WRITTEN OBSERVATIONS

In the case of

E.S. v. Austria

(Application n° 38450/12)

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Recalling its facts

The applicant was convicted of publicly "denigrating a person who is an object of veneration", namely "Muhammad" the Prophet of Islam, in a way likely to arouse justified indignation, in violation of section 188 of the Austrian Criminal Code.
The contentious statements were made during a series of lectures entitled *"Basic Knowledge on Islam"* at the Institute of Education the political party "*Bildungsinstitut Freiheitlichen der Partei Österreichs"* (FPÖ, the Austrian Freedom Party), given in front of thirty participants.
The speaker is alleged in substance to have said that Mohammad had pedophile tendencies (he *"enjoyed doing it with children"*) because he married a girl of six (Aisha) and consumed that marriage when she was nine. The speaker noted that this was problematic since *"the highest commandment for a Muslim man is to emulate Muhammad"*, adding more generally that *"Muslims are in conflict with democracy and our values system"*.
A criminal case was initiated by the Prosecutor of Vienna, following a complaint from journalists, whose action apparently was not primarily intended to protect Muhammed's reputation but to politically fight the FPÖ.
- The Regional Court, distinguishing between child marriage and pedophilia, considered that the applicant intended to wrongfully accuse Muhammad of having pedophile tendencies, that her statements were not factual but offensive value judgments, beyond permissible limits, made not with the intention of approaching the topic objectively but to denigrate Muhammad. Sanctioning such statements is "necessary" to protect the religious sensibilities of Muslims and the "religious peace" in Austria.
- The Court of Appeal of Vienna on 20 December 2011, rejected the appeal of the applicant, saying her statements showed her intention to denigrate and ridicule Muslims unnecessarily, exceeding, according to the Court, the permissible limits of freedom of expression regarding religious belief or a person who is an object of worship.

- The Supreme Court on 11 December 2013, upheld the judgment of the Court of Appeal. It held that the interference pursued the legitimate aim of ensuring the protection of religious peace and religious feelings of others. It concluded that in this case the statements were not intended to help open a serious debate, but just to defame Muhammad and portray him as unworthy of worship. A criminal conviction was therefore considered necessary in a democratic society within the meaning of Article 10 of the Convention.
The applicant was ordered to pay a total amount of 480 euros or serve sixty days in prison in default of payment.

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Freedom of expression *"constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man"*.[1] Freedom of thought, conscience and religion are not less important than freedom of speech. They all contribute, just like every freedom of thought, to pluralism, tolerance and broadmindedness that is characteristic of a democratic society.[2]
Freedom of thought, conscience and religion is "*one of the foundations of a "democratic society" (...). This freedom 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"*.[3]
Freedom of thought, conscience and religion and freedom of expression are complementary; they serve one another in their interactions, although this interaction can sometimes be difficult. Without

[1]ECHR, *Handyside v. U.K.*, 7 Dec. 1976, §49.
[2]ECHR, *Leyla Sahin v. Turkey*, GC, 10 Nov. 2005, §108.
[3]ECHR, *Kokkinakis v. Greece,* 25 May 1993, §31.

freedom of thought and conscience, there is just no message to convey, and without freedom of expression, it would be impossible to share and change one's convictions.

I. Prescribed by Law?

The criminal penalty of the petitioner is based on Article 188 of the Criminal Code, whose formulation is very broad:

Article 188 -Denigrating religious doctrines

"*Whoever, in circumstances where his behaviour is likely to arouse justified indignation, 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 a prison sentence of up to six months or a fine of up to 360 daily rates*."[4]

II. Pursuing a legitimate aim?

What is the aim of the disputed measure? To protect the religious feelings of any section of the population and/or directly protect the objects of belief in themselves?

In this case, both aims are pursued: Article 188 of the Criminal Code aims to penalize anyone who "*publicly insults or denigrates a person who is an object of veneration"* (Muhammad) when the conduct in question is *"likely to cause legitimate indignation"*. The object of the protection conferred by Article 188 is the belief itself, whereas the purpose of the penalty is to protect the feelings of believers and religious peace, because the punishment may be imposed only when the behavior is likely to arouse justified indignation.

The Court has already accepted the legitimacy of restrictions on freedom of expression out of respect for both the belief itself and the religious feelings of believers.

1. Protecting the religious feelings of any section of the population

The Court considers legitimate to protect persons against the vilification of their religious beliefs.[5] On several occasions, the organs of the Convention have dealt with complaints from individuals sanctioned in their freedom of expression, for hurting the feelings of believers.[6] The Court accepted the legitimacy of interference of freedoms to ensure the rights of others and "the peaceful enjoyment" of rights guaranteed by Article 9, particularly against *"provocative portrayals of objects of religious veneration"*[7] that are *"gratuitously offensive to others"*, when such portrayals can be regarded as *"malicious violation of the spirit of tolerance, which must also be a feature of democratic society"*.[8]

In the most recent case, *A.I. v. Turkey*, the Court held that an abusive attack directed against Muhammad could legitimately be penalized since practicing Muslims *"may legitimately feel themselves to be the object of unwarranted and offensive attacks"*[9] from the article.

2. The protection of beliefs and people who themselves worshiped

The Court also considers it is legitimate to protect beliefs, and finds the criminalization of blasphemy

[4]Free translation.
[5]ECHR, *I.A v. Turquie,* 13 Sep. 2005; *Tatlav v. Turkey,* 2 May 2006; *Giniewski v. France,* 31 Jan. 2006.
[6]*Otto-Preminger-Institut v. Autstria,* 20 Sep. 1994; *Wingrove v. the United Kingdom,* 25 Nov. 1996; *İ.A. v. Turkey*; *Giniewski v. France*, 31 Jan. 2006.
[7]*Otto-Preminger-Institut v. Autstria,* §49.
[8]*Id.*, §47.
[9]*I.A. v. Turquie,* 13 Sep. 2005, §29.

acceptable when it sanctions a *"high degree of profanation"*.[10]
The Court noted in 1996 in the *Wingrove* case that "*there is as yet not sufficient common ground in the legal and social orders of the member States of the Council of Europe to conclude that a system whereby a State can impose restrictions on the propagation of material on the basis that it is blasphemous is, in itself, unnecessary in a democratic society and thus incompatible with the Convention".*[11]
In the *Otto-Preminger* case in 1994, the Court ruled that the broadcast of a film constituting *"an abusive attack against the Roman Catholic religion"*[12] could be banned. Similarly, in the *I.A. v. Turkey* case, the Court accepted a sanction for "*abusive attack against the person of the Prophet of Islam"*, saying that Muslims could *"legitimately"* feel themselves to be objects of *"unwarranted and offensive"* attacks by certain passages of the article (§29).[13] The Court considered that the conviction in issue was *"as intended to provide protection against offensive attacks on matters regarded as sacred by Muslims"* (§30).

In fact, what these cases have in common is sexually portraying people who are objects of worship. Thus, the protection of beliefs seems legitimate against obscene portrayals that have *"a very aggressive sexual connotation"*[14] likely to have an impact on the views of believers (e.g. public display). The case-law of the Court distinguishes obscenity, which generally has a sexual connotation (*Otto Preminger, Wingrove* and *I. A. v. Turkey*) from debates (*Giniewski*). According to the ECLJ, this means that the propagation of gratuitously offensive and unnecessary obscenities to the debate can be restricted; the rest should be tolerated.

In fact, one can only distinguish between *protection of belief and protection of believers' feelings* in specific circumstances where the object of belief is denigrated without affecting the feelings of any believer. In this case, the belief in itself is protected, and it will therefore be exclusively an accusation of blasphemy. This is what seems to be the case here, since the criminal proceedings were initiated by the Prosecutor at the request of journalists.

3. The international debate on "defamation of religions" and blasphemy

a. <u>The initiative of the Organization of Islamic Conference</u>

In 2005, adopting the *Ten-year Programme of Action to meet the challenges facing Muslim Ummah in the 21st century,*[15] the Organization of the Islamic Conference decided to act in order to obtain the international ban on "defamation of religions".

The OIC, then pledged under *"the fight against Islamophobia"* to *"emphasise on the responsibility of the international community, including all governments, to ensuring respect for all religions and combating defamation"*. This effort led to the adoption of a series of resolutions by the Council of Human Rights condemning the *"defamation of Islam"* and then the *"defamation of religions"*.[16]

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[10] *Wingrove*, §60.
[11] *Wingrove*, §57.
[12] *Otto-Preminger*, §56.
[13] *"God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual intercourse with a dead person or a live animal."*
[14] *See* Gérard Gonzalez, « Les excès de la liberté d'expression et le respect des convictions religieuses selon la Cour européenne des droits de l'homme », *RDLF,* 2015, chron. n°10.
[15] *Ten-year Programme of action to meet the challenges facing the Muslim Ummah in the 21st century, Third Extraordinary Session of the Islamic Summit Conference,* Makkah al Mukarramah, Kingdom of Saudi Arabia, 5-6 dhul qa'dah 1426h/ 7-8 December 2005. Available on : <u>http://www.oic-oci.org/ex-summit/french/program-decennal.htm</u>
[16] Joint statement by Frank LaRue, UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Miklos Haraszti, OSCE Representative on Freedom of the Media: Catalina Botero, Special Rapporteur of the OAS to freedom of expression; Faith Pansy Tlakula, Special Rapporteur on Freedom of Expression

Governments and groups attached to the modern conception of human rights were strongly opposed to this initiative.

In a joint statement of 9 December 2008,[17] the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the OSCE, the OAS and the African Commission on Human and Peoples' Rights (ACHPR) reported as follows:

> *"Restrictions on freedom of expression should be limited in scope to the protection of overriding individual rights and social interests, and should never be used to protect particular institutions, or abstract notions, concepts or beliefs, including religious ones."*
>
> *"Restrictions on freedom of expression to prevent intolerance should be limited in scope to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."*

At that time, several voices were also being raised against equating criticism of religion to racism. Consequently, Asma Jahangir, the then UN Special Rapporteur on religious freedom:

> *"Cautions against confusion between a racist statement and an act of defamation of religion. The elements that constitute a racist statement are not the same as those that constitute a statement defaming a religion. To this extent, the legal measures, and in particular the criminal measures, adopted by national legal systems to fight racism may not necessarily be applicable to defamation of religion."*[18]

b. Europe: a positive trend in the suppression of blasphemy

In Europe, in reaction to the OIC initiative, there was a strong trend in favour of abolishing the criminalisation of blasphemy. This trend emerges from a series of statements from political bodies, in particular:

The Parliamentary Assembly of the Council of Europe (PACE) in its Recommendation 1805 (2007) *"4. With regards to blasphemy, religious insults and hate speech against persons on grounds of their religion"* considered that: *"(...) blasphemy, as an insult to a religion, should not be deemed a criminal offence. (...)*
15. (...) national law should only penalise expressions about religious matters which intentionally and severely disturb public order and call for public violence. (...)"

The European Commission for Democracy through Law ("Venice Commission") expressed a similar view in 2008.[19] It found in synthesis:

> *"That the offence of blasphemy should be abolished (which is already the case in most European States) and should not be reintroduced." (89 c.) And that in any event, it should not be subject to criminal penalties" (92).*
>
> *"That it is neither necessary nor desirable to create an offence of religious insult (that is, insult to religious feelings) simpliciter"*, and that in any event, it should not be subject to criminal penalties (89b.).
>
> *"That incitement to hatred, including religious hatred, should be the object of criminal sanctions"* (89 a.) *"Notwithstanding the difficulties with enforcement of criminal legislation*

and Access to Information of the African Commission on Human Rights and Peoples' Rights (ACHPR).

[17] See 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.

[18] A/HRC/2/3, see above note 6, paragraph 49.

[19] "*Report on the relationship between freedom of expression and freedom of religion: regulation and prosecution of blasphemy, religious insult and incitement to religious hatred",* 17-18 October 2008, Doc. No CDL-AD (2008) 026.

in this area" (91).

The Operational Guidelines of the European Union on the promotion and protection of freedom of religion or belief[20]

In 2013, the Council of the European Union asked that critical speech made on religions or beliefs may be punished only if they enter the "strict context" of Article 20, paragraph 2 of the ICCPR, which prohibits any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, and according to the requirements of this provision. The guidelines state that:

"In any case, the EU will recall, when appropriate, that the right to freedom of religion or belief, as enshrined in relevant international standards, does not include the right to have a religion or a belief that is free from criticism or ridicule (...)

"When faced with restrictions to freedom of expression in the name of religion or belief, the EU will" recommend the decriminalization of laws that criminalise blasphemy and will *"recall that international human rights law protects individuals, not Religion or Belief per se."*

The European Parliament expressed similar views in its resolution of 27 February 2014 on the situation of fundamental rights in the European Union (2012) (2013/2078 (INI)), recommending the decriminalization of blasphemy because it restricts freedom of expression and is often applied to persecute, mistreat, or intimidate people (35).

c. The consensus for the sanction of incitement to discrimination, hostility or imminent violence

16/18 Resolution of the Council of Human Rights entitled *"Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief",* decided by consensus on 12 April 2011, to abandon the concept of defamation of religion and reaffirmed Article 20 paragraph 2 of the Covenant on Civil and Political Rights, which states:
"Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."
This Resolution is based on the conviction that freedom of expression is the best antidote to intolerance, coupled with policies that address the root causes of discrimination. It urges States to fight against religious intolerance by promoting the right to freedom of expression, freedom of religion or belief and non-discrimination. It particularly calls on states to take action by:

(f) Adopting measures to criminalize incitement to imminent violence based on religion or belief;

(g) Understanding the need to combat denigration and negative religious stereotyping of persons, as well as incitement to religious hatred, by strategizing and harmonizing actions at the local, national, regional and international levels through, inter alia, education and awareness-building;"

In summary, it is clear from the Resolution and the work that surrounded it that:
- freedom of religion and freedom of expression are complementary;

[20] "EU *Guidelines on the promotion and protection of freedom of religion or belief"*, No. Doc.: 10963/13 COHOM 117 PESC 698 FREMP PSC 231 83, 24 June, 2013. Available at: http://eeas.europa.eu/delegations/fiji/press_corner/all_news/news/2013/eu_guidelines_on_the_promotion_and_protection_of_freedom_of_religion_or_belief_%28june_24_2013_fac%29.pdf

- freedom of religion protects people, not the beliefs themselves;
- the right of believers not to be criticized does not exist;
- criticism of a religion does not amount to a racial criticism;
- the restriction of freedom of expression is a last resort strictly to sanction incitement to imminent violence.

General Comment No. 34 on Article 19.
Following the adoption of Resolution 16/18, the Human Rights Committee adopted at its 102nd session (11-29 July 2011) a new general comment on freedom of opinion and freedom expression (Doc CCPR/C/GC/34).

"48. Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith."

Rabat Plan of Action. Following the adoption of Resolution 16/18, the Office of the United Nations for Human Rights (OHCHR) organized in 2012 a series of expert workshops on the prohibition of national, racial or religious incitement to hatred, after which experts adopted the "*Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, to hostility or violence."*[21] This Plan of Action is not binding and represents the position of the OHCHR. Participants in the process included the UN Special Rapporteurs on freedom of opinion and expression, on freedom of religion or belief, and on contemporary forms of racism, racial discrimination and xenophobia. States were present at these workshops only as observers.

The Plan of Action recommends that:

> *"25. States that have blasphemy laws should repeal them, as such laws have a stifling impact on the enjoyment of freedom of religion or belief, and healthy dialogue and debate about religion."*

This recommendation is justified by the following considerations:

> §19: "*At the national level, blasphemy laws are counterproductive, since they may result in de facto censure of all inter-religious or belief and intra-religious or belief dialogue, debate and criticism, most of which could be constructive, healthy and needed. (...) Moreover, the right to freedom of religion or belief, as enshrined in relevant international legal standards, does not include the right to have a religion or a belief that is free from criticism or ridicule*."

In 2016, the Special Rapporteur on freedom of religion or belief, Professor Heiner Bielefeldt, submitted to the Council of Human Rights a thematic report devoted to the link between the right to freedom of religion or belief and the right to freedom of opinion and expression.[22]
Heiner Bielefeldt stressed the complementarity, the synergy and the great similarities between Articles 18 and 19 of the International Covenant on Civil and Political Rights. He emphasized that

[21] Council for Human Rights, 22 , Annual Report of the High Commissioner of the United Nations Human Rights, Report on expert workshops on the prohibition of incitement to national, racial or religious A/HRC/22/17/Add.4, 11 January, 2013. https://www.article19.org/data/files/Rabat_Plan_of_Action_OFFICIAL.pdf

[22] Council for Human Rights, Document A/HRC/31/18, 23 December 2015.

the mutual reinforcement of the two freedoms is particularly necessary in the fight against intolerance, stereotyping, discrimination and incitement to violence based on religion or belief. Regarding blasphemy laws, the rapporteur also recommended their repeal (§84). He also stressed the right of every person to assert the superiority of a particular belief; this right being an antidote to relativism and a condition to freedom of expression, to the existence of a real debate, as well as to the exercise of freedom of conscience by proselytism.

III. Was this interference necessary in a democratic society?

Assuming that the interference, in this case, pursues a legitimate aim, was it a necessary measure?

It is well known that the Court held that freedom of expression *"is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population"*.[23] It also applies to *"controversial"* statements.[24]
Nevertheless, the Court qualified this statement by recalling the reservation of the provisions of paragraph 2 of Article 10, which authorizes a restriction in the name of "morality" or "the rights of others". It also stressed that *"whoever exercises his freedom of expression undertakes 'duties and responsibilities' the scope of which depends on his situation and the technical means he uses."*[25]
Was there a *"pressing social need"*[26] to justify the repression of the applicant's statements?
The Court considers that *"a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion"*.[27] This is explained by the fact that *"as in the case of "morals" it is not possible to discern throughout Europe a uniform conception of the significance of religion in society; even within a single country such conceptions may vary. For that reason it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others"*.[28]

1. Statement of fact or value judgment?

The statements in question make reference to facts, and *"it is an integral part of freedom of expression to seek historical truth."*[29] The denial of *"established historical facts"*[30] may be condemned, but not their recall – even if they were unpleasant.

The applicant is alleged to have described the act of "*pedophilia"* and went further to say that Muhammad *"enjoyed doing it with children"*.
Though this statement should be classified as a value judgment, it must however be admitted that it is not devoid of factual basis. Of course, this statement is offensive, as are the current charges against "pedophile priests" because the truth hurts more than lies and caricature. As in the case at hand, the statement of a fact may be intended to provoke a negative value judgment, but that is not enough reason to make this presentation (even generalized) a wrongful judgment of values.
The Austrian Government maintains that the reference to pedophilia was anachronistic and unjustified because the relationship between Muhammad and Aisha continued beyond Aisha's puberty. Now, firstly, the fact that the relationship continued over time does not erase what happened when Aisha

[23] *Handyside*, §49.
[24] *Lehideux and Isorni v. France*, 23 Sep. 1998, §52.
[25] *Handyside*, §49.
[26] *Wingrove,* §58; *Tatlav*, §25; *Giniewski*, §44.
[27] *Wingrove*, §58.
[28] *Otto-Preminger*, §50.
[29] *Chauvy e.a. v. France*, 29 June 2004, §69.
[30] *Garaudy v. France*, (Dec.), 24 June 2003.

was a child. On the other hand, the morality of sexual relations between an adult and a 9 year old girl is not a possible issue according to culture. Like circumcision, such sex causes physiological harm to the child, regardless of the time. In addition, a man must at least be sexually attracted to the child to be physically capable of having sex with a child. A person is a "pedophile" once he is sexually attracted to children, whether the attraction is uniquely towards children or not.

2. A question of general interest?

Did the statements touch a "matter of indisputable public interest in a democratic society"?[31]
"Basic knowledge of Islam", to which these statements were intended to contribute, is clearly of public interest. Islam cannot be excluded from the scope of the debate of ideas on the grounds that this whole set of doctrines has an important religious dimension. Islam also has social, political and historical dimensions that must be freely discussed. Given the scale of this phenomenon, the public needs to be informed, and this information can legitimately be critical as long as it is not misleading. Muhammad is also a political figure who continues to exert a strong influence, hence, it should be widely possible to criticize him within the context of a political debate.[32]
In addition, it must be noted that the facts criticized by the applicant are directly related to the on-going practice of marriage of prepubescent girls in countries influenced by Muslim culture. According to the United Nations Population Fund (UNFPA), between 2011 and 2020, 50 million girls under 15 years old should be married. This phenomenon is also marginally present in Europe.
Thus, in its "concluding observations" of March 2016 on the periodic reports of the Islamic Republic of Iran[33], the UN Committee on the Rights of the Child deplores the laws on minority and marriage in this country. Girls cease to be minor after 9 lunar years. Thus, after this age, they are excluded from the protection of the Convention on the Rights of the Child passed. The minimum age for marriage in Iran is 13 years for girls and 15 for boys. An NGO found[34] that 43,459 girls under 15 years got married in 2009 and 716 girls under 10 years married in 2010.

In Saudi Arabia, it is only since 2013 that the minimum age of girls for marriage was raised to 16 and the consent of these girls was formally required. The Grand Mufti of Saudi Arabia said in 2012 that girls are ripe for marriage at 12 years.[35]

It is true that, child marriages were also celebrated in Europe in the past, especially in royal families, but these "*marriages"* were very distinct and were contracted way before the *"honeymoon"* during which the union was consummated – which was always after puberty.

3. Obscene Statements?

Certainly, the impugned statements questioned Mohammed's sexuality, but they were not obscene. They were based on real events that enable one to reasonably establish a link with pedophilia.
The relationship between the statements and the truth is central to judging these statements, as well as measuring their obscenity. For example, the Virgin Mary or Joseph Smith cannot be portrayed in the same way regarding sex, as these people did not conduct themselves in the same manner within the said context (J. Smith had more than 30 women). Therefore, the principle of equality does not, however, protect Muhammad and St. Teresa or Mary against sexual discourse in the same way. It will be much more obscene to criticize the Virgin Mary or Judith with similar statements, than Mohammed

[31]*Giniewski v. France*, 31 Jan. 2006.
[32]*Lingens v. Austria*, 8 Jul. 1986.
[33]UN, Convention on the Rights of the Child, Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of the Islamic Republic of Iran,* CRC/C/IRN/CO/3-4, adopted by the Committee at its seventy-first session (11-29 January 2016), 14 March 2016.
[34]Robert Tait, "Alarm as hundreds of children under age of 10 married in Iran", *The Telegraph*, 26 Aug. 2012.
[35]Girls ready for marriage at 12 - Saudi Grand Mufti, http://www.arabianbusiness.com/girls-ready-for-marriage-at-12-saudi-grand-mufti-455146.html#.V0NBKfmLRaQ

or Joseph Smith.
Religions are not equivalent, and the truth cannot be blasphemous.

4. A speech incenting to hatred and imminent violence based on religion or belief?

The comments do not incite to imminent violence. They are compatible with Article 20 paragraph 2 of the Covenant on Civil Rights following its current interpretation.
They do not constitute *"hate speech promoting the glorification of violence and therefore could not be regarded as compatible with the fundamental values of justice and peace set forth in the Preamble to the Convention"*.[36]
This is not a serious generalized attack against an entire religious group, which would have constituted an abuse of rights, punishable under Article 17 of the Convention.[37]
Certainly, one can condemn remarks that directly incite to violence against a religious group, but not those which, although reasonable, are likely to incite the concerned religious group to violence.

5. The limited scope of the remarks

The statements had a very limited impact because they were made in front of only thirty people who were aware of their critical orientation, considering the fact that this conference was organized in the FPÖ Education Institute, a political party widely known to be critical of Islam.
It was the journalists present at the conference who, by lodging a complaint, made the impact of these remarks much wider.

6. A disturbance of public order?

In this case, there was no real disturbance of public order. The action was initiated not by a person of the Muslim faith, but by the Prosecutor at the request of journalists opposed to the FPÖ. Actually, *"there is moreover no evidence that at the time when the applicant made his statements the atmosphere [in Austria] was tense and could result in serious friction"* with Muslims living there.[38]
Although the purpose of the disputed measure was to ensure *"religious peace",* its implementation has been counter-productive in this case.
As underlined by the Venice Commission, freedom of expression can be restricted by respect for believers, but not for fear of a violent reaction to what they consider detrimental to their religious feeling -- otherwise it is the "believers" who by their violence set the limits of freedom of expression. Fear of inter-religious conflict should not restrict fundamental freedoms, because it is through the proper use of these freedoms that this conflict can be overcome.

The fact that the statements were sanctioned even though they had little impact and did not really disturb public order indicates that it was the reputation of "the object of belief" himself that was protected rather than the "religious sensitivity". This leads us to consider that the applicant was convicted primarily for blasphemy, even though her statements were not devoid of material basis. Beyond the facts, it was her intention to devalue Islam which was condemned.

7. A criminal sanction

Although relatively light in the case,[39] the recourse to a penal sanction, rather than civil, does not seem necessary in a democratic society. Such criminal conviction opposes the case-law of the Grand Chamber in the case *Perinçek v. Switzerland* (§280) and the opinions of "soft law" reported above.

8. A deterrent

Even though the criminal sanction was relatively light, Article 188 serves a deterrent ("chilling effect")

[36] *Gunduz v. Turkey*, (Dec) 13 Nov. 2003. *Surek v. Turkey (no 1)*, 8 July 1999, §62.
[37] *Norwood v. UK,* 16 Nov. 2004.
[38] *Perincek v. Switzerland*, 15 Oct. 2015, §244.
[39] *I.A. v. Turkey*, §32.

characterized by a sense of insecurity obstructing free debate. As highlighted by the three dissenting judges in the judgment *I.A. v. Turkey*: "*Such a risk of self-censorship is very dangerous for this freedom, which is essential in a democracy, to say nothing of the implicit encouragement of blacklisting or "fatwas".*

Conclusion:

It can be reckoned that the applicant was convicted not for having offended the religious feelings of believers, but for disparaging a belief in itself, that is to say, for blasphemy, even though the comments were based on historical facts whose dissemination, in a political context, contributes public debate. Even assuming that these statements were an *"abusive attack"* and that *"as a matter of principle it may be considered necessary to punish improper attacks on objects of religious veneration"*[40], this criminal conviction seemed unnecessary in this case.

[40]*I.A. v. Turkey,* §24.