

# E.S. v. AUSTRIA: THE FOLLY OF EUROPE

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## ABSTRACT

*The nations of Europe have been characterized in recent years by a significant increase in cultural and religious diversity. While this has brought a cultural richness, it has also increased cultural tensions. As one commentator has noted, “Clashes, provocation, and dissent between religiously and culturally different groups have characterized many mainstream European concerns.”<sup>1</sup>*

*In E.S. v. Austria (2018), the European Court of Human Rights (ECtHR) upholds Austria’s effort to promote “religious peace” and “mutual tolerance” by convicting an individual for making statements highly critical of Mohammad.<sup>2</sup> The ECtHR does so by offering Austria a wide margin of appreciation to determine how to navigate the difficult challenges of religious and cultural diversity, but also by largely ignoring the text of the European Convention of Human Rights – and even other principles of international law on which it purports to rely.<sup>3</sup> It does so also in the name of strengthening freedom of religion. But the ECtHR is mistaken. Not only does E.S. severely restrict freedom of expression, it also may actually reduce the freedom of religion as understood in the Convention.*

*Part One of this Article focuses on the unique factual and political circumstances that gave rise to the prosecution of E.S. as well as the analysis of the courts, from the Austrian national courts to the ECtHR. Part Two discusses how the ECtHR’s decision in E.S. v. Austria is deeply flawed in three ways. First, the ECtHR engages in almost no serious textual analysis of the relevant Convention articles. Second, in the place of meaningful textual interpretation, the ECtHR applies the margin of appreciation doctrine to support its own analysis which offers little clarity or certainty and leads to a troubling result. Third, the ECtHR reaches a decision that puts it in tension with other key international law standards that it identifies as relevant to the case.*

### I. PART ONE: CASE HISTORY

#### A. Facts of the Case

In January of 2008, the Freedom Party Institute (*Bildungsinstitut der Freiheitlichen Partei sterrecihs*) held several seminars entitled “Basic

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<sup>1</sup> Parvati Nair, *Cultural and Religious Diversity in Europe: The Challenges of Pluralism*, IEMED. MEDITERRANEAN YEARBOOK 328, 328 (2014), [https://www.iemed.org/observatori/arees-danalisi/arxiu-adjunts/anuari/anuari-2014/nair\\_religious\\_diversity\\_europe\\_pluralism\\_IEMed\\_yearbook\\_2014\\_EN.pdf](https://www.iemed.org/observatori/arees-danalisi/arxiu-adjunts/anuari/anuari-2014/nair_religious_diversity_europe_pluralism_IEMed_yearbook_2014_EN.pdf).

<sup>2</sup> E.S. v. Austria, App. No. 38450/12, Eur. Ct. H.R. ¶¶ 41, 44 (2018).

<sup>3</sup> *Id.* ¶ 44.

Information on Islam” (*Grundlagen Des Islams*).<sup>4</sup> The Freedom Party is a right-wing populist and national-conservative political party in Austria.<sup>5</sup> The party began attacking the influence of Islamic extremism in the early 1990s after the issue of immigration became an increasingly important issue for voters in Austria.<sup>6</sup> In 1993, the Freedom Party was among the groups promoting the controversial “Austria First” initiative, which sought to collect signatures for a referendum on immigration restrictions.<sup>7</sup> The party expanded its attack on Islamic extremism to include Islamisation and the increasing number of Muslims in general.<sup>8</sup> The party has also fought the practice of distributing free copies of the Koran.<sup>9</sup>

The “Basic Information on Islam” seminars were open to the public and were publically advertised on the Freedom Party website.<sup>10</sup> In addition, the party had distributed a leaflet specifically aimed at young voters, promoting the seminars.<sup>11</sup> Two seminars were held on October 15th and November 12th of 2009, with thirty participants each.<sup>12</sup> E.S.<sup>13</sup> was the main speaker and spoke for a total of twelve hours during both seminars.<sup>14</sup>

E.S. made two statements during this twelve hour period that placed her in legal jeopardy with the Austrian court:

One of the biggest problems we are facing today is that Muhammad is seen as the ideal man, the perfect human, the perfect Muslim. That means that the highest commandment for a male Muslim is to imitate Muhammad, to live his life. This

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<sup>4</sup> *Id.* ¶ 7.

<sup>5</sup> HANSPETER, KRIESI ET AL., *POLITICAL CONFLICT IN WESTERN EUROPE* 52 (Cambridge Univ. Press 2012); JOHANNES JÄGER & ELISABETH SPRINGLER, *ASYMMETRIC CRISIS IN EUROPE AND POSSIBLE FUTURES: CRITICAL POLITICAL ECONOMY AND POST-KEYNESIAN PERSPECTIVES* 110 (Routledge, 2015); Wolfram Nordsieck, *Austria, PARTIES & ELECTIONS EUR.* (2017), <http://www.parties-and-elections.eu/austria.html>.

<sup>6</sup> Susi Meret, *The Danish People’s Party, the Italian Northern League and the Austrian Freedom Party in a Comparative Perspective: Party Ideology and Electoral Support*, SPIRIT PHD SERIES 1, 194 (2010), [http://vbn.aau.dk/files/20049801/spirit\\_phd\\_series\\_25.pdf](http://vbn.aau.dk/files/20049801/spirit_phd_series_25.pdf).

<sup>7</sup> *Id.*

<sup>8</sup> *See id.* at 198–99; *see also Vexed in Vienna*, *ECONOMIST*, May 21, 2016, at 50.

<sup>9</sup> *Disaster averted—for now*, *ECONOMIST*, May 28, 2016, at 12.

<sup>10</sup> *E.S. v. Austria*, App. No. 38450/12, Eur. Ct. H.R. ¶ 7 (2018).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* ¶ 8.

<sup>13</sup> The Court granted E.S. anonymity on the Court’s own motion under Rule 47 § 4 of the Rules of Court; which provides: “Applicants who do not wish their identity to be disclosed to the public shall so indicate and shall submit a statement of the reasons justifying such a departure from the normal rule of public access to information in proceedings before the Court. The Court may authorize anonymity or grant it of its own motion”. Eur. Ct. H.R., *Rules of Court*, at 24–25, (Aug. 1, 2018), [https://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf).

<sup>14</sup> *E.S.*, App. No. 38450/12 ¶ 34.

does not happen according to our social standards and laws. Because he was a warlord, he had many women, to put it like this, and liked to do it with children. And according to our standards he was not a perfect human. We have huge problems with that today, that Muslims get into conflict with democracy and our value system . . . .<sup>15</sup>

and;

The most important of all Hadith collections recogni[z]ed by all legal schools: The most important is the Sahih Al-Bukhari. If a Hadith was quoted after Bukhari, one can be sure that all Muslims will recogni[z]e it. And, unfortunately, in Al-Bukhari the thing with Aisha and child sex is written . . . I remember my sister, I have said this several times already, when [S.W.] made her famous statement in Graz, my sister called me and asked: “For God’s sake. Did you tell [S.W.] that?” To which I answered: “No, it wasn’t me, but you can look it up, it’s not really a secret.” And her: “You can’t say it like that!” And me: “A 56-year-old and a six-year-old? What do you call that? Give me an example? What do we call it, if it is not p[edophilia?”<sup>16</sup>

E.S.’s statements concerned the marriage of Muhammad to Aisha as recorded in the *Sahih Al-Bukhari*, one of the *Kutub al-Sittah* (six major hadith collections) of Sunni Islam.<sup>17</sup> *Sahih Al-Bukhari* provides, “It is reported from Aisha that she said: The Prophet entered into marriage with me when I was a girl of six . . . and at the time [of joining his household] I was a girl of nine years of age,” and also, “Khadija died three years before the Prophet departed to Medina. He stayed [alone] for two years or so. He married Aisha when she was a girl of six years of age, and he consummated that marriage when she was nine years old.”<sup>18</sup>

E.S.’s statement, “[w]e have huge problems with that today, that Muslims get into conflict with democracy and our value system” referred to child marriage in many predominately Muslim countries.<sup>19</sup> The *Sahih Al-Bukhari* has influenced domestic law concerning the age of marriage in many predominately Muslim countries. This practice has been condemned by the UN Committee on the Rights of the Child that states, “[g]irls [in many Muslim nations] cease to be [a] minor after [nine] lunar

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<sup>15</sup> *Id.* ¶ 13.

<sup>16</sup> *Id.*

<sup>17</sup> HAROLD G. KOENIG & SAAD AL SHOHAIB, HEALTH AND WELL-BEING IN ISLAMIC SOCIETIES 30–31 (Springer 2014) [hereinafter KOENIG & SHOHAIB].

<sup>18</sup> Zahid Aziz, *Age of Aisha (ra) at time of marriage*, LAHORE AHMADIYYA MOVEMENT, <http://www.muslim.org/islam/aisha-age.htm> (last visited Feb. 21, 2019).

<sup>19</sup> *E.S.*, App. No. 38450/12 ¶ 13.

years. Thus, after this age, they are excluded from the protection of the Convention on the Rights of the Child.”<sup>20</sup> “According to the United Nations Population Fund (UNFPA), between 2011 and 2020, 50 million girls under 15 years old” were married, a phenomenon largely rooted in predominately Muslim countries.<sup>21</sup> “The minimum age for marriage in Iran is 13 years for girls and 15 for boys.”<sup>22</sup> It has been reported that in Iran, 43,459 girls under 15 years became married in 2009 and 716 girls under 10 years married in 2010.<sup>23</sup> The Grand Mufti of Saudi Arabia said in 2012 that girls are ripe for marriage at 12 years, and it is only since 2013 that the minimum age of marriage for girls was raised to 16 and the consent of the child required.<sup>24</sup>

E.S.’s statements, while offensive and undiplomatically put, were factually based. Her contention that Muhammad was married and consummated his marriage with a nine-year-old girl is supported through the *Sahih Al-Bukhair*, among the most respected and authoritative hadiths for Sunni Muslims. E.S.’s concern about child marriage and Islam is also valid, based on the various reports of the UN and the domestic laws of many predominately Muslim countries.

### B. Prosecution

An undercover journalist who attended the seminars requested a preliminary investigation from the Austrian authorities.<sup>25</sup> This investigation was initiated on February 11, 2010 when E.S. was questioned by the police about her statements.<sup>26</sup> The journalist’s action was not motivated by a sense of religious offense, but, rather, to fight the Freedom Party politically.<sup>27</sup> E.S. was eventually convicted of disparaging religious doctrines pursuant to Article 188 of the Criminal Code for her statements.<sup>28</sup>

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<sup>20</sup> GREGOR PUPPINCK, *Written Observations in the Case of E.S. v. Austria*, 8 (Eur. Ctr. for Law & Justice 2017), <http://9afb0ee4c2ca3737b892-e804076442d956681ee1e5a58d07b27b.r59.cf2.rackcdn.com/ECLJ%20Docs/Written%20Observations%20E.S.%20v.%20Austria.pdf>[hereinafter Puppincck].<sup>[1]</sup>

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Robert Tait, *Alarm as hundreds of children under age of 10 married in Iran*, TELEGRAPH (Aug. 26 2012), <https://www.telegraph.co.uk/news/worldnews/middleeast/iran/9500484/Alarm-as-hundreds-of-children-under-age-of-10-married-in-Iran.html>.<sup>[1]</sup>

<sup>24</sup> Sara Anabtawi, *Girls ready for marriage at 12 – Saudi Grand Mufti*, ARABIAN BUS. (Feb. 20, 2019), <http://www.arabianbusiness.com/girls-ready-for-marriage-at-12-saudi-grand-mufti-455146.html#.VONBKfmLRaQ>.

<sup>25</sup> E.S. v. Austria, App. No. 38450/12, Eur. Ct. H.R. ¶¶ 7–9.

<sup>26</sup> *Id.*

<sup>27</sup> Puppincck, *supra* note 20, at 1.

<sup>28</sup> E.S., App. No. 38450/12 ¶ 12.

Article 188 is part of Section 8 of the Austrian Criminal Code, which “lists criminally punishable offenses against religious peace.”<sup>29</sup> It provides, Article 188—Disparagement of religious doctrines, which states:

Whoever, in circumstances where his or her behaviour is likely to arouse justified indignation, publicly disparages or insults a person who, or an object which, is an object of veneration of a church or religious community established within the country, or a dogma, a lawful custom or a lawful institution of such a church or religious community, shall be liable to up to six months’ imprisonment or a day-fine for a period of up to 360 days.<sup>30</sup>

Note the breadth of Article 188. Its formulation gives two broad categories under which a party can be prosecuted. There is no wording or categories limiting the rule. Using “or” makes this provision broader than the United Nations International Covenant on Civil and Political Rights (ICCPR).

The question under Article 188 is whether the words are likely to arouse justified indignation.<sup>31</sup> Article 188 focuses on the offended hearer.<sup>32</sup> Article 188 further extends the scope by prohibiting disparagement of a dogma or lawful custom.<sup>33</sup> This test is more subjective than the ICCPR language.<sup>34</sup> Article 188 prohibits a broader scope of offensive language. Inciting someone to physical violence through speech is difficult. Offending someone through speech is easy. Inciting someone into a violent act is easy to spot, but objectively knowing when a hearer has been offended is difficult. Despite this, Article 188 would prohibit speech which incites to violence *and* speech which offends a believer.<sup>35</sup>

### C. Lower Court Analysis

#### 1. Regional Court

The ruling of the Regional Court relied on distinguishing child marriage and pedophilia.<sup>36</sup> The Regional Court held that sanctioning E.S. was “‘necessary’ to protect the religious sensibilities of Muslims and the

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<sup>29</sup> *Id.* ¶ 24.

<sup>30</sup> *Id.* (citing Strafgesetzbuch [StGB][Austrian Penal Code] Sec. 8, Art. 188).

<sup>31</sup> *See id.*

<sup>32</sup> *See id.*

<sup>33</sup> *Id.*

<sup>34</sup> *See id.*

<sup>35</sup> *See id.*

<sup>36</sup> *Id.* ¶ 14. *See also* Puppinc, *supra* note 20, at 1.

‘religious peace’ in Austria.”<sup>37</sup> The Regional Court found “that the applicant intended to wrongfully accuse Muhammad of having pedophile[ic] tendencies.”<sup>38</sup> Also, the Court found that her statements were not factual but “offensive value judgments, [that went] beyond permissible limits.”<sup>39</sup> The Regional Court further noted that the statements were not made with the “intention of approaching the topic objectively but [rather] to denigrate Muhammad.”<sup>40</sup>

## 2. Court of Appeals

E.S. appealed the ruling. She argued that her statements were factual, not value judgments.<sup>41</sup> She argued that the use of the *Sahih Al-Bukhair* to present the facts of Muhammad’s marriage to a six-year-old girl was reasonable.<sup>42</sup> She further argued that she had not used the term “pedophile” in a strict-scientific sense, but, rather, in everyday vernacular to refer to men who had relations with minors.<sup>43</sup>

The Court of Appeals of Vienna rejected the appeal on December 20, 2011.<sup>44</sup> The Court of Appeals confirmed the legal and factual findings of the lower court, finding that her statements showed her intention to denigrate and ridicule Muslims unnecessarily.<sup>45</sup> The Court held that her statements exceeded the permissible limits of freedom of expression regarding religious belief of a person who is an object of worship.<sup>46</sup>

## 3. Supreme Court

The Supreme Court upheld the judgment of the Court of Appeals on December 11, 2013.<sup>47</sup> It held that the interference pursued the legitimate aim of ensuring the protection of religious peace and religious feelings of others.<sup>48</sup> It concluded E.S. intended her statements to defame Muhammad and portray him as unworthy of worship, instead of furthering a serious debate.<sup>49</sup> A criminal conviction was therefore considered necessary in a

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<sup>37</sup> Puppink, *supra* note 20, at 1.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> E.S., App. No. 38450/12 ¶ 16.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* ¶¶ 16–17.

<sup>45</sup> *Id.* ¶ 18.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* ¶ 21.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* ¶ 22.

democratic society.<sup>50</sup> E.S. was ordered to pay a total amount of 480 euros or serve sixty days in prison in default of payment.<sup>51</sup>

#### 4. European Court of Human Rights

The ECtHR did not find that E.S.'s Article 10 rights were violated by the Austrian courts. The ECtHR found that there was a restriction of Article 10 rights, but the restriction was justified based on a multi-part test.<sup>52</sup> The ECtHR first asked if the restriction was "prescribed by law."<sup>53</sup> The answer was "yes" because of the existence of Article 188.<sup>54</sup> Next, the ECtHR discussed whether the restrictions pursued a legitimate aim, which ECtHR found in the protection of religious peace. It discussed that Austria's interference with Article 10 corresponded with a "pressing social need" and was proportionate to Austria's goals.<sup>55</sup> Lastly, the ECtHR discussed whether the restrictions were necessary in a democratic society.<sup>56</sup> In its analysis, the ECtHR greatly widens the margin of appreciation because of a lack of European consensus and an argument that E.S.'s comments were impermissible value judgments.<sup>57</sup> ECtHR found that Austria's restrictions did not violate E.S.'s Article 10 rights because the restriction was prescribed by law, pursued a legitimate aim, and that the restrictions were "necessary in a democratic society" to achieve a legitimate aim of the state.<sup>58</sup>

## II. PART TWO: ECtHR'S FLAWED DECISION

The Court's decision upholding Austria's restrictions on E.S.'s Article 10 rights is deeply flawed. First, the ECtHR engages in almost no serious textual analysis of the relevant Convention articles. Second, in the place of meaningful textual interpretation, the ECtHR applies the margin of appreciation doctrine to support its own analysis that offers little clarity or certainty and leads to a troubling result. Third, the ECtHR reaches a decision that puts it in tension with other key international law standards that it identifies as relevant to the case.

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.* ¶ 12.

<sup>52</sup> *Id.* ¶¶ 32, 39.

<sup>53</sup> *Id.* ¶¶ 39–40.

<sup>54</sup> *Id.* ¶¶ 32, 40.

<sup>55</sup> *Id.* ¶ 49.

<sup>56</sup> *Id.* ¶ 42.

<sup>57</sup> *Id.* ¶ 44.

<sup>58</sup> *Id.* ¶ 32.



A. *The ECtHR Fails to Appropriately Analyze the Convention's Text*

Perhaps the most striking feature of the ECtHR's opinion is how little time the Court spends interpreting the European Convention's text. This is a case where the text of Articles 10 and 9 ought to be central to the outcome.

The drafting and ratifying of the European Convention is one of the most significant achievements in the birth of the post-war modern human rights movement.<sup>59</sup> At the end of World War II, various representatives from Europe organized a gathering called the Congress of Europe.<sup>60</sup> At the end of the meeting a pledge was issued possessing the seeds of modern European institutions, including the Convention.<sup>61</sup> The pledge, in part, providing, “[w]e desire a Charter of Human Rights guaranteeing liberty of thought, assembly, and expression . . .”<sup>62</sup> providing further “[w]e desire a Court of Justice with adequate sanction for the implementation of this Charter.”<sup>63</sup>

While the nations of the world struggled for eighteen years after the Universal Declaration of Human Rights in 1948 to negotiate a treaty that could be presented for ratification,<sup>64</sup> the nations of Europe quickly came to a consensus on a set of concrete civil and political rights that would allow individuals and nations to flourish.<sup>65</sup> The Convention was opened for signature on November 4, 1950 in Rome.<sup>66</sup> It was ratified and entered into force on September 3, 1953.<sup>67</sup> The European human rights system is

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<sup>59</sup> See COUNCIL OF EUR., *The Conscience of Europe: 50 Years of the European Court of Human Rights* 18 (Third Millennium Publ'g Ltd. 2010), [https://www.echr.coe.int/Documents/Anni\\_Book\\_Chapter01\\_ENG.pdf](https://www.echr.coe.int/Documents/Anni_Book_Chapter01_ENG.pdf).

<sup>60</sup> *Id.*

<sup>61</sup> *See id.*

<sup>62</sup> ALASTAIR MOWBRAY, *CASES AND MATERIALS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS 2* (Oxford Univ. Press 2007) [hereinafter MOWBRAY].

<sup>63</sup> *Id.*

<sup>64</sup> It was not until 1966 that two legally binding human rights treaties were presented to states for ratification: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). It took another ten years before they entered into force. LOUIS HENKIN ET AL., *HUMAN RIGHTS* 215 (Found. Press 2d ed. 2009).

<sup>65</sup> *See generally id.*

<sup>66</sup> *European Convention on Human Rights*, COUNCIL OF EUR., [https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=#n1359128122487\\_pointe](https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=#n1359128122487_pointe) r (last visited Feb. 20, 2019).

<sup>67</sup> *Council of Europe: Fourth Protocol to the European Convention of Human Rights (Right to Free Movement and Choice of Residence; Prohibition of Exile, Collective Expulsion of Aliens, and Imprisonment for Civil Debts)*, 7:5 INT'L LEGAL MATERIALS 978, 978 (1968), [www.jstor.org/stable/20690392](http://www.jstor.org/stable/20690392).

lauded and globally respected primarily because of the strong consensus that exists around the text of the Convention.<sup>68</sup>

Articles 9 and 10 of the Convention are critically involved in the proper resolution of the case. After her conviction and exhaustion of remedies in the Austrian courts, E.S. petitioned the ECtHR alleging that her conviction violated her Article 10 right to freedom of expression.<sup>69</sup> Article 10 of the European Convention on Human Rights provides the “Freedom of expression,” which states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . . .
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others . . . .<sup>70</sup>

Article 9 is also central to the case because the Austrian government defended its criminal conviction of E.S. on the ground that it was prescribed by law and necessary to prevent disorder and protect the rights of others.<sup>71</sup> Austria asserts that to prevent disorder it must preserve religious peace and protect the rights of others, including protecting their religious feelings.<sup>72</sup> The ECtHR found both of these aims to be rooted in protecting the freedom of thought, conscience, and religion under Article 9.<sup>73</sup> Article 9 provides the “Freedom of thought, conscience and religion,” which states

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

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<sup>68</sup> See MOWBRAY, *supra* note 62.

<sup>69</sup> E.S. v. Austria, App. No. 38450/12, Eur. Ct. H.R. ¶ 3.

<sup>70</sup> Eur. Conv. on H.R. art. 10, Nov. 4, 1950, 213 U.N.T.S. 221,

[https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf)

[hereinafter Eur. Conv. on H.R.].

<sup>71</sup> E.S., App. No. 38450/12 ¶¶ 40–41.

<sup>72</sup> *Id.* ¶ 41.

<sup>73</sup> *Id.* ¶ 45.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.<sup>74</sup>

The ECtHR devotes just two sentences of its twenty-page opinion assessing whether Austria interfered with E.S.'s right to freedom of expression under Article 10(1). In one sense this is not surprising. A criminal conviction for speaking seems like a clear and direct interference. But more analysis of what Article 10 protects and how critical that protection is would have been helpful when the ECtHR later began weighing this right against other interests. Having a robust discussion and understanding of what Article 10(1) protects is important to ensure that the application of the limitation clause in Article 10(2) doesn't swallow up the right itself.

The bulk of the ECtHR's opinion centers on Article 10(2)'s limitation clause. The first element of the limitation analysis is whether Austria's conviction of E.S. was "prescribed by law."<sup>75</sup> This phrase means more than that a particular action was permitted by a legal text. To be prescribed by law, that text must be "formulated with sufficient precision to enable the citizen to regulate [her] conduct,"<sup>76</sup> allowing the citizen "to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."<sup>77</sup> It should not be vague or unclear.<sup>78</sup>

In *E.S.*, the ECtHR offered a single sentence asserting that the Austrian statute, under which E.S. was convicted, was indeed prescribed by law.<sup>79</sup> But it does no meaningful analysis beyond recognizing the obvious—that Article 188 is part of the Austrian Criminal Code.<sup>80</sup> It does not consider the other factors that are also essential before a provision can be said to be prescribed by law. Notably, the ECtHR does not discuss the exceptionally broad and imprecise text of Article 188. Article 188 provides the "Disparagement of religious doctrines," which states

Whoever, in circumstances where his or her behavior is likely to arouse justified indignation, publicly disparages or insults a

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<sup>74</sup> Eur. Conv. on H.R., *supra* note 70, at art. 9.

<sup>75</sup> *E.S.*, App. No. 38450/12 ¶ 40.

<sup>76</sup> *Sunday Times v. UK*, 30 Eur. Ct. H.R. (ser. A) ¶ 49 (1979).

<sup>77</sup> *Id.*

<sup>78</sup> *Sürek v. Turkey*, (No.1), 1999-IV Eur. Ct. H.R. ¶ 47–48.

<sup>79</sup> To be fair, the ECtHR describes this point as "undisputed." *E.S.*, App. No. 38450/12 ¶ 40. Nonetheless, even if the parties didn't raise this issue, as noted below, the statute on its face suggests several concerns with whether it satisfies the ECtHR's standard of clarity and precision. *Id.*

<sup>80</sup> *See id.* ¶¶ 24, 40.

person who, or an object which, is an object of veneration of a church or religious community established within the country, or a dogma, a lawful custom or a lawful institution of such a church or religious community, shall be liable up to six months' imprisonment or a day-fine for a period of up to 360 days.<sup>81</sup>

Article 188 is overbroad as it describes the context in which any disparagement must occur. It must occur in circumstances that are “likely to arouse justified indignation.”<sup>82</sup> This is a very loose standard that bases criminal guilt not merely on the words or actions of the applicant, but on the responsive feelings of likely listeners.

Contrast this language with that of the ICCPR Article 20(2): “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”<sup>83</sup> The ICCPR offers a partially objective test based on the actions and behavior of those hearing the speech-at-issue.<sup>84</sup> Under the ICCPR, the question is whether the offensive language can cause incitement to *discrimination, hostility, or violence*. These words describe measurable and observable actions.

Article 188 casts a very broad net over now-unprotected speech. It is hard to incite someone to physical violence through speech. It is easy to offend through speech. It is easy to know when someone has been incited into violent activity. It is harder to objectively know when a hearer has been offended – or would justifiably be offended.

Article 188 extends its scope by criminalizing disparaging or “insult[ing]” a person or object “which is an object of veneration” or “dogma” or even “custom” of a church or religious community.<sup>85</sup> This allows the Austrian courts to criminalize criticism of religious belief itself. In its breadth, as noted in more detail below, Article 188 is thus partially a blasphemy law.

The bulk of the ECtHR’s Article 10(2) analysis is devoted to whether the conviction under Article 188 was necessary to protect order and the rights of others.<sup>86</sup> The ECtHR rooted both of these aims in Article 9’s protection of freedom of thought, conscience and religion.<sup>87</sup> It found “the general requirement to ensure the peaceful enjoyment of the rights

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<sup>81</sup> See *id.* (citing Strafgesetzbuch [StGB][Austrian Penal Code] Sec. 8, Art. 188).

<sup>82</sup> *Id.*

<sup>83</sup> International Covenant on Civil and Political Rights art. 20, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>84</sup> *Id.*

<sup>85</sup> *E.S.*, App. No. 38450/12 ¶ 24 (citing Strafgesetzbuch [StGB][Austrian Penal Code] Sec. 8, Art. 188).

<sup>86</sup> *Id.* ¶ 21.

<sup>87</sup> *Id.* ¶ 43.

guaranteed under Article 9 to the holders of [religious] 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.”<sup>88</sup> Similarly, it found that state parties have “the positive obligation under Article 9 of the Convention of ensuring the peaceful co-existence of all religions and those not belonging to a religious group by ensuring mutual tolerance.”<sup>89</sup> The Court doesn’t quite conclude that religious believers are exempt from criticism,<sup>90</sup> but it does provide, “the manner in which religious views were attacked could invoke the State’s responsibility in order to guarantee the peaceful exercise of rights under Article 9.”<sup>91</sup>

Beyond making these assertions, however, the Court does no serious textual analysis of Article 9. Importantly, there is nothing in the text requiring states to maintain religious peace or mutual tolerance.<sup>92</sup> There is nothing that prohibits gratuitously offensive expression. Instead, the Article is focused on the freedom to believe, worship, teach, practice, and observe. One can fully enjoy these freedoms regardless of whether others disagree with or criticize them. Before simply concluding that protecting Article 9 rights presented Austria with a legitimate aim as it criminalized speech, the ECtHR needed to do a more thorough analysis of just what Article 9 protects and the scope of that protection.

Ironically, it is very possible that the ECtHR, in the name of offering greater protection for the freedom of religion, now provides less. Important features of Article 9 are that individuals have the right to change their religion and that religious freedom requires not only the ability to worship but the ability to teach on religious matters.<sup>93</sup> By seeking to protect religious peace and religious feelings, which are not found in Article 9<sup>94</sup>, the ECtHR suggests nations may lawfully restrict activities that seem to be clearly envisioned by the text, such as teaching others about comparative religions that might encourage them to change their faith.<sup>95</sup> After all, such teaching might result in offended feelings or be viewed as a threat to “mutual tolerance.”

The danger to both expression and religious freedom is accentuated by the nature and severity of the punishment. The consequences for violating Article 188 are “six months’ imprisonment or a day-fine for a

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.* ¶ 44.

<sup>90</sup> *Id.* ¶ 15.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* ¶ 44, 52.

<sup>93</sup> Eur. Ct. H.R., *supra* note 70, art. 9.

<sup>94</sup> *See id.*

<sup>95</sup> E.S., App. No. 38450/12 ¶¶ 43–45.

period of up to 360 days.”<sup>96</sup> E.S. was ordered to pay a fine of EUR 480.<sup>97</sup> The ECtHR approved the fine, calling it “moderate” and “on the lower end of the statutory range of punishment.”<sup>98</sup> But the ECtHR sidesteps the reality that the punishment could have been imprisonment. The fact that speech of this nature could be punished by a prison term both chills expression on religious matters and puts the ECtHR in tension with international law.<sup>99</sup>

*B. The Court Relies Instead on a Flawed Margin of Appreciation Analysis*

In place of a rigorous interpretation of the Convention text, the ECtHR engages in a grand balancing of interests using the margin of appreciation doctrine.<sup>100</sup> The margin of appreciation refers to the amount of discretion that the ECtHR gives national authorities in interpreting and fulfilling their responsibilities under the Convention.<sup>101</sup> The doctrine appears nowhere in the Convention text. The Court created it out of an understandable desire to give a degree of deference to sovereign nations, which face unique domestic challenges as they seek to comply with the Convention.<sup>102</sup>

The margin of appreciation was first articulated in *Handyside v. United Kingdom*,<sup>103</sup> a case involving allegations of obscenity. The Court held that “[b]y reason of their direct and continuous contact with the vital forces of their countries, [s]tate authorities” are better placed to determine the requirements of morality and the measures necessary to uphold it.<sup>104</sup>

The margin of appreciation is a central feature of the jurisprudence of the Court. Unfortunately, while the concept of granting a certain margin to national authorities is understandable, the ECtHR struggles to apply it in a clear, consistent, and predictable way. The degree of deference varies with the right involved and the context of the case.<sup>105</sup> In general, states are allowed a broader margin of appreciation if there is no

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<sup>96</sup> *Id.* ¶ 24.

<sup>97</sup> *Id.* ¶ 12.

<sup>98</sup> *Id.* ¶ 56.

<sup>99</sup> See Konaté v. Faso, No. 004/2013, Decision, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 167 (Dec. 5, 2014).

<sup>100</sup> Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUMBIA J. EUR. LAW 113, 115 (2004).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) ¶¶ 47–48 (1976).

<sup>104</sup> *Id.* at ¶¶ 47–48.

<sup>105</sup> See e.g. HURST HANNUM, ET AL., INTERNATIONAL HUMAN RIGHTS 102 (6th ed. 2018).

European consensus on the issue.<sup>106</sup> The extent of margin widening or narrowing is rarely clear.

Normally, because of the importance the ECtHR puts on freedom of expression in democratic societies, the ECtHR applies a narrow margin of appreciation when reviewing a restriction on speech.<sup>107</sup> But in this case, despite the fact that E.S. is asserting that Austria infringed her right to freedom of expression—and indeed convicted her of a criminal offense for her speech—the ECtHR uses every possible argument to widen the margin of appreciation, in order to uphold Austria’s restrictions on freedom of expression.<sup>108</sup> In doing so, it allows Austria to protect the feelings of religious believers and essentially makes them immune from reasonable criticism.

### 1. Definition of Pedophilia

The first step that the Court takes in widening the margin of appreciation is to conclude that E.S. “must have been aware that her statements were partly based on untrue facts.”<sup>109</sup> The primary statement at issue was that Muhammad was a pedophile.<sup>110</sup> This statement was based on the *Sahih Al-Bukhari*, a highly-respected hadith, which documents that Muhammad married his third wife Aisha when she was six and consummated the marriage when she was nine.<sup>111</sup> Significantly, these are not the facts the ECtHR disputes. Instead the Court—taking its lead from the regional courts—focuses on an extremely narrow scientific definition of pedophilia.<sup>112</sup>

Providing a narrow definition of pedophilia is a crucial step for the Court to widen the margin of appreciation in the case. This is indicated by the inordinate amount of time the Court spends analyzing and discussing the specific definition of pedophilia.<sup>113</sup> Indeed, the Court spends more time discussing the definition of pedophilia than analyzing the text of Articles 9 and 10.<sup>114</sup>

A factor that goes into determining the scope of the margin is whether the statement is a fact or value judgment. For example, the Court cites the UN Human Rights Committee’s general comment No. 34 which

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<sup>106</sup> *Evans v. United Kingdom*, 2007-I Eur. Ct. H.R. ¶ 10.

<sup>107</sup> *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) ¶ 65 (1979); *see also Muller v. Switzerland*, 133 Eur. Ct. H.R. (ser. A) ¶¶ 22, 26 (1988).

<sup>108</sup> *E.S. v. Austria*, App. No. 38450/12, Eur. Ct. H.R. ¶ 44.

<sup>109</sup> *Id.* ¶ 53.

<sup>110</sup> *Id.* ¶ 13.

<sup>111</sup> *Sahih Bukhari: Merits of Al-Ansaar*, vol. 5, bk. 58, no. 234, 236 [hereinafter *Sahih Bukhari*].

<sup>112</sup> *See E.S.*, App. No. 38450/12 ¶ 14.

<sup>113</sup> *See id.*

<sup>114</sup> *Id.*

provides, “Laws that penalize the expression of opinions about historical facts are incompatible [with the obligations of the Covenant].”<sup>115</sup> The Court quotes this general comment in its entirety earlier in the decision.<sup>116</sup> How does E.S.’s statement not fall squarely under this standard? E.S. is giving her opinion—Muhammad was a pedophile—based on the historical fact that he had relations with a nine-year-old girl.

The Court cites its traditional standard that speakers of value judgments should not be required to prove the factual basis of a value judgment under Article 10.<sup>117</sup> The Court limits this general principle, “[h]owever, even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement . . . .”<sup>118</sup> One would think that under this standard, E.S. would face no legal jeopardy. Her opinion is that Muhammad was a pedophile, and that opinion is based on a respected historical document which states that Muhammad had relations with a nine-year-old-girl. This is a value judgment, based on historical fact. However, the ECtHR concludes that this statement is an impermissible value judgment, and therefore, Austria had a wide margin to restrict the statement.

The Austrian court relied on this definition of pedophilia: “[P]edophilia [is] a primary sexual interest in children who had not yet reached puberty.”<sup>119</sup> The ECtHR approves of this very technical definition in the name of predictability<sup>120</sup> and notes that this definition is comparable to the World Health Organization’s definition.<sup>121</sup> While this definition is perhaps scientifically precise, the popular usage of the term “pedophilia” is often applied to any sexual interest in children or the act of child sexual abuse.<sup>122</sup> Black’s Law Dictionary defines pedophilia as “[a]n adult’s act of child molestation”<sup>123</sup> and further defines child molestation as “any indecent or sexual activity with, involving, or surrounding a child, usually under the age of 14.”<sup>124</sup>

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<sup>115</sup> U.N. Human Rights Comm., General Comment No. 34 on Its One-Hundred-Second Session (2011).

<sup>116</sup> *E.S.*, App. No. 38450/12 ¶ 30.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* ¶ 48.

<sup>119</sup> *Id.* ¶ 14.

<sup>120</sup> Interestingly, this is the first and only time the Court seems concerned with “predictability” stating: “[The regional court] had not based its findings on an *unpredictable* definition of the term.” *Id.* ¶ 17 (emphasis added).

<sup>121</sup> *Id.*

<sup>122</sup> HELEN GAVIN, *CRIMINOLOGICAL AND FORENSIC PSYCHOLOGY* 155 (Michael Carmichael et al. eds., 2014); MICHAEL C. SETO, *PEDOPHILIA AND SEXUAL OFFENDING AGAINST CHILDREN* (Am. Psychological Ass’n, 1st ed. 2008).

<sup>123</sup> *Pedophilia*, BLACK’S LAW DICTIONARY (10th ed. 2009).

<sup>124</sup> *Child Molestation*, BLACK’S LAW DICTIONARY (10th ed. 2009).



Whether E.S. was using pedophilia in a popular or scientific sense determines whether she was giving a value statement based on historical fact—a protected expression, or an impermissible value statement not based on historical fact—not protected expression.<sup>125</sup> The Court decides she was using pedophilia in scientific sense, and, therefore, Austria had a wide margin in restricting her speech.

Recall the criminal code that Austria used to prosecute E.S. applies a subjective, “likely to arouse justified indignation” standard.<sup>126</sup> This means that the test is based on what the people in the audience heard and would understand. Thus, the ECtHR reasonably should have used either the popular or legal definition of pedophilia in its analysis. There is simply no way that the audience had the precise, scientific definition of pedophilia in mind when E.S. spoke that word.

Narrowly defining the term to its scientific meaning was the only way the Court could reach the conclusion that E.S.’s statement was a “derogatory value judgment[] which exceeded the permissible limits” of expression under Article 10.<sup>127</sup> Using the scientific definition and creative license in interpreting E.S.’s words, her statement takes a different light. No longer is she making the logical connection that relations with a nine-year-old girl is usually considered pedophilia. From the Court’s analysis, she is saying that Muhammad was *primarily* attracted to pre-pubescent children and had a mental disorder, which is not supported by the evidence.<sup>128</sup> From the Court’s view, relations with a single nine-year-old girl does not constitute pedophilia.

This reading of E.S.’s words is strained at best. The ECtHR is essentially saying it knows from the historical record that he had relations with a nine-year-old girl, but that it doesn’t know if he enjoyed it enough to be a pedophile. The Court uses this shaky logic to clear what should be an extremely high bar and restrict E.S.’s Article 10 rights. The Court states, “the applicant had not intended to approach the topic in an objective manner, but had directly aimed to degrade Muhammad.”<sup>129</sup> The Court’s confidence in this holding, after it was forced to use the narrowest definition of the term “pedophile”, is a denigration of her Article 10 rights.

## 2. Contributing to a Debate of Public Interest

The ECtHR further extends the margin of appreciation by failing to recognize that E.S.’s statements contributed to the public debate. The ECtHR has generally restricted the margin of appreciation when the

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<sup>125</sup> *E.S.*, App. No. 38450/12 ¶ 37.

<sup>126</sup> *Id.* ¶ 24 (citing Strafgesetzbuch [StGB][Austrian Penal Code] Sec. 8, Art. 188).

<sup>127</sup> *Id.* ¶ 15.

<sup>128</sup> *Id.* ¶ 22.

<sup>129</sup> *Id.* ¶ 15.

discussion at-issue concerned a matter of public interest.<sup>130</sup> For example in *Ginieski v. France*, the ECtHR restricted the margin of appreciation afforded to France for an article concerning a particular doctrine of the Catholic Church and its links to the origins of the Holocaust.<sup>131</sup> The Court held that the article had contributed to a debate about the various possible reasons for the extermination of the Jews in Europe, which was a question of public interest in a democratic society.<sup>132</sup>

However, the “public interest” standard seems as pliable as the ECtHR’s other standards. In *E.S.*, the Court concludes that her statements were not made in an objective manner aimed at contributing to a debate of public interest.<sup>133</sup> Note that the Court has added an *additional* requirement, which it did not require in *Ginieksi*, that the statement must be made in an *objective manner*.<sup>134</sup>

The ECtHR goes through amazing contortions in its effort to grant deference to Austria’s conviction of E.S. It starts off with a broad reading of what might offend hearers, the standard is “justified indignation.”<sup>135</sup> However, when it comes time for the ECtHR to analyze the words and intent of the speaker, they switch to a narrow, restrictive approach to what was said – and even intended.<sup>136</sup> First, they use a definition of pedophilia that isn’t commonly understood, as would be appropriate in this case.<sup>137</sup> Next, without evidence, they discover E.S.’s inner motivation in making the statements, “she had not aimed to contribute to a serious debate about Islam or the phenomenon of child marriage, but merely to defame Muhammad by accusing him of a specific sexual preference, based on the assumption that he had had sexual [relations] with a prepubescent child.”<sup>138</sup>

The ECtHR never explains *how* they come to this conclusion. Their analysis concludes that E.S. made the statements for the obvious purpose of defaming Muhammad.<sup>139</sup> To reach this conclusion, the Court had to ignore several obvious facts. First, when the ECtHR states that she defamed Muhammad as a pedophile “based on the assumption that he had had sexual [relations] with a prepubescent child,” they completely ignore the factual underpinnings of E.S.’s statement.<sup>140</sup> E.S. was not *assuming*

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<sup>130</sup> See *Giniewski v. France*, 2006-I Eur. Ct. H.R. ¶¶ 44, 51 (2006).

<sup>131</sup> *Id.* ¶¶ 20–21.

<sup>132</sup> *Id.* ¶ 51.

<sup>133</sup> *E.S.*, App. No. 38450/12 ¶ 52.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* ¶ 12.

<sup>136</sup> The Court seems to hold their own opinions as objective.

<sup>137</sup> *E.S.*, App. No. 38450/12 ¶ 14.

<sup>138</sup> *Id.* ¶ 22.

<sup>139</sup> *Id.* ¶ 34.

<sup>140</sup> *Id.* ¶ 22.

Muhammad had relations with a prepubescent child. She was relying on the *Sahih Al-Bukhair*, which Sunni Muslims view as one of the two most trusted collections of hadith along with *Sahih Muslim*.<sup>141</sup> The *Sahih Al-Bukhair* does not use ambiguous terms in describing the events concerning Muhammed and Aisha.<sup>142</sup> In denigrating E.S.'s view as an assumption, the Court also denigrates the *Sahih Al-Bukhair*. Perhaps the ECtHR should count itself fortunate that is not under the jurisdiction of Austria's criminal code.

Regardless of its statements to the contrary, the ECtHR also calls into question the serious nature of child marriage in Islamic societies. The Court ignores the totality of E.S.'s statement which provides, "[w]e have huge problems with [relations with children], that Muslims get into conflict with democracy and our value system," she explains further, relations with children "wasn't okay back then, and it's not okay today. Full stop. And it is still happening today."<sup>143</sup>

Could these statements be viewed as offensive? Of course. But E.S.'s argument isn't hard to follow, even with the remaining eleven hours and fifty-eight minutes of apparently inoffensive comments that weren't referenced in the case. Even E.S.'s most offensive comments carry a logical force. First, Muhammad is seen as the perfect Muslim, a person to be emulated and followed. Second, a well-respected hadith reports that Muhammad had relations with a nine-year-old. Third, this has impacted the policies and behaviors of Muslim societies today.<sup>144</sup> Fourth, these policies and behaviors can come into conflict with the value-system of Western democracies.<sup>145</sup> Fifth, we should be concerned with the promulgation of such a value-system. This is the clearest interpretation of E.S.'s statements.

This argument, regardless of how offensive others (even the authors of this Article) may find it, clearly contributes to a public debate about the role of religion in democratic societies. If the Court considered E.S.'s statements in their context, it would limit Austria's margin to restrict her freedom of expression. Instead, the Court abandons any serious analysis of E.S.'s statement and concludes that her main purpose was to blaspheme Muhammad. This is only possible through the Court's narrow definition of "pedophile," and ignoring the statements in their entirety.

Unfortunately, the analysis above offers little guidance to other nations facing similar situations. While it is true that the ECtHR is not

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<sup>141</sup> KOENIG & SHOHAIB, *supra* note 17.

<sup>142</sup> See *Sahih Bukhari*, *supra* note 111.

<sup>143</sup> *E.S.*, App. No. 38450/12 ¶ 13

<sup>144</sup> Irini Ibrahim et al., *The Child Bride: Rights Under the Civil and Shariah Law*, 38 *PROCEDIA - SOC. & BEHAV. SCI.* 51, 51–53 (2012).

<sup>145</sup> *E.S.*, App. No. 38450/12 ¶ 13.

bound by stare decisis, it has committed itself to pursuing “legal certainty, foreseeability and equality” in its decision-making.<sup>146</sup> Unfortunately, nations within Europe looking for guidance on how far they may go in restricting speech about religious matters will find little here, other than a highly subjective margin of appreciation analysis.

Austria’s situation is not unique in Europe. As of 2016, Muslims made up roughly 4.9% of Europe’s population.<sup>147</sup> In 2016 Austria’s Muslim population constituted 6.9% of its overall population.<sup>148</sup> This is compared with nations such as France at 8.8%<sup>149</sup>; Germany at 6.1%<sup>150</sup>; Sweden 8.1%<sup>151</sup>; U.K at 6.3%<sup>152</sup>; Belgium at 7.6%<sup>153</sup>; and Netherlands with 7.1%.<sup>154</sup> Most European Union countries have a larger Muslim population as a percentage to the overall population than Austria.<sup>155</sup>

This is not to denigrate the unique problems that Austria is facing. However, the general problem of how to integrate religious minorities into European communities is widespread. The European community drafted the European Convention on Human Rights with these types of problems in mind.<sup>156</sup> Since the Convention was drafted and ratified as a European “bill of rights,”<sup>157</sup> to protect human rights in the face of common challenges, it would greatly benefit Europe if the Court relied on the collective wisdom captured in the Convention, especially when addressing challenges faced by all. Again, citizens and government officials from member states of the Council of Europe would have been far better served by a rigorous analysis of the Convention text than by the highly uncertain margin of appreciation analysis chosen by the ECtHR. The analysis in *E.S.* gives little guidance to countries which are either crafting legislation restricting speech about religious matters or to citizens seeking to comply with such restrictions.

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<sup>146</sup> Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. ¶ 74 (2002).

<sup>147</sup> *Europe’s Growing Muslim Population*, PEW RES. CTR. (Nov. 29, 2017), <http://www.pewforum.org/2017/11/29/europes-growing-muslim-population/>.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Lauren C. Baillie, *Protection of Religious Minorities in Europe: The Council of Europe’s Successes and Failures*, 23 AM. U. INT’L L. REV. 617, 620–25 (2007).

<sup>157</sup> See A.A. Luini del Russo, *The European Bill of Rights: The First Decade of International Protection of Human Rights*, 4 SANTA CLARA L. REV. 8, 29 (1963).

*C. The ECtHR's Ruling Puts It in Tension with Other  
International Law Standards Regarding Speech About  
Religious Matters*

Before doing its own assessment of Austria's law under the European Convention, the ECtHR identified a number of international legal provisions relevant to the case in a section entitled "International Material."<sup>158</sup> Significantly, while the international provisions could have provided helpful guidance, the ECtHR largely ignored them in *E.S.* and offered much less protection for expression about religion than that called for by those provisions.

The ECtHR would have done well to heed two principles from those international provisions: First, criminal sanctions for speech should only be imposed if the speech incites violence or hatred.<sup>159</sup> Second, states should not criminalize blasphemy.<sup>160</sup>

Regarding the first principle, the ECtHR notes that Article 20 Section 2 of the ICCPR provides, "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."<sup>161</sup> This is a much higher standard than Austria's Article 188 in that it removes from the analysis the object of belief or the feelings of the religious believer. The ICCPR standard relies on observable, measurable behavior, which makes it less prone to being over applied.

The ECtHR next highlights a 2007 recommendation from the Council of Europe's Parliamentary Assembly, Recommendation 1805, adopted unanimously, which urges adoption of an even stronger standard—one tied to incitement of violence.<sup>162</sup> Referring specifically to Convention article 10(2), it asserts that "national law should only penalize expressions about religious matters which intentionally and severely disturb public order and call for public violence."<sup>163</sup> The European Commission for Democracy through Law ("Venice Commission") in 2008 similarly urged reliance on an incitement standard by saying, "[C]riminal sanctions are only appropriate in respect of incitement to hatred (unless public order offenses are appropriate)."<sup>164</sup>

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<sup>158</sup> *E.S. v. Austria*, App. No. 38450/12, Eur. Ct. H.R. ¶¶ 26–31 (2018).

<sup>159</sup> *Id.* ¶ 28.

<sup>160</sup> *Id.* ¶ 27.

<sup>161</sup> ICCPR, *supra* note 83.

<sup>162</sup> EUR. PARL. ASS. DEB., 27th Sess. 1805 (June 29, 2007).

<sup>163</sup> *Id.*

<sup>164</sup> EUR. PARL. ASS., *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*, 76th Sess., Doc No. CDL-AD(2008)026 (2008).

Each of these provisions is consistent with the admonition of the United Nation Special Rapporteur on the promotion and protection of the rights to freedom of opinion and expression that provides, “restrictions on freedom of expression . . . should be limited in scope to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence.”<sup>165</sup>

The second principle that emerges clearly from the “International Materials” cited by the ECtHR in *E.S.* is that blasphemy should not be a criminal offense.<sup>166</sup> The Parliamentary Assembly’s Recommendation 1805 speaks to this point as well: “[B]lasphe­my, as an insult to a religion, should not be deemed a criminal offense.”<sup>167</sup> The Venice Commission agreed “that the offense of blasphemy should be abolished . . .”<sup>168</sup>

The ECtHR acknowledges that decriminalizing blasphemy is also the position of the Council of Europe’s sister organization, the European Union.<sup>169</sup> The European Parliament in 2012 recommended that Member States decriminalize [blasphemy] offenses since they “restrict [freedom of] expression concerning religious or other beliefs; they are often applied so as to persecute, mistreat or intimidate persons belonging to religious or other minorities and they can have a serious inhibiting effect on freedom of expression and on freedom of religion or belief.”<sup>170</sup>

Oddly, while the ECtHR cites these principles as relevant to its analysis, it goes on to uphold an Austrian law that does not comport with either. To the extent that it bases liability in part on the feelings of listeners, Article 188’s breadth goes far beyond that of an incitement standard. An incitement standard is not without its challenges, particularly when the act potentially incited is not just violence but something as vague as hostility.<sup>171</sup> Nonetheless, it at least adds a partially objective element in that it focuses on the intent of the speaker to produce concrete outcomes: violence, hostility, or discrimination.<sup>172</sup>

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<sup>165</sup> *International standards on freedom of religion or belief*, U.N. HUM. RTS. OFF. HIGH COMMISSIONER, <https://www.ohchr.org/en/issues/freedomreligion/pages/standards.aspx> (last visited Apr. 11, 2019). See also Resolutions 60/150, 61/164, 62/154 of the General Assembly; Res. 1999/82, 2000/84, 2001/4, 2002/9, 2003/4, 2004/6, 2005/3 of the Commission of Human Rights; Res; Human Rights Council 4/9, 7/19.<sup>[17]</sup>

<sup>166</sup> *E.S. v. Austria*, App. No. 38450/12, Eur. Ct. H.R. ¶ 27.

<sup>167</sup> EUR. PARL. ASS. Deb. 27th Sess. 1805 (June 29, 2007).

<sup>168</sup> EUR. PARL. ASS., *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*, 76th Sess., Doc No. CDL-AD(2008)026 (2008).

<sup>169</sup> *E.S.*, App. No. 38450/12 ¶ 31.

<sup>170</sup> Council of Eur. Union, EU Human Rights Guidelines on Freedom of Expression Online and Offline, 12 May 2014.

<sup>171</sup> ICCPR, *supra* note 83.

<sup>172</sup> *Id.*

There is another sense in which Article 188 has a further reach than a prohibition on incitement. It protects not only the feelings of a religious person, but the objects of belief themselves. Article 188 penalizes anyone who publically insults or denigrates a person who is an object of veneration, meaning that the object of protection is the belief itself.<sup>173</sup> In this aspect, it is a blasphemy law.

Significantly, the facts of the case, too, support the conclusion that *E.S.* was a blasphemy decision. Recall the original complaint came from a journalist who was not offended because of religious sentiments, but rather was in political opposition to the Freedom Party.<sup>174</sup> No one in the audience publically expressed justified indignation.<sup>175</sup> The Court ignores this, and instead, focuses on the alleged denigration of Muhammad. The ECtHR emphasizes Article 188's protection of objects of worship rather than the feelings of religious believers. Criminalizing the insulting of objects of worship is criminalizing blasphemy.

#### CONCLUSION

Austria, like other nations in Europe, is grappling with the best way to foster peace and toleration among people with different cultural and religious backgrounds. It is understandable that the ECtHR in *E.S.* was eager to grant Austria deference in determining the best legal framework for accomplishing these goals. Unfortunately, in granting this deference – and upholding a criminal conviction for speech about religious matters – the ECtHR largely ignored the text of the European Convention. In its place it substituted a questionable margin of appreciation analysis that in the end offers little guidance to states on how they may lawfully regulate expression and to individuals on what expression is permissible.

Perhaps most disappointing is that while the ECtHR undoubtedly thought it was expanding the reach of freedom of religion in *E.S.*, it did no such thing. Its holding and reasoning actually diminish protection for both freedom of expression and freedom of religion. The only way forward is for the ECtHR to return to a rigorous analysis and application of the Convention's terms in order to achieve the goals so carefully agreed upon by the nations of Europe when the Convention entered into force in 1953.

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<sup>173</sup> *E.S.*, App. No. 38450/12 ¶ 24 (citing Strafgesetzbuch [StGB][Austrian Penal Code] Sec. 8, Art. 188).

<sup>174</sup> *Id.* ¶ 6–13.

<sup>175</sup> *See id.*