



Jean Monnet Saar

EUROPARECHT ONLINE

Saar Blueprints

Ahmet Serhat Acar

The Clash of Religious Feelings and Provocative Speech:
Recent Strasbourg Case Law on Blasphemy

About the author

Ahmet Serhat Acar is an LL.M. graduate from the Europa-Institut of Saarland University. He obtained his license to practice law from the İzmir Bar Association in Turkey before specializing in international law and human rights protection. He looks forward to continuing his work on similar topics in the future.

Preface

This publication is part of an e-paper series (Saar Blueprints), which was created as part of the Jean-Monnet-Saar activity of the Jean-Monnet Chair of Prof. Dr. Thomas Giegerich, LL.M. at the Europa-Institut of Saarland University, Germany.

The opinions and analysis within these papers reflects the author's views and is not to be associated with Jean-Monnet-Saar or the respective employers or institutions that the authors work for.

Editor

Lehrstuhl Prof. Dr. Thomas Giegerich
Universität des Saarlandes
Postfach 15 11 50
66041 Saarbrücken
Germany

ISSN

2199-0050 (Saar Blueprints)
DOI: 10.17176/20240118-161446-0

Citation

Acar, Ahmet Serhat, The Clash of Religious Feelings and Provocative Speech: Recent Strasbourg Case Law on Blasphemy, Saar Blueprint 01/2024, accessible via: https://jean-monnet-saar.eu/?page_id=67.

Funded by the **Deutsche Forschungsgemeinschaft** (DFG, German Research Foundation) – Project No.: 525576645.

TABLE OF CONTENTS

A.	INTRODUCTION	1
B.	THE CONCEPT OF RELIGIOUS FEELINGS IN THE CONTEXT OF STRASBOURG COURT’S CASE LAW 3	
I.	The Source of the Concept of Religious Feelings	4
II.	Should Religious Feelings Be Protected?.....	6
1.	The Importance of Religious Feelings in a Society.....	6
2.	Current Developments.....	7
3.	Conclusion on the Answer to the Question	8
C.	FREEDOM OF EXPRESSION: “THE FOUNDATION OF HUMAN RIGHTS, THE SOURCE OF HUMANITY, AND THE MOTHER OF TRUTH”	9
I.	The Importance of Freedom of Expression in a Democratic Society	10
II.	Freedom of Expression in the European Convention on Human Rights System	10
III.	Limits to Freedom of Expression	11
IV.	Provocative Speech	11
1.	Provocative Speech as a Subpart of Freedom of Expression.....	11
2.	Limitations to Provocative Speech.....	12
D.	THE CLASH BETWEEN RELIGIOUS FEELINGS AND FREEDOM OF EXPRESSION: BLASPHEMY	13
I.	Blasphemy and Its Place in European Legal Context.....	13
II.	European Court of Human Rights Jurisprudence on the Clash of Religious Feelings and Freedom of Expression: Strasbourg Court’s “ <i>Consistent in Inconsistency</i> ” Case Law on Blasphemy ...	15
1.	Otto-Preminger-Institut v. Austria (1994): Birth of the Balancing Test between Article 9 and Article 10	16
a)	Background of the Case	16
b)	Judgment of the Court	16
c)	Aftermath of the Otto-Preminger v. Austria and Criticisms	18
2.	I.A. v. Turkey (2005)	19
a)	Background of the Case	19
b)	Judgment of the Court	20
3.	Aydin Tatlav v. Turkey (2006).....	21
a)	Background of the Case	21
b)	Judgment of the Court	21

4.	E.S. v. Austria (2018)	22
a)	Background of the Case	22
b)	Judgment of the Court	23
c)	Aftermath of E.S. v. Austria and Criticisms	24
5.	Rabczewska v. Poland (2022)	25
a)	Backgrounds of the Case.....	25
b)	Judgment of the Court	26
c)	Aftermath of the Case and Criticisms	27
III.	Evaluation of the Strasbourg Court’s Case Law and Approach on the Clash Between Freedom of Expression and Freedom of Religion.....	28
1.	The Strasbourg Court’s Condition in the Issue of Blasphemy: Tangled Up In Self-Contradiction.....	29
2.	The Major Problem: Inconsistency	30
3.	The Reason Behind the Inconsistency: Sociopolitical Concerns	31
4.	The Misuse of Margin of Appreciation	33
5.	Solution: A Consistent, Clear and Uniform Approach.....	35
6.	Right to the Protection of Religious Feelings Out, Public Order In.....	36
E.	CONCLUSION	39
	BIBLIOGRAPHY.....	I

A. INTRODUCTION

Freedom of religion and freedom of expression are two of the most fundamental human rights, and consequently they both are enshrined in international conventions and protected by numerous domestic legislative texts. Franklin D. Roosevelt once mentioned these two rights consecutively and highlighted their importance, saying “*We look forward to a world founded upon four essential human freedoms. The first is freedom of speech and expression. The second is freedom of every person to worship God in his own way...* ”¹. Similarly, as one of the most important and leading international legal instruments, the European Convention on Human Rights protects freedom of religion in its Article 9, while it covers freedom of expression right after in Article 10. Indisputably, both rights are extremely important pieces of the European human rights agenda and must be protected by authorities and courts on all levels.

However, at the intersection of these fundamental rights an issue lies: The clash between religious feelings and provocative speech. In other words, the issue of blasphemy. Continuously seen in all countries around the world throughout the history, this clash is often complex. It gives birth to profound questions concerning free speech and limitations to it in pluralistic societies where many groups of believers’ sensitivities are at stake. Especially in today’s Europe with heightened cultural and religious diversity, as well as the rapid distribution of ideas and communication between individuals through digital and social media platforms, the issue appears to be a deep sea.

Throughout the development of its case law, the European Court of Human Rights has been very inconsistent in its approach to the issue of blasphemy. While in some cases it valued freedom of expression more even though there were excessively “*slang terms and innuendoes with oblique vulgar and sexual connotations*”², in some very similar and maybe even less borderline other cases it tried to take religious sensitivities into account a bit more protectively and ruled in favor of applicants who claimed to be victims of blasphemous defamation. The norm which such applicants file an application through and which the Strasbourg Court examines the issue under has been the above-mentioned Article 9 of the Convention, namely freedom of religion. That way by using another article of the Convention, a case law originated check and balance system was used specifically for blasphemy cases by the Court and it has

¹ Four Freedoms, https://www.archives.gov/exhibits/powers_of_persuasion/four_freedoms/four_freedoms.html (last accessed on 05/10/2023).

² ECtHR, Klein v. Slovakia, App. no. 72208/01, 31 October 2006, para. 49.

been brought against the clear protection of freedom of expression by Article 10 of the Convention.

This clash between freedom of expression and religious feelings has appeared to be a complex issue with different aspects in Strasbourg Court's case law. The Court, as the guardian of the Convention, has faced a range of cases that contain a wide spectrum of scenarios, from provocative cartoons and writings to critical artistic expressions and public debates. So far, the Court's judgments in these cases have been continuously, to say the least, self-contradictory. As *Tommaso Virgili* put it, the blasphemy before the European Court of Human Rights is a never-ending story of inconsistency.³ This nature of the Court's take on blasphemy has been expectably controversial and drawing a lot of criticism, and it seems that this situation will continue so.

With a couple of striking judgments which have been produced in recent years,⁴ the Court's self-conflicted and zigzagging approach towards the protection of religious feelings versus freedom of expression cases and discussions concerning it has come to the surface once again, and the contradiction in those cases which can be seen when they are compared to each other and to previous judgments that were also recently made drew serious criticism.

It seems like the European Court of Human Rights has been struggling to come up with a definite and specific approach towards blasphemy related cases, and it has taken political and societal aspects into consideration more than such an institution should have done. It is fair to say that the criticism of lacking a strong and uniform approach dealing with the regard is a valid one, and the case law so far is plain enough to see that the Court stretches the line in-between from time to time. Moreover, many critics, including some judges of the Court, have been suggesting that the issue of blasphemy should have never been taken under the umbrella of Article 9 as it does not concern the freedom of religion singlehandedly, therefore freedom of expression should only be restricted when situations mentioned in Article 10/2⁵ occur along with blasphemy.

The answer to how to solve the issue of blasphemy before the Strasbourg Court has become especially important recently because the European society is dealing with big

³ Virgili, "Rabczewska v. Poland and Blasphemy Before The ECtHR: A Neverending Story of Inconsistency", <https://strasbourgobservers.com/2022/10/21/rabczewska-v-poland-and-blasphemy-before-the-ecthr-a-neverending-story-of-inconsistency/> (last accessed on 05/10/2023).

⁴ Those are the cases *E.S. v. Austria* and *Rabczewska v. Poland* which we will try to analyze in upcoming sections.

⁵ Namely, matters of public order.

questions concerning different cultures and how they interact with each other, how people should express themselves and what is allowed and what is not in regard to the religious matters. The conflict between the protection of religious feelings and saying things that can hurt people's those sensitivities is not just something that occurs before courts. It is about how people speak, what the media say and what politicians do. How the Court deals with this issue may shape the bigger picture of how people express themselves and practice their religion and therefore might affect the European society.

This paper will try to have a closer look on the situation and give insight in order to understand what has happened, may happen and should happen with regards to the issue. To do that, an examination of the concepts of religious feelings and freedom of expression comes first. Explanation of the conflict appearing from time to time between them as defined by the European Court of Human Rights follows, while weighing on the most prominent cases before the Court. More recent cases concerning blasphemy and the Court's interpretations and reasoning in them will be given, before ending with an evaluation of the Court's stance and recommendations for future scenarios.

There are several approaches referring to what the Court's direction -in terms of legality and methodology- should be in the clash between religious feelings and provocative speech, but it is not wrong to say that most importantly the Court should figure out its inconsistency problem first. Ultimately, it touches upon on the complex interplay between rights and beliefs and a consistent approach towards the issue is much needed.

B. THE CONCEPT OF RELIGIOUS FEELINGS IN THE CONTEXT OF STRASBOURG COURT'S CASE LAW

In the context of the case law of the European Court of Human Rights, religious feelings mean a person's deep-seated beliefs, emotions and feelings related to his or her religious or spiritual belief. The term "religious feelings" refers to the deep and often intense emotions and beliefs that individuals have in relation to their religion or spiritual beliefs. By definition, they are personal and subjective, containing a range of emotions from reverence to devotion, and commitment to one's religious or spiritual beliefs. Feelings are frequently an integral part of a person's identity and often influence their attitudes and behaviors, which in the case of religious feelings appear as their attitudes and behaviors related to their beliefs. Therefore, those feelings can be highly significant and play an important role in an individual's life, shaping their worldview and moral values and one by one shaping the society.

The Strasbourg Court deals with cases where those religious feelings of believers are claimed to be offended or violated by actions or expressions of others.

I. The Source of the Concept of Religious Feelings

But in order for a right to be claimed violated before the Strasbourg Court, it must be protected by the European Convention on Human Rights. Physically, religious feelings are nowhere to be found in the text of the Convention or its any article or protocol.⁶ As a matter of fact, religious feelings are not even an explicit and separate human right. So why are religious feelings assumed to be protected under the European Convention of Human Rights system and how are they being protected?

Since every case is filed with a claim of violation against one of the articles in the Convention, the Court examines cases regarding the protection of religious feelings under Article 9. The article protects the right to freedom of thought, conscience and religion, and basically explains that it means everyone can choose what they believe and can manifest their beliefs in whatever way they like, as long as it does not contradict with what is stated in the second paragraph. It does not mention anywhere that one's right to have their feelings protected given that their origin is religious beliefs.

Nevertheless, the Strasbourg Court interprets the protection of religious feelings of believers as a part of freedom of religion under Article 9 of the Convention. In the groundbreaking *Otto-Preminger Institut v. Austria* case in 1994, while explaining why there was a violation of Article 9 and why freedom of expression was not absolute and must have been balanced with freedom of religion, the Court reflected this interpretation and summarized the notion behind it by stating:

“In the context of Article 9... a State may legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas, judged incompatible with the respect for the freedom of thought, conscience and religion of others (ibid., p. 21, para. 48). The respect for the religious feelings of believers as guaranteed in Article 9 can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must

⁶ Virgili, “Rabczewska v. Poland and Blasphemy Before The ECtHR: A Neverending Story of Inconsistency”, <https://strasbourgobservers.com/2022/10/21/rabczewska-v-poland-and-blasphemy-before-the-ecthr-a-neverending-story-of-inconsistency/> (last accessed on 05/10/2023).

*also be a feature of democratic society. The Convention is to be read as a whole and therefore the interpretation and application of Article 10 in the present case must be in harmony with the logic of the Convention.”*⁷

Hence, the concept finds its source as a right in the Court’s jurisprudence. But even back then, in the *Otto-Preminger v. Austria* case itself, there were criticisms aimed at this approach and its reasoning. Dissenting judges of the case reflected those criticisms which are still ongoing today, and summarized the notion behind them by stating:

*“The Convention does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom of religion, which in effect includes a right to express views critical of the religious opinions of others. Nevertheless, it must be accepted that it may be "legitimate" for the purpose of Article 10 to protect the religious feelings of certain members of society against criticism and abuse to some extent; tolerance works both ways and the democratic character of a society will be affected if violent and abusive attacks on the reputation of a religious group are allowed. Consequently, it must also be accepted that it may be "necessary in a democratic society" to set limits to the public expression of such criticism or abuse.”*⁸

Still, to this day, the protection of religious feelings as a right under Article 9 of the Convention plays a huge part in Strasbourg Court’s case law on blasphemy. Accordingly, the topic of this acceptance and balancing religious feelings with freedom of expression sometimes to the level of setting limits to it is a hot debate and likely to cause more controversy as there are still cases of blasphemy pending before the Court, coming from even the countries with most secularized societies such as Czechia.⁹

⁷ ECtHR, *Otto-Preminger-Institut v. Austria*, App. no. 13470/87, 20 September 1994, para. 47.

⁸ ECtHR, *Otto-Preminger-Institut v. Austria*, App. no. 13470/87, 20 September 1994, Joint Dissenting Opinion of Judges Palm, Pekkanen and Makarczyk.

⁹ Vikarská, “Sex, God, and Blasphemy”, <https://verfassungsblog.de/sex-god-and-blasphemy/> (last accessed on 05/10/2023).

II. Should Religious Feelings Be Protected?

1. The Importance of Religious Feelings in a Society

Religion plays a vital role in many people's lives, making it a very important component of society. Even in a predominantly secularized continent like Europe,¹⁰ religion continues to hold considerable influence in people's lives, affecting politics, culture, and law, often defining individuals' identity and belonging.¹¹ Because of the importance it carries, expressions and actions related to religion can cause strong reactions in society. While freedom of expression is undeniably essential for a democratic society, social cohesion is also crucial.¹²

As previously mentioned, to address offensive statements and expressions related to religious matters that may provoke public unrest, the European Court of Human Rights has been using the concept of religious feelings and one's right to get his freedom of religion under Article 9 of the Convention. However, Article 9 is about acts occurring in the external and tangible world, while feelings belong to an individual's inner world. Something that does not happen in tangible world practically cannot be prevented or controlled, nor can the right to do it be violated. Therefore, feelings are unrelated to the concept of freedom and consequently religious feelings cannot fall within the boundaries of freedom of religion.

Apparently, the Court gives enough importance to religious feelings to consider them a must-protected right by balancing them with such a fundamental human right as freedom of expression despite that logical reality. It evokes this position in a recent case, *Rabczewska v. Poland*, stating that:

“The exercise of the freedom of expression carries with it duties and responsibilities. Among them, in the context of religious beliefs, is the general requirement to ensure the peaceful enjoyment of the rights guaranteed under Article 9 to the holders of such beliefs, including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane.”¹³

¹⁰ Sherwood, 'Christianity as default is gone': the rise of a non-Christian Europe, <https://www.theguardian.com/world/2018/mar/21/christianity-non-christian-europe-young-people-survey-religion> (last accessed on 05/10/2023).

¹¹ Religious Belief and National Belonging in Central and Eastern Europe, <https://www.pewresearch.org/religion/2017/05/10/religious-belief-and-national-belonging-in-central-and-eastern-europe/> (last accessed on 05/10/2023).

¹² Berger-Schmitt, Social Cohesion as an Aspect of the Quality of Societies: Concept and Measurement, https://www.gesis.org/fileadmin/upload/dienstleistung/daten/soz_indikatoren/eusi/paper14.pdf, p. 7, (last accessed on 05/10/2023).

¹³ ECtHR, *Rabczewska v. Poland*, App. no. 8257/13, 15 September 2022, para. 47.

Leaning on that, the Court also mentions a positive obligation that the contracting states have in order to ensure peaceful coexistence of all beliefs, religious or nonreligious, guided by mutual tolerance.¹⁴ However, although balancing restrictions with rights they are imposed on is a legal methodology as proportionality test in the Court's jurisprudence, using that methodology for setting restrictions on freedom of expression and doing that by using a logically flawed conclusion like the right to the protection of religious feelings do not seem profound. As George Letsas summarized, that balancing test of the Court in blasphemy cases seems like a cover to hide the logical oddness of accepting not to be offended in one's religious feelings as a right under Article 9.¹⁵

It is fair to say that it seems the Strasbourg Court is acting with different concerns when deciding on blasphemy related cases and following a sociopolitical approach regarding the issue rather than a legal one.

2. Current Developments

Europe has been facing a big wave of immigration from neighboring countries and continents for a long time now,¹⁶ due to various crises in those places and driven by the region's prosperity and positive reputation in terms of human rights protection.¹⁷ People living under authoritarian regimes, experiencing hardship in neighboring countries and the nearby geography often risk their lives to seek refuge in Europe.¹⁸ It's estimated that there are millions of refugees in Europe,¹⁹ and they bring with them diverse cultures and backgrounds that may sometimes get into conflicts with the local culture. Along with that sudden and impacting shift in society's dynamics, there has been new impactful events in the region such as the war in Ukraine. The war has had severe political and economic results, and also added millions of Ukrainians to the flow of immigration to central Europe.²⁰ All that adds to and inflates the cultural diversion.

¹⁴ Ibid., para. 49.

¹⁵ Letsas, LSRE, 2012, p.239, 240.

¹⁶ Migration Flow to Europe: Arrivals, <https://dtm.iom.int/europe/arrivals> (last accessed on 05/10/2023).

¹⁷ Exploring migration causes: why people migrate, <https://www.europarl.europa.eu/news/en/headlines/world/20200624STO81906/exploring-migration-causes-why-people-migrate> (last accessed on 05/10/2023).

¹⁸ Ibid.

¹⁹ Non-EU citizens make up 5.3% of the EU population, <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20220330-2> (last accessed on 05/10/2023).

²⁰ "Ukraine Refugee Situation", <https://data.unhcr.org/en/situations/ukraine> (last accessed on 05/10/2023); "Infographic - Refugees from Ukraine in the EU", <https://www.consilium.europa.eu/en/infographics/ukraine-refugees-eu/> (last accessed on 05/10/2023).

These factors all help to the rise of far-right²¹ and populist²² politics and actions in the region. Of course, among those populist politics and narratives, religion plays an important part too.²³ Effects of this can be seen in every-day news, such as the ongoing events surrounding the Quran burnings in Sweden,²⁴ triggering discussions on the limits to freedom of expression in cases of incitement of hatred and public security.²⁵ Plus, there are setbacks in Europe's human rights record,²⁶ and some of the biggest examples of that are somehow related to the above-mentioned differences between local and foreign social dynamics.²⁷

3. Conclusion on the Answer to the Question

Although it is not possible to say that religious feelings constitute a freedom as the Strasbourg Court takes on the issue, its influence on people's lives is a reality and their reasonable level of protection is somewhat important for interfaith harmony within the society. People have different kinds of beliefs and sacred and dear things to them, even if they are not religious. Religion and religious feelings on the other hand, constitute the vast majority of those sensitivities and therefore, their border with freedom of expression comes as a big topic of discussion and as a difficult line to draw.

Since religious feelings and people's reaction to them being challenged by other people differs from individual to individual, it is not possible to keep everyone satisfied with the law's offer of protection for it, be it high or low or maybe not at all as some²⁸ suggest. Therefore, there must be a rational level of protection or an explanation of why absolute protection for

²¹ Fiedler, "Germany's Right-Wing AfD Party Makes Strides in the West", <https://www.spiegel.de/international/germany/rising-radicalism-germany-s-right-wing-afd-party-makes-strides-in-the-west-a-4d0bde4f-ff09-4093-a653-b396860a62e5> (last accessed on 11/10/2023).

²² Fröschl, "Democracy, Populism and Minority Rights: Introduction", https://www.socialistsanddemocrats.eu/sites/default/files/2632_EN_democracy-populism_ANTILOPE_1.pdf, p. 7.

²³ Hungary Today, "Orbán: Europe Can Only Be Saved by Returning to Christianity", <https://hungarytoday.hu/orban-christianity-europe-persecuted/>, (last accessed on 05/10/2023).

²⁴ Comerford, "Violent protests after Quran burning in Sweden", <https://www.bbc.com/news/world-europe-66706937> (last accessed on 05/10/2023).

²⁵ Langer, "Quran burning in Sweden prompts debate on the fine line between freedom of expression and incitement of hatred", <https://theconversation.com/quran-burning-in-sweden-prompts-debate-on-the-fine-line-between-freedom-of-expression-and-incitement-of-hatred-211849> (last accessed on 05/10/2023).

²⁶ Human Rights Watch, "Events of 2021 European Union", <https://www.hrw.org/world-report/2022/country-chapters/european-union> (last accessed on 05/10/2023).

²⁷ Amnesty International, "EU: New Evidence of Systematic Unlawful Pushbacks and Violence at Borders", <https://www.amnesty.org/en/latest/news/2021/10/eu-new-evidence-of-systematic-unlawful-pushbacks-and-violence-at-borders/>, (last accessed on 05/10/2023).

²⁸ Wood, "In Europe, Speech Is an Alienable Right", www.theatlantic.com/ideas/archive/2018/10/its-not-free-speech-criticizemuhammad-echr-ruled/574174 (last accessed on 05/10/2023).

religious feelings against challenges is not always possible, applicable to everybody and fair and proportionate enough to keep society's dynamics intact.

On the other hand, as explained, it may be discussed and it is true that religious feelings are not tangible and they are rooted in an individual's perception of the outer world eventually. However, that does not mean that they cannot be a topic of discussion for legal protection, especially in the face of expressions inciting hatred, causing public unrest and hurting public order and security. In reality, how individuals and the society built by them reacts to things shape a land's inner peace and that situation of inner peace affects how they communicate with other countries and communities. Consequently, it is understandable for authorities and legal courts and the Strasbourg Court to have that reality in mind. What is not understandable in our opinion, is stretching the meanings of the Convention's articles and inventing logically bizarre rights and legally problematic exercises instead of using clear means presented by the Convention, such as the exceptions counted in Article 10/2 regarding the possible limitations to freedom of expression.

Indeed, one of the main and first things that can make individuals feel like their religious feelings are challenged or insulted is of course provocative speeches and expressions. Of course, those are by themselves are subject to a far more integral and arguably important concept of human rights and democratic societies, which is free speech.

C. FREEDOM OF EXPRESSION: “THE FOUNDATION OF HUMAN RIGHTS, THE SOURCE OF HUMANITY, AND THE MOTHER OF TRUTH”²⁹

Liu Xiaobo defines and stresses the importance of freedom of expression in these perhaps a bit exaggerated but succinct words to show its specialty. Without a doubt, freedom of expression is one of the most important human rights which is widely recognized and protected in international and national legislations. Indeed, it is a cornerstone of democratic societies and plays a crucial role in upholding democratic values. It protects a broad range of speech and that includes political, artistic, and social expressions; especially which may appear as unpopular or controversial views. After all, the sole reason freedom of expression exists is to protect unpopular views because popular views and expressions do not need protection by their nature.³⁰

²⁹ Xiaobo, I Have No Enemies: My Final Statement, <https://www.nobelprize.org/prizes/peace/2010/xiaobo/lecture/> (last accessed on 05/10/2023).

³⁰ Boortz, p. 49.

I. The Importance of Freedom of Expression in a Democratic Society

The most fundamental element that distinguishes human beings from other beings is their reason. And the fruit of the reason is the ability to think and to express thoughts. In a society, this is only possible by ensuring freedom of expression. This is also why it is an indispensable element of democracy. It is unthinkable to imagine democracy without it. Freedom of expression allows individuals to voice their views, engage in political debate and hold governments accountable. This is how people participate in decision-making processes. Thus, it acts as a check on government power. Being able to criticize and question government actions ensures transparency and accountability. Throughout history, the first step in the struggle for democratic freedoms has always been the open expression of ideas, sometimes at great cost. If Martin Luther King carries weight in people's perception today and had an impact on American society, it is because of the famous "I Have a Dream" speech given by him during the March on Washington for Jobs and Freedom on 28th of August 1963. As another example, the first step in the acceptance of a scientific fact that today seems very basic and easy to realize, the earth being round, was Galileo Galilei's noising around and defense of his observation at the cost of his life.

As seen in those examples, freedom of expression is essential for the advancement of knowledge and innovation. It helps create an environment where different ideas and perspectives can be explored and shared. Sharing and expressing ideas freely in academia, science and art fosters intellectual growth and gives birth to new discoveries and perspectives. Talking about freedom of expression, Noam Chomsky once said *"If you are in favor of freedom of speech, that means you are in favor of freedom of speech precisely for views you despise."*³¹ This summarizes the most critical point of free speech that should be kept in mind and the essence of why it is so important: When there are no different narratives in a society, there are no different intellectual, ideological or political options, therefore there is not an environment for democracy to begin with.

II. Freedom of Expression in the European Convention on Human Rights System

Of course, the European Convention on Human Rights also recognizes freedom of expression as one of the most fundamental human rights. Accordingly, the Strasbourg Court has stated that it *"freedom of expression constitutes one of the essential foundations of*

³¹ From the documentary: Manufacturing Consent: Noam Chomsky and the Media (1992).

*[democratic] society, one of the basic conditions for its progress and for the development of every man”.*³²

III. Limits to Freedom of Expression

As it can be seen in Article 10's second paragraph, freedom of expression is not absolute and is subject to limitations to protect other important interests, such as public safety and individual rights. Consequently, in some cases, freedom of expression must be balanced against other rights as part of a proportionality test pursuing the legitimate aims to protect some of those counted interests. Hence, like other courts and legislatures, the European Court of Human Rights is often in the position to mind a balance between rights that sometimes are in conflict with each other. Many legal systems especially draw a distinction between freedom of expression and hate speech or incitement to violence, which may be subject to legal restrictions due to their potential to harm individuals or society. Under the European Convention on Human Rights umbrella, as in many other legal systems, these restrictions are subject to the principles of necessity, having a legitimate aim and proportionate.

But also, the possible limitations mentioned in Article 10's second paragraph constitute a really narrow and strict area as freedom of expression often prevails claims of violation of other freedoms and rights. This is not hard to understand and it can be said that it should principally be so considering the importance and criticality of freedom of expression as put out above. As the Court held in its case law, freedom of expression has a wide area to move on and it often goes beyond the majority's consensus on what is reasonable and what is not, as it also covers expressions that may offend, shock or disturb people.³³

So, what does happen when such a freedom, which is such a crucial and elementary part of human rights and plays such a huge role in democracy, is used for expressing ideas or views that may hurt some people's religious feelings?

IV. Provocative Speech

1. Provocative Speech as a Subpart of Freedom of Expression

Words have power. Along with the reason, it is probably what differentiates us human beings from other beings. It is how we communicate. When looked at the history it is not hard to see that words can change the course of how things go. They can cause a war and they can

³² ECtHR, *Handyside v. the United Kingdom*, App. no. 5493/72, 7 December 1976, para.49.

³³ *Ibid.*

end a war. They can cost a man's life and sometimes they can make people follow the same man to the ends of the Earth, for the better or for the worse. Maybe not one word, but sometimes a discourse consisting of words that are in the same direction and that follow one another may shape society over a period of time.

This form of expression that provokes, challenges, shocks and incites, namely provocative speech, includes a wide range of act that may take the form of art, political statement, cartoon, or even hate speech. It often gives birth to strong reactions, challenges established norms, hits some nerves that are entwined with beliefs or sensitivities. The intent behind it may sometimes be stimulating critical thinking and sometimes inciting violence. This power of words to provoke and incite has taken on new dimensions, amplified by the global effects of the internet and the social media. All of these things make it a multifaceted and often controversial topic.

One thing is certain, it is a part of freedom of expression which is a fundamental human right and a cornerstone of democratic societies. As a part of it, provocative speech also often allows for the open exchange of ideas, fosters innovation, scientific developments, art or political debate, and serves as a guardian against authoritarianism. Within some necessary boundaries, it contributes to the diversity of ideas and the richness of public opinions. It challenges the status quo and pushes the society to do better, examining its current values.

2. Limitations to Provocative Speech

While being a critical right, as a part of the freedom of expression, provocative speech has the same limitations under the Article 10 of the Convention and is not absolute. The challenge lies in defining those limits to protect other important rights and social interests. It is a complex and evolving concept that continues to be subject to legal and cultural debate, especially in rapidly changing European society. Certainly, protecting and promoting freedom of expression is a vital aspect for the protection of human rights and maintaining a democratic society, but it also is not absolute and sometimes sociopolitical aspects can be vital too to sustain a peaceful society.

Of course, among those sociopolitical aspects, it especially gets critic when it comes to provocative speech regarding religion, religious figures or religious matters due to the importance of and the sensitivity surrounding the religion. Those questions and uncertainties of where to draw the line and limit freedom of expression, and therefore provocative speech,

become more of a subject of debate when expressions and actions in question target religion or religious matters.

D. THE CLASH BETWEEN RELIGIOUS FEELINGS AND FREEDOM OF EXPRESSION: BLASPHEMY

I. Blasphemy and Its Place in European Legal Context

Blasphemy is one of the forms of provocative speech. It is the act of showing disrespect or dislike towards religious beliefs, sacred objects, religious figures or as European Court of Human Rights names “objects of religious veneration”³⁴. Expressions in any form, words or actions, which are offensive and disrespectful within the context of a particular religion or belief system are considered blasphemy. By its nature, blasphemy is a subject that tests the limits of freedom of expression.

Due to the influence of religion in people’s lives and the power of religious authorities, blasphemy has been a crime in many parts of the world throughout the history. Now it is not such a big offence as it once used to be,³⁵ especially in countries with democratic values.³⁶ Today in Europe, most of the time it is within the boundaries of freedom of expression and does not constitute any act of illegality.³⁷ Yet, this has not always been the case as there were severe blasphemy laws once. As a matter of fact, there still are some countries with blasphemy laws in effect in the continent.

After a complex and long process of liberalization and secularization, the most of blasphemy laws in Europe have seen significant changes towards the 21st century. In recent years, many countries either abolished or reformed their blasphemy laws, seeing them incompatible with freedom of expression and human rights. For instance, Ireland had a blasphemy law until recent years. In fact, it constituted a constitutional crime but that was removed from the Irish Constitution with a referendum in 2018.³⁸ Denmark also had a

³⁴ ECtHR, *Otto-Preminger-Institut v. Austria*, App. no. 13470/87, 20 September 1994, para. 47. The term is frequently used in the Court’s case law involving the conflict of religious feelings and freedom of expression.

³⁵ Vikarská, “Sex, God, and Blasphemy”, <https://verfassungsblog.de/sex-god-and-blasphemy/> (last accessed on 05/10/2023).

³⁶ European Commission For Democracy Through Law (Venice Commission), Report On The Relationship Between Freedom Of Expression And Freedom Of Religion: The Issue Of Regulation And Prosecution Of Blasphemy, Religious Insult And Incitement To Religious Hatred, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2008\)026-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2008)026-e) (last accessed on 05/10/2023), para 24.

³⁷ *Ibid.*, para. 26.

³⁸ Fathaigh, Referendum Removes Blasphemy from Irish Constitution, <https://merlin.obs.coe.int/article/8456> (last accessed on 05/10/2023).

blasphemy law until recently which dated 335 years back and it was also repealed in 2017 by legislators.³⁹ The repealed law also had a ban on burning religious texts,⁴⁰ which is a rule nowadays being considered to be brought back after controversies surrounding Quran burning.⁴¹ After the attack on French satirical magazine Charlie Hebdo, Norway repealed its penal code regarding blasphemy as a response in 2015.⁴² Taking a liberal approach on the side of freedom of expression, Sweden had abolished its blasphemy law as early as 1970, which may explain incidents of Quran burnings in the country and the controversies surrounding the issue.⁴³

Although infrequently enforced, many European countries still maintain laws that are related to blasphemy. Austria has been involved in many prominent blasphemy cases before the European Court of Human Rights, some of which we will touch upon in this paper, with its Criminal Code's Section 188.⁴⁴ In some other countries such as Poland, Germany and Italy, blasphemy related laws and codes still remains in force too.⁴⁵

As it can be seen, interpretation and application of freedom of expression along with limitations to it in the face of religious matters differs throughout the Europe. The perception of what right or interest should be favored seems to be subject to the society's evolving norms and concerns. Nevertheless, Europe is mostly free from blasphemy laws at least in terms of application, and tolerant towards blasphemous expressions as they are considered to be within the protection of freedom of expression.

It is fair to say that the European Court of Human Rights has played a role in the reform of blasphemy laws in Europe as it pushed the human rights agenda in the continent, often bringing new legal precedents set by United States Supreme Court and related to freedom of expression.⁴⁶ Judgments of the Court have had an effect on European countries to prioritize free speech instead of preserving religious sensitivities, although it is hard to say it is what caused

³⁹ Denmark scraps 334-year-old blasphemy law, <https://www.theguardian.com/world/2017/jun/02/denmark-scraps-334-year-old-blasphemy-law> (last accessed on 05/10/2023).

⁴⁰ Ibid.

⁴¹ Denmark proposes bill that could see ban on Quran burnings, <https://www.aljazeera.com/news/2023/8/25/danish-government-proposes-bill-that-would-ban-quran-burnings> (last accessed on 05/10/2023).

⁴² Norway ends blasphemy law after Hebdo attack, <https://www.thelocal.no/20150507/norway-scraps-blasphemy-law-after-hebdo-attacks> (last accessed on 05/10/2023).

⁴³ Why Does Sweden Allow Quran Burnings? It Has No Blasphemy Laws, <https://www.voanews.com/a/why-does-sweden-allow-quran-burnings-it-has-no-blasphemy-laws-/7190103.html> (last accessed on 05/10/2023).

⁴⁴ Report on Austria, <https://end-blasphemy-laws.org/countries/europe/austria/> (last accessed on 05/10/2023).

⁴⁵ Europe, <https://end-blasphemy-laws.org/countries/europe/> (last accessed on 05/10/2023).

⁴⁶ Flauss, ILJ, 84(3)/2009, p.809, 811.

the abolition of those laws as the Strasbourg Court frequently emphasizes the importance of finding a balance between freedom of expression and the protection of religious beliefs while giving countries a wide margin of appreciation⁴⁷. Still, there is no denying that the Court has had a substantial influence on the states and therefore its judgments can affect their legal frameworks and policies, and the public opinion. Maybe not at the highest level, but through that influence the Strasbourg Court helps promote freedom of expression in its contracting states. Unfortunately, that does not mean the Court's history on the issue of the clash between religious feelings and freedom of expression has been a clear guide and showed a definitive approach regarding blasphemy.

In the following sections, we will have a look at the Court's past cases regarding blasphemy and try to explain them, before examining the recent case law on the issue and discussing the Court's stand and direction.

II. European Court of Human Rights Jurisprudence on the Clash of Religious Feelings and Freedom of Expression: Strasbourg Court's "*Consistent in Inconsistency*"⁴⁸ Case Law on Blasphemy

In this chapter we will first analyze probably the most important and founding case in the Strasbourg Court's case law on blasphemy, namely *Otto-Preminger-Institut v. Austria* which established the still ongoing balancing methodology and showed the Court's rationale behind its take on the clash of religious feelings and freedom of expression. Then two other prominent cases from the following years of *Otto-Preminger*, *I.A. v. Turkey* and *Aydın Tatlav v. Turkey* will be added, reflecting the Court's now-established exercise. After that, two recent cases which caused controversy with the Court's reasonings and decisions on them and brought the issue of blasphemy to the surface will follow.

These will be done by giving backgrounds of the cases first, then explaining the reasonings of the judgments and lastly, only in three most considerable ones, analyzing their aftermath. We will also try to give insight on the criticisms surrounding the cases.

⁴⁷ ECtHR, *E.S. v. Austria*, App. No. 28450/12, 25 October 2018, para.58.

⁴⁸ Virgili, "Rabczewska v. Poland and Blasphemy Before The ECtHR: A Neverending Story of Inconsistency", <https://strasbourgobservers.com/2022/10/21/rabczewska-v-poland-and-blasphemy-before-the-ecthr-a-neverending-story-of-inconsistency/> (last accessed on 05/10/2023).

1. Otto-Preminger-Institut v. Austria (1994): Birth of the Balancing Test between Article 9 and Article 10

a) Background of the Case

The first cornerstone case in the European Court of Human Rights case law on blasphemy, founding the practice of balancing between Article 9 and Article 10, was *Otto-Preminger Institut v. Austria* in 1994. *Otto-Preminger Institut*, an Austrian film distributor, wanted to screen the satirical film *Das Liebeskonzil* in Austria. The film had a controversial take on the Roman Catholic Church and its teachings. There were humorous scenes involving religious figures, expressed in a very provocative narrative such as God being portrayed as a “*senile old man prostrating himself before the Devil with whom he exchanges a deep kiss*”, “*a degree of erotic tension between the Virgin Mary and the Devil*”, or Jesus Christ “*shown lasciviously attempting to fondle and kiss his mother’s breasts*”. The Austrian authorities banned the film from being screened due to the concerns about the potential to offend religious feelings and to disturb social peace.⁴⁹

The case was eventually brought before the Strasbourg Court after being upheld by the Austrian courts, with the claim that Article 10 of the Convention and the applicant’s right to freedom of expression was violated.

b) Judgment of the Court

The Court ruled that the ban on the film was not a violation of Article 10 of the European Convention on Human Rights. According to the judgment, Austrian authorities had legitimate aim in banning the film as there was a necessity to protect the rights of others, namely religious feelings of believers. The Court also stated that “*there was a pressing social need for the preservation of religious peace*”⁵⁰ and it was “*necessary to protect public order against the film*”⁵¹. Under these circumstances, the Court ruled that Austrian authorities and domestic courts had “*a certain margin of appreciation... in assessing the existence and extent of the necessity of such interference*”⁵² because they are “*better placed than the international judge, to assess the need for such a measure*”⁵³. According to the Strasbourg Court, this wide margin

⁴⁹ ECtHR, *Otto-Preminger-Institut v. Austria*, App. no. 13470/87, 20 September 1994, para. 9, 10, 11, 12, 13, 21 and 22.

⁵⁰ *Ibid.*, para.52.

⁵¹ *Ibid.*

⁵² *Ibid.*, para. 50.

⁵³ *Ibid.*, para. 56.

of appreciation was not overstepped in the case and the means employed to stop the film's distribution were proportionate and there was no violation of the applicant's right to freedom of expression.⁵⁴

Otto-Preminger v. Austria case was the beginning for many important principles in the Strasbourg Court's case law on blasphemy.⁵⁵ Most importantly, although the term religious feelings does not exist in the Convention and taking feelings into consideration as part of a freedom is logically problematic as we discussed, the Court drew the conclusion that Article 9 of the European Convention on Human Rights includes a right to respect for religious feelings. That conclusion has determined the Court's method to deal with blasphemy cases till this day and has set the basis of discussions on that regard. The Court explained its reasoning in the judgment's paragraph 47 by stating:

"...freedom of thought, conscience and religion, which is safeguarded under Article of the Convention, is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life.

Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.

...in the context of Article 9, that a State may legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas, judged incompatible with the respect for the freedom of thought, conscience and religion of others. The respect for the religious feelings of believers as guaranteed in Article 9 can legitimately be thought to have been violated by provocative

⁵⁴ Ibid., para. 57.

⁵⁵ Smet, ECLR, 15/2019, p.158, 161.

portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society. The Convention is to be read as a whole and therefore the interpretation and application of Article 10 in the present case must be in harmony with the logic of the Convention."⁵⁶

That meant a conflict between two fundamental human rights recognized in the Convention occurred: Freedom of religion (recognized in Article 9) and freedom of expression (recognized in Article 10).⁵⁷ The Court also explained the solution to solve that conflict between two fundamental rights as balancing them against each other, saying the issue “*involves weighing up the conflicting interests of the exercise of two fundamental freedoms*”.⁵⁸ Some guidance on how to do that balancing test was given by the Court,⁵⁹ by stating:

“...whoever exercises the rights and freedoms enshrined in the first paragraph of that Article undertakes "duties and responsibilities". Amongst them -in the context of religious opinions and beliefs- may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.”

c) Aftermath of the Otto-Preminger v. Austria and Criticisms

In Otto-Preminger Institut case the European Court of Human Rights ruled for the first time that a member state can limit freedom of expression to protect the religious feelings of believers, making the case “the origin story” of the Court’s problematic case law on blasphemy.⁶⁰ It set a precedent by the Court, meaning that it was legitimate for member states to limit freedom of expression to protect religious feelings under certain circumstances.

According to Virgili, that was “*the first aporia that consists in raising the protection of religious feeling to the rank of a safeguarded right*”⁶¹ because it meant that Article 9 of the Convention which protects freedom of religion included a right to respect for religious

⁵⁶ ECtHR, Otto-Preminger-Institut v. Austria, App. no. 13470/87, 20 September 1994, para. 47.

⁵⁷ Ibid., para. 55.

⁵⁸ Ibid.

⁵⁹ Smet, ECLR, 15/2019, p.158, 161.

⁶⁰ Ibid., p.158, 160.

⁶¹ Virgili, “Rabczewska v. Poland and Blasphemy Before The ECtHR: A Neverending Story of Inconsistency”, <https://strasbourgobservers.com/2022/10/21/rabczewska-v-poland-and-blasphemy-before-the-ecthr-a-neverending-story-of-inconsistency/> (last accessed on 05/10/2023).

feelings.⁶² The case has quite a fame for getting heavily criticized by many authors and critics both from those who support and those who oppose the proportionality analysis, more specifically the balancing test in blasphemy cases.⁶³ The case continues to draw criticism even today, showing its controversial nature.⁶⁴

Although it is noteworthy to say that the Court's balancing test laid out in *Otto-Preminger Insitut v. Austria* case has received positive feedback as well,⁶⁵ those do not constitute the majority. The biggest criticism made by the opponents of the balancing test has been the consideration of religious feelings as a part of freedom of conscious, thought and religion, namely Article 9 of the Convention. Commenting on the case, Tsakyrakis wrote that *Otto-Preminger-Institut v. Austria* only proves that the balancing test is a big failure,⁶⁶ citing the non-existence of a right to have religious feelings protected.⁶⁷ Similar criticism was made by other commentators too, questioning the balancing test based on the postulate of the protection of religious feelings as a right.⁶⁸ Moreover, *Otto-Preminger's* balancing test and its reasoning was examined and defined as a bad application by Klatt and Meister, supporters of the proportionality exercise.⁶⁹

2. I.A. v. Turkey (2005)

a) Background of the Case

The applicant, a French citizen residing in Turkey, was the managing director of a publishing house. In November 1993, they published a novel in Turkey called "*The Forbidden Phrases*", which reflected the author's philosophical and religious views through a narrative. Afterwards, the applicant was charged with blasphemy against God, religion, the Prophet and the Holy Book under Art. 175 of the Turkish Criminal Code. The indictment was based on an expert report by a theology professor who stated that the author tries to direct his readers to a materialist and positivist point of view and eventually to atheism, directly discrediting religion, its symbols and beliefs. In his defense the applicant had requested a second expert opinion, questioning the expert's impartiality and claiming that the work was a novel and should be

⁶² Ibid.

⁶³ Smet, ECLR, 15/2019, p.158, 161.

⁶⁴ Smet, E.S. v. Austria: Freedom Of Expression Versus Religious Feelings, The Sequel, <https://strasbourgobservers.com/2018/11/07/e-s-v-austria-freedom-of-expression-versus-religious-feelings-the-sequel/> (last accessed on 05/10/2023).

⁶⁵ Evans, CLNSPC, 26(1)/2012, p.345, 352.

⁶⁶ Tsakykaris, IJCL, 7/2009, p.468, 482.

⁶⁷ Ibid., p.468, 481.

⁶⁸ Letsas, LSRE, 2012, p.239, 240.

⁶⁹ Klatt, p. 165 ff.

assessed by a literary specialist. Eventually, a second report was prepared, but as claimed by the applicant, it was the same as the first report. All in all, the Court had sentenced the applicant to two years in prison which was later commuted to a fine. The Court of Cassation of Turkey upheld the sentence.⁷⁰

The applicant brought the case before the European Court of Human Rights, claiming his right to freedom of expression under Article 10 of the Convention was violated. In their reply, the Turkish government argued that the level of criticism was beyond the prudence expected in a country where most of the population is Muslim.⁷¹

b) Judgment of the Court

Regarding the facts, the Court started its examination by stating that the issue was whether such interference is necessary in a democratic society.⁷² It referred to the former cases, underlying that freedom of expression is an essential component of a democratic society, as it helps the development of its members and encompasses not only inoffensive comments but also those that would “*shock, offend or disturb*”.⁷³

However, the Court noted, such freedom is limited to the extent that the speech should not be “*gratuitously offensive to others and profane*”. Furthermore, the member states were allowed to exercise a certain margin of appreciation, which is broader in regard to the protection of the rights of others against attack on their beliefs. In this regard, the contracting states are allowed to take necessary measures against such actions as long as the interference is taken for a “*pressing social need*” and “*proportionate to the legitimate aim pursued*”.⁷⁴

Having said that, the Court also underlined that while exercising their freedom of religion, people are expected to tolerate criticisms directed at their religion and beliefs, even if such criticisms are hostile to their religion. However, reciting a passage from the book, the Court believed that the book had comments that constituted an abusive attack on the Prophet of Islam, stating that Turkish believers might have felt personally attacked by such statements. Accordingly, the Court found that the measures taken by the authorities aimed to protect against attacks to matters deemed sacred by Muslims, reflecting a “*pressing social need*”. Eventually,

⁷⁰ ECtHR, I.A. v. Turkey, App. no. 42571/98, 13 December 2005, para. 7, 9, 10, 11, 13 and 15.

⁷¹ Ibid., para. 20.

⁷² Ibid., para. 22.

⁷³ Ibid., para. 23.

⁷⁴ Ibid., para. 24, 25, 26, 28, 29 and 30.

the measure was found to be within the boundaries of the country's margin of appreciation and proportional by the majority of the members of the Court.⁷⁵

The case was more or less an adaptation of *Otto-Preminger v. Austria* to the specific factual background considering Turkey's social, cultural and religious conditions instead of Austria this time, while applying the balancing test between the assumed right to the protection of religious feelings and freedom of expression.

3. Aydin Tatlav v. Turkey (2006)

a) Background of the Case

Aydin Tatlav, the applicant, was a Turkish journalist situated in Istanbul. He published a five-volume work called "*Reality of Islam*", which constituted a critical commentary on the Quran. After an individual complaint, a criminal procedure was commenced against the author, leading to twelve months of imprisonment which was later converted to a heavy fine. The Court of Cassation of Turkey further upheld the judgement.⁷⁶

Throughout the case Mr. Tatlav contended that the work should have been interpreted as a scientific book on the history of religion, and his criticisms were directed towards the use of religion by public officers for the sake of political gains rather than the belief system or the believers. The applicant referred the case to the European Court of Human Rights on the grounds that the judgement had violated his freedom of expression under Article 10 of the Convention. On the other hand, the Turkish government opposed the arguments of the applicant, claiming that the judgement was proportional to the "*legitimate aim of protecting morals and the rights of others*" and fell within the margin of appreciation of the state, referring to the case of *Otto-Preminger-Institut v. Austria*.⁷⁷

b) Judgment of the Court

Starting their examination, the Court underlined that the matter at stake was whether the interference was necessary in a democratic society which requires freedom of expression for the advancement of the individuals, even for the comments that are "*offending, shocking or disturbing*". The Court recalled previous judgements regarding the limited margin of appreciation of member states, which is further broadened for expressions relating to religious

⁷⁵ Ibid., para. 28, 29, 30.

⁷⁶ ECtHR, *Aydin Tatlav v. Turkey*, App. no. 50692/99, 2 May 2006, para. 9, 14 and 16.

⁷⁷ Ibid., para. 13, 14 and 20.

feelings due to a lack of uniform understanding of the protection of those rights of others. In this sense, the Court underlined its role to strike a balance between the conflicting interests of the freedom of expression and religious feelings and the right of other people to be respected for their freedom of thought, conscience and religion.⁷⁸

The Court again stated that the freedom of religion entails individuals to tolerate specific criticisms against their belief, even if such opposition is hostile to their faith. Regarding the work itself, the Court believed that the content that led to the judgement was rather critical than directly insulting the believers or the sacred symbols, even though the believers might have felt offended upon reading the book. Accordingly, the Court added that the prison sentence would work as a deterrent against the expression of non-conformist ideas which is essential to the protection of pluralism. In this regard the Court ruled, the Turkish authorities had failed to demonstrate that the interference was for pursuing a legitimate aim and the balancing test was applied proportionally. Hence, the Court found a violation of Article 10 of the Convention.⁷⁹

Aydin Tatlav v. Turkey case came after the previous I.A. v. Turkey, and it was only months after it. Despite coming around the same time from the same country and having very similar factual backgrounds, the cases were judged differently and while Mr. Tatlav enjoyed his right to freedom of expression, I.A. was convicted of offending religious feelings of believers. The opposite direction of decisions, keeping in mind that the styles of the applicants' works were the only significant difference in their cases, has been used as an example of the Court's inconsistency in its take on blasphemy.⁸⁰

4. E.S. v. Austria (2018)

a) Background of the Case

The Austrian national E.S., the applicant, had given seminars on Islam in which she stated that the Prophet Muhammad was a pedophile, and she was convicted, under the Article 188 of Austria Criminal Code⁸¹, of disparaging a religious figure and offending religious beliefs in a way that could cause justified indignation.⁸² The promotion of those seminars happened

⁷⁸ Ibid., para. 21, 22, 24 and 26.

⁷⁹ Ibid., para. 28, 30 and 31.

⁸⁰ Virgili, "Rabczewska v. Poland and Blasphemy Before The ECtHR: A Neverending Story of Inconsistency", <https://strasbourgobservers.com/2022/10/21/rabczewska-v-poland-and-blasphemy-before-the-ecthr-a-neverending-story-of-inconsistency/> (last accessed on 05/10/2023).

⁸¹ The same code and the article was used by authorities and domestic courts in Otto-Preminger v. Austria case, finding the film in question illegal.

⁸² ECtHR, E.S. v. Austria, App. no. 38450/12, 25 October 2018, para. 12.

through a website and by distributing leaflets, targeting young voters.⁸³ There were two seminars, with around thirty participants for both.⁸⁴

In an ordinary way, a substantial portion of the reasoning of domestic courts directly followed the Strasbourg Court's established case law regarding offenses related to religious feelings, with a specific focus on the *Otto-Preminger v. Austria* case.⁸⁵ The case was upheld, and eventually was brought before the Strasbourg Court. E.S. argued that the conviction violated her right to freedom of expression as protected under Article 10 of the European Convention on Human Rights, claiming that her conviction amounted to an unjustified limitation on her right to express her views on a broad debate of religious matters.⁸⁶

b) Judgment of the Court

The European Court of Human Rights ruled that Austria did not violate Article 10 of the Convention, noting that the statements of E.S. were intended to disparage the Prophet Mohammad rather than contribute to a broad debate on religious matters. The Court followed the methodology it introduced in *Otto Preminger v. Austria*. It repeated what it had said in that case on how “*a religious group must tolerate the denial by others of their religious beliefs and even propagation by others of doctrines hostile to their faith, as long as the statements at issue do not incite hatred or religious intolerance*”. The Court also reminded those who enjoy freedom of expression that there is a “*duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane*”. Continuing to follow *Otto Preminger v. Austria*, the Court mentioned a conflict between two fundamental human rights and as solution referred to the balancing test. Lastly, a wide margin of appreciation of the Austrian authorities due to their “*better position to evaluate which statements were likely to disturb religious peace in their country*” was highlighted.⁸⁷

The Strasbourg Court concluded that domestic courts correctly balanced the applicant's right to freedom of expression with the rights of others to have their religious feelings protected. According to the Court, authorities pursued a legitimate aim to have religious peace preserved in Austrian society and they did not overstep their margin of appreciation in the given case.⁸⁸

⁸³ Ibid., para. 7.

⁸⁴ Ibid., para. 8.

⁸⁵ Smet, ECLR, 15/2019, p.158, 163.

⁸⁶ ECtHR, E.S. v. Austria, App. no. 38450/12, 25 October 2018, para. 16.

⁸⁷ Ibid., para. 43, 46, 50 and 52.

⁸⁸ Ibid., para. 57 and 58.

What made *E.S. v. Austria* a unique case rather than just following a straightforward application of *Otto-Preminger v. Austria* was that the Court agreed “*with the domestic courts that the impugned statements can be classified as value judgments without sufficient factual basis*”⁸⁹, continuing the problematic and chronic inconsistency in its case law on blasphemy by approving the conflation of religious feelings case law and defamation case law made by domestic courts.⁹⁰

c) Aftermath of *E.S. v. Austria* and Criticisms

In the *E.S. v. Austria* case, the Court reaffirmed the protection of religious feelings as a right under the Convention’s Article 9, more specifically freedom of religion, and the balancing test between Article 9 and Article 10 in the case of a conflict of religious feelings and freedom of expression. The methodology laid out in *Otto-Preminger* was followed, and similarly Austrian authorities were found right in pursuing a legitimate aim and taking necessary measures within their margin of appreciation.

The judgment has gotten criticized deeply and added up to the ongoing debate about the Strasbourg Court’s case law on blasphemy.⁹¹ Many of those criticisms also track back to *Otto-Preminger*, as *E.S. v. Austria* adopts the same approach.⁹² The lack in the logic of the Court’s explaining why religious feelings are a part of freedom of religion under Article 9 still lingers,⁹³ while some critics find the decision correct but the reasoning even “foolish”⁹⁴. Milanovic summarizes both dissatisfactions saying that the case indicates the dangers of the balancing test as it is not based on sufficient doctrinal and analytical rigor required in such a framework.⁹⁵ He further comments that “*the Court’s distinctions are essentially meaningless and incapable of being applied in any non-arbitrary way, leading us not to a slippery slope of a further erosion of free speech, but to a cliff.*”⁹⁶ The Court’s attitude on adhering to the exercise that many had

⁸⁹ *Ibid.*, para. 54.

⁹⁰ Smet, ECLR, 15/2019, p.158, 165.

⁹¹ *Ibid.*, p.158, 158.

⁹² *Ibid.*, p.158, 160.

⁹³ Bougiakiotis, “*E.S. v Austria: Blasphemy Laws and the Double Standards of the European Court of Human Rights*”, <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/> (last accessed on 05/10/2023).

⁹⁴ Wood, “*In Europe, Speech Is an Alienable Right*”, www.theatlantic.com/ideas/archive/2018/10/its-not-free-speech-criticizemuhammad-echr-ruled/574174 (last accessed on 05/10/2023).

⁹⁵ Milanovic, “*Legitimizing Blasphemy Laws Through the Backdoor: The European Court’s Judgment in E.S. v. Austria*”, <https://www.ejiltalk.org/legitimizing-blasphemy-laws-through-the-backdoor-the-european-courts-judgment-in-e-s-v-austria/> (last accessed on 05/10/2023).

⁹⁶ *Ibid.*

hoped to be abandoned was disappointing as the case brought nothing new to offer, other than more complexities.⁹⁷

Smet interprets the motivation behind the decision in *E.S. v. Austria* as being concerned about sociopolitical consequences more than legality.⁹⁸ Referring to the big and many similarities between *Otto-Preminger Institut v. Austria* and *E.S. v. Austria*, he comments that it would not be possible for the Court to give a decision favoring freedom of expression in front of religious feelings when it is aimed at Muslim minority's beliefs because the decision regarding the conflict between Article 10 and Christian majority's beliefs was made in opposite direction in the former case.⁹⁹ Milanovic on the other hand, thinks this rationale can easily be interpreted as letting the criminalization of blasphemy be justified.¹⁰⁰

5. Rabczewska v. Poland (2022)

a) Backgrounds of the Case

The applicant in the case *Rabczewska v. Poland* was a famous singer known as “Doda”, and she was convicted of having committed an offence under Poland's Criminal Code because of her statements in an interview regarding the Bible and biblical figures after two individuals complained to a public prosecutor about those statements.¹⁰¹ Ms. Rabczewska, after being asked about her religious beliefs in the interview, had stated that she preferred science over “the writings of someone wasted from drinking wine and smoking weed.”¹⁰² The applicant was found guilty and fined with a sum of money.¹⁰³ Ms. Rabczewska eventually filed a constitutional complaint which was brought before the Poland Constitutional Court. The Constitutional Court rejected the application, basing the decision on arguments developed by the European Court of Human Rights.¹⁰⁴ The Constitutional Court mentioned that Article 196 of the Criminal Code of Poland guaranteed a right to the protection of religious feelings, and

⁹⁷ Smet, *E.S. v. Austria: Freedom Of Expression Versus Religious Feelings, The Sequel*, <https://strasbourgobservers.com/2018/11/07/e-s-v-austria-freedom-of-expression-versus-religious-feelings-the-sequel/> (last accessed on 05/10/2023).

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ Milanovic, “Legitimizing Blasphemy Laws Through the Backdoor: The European Court's Judgment in *E.S. v. Austria*”, <https://www.ejiltalk.org/legitimizing-blasphemy-laws-through-the-backdoor-the-european-courts-judgment-in-e-s-v-austria/> (last accessed on 05/10/2023).

¹⁰¹ ECtHR, *Rabczewska v. Poland*, App. no. 8257/13, 15 September 2022, para. 7.

¹⁰² *Ibid.*, para. 6.

¹⁰³ *Ibid.*, para. 11.

¹⁰⁴ Virgili, “*Rabczewska v. Poland* and Blasphemy Before The ECtHR: A Neverending Story of Inconsistency”, <https://strasbourgobservers.com/2022/10/21/rabczewska-v-poland-and-blasphemy-before-the-ecthr-a-neverending-story-of-inconsistency/> (last accessed on 05/10/2023).

the authorities acted within a legitimate aim and applied a necessary restriction.¹⁰⁵ Ms. Rabczewska finally brought her case before the Strasbourg Court, claiming that her right to freedom of expression under the Article 10 of the European Convention on Human Rights was violated.

b) Judgment of the Court

The Strasbourg Court ruled that Ms. Rabczewska's right to freedom of expression under Article 10 was indeed violated by Polish authorities and judgments of the domestic courts were wrong. In doing so, the Court first made a connection, in paragraph 51 of the judgment, between four concepts.¹⁰⁶ Those four concepts are namely "presenting objects of religious worship in a provocative way", "hurting the feelings of the followers of that religion", "a malicious violation of the spirit of tolerance" and "expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance".¹⁰⁷ The Court continues by reminding its established methodology coming from *Otto-Preminger v. Austria* case, saying that "*A State may therefore legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas judged incompatible with respect for the freedom of thought, conscience and religion of others.*".¹⁰⁸ The necessity of that repressing which assumingly pursues a legitimate aim, according to the Court, must be determined by balancing "*the conflicting interests of the exercise of two fundamental freedoms, namely the right of the applicant to impart to the public his or her views on religious doctrine on the one hand, and the right of others to respect for their freedom of thought, conscience and religion on the other*".¹⁰⁹ The Court also does not change its stance on countries being in a better position, therefore having a wide margin of appreciation, on assessing the effects of statements in question which present the possible danger of disturbing the religious peace in a country, explaining that it depends on "*the situation in the country where the statements were made at the time and the context in which they were made*"¹¹⁰.

However, the Strasbourg Court notes, in determining if Ms. Rabczewska's right to freedom of expression was violated, the domestic courts did not "*identify and carefully weigh*

¹⁰⁵ ECtHR, *Rabczewska v. Poland*, App. no. 8257/13, 15 September 2022, para. 19.

¹⁰⁶ Virgili, "Rabczewska v. Poland and Blasphemy Before The ECtHR: A Neverending Story of Inconsistency", <https://strasbourgobservers.com/2022/10/21/rabczewska-v-poland-and-blasphemy-before-the-ecthr-a-neverending-story-of-inconsistency/> (last accessed on 05/10/2023).

¹⁰⁷ ECtHR, *Rabczewska v. Poland*, App. no. 8257/13, 15 September 2022, para. 51.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*, para. 52.

¹¹⁰ *Ibid.*

the competing interests at stake. Nor did they discuss the permissible limits of criticism of religious doctrines under the Convention versus their disparagement. In particular, the domestic courts did not assess whether applicant's statements had been capable of arousing justified indignation or whether they were of a nature to incite to hatred or otherwise disturb religious peace and tolerance in Poland". In other words, the Court says that Polish courts did not apply the balancing test to the conflict of interests between freedom of expression and the right to the protection of religious feelings. Coming up with a second test in addition to the balancing test,¹¹¹ which was also used in *E.S. v. Austria*, the Court goes further and says that the domestic courts also failed "*to assess properly – on the basis of a detailed analysis of the wording of the statements made - whether the impugned statements constituted factual statements or value judgments.*"¹¹². Making its own evaluation, the Court found that Article 10 of the Convention was violated in the case because the statements made by Ms. Rabczewska did not constitute an inappropriate or harmful assault on objects of religious veneration in question and her actions were not capable of inciting religious intolerance.¹¹³ As Virgili noted, assessments on the context and the content of *Rabczewska v. Poland* were clearly made in comparison with *E.S. v. Austria* case.¹¹⁴

c) Aftermath of the Case and Criticisms

Rabczewska v. Poland drew criticism because despite having similar facts and background with *E.S. v. Austria* and coming not long after it, the Court's decision was in the opposite direction. Moreover, the Court itself used *E.S. v. Austria* heavily in its assessment of the situation and made many references to it. That contradiction made critics, including judges by the Court in their concurring and dissenting opinions of the case, note that the Court was zigzagging in its own case law.

In his dissenting opinion in the judgment of the *Rabczewska v. Poland*, Judge Wojtyczekis criticized the decision and said the case must have been "*placed in a wider social context, characterized by a rapidly growing number of religiophobic acts, of various guises, in Europe. These concern mainly Judaism and Christianity.*". According to the Judge, a balancing

¹¹¹ Virgili, "Rabczewska v. Poland and Blasphemy Before The ECtHR: A Neverending Story of Inconsistency", <https://strasbourgobservers.com/2022/10/21/rabczewska-v-poland-and-blasphemy-before-the-ecthr-a-neverending-story-of-inconsistency/> (last accessed on 05/10/2023).

¹¹² ECtHR, *Rabczewska v. Poland*, App. no. 8257/13, 15 September 2022, para. 60.

¹¹³ *Ibid.*, para. 64.

¹¹⁴ Virgili, "Rabczewska v. Poland and Blasphemy Before The ECtHR: A Neverending Story of Inconsistency", <https://strasbourgobservers.com/2022/10/21/rabczewska-v-poland-and-blasphemy-before-the-ecthr-a-neverending-story-of-inconsistency/> (last accessed on 05/10/2023).

test between two fundamental rights, namely freedom of expression and freedom of religion, was needed due to the importance of religious feelings as an element of Article 9 but it was not applied correctly in the instant case. According to the Judge the statements made by Ms. Rabczewska were enough to make up to an abusive attack upon an object of veneration and disturb religious peace in society, therefore measures taken by authorities as approved by domestic courts were within a necessity. The Judge pointed out that the European Court of Human Rights had acted differently in very similar cases with regards to other religious beliefs and systems, including *I.A. v. Turkey* and *E.S. v. Austria* where the audience of the statements in question was much smaller. That difference of proceeding despite being very similar cases regarding two different religions “*may create an impression that in cases concerning Islam the Court follows its established approach and seeks to protect religious feelings effectively against anti-religious speech, whereas in cases involving other religions, the approach has evolved and the protection offered to believers against abusive anti-religious speech has weakened*” in his opinion which is a valid point on the Court’s sociopolitical approach to blasphemy cases rather than legal.¹¹⁵

Concurring judges on the other hand, in their opinion, agree with the eventual decision that there was a violation of the applicant’s right to freedom of expression. Their criticism is aimed at the Court’s long established balancing test between Article 9 and Article 10, and they view the methodology in *Otto Preminger v. Austria* as outdated. Unlike the dissenting judge, they think the protection of religious feelings is not a part of the freedom of conscience, thought and religion. Accepting that, according to them, is considering freedom of religion as a mere exception to freedom of expression. This exercise should be abandoned they believe, and instead the right to freedom of expression should only be limited when it threatens the public order matters indicated in Article 10/2. In that view, and rightly so, religious peace is seen as a part of public order instead of accepting that it is built upon the protection of believers’ religious feelings as part of freedom of religion.¹¹⁶

III. Evaluation of the Strasbourg Court’s Case Law and Approach on the Clash Between Freedom of Expression and Freedom of Religion

In this section, we will try to make a general assessment of the European Court of Human Rights’ case law on blasphemy and the approach it has adopted and been using so far.

¹¹⁵ ECtHR, *Rabczewska v. Poland*, App. no. 8257/13, 15 September 2022, Dissenting Opinion of Judge Wojtyczek, para. 2, 5, 6 and 8.

¹¹⁶ ECtHR, *Rabczewska v. Poland*, App. no. 8257/13, 15 September 2022, Concurring Opinion, para. 1, 2 and 3.

Criticisms regarding the Court's methodology and controversial stances in its decisions will also be reminded and discussed.

1. The Strasbourg Court's Condition in the Issue of Blasphemy: Tangled Up In Self-Contradiction

First of all, it is clear that the Court's case law on blasphemy has not been satisfying in terms of finding a straight answer to the issue. Even for the supporters of the Court's long established balancing test in cases related to religious feelings and freedom of expression, such as dissenting Judge Wojtyczekis in *Rabczewska v. Poland*, decisions have drawn criticism because of being reasoned differently despite having very similar factual backgrounds. The case *Rabczewska v. Poland* was very much similar to *E.S. v. Austria* which was ruled not long ago before the former case. Similarly, as we mentioned before,¹¹⁷ even authors who support the proportionality methodology used the Court's practice of balancing test in *Otto-Preminger Institut v. Austria* as an example of how things can go abruptly wrong when applying proportionality exercise. So, even for those who are on the side of accepting the protection of religious feelings as a right under freedom of religion and balancing its conflicting interest with freedom of expression, the Court's judgments and reasoning in those judgments have not been convincing.

Of course, that reflects itself even more in the assessments of those who doubt the position of religious feelings as part of Article 9 and therefore the balancing test of the Court. Examining the *Otto-Preminger Institut v. Austria*, Smet notes that while the Court seems very determined in emphasizing the importance of freedom of expression and that believers have to tolerate provocative speech regarding their religious views and even expressions hostile to their beliefs, at the same time it also asserts the idea that religious feelings of believers should be respected and this necessity brings a duty for others to avoid gratuitously offensive expressions regarding religious objects of veneration.¹¹⁸ Reminding that religious feelings are nowhere to be found in Article 9 of the Convention and likening blasphemy cases being brought before the European Court of Human Rights to a minefield, Virgili summarizes the Court's history on the issue as wavering between opposite decisions on equal and akin facts.¹¹⁹

¹¹⁷ See page 20, the last paragraph of the topic "Otto-Preminger-Institut v. Austria (1994): Birth of the Balancing Test between Article 9 and Article 10".

¹¹⁸ Smet, ECLR, 15/2019, p.158, 159.

¹¹⁹ Virgili, "Rabczewska v. Poland and Blasphemy Before The ECtHR: A Neverending Story of Inconsistency", <https://strasbourgobservers.com/2022/10/21/rabczewska-v-poland-and-blasphemy-before-the-ecthr-a-neverending-story-of-inconsistency/> (last accessed on 05/10/2023).

We also have the examples of *I.A. v. Turkey* and *Aydın Tatlav v. Turkey* at hand, where two decisions regarding artistic and scientific expressions came up within a year from the same country, on cases with highly similar factual backgrounds. Despite these factors, the Court had judged the two cases differently, simply basing its decision on the fact that one applicant's work was a novel and the other's work was a political criticism. Is it not possible to do political criticism through a literary piece?¹²⁰ And are artistic manifestations really less protected than the political speech within the boundaries of freedom of expression?

Another example of the Court's inconsistency in its blasphemy jurisprudence is the case of *Choudhury v. United Kingdom* from 1991, where the applicant claimed his right to the freedom of religion was violated because his religious sensitivities were damaged by author Salman Rushdie's *Satanic Verses* book.¹²¹ This judgment was made before groundbreaking *Otto-Preminger Institut v. Austria*, therefore the Court's methodology of balancing between Article 9 and Article 10 of the Convention was not born yet. Three years before the *Otto-Preminger* the Court found that there was "*no indication in the present case of a link between freedom from interference with the freedoms of Art. 9-1 of the Convention and the applicant's complaints*" and decided that the application was inadmissible.¹²² Not only the latter case was a sharp "U-turn" in methodology which was to follow till today, it was also very different than the Court's approach in *I.A. v. Turkey* in 2005 as it can be noticed. It was also quite contradictory with a previous judgment from the United Kingdom which also concerned blasphemy, *X. Ltd. and Y. v. UK* before the then Commission, and the fact that the decision was in favor of the protection of Christian majority's religious feelings had drawn legitimate criticism.¹²³

2. The Major Problem: Inconsistency

Those examples above show that although there are different opinions as to what should be the direction in blasphemy cases, almost everybody agrees that the Court is not consistent in what it is saying and what it is doing. Therefore, the first and biggest issue in the Strasbourg

¹²⁰ Ibid.

¹²¹ ECtHR, *Choudhury v. United Kingdom*, App. No. 17439/90, 5 March 1991.

The application does not have paragraph numbers. Accessed at:

<https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-854&filename=CHOUDHURY%20v.%20THE%20UNITED%20KINGDOM.docx&logEvent=False> (last accessed on 05/10/2023).

¹²² Ibid.

¹²³ Virgili, "Rabczewska v. Poland and Blasphemy Before The ECtHR: A Neverending Story of Inconsistency", <https://strasbourgobservers.com/2022/10/21/rabczewska-v-poland-and-blasphemy-before-the-ecthr-a-neverending-story-of-inconsistency/> (last accessed on 05/10/2023).

Court's case law on blasphemy, including the most recent cases, is inconsistency. Not only those who support balancing religious feelings with freedom of expression, but also those who think that there is no such a right as the protection of religious feelings repeatedly pointed out that the Court has been conflicting with its own jurisprudence in several judgments.

By continuing its self-contradiction, the Court opens the door to those who claim, such as the dissenting Judge Wojtyczek does in *Rabczewska v. Poland* case, that there is a recent religiophobia against Christianity and Judaism and instead Islam gets a preferential treatment from the Court, even if that is untrue. If equal and consistent reasonings were applied to the blasphemy cases that are related to different religions, at least the Court would not draw such criticisms of being unjust and political.

3. The Reason Behind the Inconsistency: Sociopolitical Concerns

Thus, the first thing to do for the Court from now on is resolving that inconsistency problem. In order to do that, it is needed to frankly name the motivation or fear standing behind the inconsistency when it comes to the clash of religious feelings and provocative speech. As seen in several cases which were very similar to each other factually but judged differently, the Court behaves with sociopolitical concerns and gives conflicting rulings regarding different cases that are related to different belief systems.

Moreover, this acting with sociopolitical concerns situation is not specific to the Court's take on blasphemy cases. In his partly dissenting opinion in the case of *Ahmet Hüsrev Altan v. Turkey* from 2021, Judge Kuris criticized the majority of the Court for continuously ignoring the Turkey's systematic persecution against journalists and the free media, and for adamantly refusing to find a violation of Article 18 of the Convention on the matter. The Judge briefly and delectably said the Court's case law on that regard "*indicates the patterns and the tendencies – both the pattern and the tendency of the respondent State's stand vis-à-vis the independent media and the pattern and the tendency on the part of the Court in dealing with the respective complaints. I am far from sure that these are patterns and tendencies which would enjoy the same persuasiveness in the world outside the judicial ivory tower as within its halls.*"¹²⁴

Historically, blasphemy and law's relationship with it has always been a sociopolitical issue. Politicians and governments, those who rule and consolidate power, have used religious sensitivities constantly throughout the civilization. This, for example, can be seen in Islamic

¹²⁴ ECtHR, *Ahmet Hüsrev Altan v. Turkey*, App. no. 13252/17, 13 April 2021, Partly Dissenting Opinion of Judge Kuris, para. 6.

world and society. Despite the historic anecdote that the Prophet Muhammad let go of a poet who wrote and sang gratuitously offensive and foulmouthed poems about him against his followers' wishes, blasphemous crimes have gradually become a tool for many rulers of the Islamic world to oppress the masses.¹²⁵ This attitude has eventually fed into the Muslim society and now whenever the Prophet's name is related to blasphemous actions and expressions, a violent response somehow comes within the Muslims.

What such a legal organization as the European Court of Human Rights should do is not following this habit and letting politics and political interests influence law, especially human rights law. For the Strasbourg Court, continuing the same mentality and using the same approach, be it under whatever name, can cause the use of blasphemy to be embodied in European politics and increase its influence on the European society.

Leaving other matters out, it is in a way understandable why the Strasbourg Court have such concerns due to the current social and political developments -as explained before in this paper- in the European society.¹²⁶ But being understandable does not mean it is the right thing to do and it works, nor that the approach is not a big mistake. In fact, taking a sociopolitical approach does not work and does not help. Maybe in general picture, it makes those who have religious sensitivities more tense because it leads them to think they are treated differently and casts doubt on their faith in justice.¹²⁷ Such actions do not help with reducing polarization or radicalization. We gave the example of how the Strasbourg Court was inconsistent with judging blasphemy cases, counting *Choudhury v. United Kingdom* as one of them. The case, ruled in 1991, was about the controversies surrounding the author Salman Rushdie's book *Satanic Verses*. Decades after the book's publication and the case before the Court, Salman Rushdie was attacked onstage in New York.¹²⁸ Of course, one cannot establish a direct connection between the Court's judgment (which in our opinion was correct) and the attack to the author. However, it is apparent that the Court's inconsistent stance in the *Choudhury v. United Kingdom* compared to *X. Ltd. and Y. v. UK* around same time has not been helpful. Accordingly, the Court's decisions driven by sociopolitical motivations today will not be helpful in the future

¹²⁵ Kuru, "Op-Ed: How blasphemy laws are used to serve political ends", <https://www.latimes.com/opinion/story/2023-02-03/pakistan-blasphemy-law-muslim-countries> (last accessed on 05/10/2023).

¹²⁶ Regarding that, see the topic "Current Developments" in pages 7-8.

¹²⁷ That can be seen in Judge Wojtyczek's dissenting opinion in *Rabczewska v. Poland* case, for example. See: ECtHR, *Rabczewska v. Poland*, App. no. 8257/13, 15 September 2022, Dissenting Opinion of Judge Wojtyczek, para. 8.

¹²⁸ Alkiviadou, "Blasphemy and *Choudhury v. The United Kingdom* Revisited in Light of the Attack on Rushdie", <https://strasbourgobservers.com/2022/09/27/blasphemy-and-choudhury-v-the-united-kingdom-revisited-in-light-of-the-rushdie-stabbing/> (last accessed on 05/10/2023).

either. Identity politics are a slippery slope where objective arguments almost never prevail.¹²⁹ Many factors, legal or non-legal, play a role in the issue of blasphemy. Identity is just one of them, which cannot be controlled by a legal court. A leading authoritative legal body such as the European Court of Human Rights should not play on that ground by seeking sociopolitical results rather than giving legal answers.¹³⁰ As Milanovic said regarding the decision on and inconsistency of *E.S. v. Austria* case, the most concerning thing is that the current approach of the Strasbourg Court will probably not advance religious understanding in Europe at all.¹³¹ Instead, it might help to amplify the claims of those with religiophobic and far-right leanings that they are fighting for freedom of expression and being oppressed by evil groups, the elite, and human rights defenders.¹³²

Plus, if the aim is preserving democracy and secularism in Europe, it should be remembered that secularism first of all should mean no unequal treatment for any specific religion. A manner of action and case law which have sociopolitical motivations and is not unified and constantly inconsistent within itself, not only cause a confliction with secularism by its nature, but also give rise to criticisms of letting blasphemy laws be reintroduced through the backdoor into the European agenda.¹³³

Yes, it may also be asked regarding the issue of blasphemy, as Judge Kuris quoted from Bob Dylan in his dissenting opinion in *Ahmet Hüsrev Altan v. Turkey*:¹³⁴ How many times can the Strasbourg Court turn his head and pretend that it just does not see?

4. The Misuse of Margin of Appreciation

The European Court of Human Rights often grants the contracting states a certain margin of appreciation when it comes to determining the limits to the use of certain rights, allowing them to move within an elbowroom in line with their cultural, historical, social and political conditions. When it comes to the issues related to the conflict between religious feelings and freedom of expression, the level of margin of appreciation for countries becomes

¹²⁹ Virgili, “Rabczewska v. Poland and Blasphemy Before The ECtHR: A Neverending Story of Inconsistency”, <https://strasbourgothers.com/2022/10/21/rabczewska-v-poland-and-blasphemy-before-the-ecthr-a-neverending-story-of-inconsistency/> (last accessed on 05/10/2023).

¹³⁰ Ibid.

¹³¹ Milanovic, “Legitimizing Blasphemy Laws Through the Backdoor: The European Court’s Judgment in *E.S. v. Austria*”, <https://www.ejiltalk.org/legitimizing-blasphemy-laws-through-the-backdoor-the-european-courts-judgment-in-e-s-v-austria/> (last accessed on 05/10/2023).

¹³² Ibid.

¹³³ Ibid.

¹³⁴ ECtHR, *Ahmet Hüsrev Altan v. Turkey*, App. no. 13252/17, 13 April 2021, Partly Dissenting Opinion of Judge Kuris, para. 20.

a wide one in the Court's case law.¹³⁵ A good summary of the Court's reasoning in this granting is stated in *Rabczewska v. Poland* case. It is as it follows:

*“The fact that there is no uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions means that the Contracting States have a wider margin of appreciation when regulating freedom of expression in connection with matters liable to offend intimate personal convictions within the sphere of morals or religion. Moreover, in cases involving weighing up the conflicting interests of the exercise of two fundamental freedoms, namely the right of the applicant to impart to the public his or her views on religious doctrine on the one hand, and the right of others to respect for their freedom of thought, conscience and religion on the other, the assessment of the (potential) effects of the impugned statements depends, to a certain degree, on the situation in the country where the statements were made at the time and the context in which they were made. In such cases, the domestic authorities have a wide margin of appreciation, as they are in a better position to evaluate which statements were likely to disturb the religious peace in their country.”*¹³⁶

Accordingly, that allowance of the use of wide margin of appreciation given by the Court in blasphemy cases has been subject to criticisms. While criticizing the Court's use of proportionality test and balancing between freedom of expression and religious feelings along with the reasoning behind it which lacks doctrinal rigor, Milanovic said that the Strasbourg Court “fetishizes the national margin of appreciation” in *E.S. v. Austria* and blasphemy cases in general.¹³⁷ Indeed, it is not hard to see that whenever the Court got criticism for its jurisprudence of blasphemy and made an inconsistent judgment, it did so by weakly relying on the margin of appreciation it granted to the authorities and domestic courts.¹³⁸

Plus, it contradicts the notion of religious feelings being a part of freedom of religion under Article 9 of Convention: Such a fundamental right under the Convention, namely freedom

¹³⁵ The same is also highlighted in *E.S. v. Austria*: “Therefore, the Court considers that the domestic courts did not overstep their – wide – margin of appreciation in the instant case when convicting the applicant of disparaging religious doctrines. Accordingly, there has been no violation of Article 10 of the Convention.” See: ECtHR, *E.S. v. Austria*, App. no. 38450/12, 25 October 2018, para. 58.

¹³⁶ ECtHR, *Rabczewska v. Poland*, App. no. 8257/13, 15 September 2022, para. 52.

¹³⁷ Milanovic, “Legitimizing Blasphemy Laws Through the Backdoor: The European Court's Judgment in *E.S. v. Austria*”, <https://www.ejiltalk.org/legitimizing-blasphemy-laws-through-the-backdoor-the-european-courts-judgment-in-e-s-v-austria/> (last accessed on 05/10/2023).

¹³⁸ Virgili, “*Rabczewska v. Poland* and Blasphemy Before The ECtHR: A Neverending Story of Inconsistency”, <https://strasbourgobservers.com/2022/10/21/rabczewska-v-poland-and-blasphemy-before-the-ecthr-a-neverending-story-of-inconsistency/> (last accessed on 05/10/2023).

of religion and its application, should normally not be left to the will of the states.¹³⁹ Such a control that can be used to restrict other freedoms and human rights, in the case of blasphemy the right to freedom of expression, carries a potential risk for abuse. It may become an excuse for imposing limitations on freedom of expression in the name of protecting freedom of religion.

We have already mentioned the criticisms aimed at the Court's methodology of balancing, which was based on the problematic acceptance of the protection of religious feelings being a part of Article 9 of the Convention and filled with inconsistency in its application by the Court. Giving authorities a wide margin of appreciation is one more problematic aspect added to those, and it is the channel the Court uses to obtain a result in the pursuit of its sociopolitical concerns. Therefore, in order to solve the first and biggest problem, namely the inconsistency, the Court also has to draw limits on the level of margin of appreciation it grants to contracting states in blasphemy cases.

5. Solution: A Consistent, Clear and Uniform Approach

All of the problems, situations and factors stated above show that the European Court of Human Rights must solve the inconsistency problem in its case law on blasphemy. We explained that the Court's sociopolitical concerns when it comes to matters of religion and freedom of expression are what causes that problem, and why the Court should abandon such motivations. In addition, the misuse of margin appreciation given to the contracting states in cases where religious feelings and freedom of expression clash was mentioned along with how the Court's granting it on a really wide scale was the channel for seeking sociopolitical results and therefore another way to inconsistency.

Indeed, it really is a circle where everything ends up, no matter what the decisions are and what groups are satisfied or dissatisfied with them, in inconsistency. Therefore, whether the Strasbourg Court's methodology of judging blasphemy cases stays as accepting the protection of religious feelings as a right to freedom of religion under Article 9 and balancing it with freedom of expression under Article 10, whether a new methodology such as balancing religious feelings with public order or conflating the strands of religious feelings and defamation case law or even demolishing any limitations to freedom of expression and making it absolute is introduced; the Court has to adopt a clear, uniform approach.

¹³⁹ Ibid.

Nevertheless, a certain way of methodology has to be chosen for ensuring those points. It is a step towards and a necessity for providing consistency and achieving uniformity. Leaving all other things aside, the Court needs to follow its own path in its case law, namely, to ensure that fundamental human rights are protected and to prioritize legality of its decisions rather than their effects and reactions they get. Figuring a solid case law on blasphemy based on objective criteria would also help the Court to get rid of accusations such as treating some religions and belief systems differently than others.

Answers to the questions of which methodology the Court should follow and build its case law and reasoning upon, or what should be the element that provides uniformity and consistency are beyond the limits and capacity of this paper. However, as some of them mentioned in the examination of the Court's case law on blasphemy, different opinions and options are offered by critics, authors, commentators and judges of the Court.

We will try to explain why one of those options, the current approach, cannot be the base for long-awaited new direction in the Court's case law on blasphemy and give quick opinions and final evaluation regarding it. With the short mention of the most prominent alternative, namely balancing the protection of religious feelings with freedom of expression when it appears as a public order matter under Article 10/2, the paper will conclude.

6. Right to the Protection of Religious Feelings Out, Public Order In

As stressed many times, the European Court of Human Rights have a consistency problem in its case law on blasphemy and that problem needs to be handled. But it does not seem possible to achieve that by keeping the current methodology, which is accepting religious feelings protected under Article 9 of the Convention -although it is not mentioned anywhere- and balancing it with freedom of expression under Article 10 when these two rights conflict with each other. As a matter of fact, this exercise itself is the tool for acting under the influence of sociopolitical concerns, and therefore it is at the root of the consistency problem.

Elevating religious feelings to the level of a protected right under the Convention, taking them into a balancing test against such a fundamental human right as freedom of expression and using them to sometimes restrict it, plus granting a wide margin of appreciation to the contracting states, the Court has a vast field to move on and avoid responsibility or decisive judgments whenever it wishes which is something contradictory with legality. Uniqueness of every country's cultural, historical, social and political backgrounds and fragility of the religion and religious feelings concepts do not mean that the Court should or can act in such a way. If

anything, it means that the issue requires more attention, rigor, deliberation and great care in terms of legal scrutinization.

Not only because of the allowance of such an approach it gives to the Court but also because of the legality of its nature, religious feelings are a problematic concept. Freedom in the context of human rights means the liberty of doing something without the threat of being interfered or stopped by authorities and the state. And freedom of religion is a specific version of that liberty, dwelling on the concepts of beliefs, faith, spirituality and so on. One can even say that it is within the boundaries of freedom of expression because almost any religious activity involves some kind of manifestation. Feelings on the other hand, religious or not, are about the individual's inner world. They are not tangible and by their nature cannot be stopped or interfered by authorities or the state, at least not directly. They are not at all similar to a freedom.¹⁴⁰

Plus, where is the line to stop taking feelings as serious as the Court does in cases related to religious matters? As Bougiakiotis touched upon, the concept of religious feelings constitutes the only type of belief which is granted a right to cling by the Strasbourg Court, by being elevated to have one's feelings not hurt about it.¹⁴¹ If feelings and their protection can be interpreted as a right under freedoms, why cannot someone's ideological, political or philosophical feelings for example be protected when they are at the aim of provocative speech?¹⁴² As it does not mention religious feelings anywhere, the Convention does not make any distinction between feelings too, and since feelings are completely subjective and personal, some individuals surely are very sensitive about their other types of feelings too.¹⁴³

What makes a freedom so special and precious is the pass it gives to an individual, allowing them to act in accordance with their feelings and thoughts. If there is no act, there is no freedom too. Because mathematically, feelings plus the action equals the use of freedom based on feelings. Having a feeling and taking an action are two sharply separate situations. Acts are of outer world; feelings are of inner world. When they are found together, they make up freedom. It does not make any sense to assume that getting one's feelings hurt can mean the freedom related to it is violated, despite having no restriction on its manifestation.

¹⁴⁰ Letsas, LSRE, 2012, p.239, 240; Tsakykaris, IJCL, 7/2009, p.468, 482.

¹⁴¹ Bougiakiotis, "E.S. v Austria: Blasphemy Laws and the Double Standards of the European Court of Human Rights", <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/> (last accessed on 05/10/2023).

¹⁴² Ibid.

¹⁴³ Ibid.

Moreover, elevating religious feelings to the level of a protected right although it is not in any way mentioned in Article 9 and making their supposedly required protection a way to set limitations to freedom of expression via balancing test is a legal travesty. If the term religious feelings were mentioned in the Article 9 or anywhere in the Convention, it would still be logically faulty to consider them a part of freedom of religion but at least it would not be legally bizarre as it is now.¹⁴⁴

Nevertheless, there are those who support the Strasbourg Court's exercise of balancing test too, therefore protecting religious feelings as a right under Article 9 of the Convention.¹⁴⁵ Commenting on *Otto-Preminger Institut v. Austria* case, Reed and Dumper said the methodology brought up by the Court in that case and later used in others has "*considerable merit*" and proved enough functioning to solve the issue.¹⁴⁶

Nonetheless, the group of critics and those who are against the exercise and the protection of religious feelings as a right under Article 9 is evidently the majority. Accordingly, the criticism made in the doctrine is as harsh as it is in this writing, especially seen in reactions to the case of *E.S. v. Austria*.¹⁴⁷ Such a stream of reactions mostly comes from the impression that the Court has given, as its exercise and reasoning was interpreted as letting blasphemy laws in through the backdoor¹⁴⁸ into the Europe by using religious feelings to limit freedom of expression. That is mainly due to the persistent awareness of the possible vulnerability of religious tolerance in Europe, even though the majority of blasphemy laws have been abolished, there is a fear that they may be replaced by other practices.¹⁴⁹ The Strasbourg Court's stance on the protection of religious feelings may be interpreted as a sign of the materialization of that possibility.¹⁵⁰ That is understandable, as the difference between the practice of protection of religious feelings and blasphemy laws may not always be easy to distinguish from one another.¹⁵¹

¹⁴⁴ It would be much like the concept of margin of appreciation which is unlike religious feelings physically mentioned in the Convention.

¹⁴⁵ Evans, CLNSPC, 26(1)/2012, p.345, 352.

¹⁴⁶ *Ibid.*, p. 345, 348.

¹⁴⁷ Smet, ECLR, 15/2019, p.158, 159.

¹⁴⁸ Milanovic, "Legitimizing Blasphemy Laws Through the Backdoor: The European Court's Judgment in *E.S. v. Austria*", <https://www.ejiltalk.org/legitimizing-blasphemy-laws-through-the-backdoor-the-european-courts-judgment-in-e-s-v-austria/> (last accessed on 05/10/2023). Milanovic also uses the striking term "blasphemy plus" for the Court's exercise in the article.

¹⁴⁹ Smet, ECLR, 15/2019, p.158, 159.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

At the core of all those criticisms is the legally problematic nature of the concept of religious feelings and its interpretation by the Court. The Court's case law, the solution it has offered and its reasoning on the conflict of religious feelings and freedom of expression has not been convincing.¹⁵² So it seems, adoption of another approach is necessary for solving all problematic points in the Court's case law on blasphemy.

E. CONCLUSION

The Convention already has a way in its toolbox to ensure that religious peace and social cohesion in the European society is preserved without having any unrest. Under Article 10/2, possible limitations to freedom of expression on the rare occasion they are necessary in a democratic society, are given. Those are stated as interests of national security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals, the protection of the reputation rights of others, preventing disclosure of information received in confidence and maintaining the authority and impartiality of judiciary. Such a long list of occasions on which such a fundamental right as freedom of expression can be restricted should be enough for the Court to find its way to observing legality, having logical coherence and showing consistency in its case law.

That option would not solve all of the Court's problematic takes on the issue, such as its sociopolitical approach and inconsistent judgments, and maybe it would not change the general dissatisfaction in public opinion as it does not necessarily mean that the outcome would be different, but it would at least provide a more legal and logical basis for the Strasbourg Court's case law on blasphemy. That is because of the unshakable presence of Article 10/2's in the Convention, and its widely accepted importance for the protection of a democratic society and fundamental rights as a whole. Especially compared to the blurred concept of religious feelings, it would substantially reduce the criticism of letting blasphemy through the backdoor by maybe affecting the outcome after all. It would give less of a leeway to the domestic authorities rather than such a wide margin of appreciation as seen in the blasphemy cases.

Through that path, the Court could also help preserve the social peace in the society without having that as the first thing in mind and as the main goal. Adamantly following the exercise which was established in *Otto-Preminger-Institut v. Austria*, will not be a solution for

¹⁵² Bougiakiotis, "E.S. v Austria: Blasphemy Laws and the Double Standards of the European Court of Human Rights", <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/> (last accessed on 05/10/2023).

any of those as seen in the most recent and prominent case *Rabczewska v. Poland*. Hopefully, upcoming judgments and cases pending before the Court will direct its case law on blasphemy to a new and better direction and will dismiss the increasing tendency of domestic authorities and courts to sanction actions and expressions that conflict with religious feelings even when they cause no harm at all.¹⁵³

¹⁵³ Vikarská, “Sex, God, and Blasphemy”, <https://verfassungsblog.de/sex-god-and-blasphemy/> (last accessed on 05/10/2023).

BIBLIOGRAPHY

Amnesty International, EU: New evidence of systematic unlawful pushbacks and violence at borders, Amnesty International website, 6 October 2021, <https://www.amnesty.org/en/latest/news/2021/10/eu-new-evidence-of-systematic-unlawful-pushbacks-and-violence-at-borders/> (last accessed on 05/10/2023).

Alkiviadou, “Blasphemy and Choudhury v. The United Kingdom Revisited in Light of the Attack on Rushdie”, Strasbourg Observers, 27 September 2022, <https://strasbourgobservers.com/2022/09/27/blasphemy-and-choudhury-v-the-united-kingdom-revisited-in-light-of-the-rushdie-stabbing/> (last accessed on 05/10/2023).

Berger-Schmitt, Regina, Social Cohesion as an Aspect of the Quality of Societies: Concept and Measurement, Gesis, 2000, https://www.gesis.org/fileadmin/upload/dienstleistung/daten/soz_indikatoren/eusi/paper14.pdf (last accessed on 05/10/2023).

Boortz, Neal, The Terrible Truth About Liberals, 1st ed., Marietta, 2001.

Bougiakiotis, Emmanouil, E.S. v. Austria: Blasphemy Laws and the Double Standards of the European Courts of Human Rights, UK Constitutional Law Association Blog, 22 November 2018, <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/> (last accessed on 05/10/2023).

Comerford, Ruth, Violent protests after Quran burning in Sweden, BBC News, 4 September 2023, <https://www.bbc.com/news/world-europe-66706937> (last accessed on 05/10/2023).

Denmark proposes bill that could see ban on Quran burnings, Al Jazeera, 25 August 2023, <https://www.aljazeera.com/news/2023/8/25/danish-government-proposes-bill-that-would-ban-quran-burnings> (last accessed on 05/10/2023).

Denmark scraps 334-year-old blasphemy law, The Guardian, 2 June 2017, <https://www.theguardian.com/world/2017/jun/02/denmark-scraps-334-year-old-blasphemy-law> (last accessed 05/10/2023).

European Commission For Democracy Through Law (Venice Commission), Report On The Relationship Between Freedom Of Expression And Freedom Of Religion: The Issue

Of Regulation And Prosecution Of Blasphemy, Religious Insult And Incitement To Religious Hatred, Council of Europe, 23 October 2008,

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2008\)026-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2008)026-e)

(last accessed on 05/10/2023), para 24.

Europe, End Blasphemy Laws, <https://end-blasphemy-laws.org/countries/europe/> (last accessed on 05/10/2023).

Evans, Malcolm, From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression before the European Court of Human Rights, in: E.D. Reed and M. Dumper (eds.), *Civil Liberties, National Security and Prospects for Consensus: Legal, Philosophical and Religious Perspectives*, 26(1)/2012, p. 345-370.

Exploring migration causes: why people migrate, European Parliament News, 01.07.2020,

<https://www.europarl.europa.eu/news/en/headlines/world/20200624STO81906/exploring-migration-causes-why-people-migrate> (last accessed on 05/10/2023).

Fathaigh, Ronan, Referendum Removes Blasphemy From Irish Constitution, Iris Merlin, 2019, <https://merlin.obs.coe.int/article/8456> (last accessed on 05/10/2023).

Fiedler, Maria, Germany's Right-Wing AfD Party Makes Strides in the West, 9 October 2023, Spiegel International, <https://www.spiegel.de/international/germany/rising-radicalism-germany-s-right-wing-afd-party-makes-strides-in-the-west-a-4d0bde4f-ff09-4093-a653-b396860a62e5> (Last accessed on 11/10/2023).

Flauss, Jean-Francois, The European Court of Human Rights and the Freedom of Expression, in: *Indiana Law Journal*, 84(3), 2009, p. 809-850.

Fröschl, Erich, Democracy, Populism and Minority Rights: The Rise of Populism, 06/09/2008, https://www.socialistsanddemocrats.eu/sites/default/files/2632_EN_democracy-populism_ANTILOPE_1.pdf, (last accessed on 05/10/2023).

Four Freedoms, The National Archives, https://www.archives.gov/exhibits/powers_of_persuasion/four_freedoms/four_freedoms.html (last accessed on 05/10/2023).

Human Rights Watch, Events of 2021: European Union, <https://www.hrw.org/world-report/2022/country-chapters/european-union>, (last accessed on 05/10/2023).

Infographic - Refugees from Ukraine in the EU, Consilium, 26 September 2023, <https://www.consilium.europa.eu/en/infographics/ukraine-refugees-eu/> (last accessed on 05/10/2023).

Klatt, Matthias; Meister, Moritz, *The Constitutional Structure of Proportionality*, 1st ed., Oxford, 2012.

Kuru, Ahmet T., “Op-Ed: How blasphemy laws are used to serve political ends”, Los Angeles Times, 3 February 2023, <https://www.latimes.com/opinion/story/2023-02-03/pakistan-blasphemy-law-muslim-countries> (last accessed on 05/10/2023).

Langer, Armin, Quran burning in Sweden prompts debate on the fine line between freedom of expression and incitement of hatred, *The Conversation*, 29 August 2023, <https://theconversation.com/quran-burning-in-sweden-prompts-debate-on-the-fine-line-between-freedom-of-expression-and-incitement-of-hatred-211849> (last accessed on 05/10/2023).

Letsas, George, *Is there a Right not to be Offended in One’s Religious Beliefs?*, in: Zucca, Lorenzo / Ungureanu, Camil (eds.), *Law, State and Religion in the New Europe: Databases and Dilemmas*, Cambridge, 2012, p.239-260.

Migration Flow to Europe: Arrivals, Displacement Tracking Matrix of Global Data Institut, <https://dtm.iom.int/europe/arrivals> (last accessed on 05/10/2023).

Milanovic, Marko, Legitimizing Blasphemy Laws Through the Backdoor: The European Court’s Judgment in *E.S. v. Austria*, *EJIL: Talk! Blog*, 29 October 2018, <https://www.ejiltalk.org/legitimizing-blasphemy-laws-through-the-backdoor-the-european-courts-judgment-in-e-s-v-austria/> (last accessed on 05/10/2023).

Non-EU citizens make up 5.3% of the EU population, Eurostat, 30 March 2022, <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20220330-2> (last accessed on 05/10/2023).

Norway ends blasphemy law after Hebdo attack, *The Local*, 7 May 2015, <https://www.thelocal.no/20150507/norway-scraps-blasphemy-law-after-hebdo-attacks> (last accessed on 05/10/2023).

Orbán: Europe Can Only Be Saved by Returning to Christianity, Hungary Today, 26 November 2019, <https://hungarytoday.hu/orban-christianity-europe-persecuted/> (last accessed on 05/10/2023).

Religious Belief and National Belonging in Central and Eastern Europe, Pew Research Center, 10 May 2017, <https://www.pewresearch.org/religion/2017/05/10/religious-belief-and-national-belonging-in-central-and-eastern-europe/> (last accessed on 05/10/2023).

Report on Austria, End Blasphemy Laws website, 25 August 2020, <https://end-blasphemy-laws.org/countries/europe/austria/> (last accessed on 05/10/2023).

Sherwood, Harriet, 'Christianity as default is gone': the rise of a non-Christian Europe, The Guardian, 21 March 2018, <https://www.theguardian.com/world/2018/mar/21/christianity-non-christian-europe-young-people-survey-religion> (last accessed on 05/10/2023).

Smet, "E.S. v. Austria: Freedom Of Expression Versus Religious Feelings, The Sequel", Strasbourg Observers, 7 November 2018, <https://strasbourgobservers.com/2018/11/07/e-s-v-austria-freedom-of-expression-versus-religious-feelings-the-sequel/> (last accessed on 05/10/2023).

Smet, Stijn, Free Speech versus Religious Feelings, the Sequel: Defamation of the Prophet Muhammad in E.S. v Austria, in: European Constitutional Law Review, 15/2019, p. 158-170.

Tsakyrakis, Stavros, Proportionality: An Assault on Human Rights?, in: International Journal of Constitutional Law, 7/2009 p. 468-493.

UNCHR, Ukraine Refugee Situation, Operational Data Portal of UNCHR, <https://data.unhcr.org/en/situations/ukraine> (last accessed on 05/10/2023).

Vikarská, Zuzana, Sex, God, and Blasphemy, Verfassungsblog, 19 October 2022, <https://verfassungsblog.de/sex-god-and-blasphemy/> (last accessed on 05/10/2023).

Virgili, Tommaso, Rabczewska v. Poland And Blasphemy Before The ECtHR: A Neverending Story of Inconsistency, Strasbourg Observers, 21 October 2022, <https://strasbourgobservers.com/2022/10/21/rabczewska-v-poland-and-blasphemy-before-the-ecthr-a-neverending-story-of-inconsistency/> (last accessed on 05/10/2023).

Why Does Sweden Allow Quran Burnings? It Has No Blasphemy Laws, VOA News, 21 July 2023, <https://www.voanews.com/a/why-does-sweden-allow-quran-burnings-it-has-no-blasphemy-laws-/7190103.html> (last accessed on 05/10/2023).

Wood, Greame, In Europe, Speech Is an Alienable Right, The Atlantic, 27 October 2018, www.theatlantic.com/ideas/archive/2018/10/its-not-free-speech-criticizemuhammadechr-ruled/574174 (last accessed on 05/10/2023).

Xiaobo, Liu, I Have No Enemies: My Final Statement, The Nobel Prize website, 23 December 2009, <https://www.nobelprize.org/prizes/peace/2010/xiaobo/lecture/> (last accessed on 05/10/2023).