they require a factual basis.

[50] https://ukconstitutionallaw.org/2018/11/22/emmanouil-bougiakiotis-e-s-v-austria-blasphemy-laws-and-the-double-standards-of-the-european-court-of-human-rights/

[51] http://www.spiegel.de/panorama/missbrauch-in-der-katholischen-kirche-pedophiler-priester-versetzt-neuer-missbrauch-a-1240753.html; https://www.oe24.at/oesterreich/chronik/kaernten/Kinderbetreuer-schwer-pedophil-aber-nicht-in-U-Haft/357239116; https://www.vice.com/de/article/9kmxqe/doku-wenn-dein-ehemann-padophil-ist-married-to-a-pedophile

97 It is also a basic principle of the jurisprudence of the ECtHR that political discussion may only very rarely be restricted.[52]

98 In § 217 of the judgment *Mariya Alkehina et al v. Russia*[53] the Court refers to its previous jurisprudence, according to which it regularly had to take into consideration **several factors** in cases which concerned verbal or also non-verbal statements.

99 Thus, for example, it is to be taken into consideration whether a remark was made against a strained political or social backdrop.[54]

4.4.2 Application in the specific case

100 Neither the national Courts nor the ECtHR has applied any of these principles in the present case:

101 None of the courts have ever contested, but rather on the contrary have indeed confirmed that Mohammed had sexual intercourse with the nine-year-old Aisha. Herewith it is clear that the value judgment "pedophilia" had a factual basis.

4.4.3 Contribution to a discussion of public interest

102 Apart from the fact that the interpretation of the remarks was disproportionately strictly carried out and also that otherwise the due diligence standards for the applicant were set extremely high, the Court also does not examine the social or political context in which this remark was made. On the contrary, from the outset it repudiated the possibility that the remarks amounted to a "contribution to a discussion of public interest".

103 The circumstance remains unrecognized that the organiser of this seminar was the Austrian Freedom Party or, in particular, its educational organisation.

104 This party is known both nationally and internationally as a right-wing populist party. A topic of regular political discussions of this party is the integration of

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52 ECtHR 17.07.2018, *Mariya Alkehina et al v. Russia*, No.38004/12; *ECtHR* 13.11.2003, *Scharschach und News Verlagsgesellschaft v. Austria*, No.39394/98

53 ECtHR 17.07.2018, *Mariya Alkehina et al v. Russia*, No.38004/12

54 ECtHR 17.07.2018, *Mariya Alkehina et al v. Russia*, No.38004/12, RZ 218.

immigrants and the concomitant social and cultural problems.

105 Against this backdrop, the organization called the "Liberal Education Institute", which has as one of its key objectives the making available of liberal values in an institutional framework, must also be taken as context.

106 The applicant put several times on record that she wanted to contribute with her remarks to a lively discussion.

4.5 Protection from remarks which can shock, offend and disturb

107 It is established the jurisprudence of the ECtHR that remarks which may shock or even offend the receiver are protected by Article 10 ECHR.[55] With the present judgment, the ECtHR follows without reflection the opinion of the national authorities, without substantiating why it has in the present case deviated from this jurisprudence.

4.6 Conclusion

108 In light of the case law of the ECtHR, it is clear that the applicant did not:

- incite violence,
- propagate hate,
- make remarks lacking any basis in fact, nor
- make public remarks in the sense of a large public distribution.

5. Requests

The applicant therefore makes the

REQUEST,

- to refer the case to the Grand Chamber of the European Court of Human Rights;

[55] ECtHR 08.07.2014, *Sik v. Turkey*, No.53413/11.

- to schedule a public hearing;

- to establish that the applicant's right to freedom of expression was unjustifiably restricted (Article 10 ECHR);

- to award the applicant appropriate compensation for pecuniary loss (480 Euro [fine] and 16,776.79 [cost of the proceedings before the Austrian courts] = 17,256.79 Euro);

- to award the applicant reimbursement of the costs of the proceedings before the ECtHR (xxx Euro);

- to award the applicant appropriate compensation for non-pecuniary damages;

- to award the applicant interest at the level of 4% from the awarded sums.

The claim for damages is based on the fact that the applicant would have been liable for no costs if the Austrian authorities had correctly applied Article 10 ECHR.

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APPENDIX – Relevant coverage of the Fifth Section Decision

1 On 26 October 2018, the European Center for Law & Justice (ECLJ) published an interview with their director, Grégor Puppinck[56], who addressed in particular the unequal treatment of "Christian and Islamic blasphemy" on the part of the ECtHR:

> **The Court has taken the opposite position in granting protection to blasphemies against the Christian religion.**
>
> In fact, this trend is a defensive reaction to the UN's offensive by the Organization of the Islamic Conference to create in international law a crime of blasphemy under the name of "defamation of Islam". There has thus been a conflict in international law between the Muslim and Western conceptions of freedom of expression in religious matters. The court, in this case, opted for the Muslim conception ... in accordance with the Sharia law.
>
> **In short, the ECHR defends those who blaspheme against Christianity, but condemns those who blaspheme against Islam...**
>
> One has but to note that in two recent judgments the Court has taken the opposite position in granting protection to blasphemies against the Christian religion. These were not historical debates, but mere commercial advertisements and political activism.
>
> First there was the case of advertisements representing Christ and the Virgin Mary as tattooed and lascivious junkies. The Strasbourg Court did not admit the condemnation of these advertisements, even though they shocked for free, for a single commercial purpose. It condemned Lithuania.
>
> Then there was the "Pussy Riot" case, this famous group of punk agitators who had been heavily condemned in Russia for organizing a wild concert in the choir of the Orthodox Cathedral of Moscow. Here again, the ECHR protected their freedom of expression, recognizing at most that a reaction to the violation of ordinary rules of conduct in a place of worship could have been justified.
>
> One can scarcely understand the divergence of approaches of the Court between these

56 https://eclj.org/free-speech/echr/blasphemy-crime-the-echr-is-not-charlie

different cases.[57]

2 On the same day, 26 October 2018, Sohrab Ahmari published an article with the apt title "The Day Free Speech Died in Europe" in *Commentary Magazine.*[58] One of the main points of this article is the finding on the part of the ECtHR that the public discussion of historical facts of Islam in a provocative manner provides no contribution to the public discussion:

> The conclusion: "In the instant case the domestic courts carefully balanced the applicant's right to freedom of expression with the rights of others to have their religious feelings protected, and to have religious peace preserved in Austrian society."
>
> But notice the unstated premise here: The ECHR is suggesting that discussing the history of Islam and the psychology its founder for their own sake is *not* in the "public interest." The court is arrogating to itself and the individual European states the power to decide which topics Europeans are permitted to debate and on what terms.

3 On 27 October 2018, barrister Matthew Scott published a comment on his blog:[59]

> Freedom to practise religion does not require blasphemy laws. In fact, such laws *restrict* freedom of religion far more than they protect it. Some religions, for example, advocate evangelism or proselytising, to convert those they consider heathen. For some it is a central part of the practice of their religion. Yet the objects of the proselytism often consider that the attempt to convert them is disrespectful or blasphemous, as indeed it may be by their standards. It is no co-incidence that adherents of religions or sects that actively seek to convert others such as Baha'is in Iran or Ahmadis in Pakistan have been particularly harshly treated, either under blasphemy or more general discriminatory laws.
>
> [..]
>
> The learned judges might have done better to listen to another Saudi, Raif Badawi who knows a lot about the "domestic environment of religious tolerance, peace and respect" in Saudi Arabia. He is currently serving a sentence of 10 years imprisonment with 1,000 lashes for apostasy, because he wrote a blog that was critical of some aspects of Saudi

[57] https://eclj.org/free-speech/echr/blasphemy-crime-the-echr-is-not-charlie

[58] https://www.commentarymagazine.com/foreign-policy/europe/the-day-free-speech-died-in-europe/

[59] http://barristerblogger.com/2018/10/27/the-ecthr-has-not-created-a-european-blasphemy-law-but-it-has-produced-a-lamentable-judgment/

law and policy, for example its treatment of non-Muslims as apostates.

ES is no Raif Badawi or Asia Bibi. Whatever the strictures of Austrian law, her kaffe und kuchen seminars on Islam were probably not conducted in an atmosphere of overpowering fear and intimidation. Austria is not like Pakistan. Rather than 10 years in prison, 1,000 lashes or an early morning appointment with the hangman, she faced only a 480 Euro fine for saying the wrong thing. But the European Court of Human Rights likes to see itself as setting an international standard in human rights law. By supporting Austria's blasphemy law it has given succour to the world's oppressors and done nothing for those oppressed. That is a very bad look for an international human rights court.

4 On 29 October 2018, Marko Milanovic published an article on the blog of the *European Journal of International Law*:[60]

Worst of all, the judgment will likely do nothing to promote religious tolerance in Europe …

[..]

So, to sum up, according to the Austrian courts (the findings of which were fully accepted by the European Court), the applicant's remark about the Prophet were not (1) hate speech inciting to violence or discrimination, the type of which is prohibited e.g. by Article 20(2) ICCPR; nor (2) hate speech simpliciter, which 'merely' incited to hatred and not to violence or discrimination. The applicant's remark was also not (3) made in a context where it could directly and imminently provoke the audience to violence (cf. the Brandenburg v. Ohio standard in US First Amendment law) – for example, the applicant did not go to a mosque on Friday and start preaching to those gathered there about the folly of Muhammad's marriage to Aisha. Rather, the applicant's remark (i) disparaged a person who was the object of religious veneration, and did so (ii) in a way likely to likely to arouse justified indignation. According to the Austrian Supreme Court (para. 22), these requirements were met because the applicant 'had not aimed to contribute to a serious debate about Islam or the phenomenon of child marriage, but merely to defame Muhammad by accusing him of a specific sexual preference, based on the assumption that he had had sexual intercourse with a prepubescent child, in order to show that he was not a worthy subject of worship.'

[60] https://www.ejiltalk.org/legitimizing-blasphemy-laws-through-the-backdoor-the-european-courts-judgment-in-e-s-v-austria/

So, what did the European Court have to say on all this?

[..] Look carefully what happens here: 'religious peace' and 'religious feelings', which are not mentioned as legitimate aims for the limitation of the freedom of expression in Article 10(2) of the Convention, become such under the guise of 'protecting the rights of others.' According to the government's own formulation of these aims, which, recall, is expressly endorsed by the Court (para. 36).

[..]

It is entirely unclear what, in the Court's view, makes real or hypothetical indignation justified or not. Imagine if the applicant did not accuse Muhammad of being a pedophile, but simply said that 'Muhammad is not a worthy subject of worship' (even if, again just by the way, Muslims do not actually worship Muhammad). Would the indignation suffered by any Muslim believer now somehow not be justified?

[…] isn't Monty Python's 'Every Sperm is Sacred' extravaganza quite clearly provocative and capable of hurting the feelings of a devout Catholic? (et cetera) Couldn't every example of religious satire ever made be suppressed, on this basis, by a state saying that the speaker should have been less provocative and could have conveyed their message in a less hurtful way?

[…]

The ultimate problem with this judgment, in other words, is that the bottom line of all that balancing is a manifest imbalance: the Court eroded the freedom of speech while doing nothing meaningful for religious tolerance. It can and should do better.

5 On the same day, 29 October 2018, Erik Voeten (Peter F. Krogh professor of geopolitics and justice in world affairs at Georgetown University's Edmund A. Walsh School of Foreign Service) argued in an article in Was*hington Post* that "the ruling provides further evidence that the court thinks that it can no longer manage these highly sensitive issues at the European level":[61]

Ireland's voters have just voted to remove a long-standing blasphemy law from their

[61] https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/29/american-pundits-think-europe-has-just-introduced-a-blasphemy-law-through-the-back-door-theyre-wrong/?utm_term=.a0db0eca9e3c

constitution. Just two days before, the European Court of Human Rights upheld an Austrian court's conviction of a woman for publicly suggesting that the prophet Muhammad had pedophilic tendencies. The ruling has been criticized by many people, ranging from centrists to people on the extreme right who argue that the court is introducing "a blasphemy law by the back door." The latter claim that in Europe "free speech bows to sharia," providing what conservative writer Eli Lake calls a cautionary tale for the United States

6 On 30 October 2018, Thomas Müller (Professor of European and International Law at the University of Innsbruck) published an article on verfassungsblog.de:[62]

In the grounds for judgment, tolerance was admittedly repeatedly invoked, however this was mainly in the form of tolerance with respect to religious persons and groups. Comparatively underexposed, on the other hand – apart from general professions; margin number 42, 52 – is tolerance with respect to religious critics. The Court answers in this respect the question as to who is obliged to tolerate whom, but without a satisfactory explanation.

This lends a cold, indeed icy note to the religious peace demanded in the same breath. Should the present judgment be aped in other cases (i.e. beyond "right" criticism of Islam), there threatens a *chilling effect* with respect to "non-constructive" criticism and satire in regard to religion (one only needs to think of the caricatures of Mohammed). In an extreme case, such thinking refers to the preface to Kant's "To Eternal Peace", which reports on the satirical title on the sign belonging to a Dutch publican, which shows a graveyard. Incorrectly understood tolerance regulations do not promote public debate, but rather silence it.

Tolerance and peaceful cohabitation are indeed central categories for the democratic rule of law, especially in the relationship between religious and non-religious persons and groups, which owe one another such tolerance to an equal extent. On the other hand, caution is advised when the matter involves calling upon the paternalizing state in the guise of a harmonistically impregnated tolerant thinking and "deep-freezing" the democratically necessary exchange of views and dispute of opinions. Insofar as the *E.S./Austria*-judgment follows this path, the Chamber appropriates in manifold manner the rationale of the national Courts, or relying on the wide margin of discretion of the national courts offers itself with open eyes to the possibility of verification, the ECtHR must put up with the question, whether with this judgment a

62 https://verfassungsblog.de/toleranz-ja-aber-gegenueber-wem-der-oesterreichische-blasphemiestraftatbestand-vor-dem-ECtHR/

> contribution to the promotion of an „*atmosphere of mutual tolerance*" (para 53) has been made.

7 On 31 October 2018, Simon Cottee (visiting professor in the Faculty of Law at the University of Copenhagen) published an article in *The Atlantic* in which he labels the judgment as "a historic move" and argues that "it is hard not to read the ECHR's ruling as a concession to those who would not hesitate to interpret E.S.'s comments not just as offensive, but as deserving of a murderous retaliation":[63]

> Given the substance of what E.S. said, it seems unlikely that anyone would take up arms against Muslims on hearing it. But who seriously doubts the chances of some jihadist taking up arms against E.S. and her sympathizers on hearing what she had to say about Muhammad?
>
> In the current political climate in Europe, where only the most courageous cartoonist would dare to make fun of the Prophet Muhammad, it is hard not to read the ECHR's ruling as a concession to those who wouldn't hesitate to interpret E.S.'s comments not just as offensive, but as deserving of a murderous retaliation.

8 On 3 November 2018, Shane Armstrong published an article on *Liberalistia* and described the judgment as a terminal blow against freedom of speech:[64]

> What has been witnessed here is an abridgment of rights, but also so much more. The ECHR no longer cares about the protection of health or morals, it seems, as outlined in Article 10, it seems they would rather take issue with the protection of the reputation of a long dead figurehead of a religion, over what can be argued is nothing more than a matter of petty semantics over the term pedophile. They would likewise place the protection of Mohammed's reputation over the protection of children as outlined in Article 2, as what is considered a remark of fact, that Mohammed's act of committing sexual abuse against a 9-year-old repeatedly throughout the duration of their "marriage", can no longer be called pedophilia.

9 On 11 November 2018, Stijn Smet (Assistant Professor of Constitutional Law at Hasselt University) published an article on *Strasbourg Observers*:[65]

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63 https://www.theatlantic.com/ideas/archive/2018/10/europe-rules-against-free-speech/574369/

64 https://liberalistia.com/the-ember/es-v-austria-echr-ruling-03-11-2018

65 https://strasbourgobservers.com/2018/11/07/e-s-v-austria-freedom-of-expression-versus-religious-feelings-the-sequel/

> What dumbfounds me about *E.S. v. Austria* is not how the Court applies the proportionality test. Rather, it's the Court's insistence on the distinction between value judgments and factual remarks. By going down this road, the Court reduces the case to a single factual question: is having sex with one child 1,400 years ago enough to be labelled a pedophile today? That is an exceedingly narrow view of the case and entirely unhelpful for its resolution.
>
> I cannot fathom why the Court thought the case best resolved by finding that Ms. E.S. had made 'incriminating remarks' in the form of 'value judgments' that 'were partly based on untrue facts'. Where is insistence on 'truth' and 'factual accuracy' supposed to lead us, when we are discussing religious scripture on events that allegedly took place some 1,400 years ago? How 'meta' can a judgment get? Perhaps in a future case, the Court could hope to debate the 'factual basis' for remarks doubting how the animals in Noah's Ark were able to effectively procreate in the aftermath of the flood (consider, especially, the second generation).

10 On 22 November 2018, Emmanouil Bougiakiotis published an article on the blog of the UK Constitutional Law Association:[66]

> The second troubling aspect of this case is its application of the value-judgment doctrine. Even though whether something is pedophilic is not often disputed, it can be considered a value judgment. However, it is very unconvincing to argue that a certain view is untrue based on some rather peculiar value judgments of the courts. It is also very strange that the Court found that this value-judgment lacked any factual basis, generally a quite low bar. The applicant in her quoted remark, does refer to a source (the Al-Bukhari Hadith collection), regarding a well-known historical controversy. It is not clear what kind of proof the Court expected to be satisfied that there was some factual basis to her value judgment. The Court has in fact endorsed an odd interpretation of a term and from that it has deduced that there is no factual basis to a value-judgment. This is methodologically erroneous. The courts did not dispute that the marriage had been conducted and consummated while Aisha was still a child, though this is generally debated. That was the factual question. Whether this made Muhammad a pedophile was, as the Court itself argued, a value-judgment and value-judgments – according to its own case-law – are not provable. It is astonishing then how the Court unanimously found that a factual basis was lacking entirely.

[66] https://ukconstitutionallaw.org/2018/11/22/emmanouil-bougiakiotis-e-s-v-austria-blasphemy-laws-and-the-double-standards-of-the-european-court-of-human-rights/