

The Erotic Taboo: An Investigation into the Margin of Appreciation Concerning Cases of Sexual Blasphemy at the European Court of Human Rights

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Abstract: The European Court of Human Rights' jurisprudence shows the Court affords State Parties a wider margin of appreciation when restricting freedom of expression in cases involving religious offence than in cases concerning political speech. This article argues that this already-broad margin is widened further when the impugned expression contains a sexual element. The article advances this claim through a comparative analysis of three categories of case: non-sexual blasphemy, sexualised blasphemy, and sexual expression without a religious element. It argues that sexualised blasphemy forces the Court to contend simultaneously with two spheres, religion and sexuality, that it is institutionally reluctant to define, and that the doctrine of 'living together' functions as a substitute for principled reasoning in this double bind. Drawing on liberal political philosophy's public/private distinction and its implications for human rights adjudication, the article contends that the resulting deference to state authorities is doctrinally inconsistent and risks insulating dominant moral orthodoxies from legitimate criticism. The article concludes that a sexual element in blasphemy does indeed affect the Court's application of the margin of appreciation, and that this effect is in tension with the Court's own commitment to freedom of expression as a foundational democratic principle.

Keywords: *EU law; freedom of expression; freedom of religion; human rights; blasphemy.*

I. Introduction

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It has become generally understood that the European Court of Human Rights (ECtHR) lends States a wider margin of appreciation when dealing with restrictions on freedom of expression concerning offence to religion compared to non-religious offence, being a conflict involving 'inalienable', fundamental rights.¹ However, even within this wider margin, there are certain cases where states are awarded an even wider margin still. This essay argues that this broader margin of appreciation is granted when there is a sexual element to the blasphemy, and advances that claim through a systematic comparison of three categories of case: non-sexual blasphemy, sexualised blasphemy, and sexual expression without a religious element.

The comparison reveals a coherent, if implicit, pattern: the ECtHR is institutionally unwilling to adjudicate on either religious doctrine or sexual morality and, when both are present simultaneously, the result is a compound deference that far exceeds what doctrinal consistency would require. Representing two categories the Court sees as outside of its jurisdiction, defining religion and sexual morals, the ECtHR is left in a double bind. As a court with a distinctly humanist tradition, the ECtHR has the difficult task of balancing the traditions of countries with a multitude of religious and legal histories, which has led to an increasingly deferential stance.² The deference in blasphemy cases applies in relation to the caveat to the European Convention on Human Rights' (ECHR) Article 10 freedom of expression. This allows expression to be limited where such restrictions 'are prescribed by law and necessary in a democratic society' for purposes including national security, public safety, the prevention of crime, the protection of health or morals, and the protection of the reputation or rights of others.³ As a concept not enshrined in the ECHR, the Strasbourg Court has never formally defined 'blasphemy', but it can be generally understood as speech which insults religious tenets, texts, institutions, or figures, resulting in offence to believers. This essay analyses how the Court's interpretation of the margin of appreciation in blasphemy cases has evolved, focusing in particular on its novel reliance on the concept of 'living together'.

II. The Margin of Appreciation

¹ See *Morice v France* App no 29368/10 (ECtHR, 23 April 2016) 62 EHRR 1 and Joanna Kulesza, 'Free Speech, Artistic Expression and Blasphemy Laws within the ECHR Margin of Appreciation' in *Law, Language and the Courtroom* (Routledge 2022) 160–72.

² Ronan McCrea, *Religion and the Public Order of the European Union* (Oxford University Press 2013) Chapter 2.

³ European Convention on Human Rights (ECHR) (1950) article 10(2).

Though *Engel and Others v The Netherlands* saw the first application of the margin of appreciation formula, *Handyside v UK* was the foundational decision for its rationale at the ECtHR, specifically with the interference with Article 10 freedom of expression rights.⁴ The Court established in *Handyside* a stringent standard of review for restrictions on expression, emphasising the importance of freedom of speech in democracy, stating that “[f]reedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man.”⁵ The case clarified three major points of law concerning the doctrine: that the margin is linked with subsidiarity; that it is granted to both the legislature and the judiciary of the Member State; and that it is not boundless as it is necessarily outlined by European jurisprudence.⁶ A crucial further point is that the Convention machinery is subsidiary to national systems of safeguarding human rights, and that there is a clear sequential chain where national authorities make the initial assessment.⁷

The position of national authorities has subsequently been fortified by the Brighton Declaration and Protocol 15 to the ECHR, which added subsidiarity and the margin of appreciation to the Convention explicitly. One issue with the margin of appreciation, as the UK's 2013 Joint Committee Report identified, is that “rather than [being] an explicit qualification of specific rights, [it] is not strictly defined, with the result that its application is at the sole discretion of the Court”,⁸ leading to a lack of predictability. Protocol 15 has increased deference towards local authorities concerning the interpretation of human rights even further, particularly in conditions where mature democracies are considered by the ECtHR to have sufficient executive scrutiny measures.⁹

III. Blasphemy Laws and Their European Context

⁴ *Engel v The Netherlands* (1976) 1 EHRR 647; *Handyside v United Kingdom* (1976) 1 EHRR 737.

⁵ *Handyside v United Kingdom* (n 4) para 49.

⁶ *ibid.*

⁷ Dean Spielmann, ‘Whither the Margin of Appreciation?’ (2014) 67 *Current Legal Problems* 49, 53.

⁸ Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility (Prisoners) Bill: Report* (2013-24, HL 103, HC 924) para 35.

⁹ Ian Cram, ‘Protocol 15 and Articles 10 and 11 ECHR—The Partial Triumph of Political Incumbency post-Brighton?’ (2018) 67 *ICLQ* 477.

To understand why the Court is particularly deferential concerning blasphemy and sexualised blasphemy, it is essential to understand Europe's religious background and its crucial role in the ECtHR's approach to interpreting these laws. Today, Western Europe stands out in its secularity; it has some of the lowest recorded rates of religious practice and belief globally, with rates that continue to decline.¹⁰ However, Europe was once a majority Christian continent, and this is reflected in the common law and jurisprudence which have become the basis of modern legal systems.¹¹ In recent years, immigration, and religious diversity along with it, have increased, changing the societal context of blasphemy laws, most of which were drafted solely to protect Christianity, or at least only with Christian values in mind.¹² The ECtHR has therefore had the difficult job of translating blasphemy laws across religions, in the context of increasingly secular societies.¹³ This is not a new concept; Montesquieu emphasised the need for an inclusive and tolerant legal system, requiring that “[w]hen the laws of a state have thought it best to allow multiple religions, they must also oblige them to tolerate each other.”¹⁴

The issue for the ECtHR is ensuring this tolerance without infringing on state sovereignty, which would disrespect the doctrine of the margin of appreciation. The context of the ECtHR's decisions is therefore a delicate balancing test concerning fundamental rights overlaid by significant political complexities.

IV. The Balancing Test and Its Inconsistent Application

When two rights are in competition in this manner, as the Article 9 right to “freedom of thought, conscience and religion” and Article 10 “freedom of expression” are for blasphemy, the

¹⁰ See the data on religious affiliation in European Commission, Directorate-General for Justice and Consumers, Discrimination in the EU in 2023: Report (European Commission 2023), 110 <<https://data.europa.eu/doi/10.2838/499763>> accessed 26 February 2026; and the data on attitudes towards religion and society in ‘Being Christian in Western Europe’ (The Pew Center, 29 May 2018) <<https://www.pewresearch.org/religion/2018/05/29/being-christian-in-western-europe/>> accessed 26 February 2026.

¹¹ For a detailed analysis, see Ronan McCrea, *Religion and the Public Order of the European Union* (Oxford University Press 2011) 16-17.

¹² *ibid.*

¹³ Illias Trispiotis, ‘Two Interpretations of “Living Together” in European Human Rights Law’ (2016) 75(3) Cambridge Law Journal 580, 590–96.

¹⁴ David W Carrithers and Philip Stewart (eds), *Montesquieu: Discourses, Dissertations, and Dialogues on Politics, Science, and Religion* (Cambridge University Press 2020) 246.

Strasbourg Court must apply a balancing test. In cases concerning blasphemy, there is an inherent clashing of rights, and the Court must determine whether the Article 9 right justifies the exceptional restriction of freedom of expression.¹⁵ This difficulty arises from the EU's fundamental commitment to the equality of religious and non-religious worldviews as part of its broader commitment to fundamental rights.¹⁶ It is the ECtHR's liberal and "individual" autonomy-focused approach to religious freedom which requires the Court to balance the freedoms guaranteed in Articles 9 and 10 ECHR.¹⁷

Balancing of Article 10 is possible as it is a qualified right, allowing for restriction where the three requirements previously mentioned are satisfied: the restriction is prescribed by law, is necessary in a democratic society and, among other justifications, is necessary for protecting the rights of others.¹⁸ The Court stressed in *Handyside* that Article 10 rights are not applicable only to forms of expression that are favourable but also to "those that offend, shock or disturb the State or any sector of the population."¹⁹ Similarly, in *Morice v France*, the Court clearly set out that freedom of expression is a crucial fundamental right which should only be restricted in exceptional circumstances, stating that "[t]here is little scope under art 10(2) of the Convention for restrictions on political speech or on the debate on matters of public interest. Accordingly, a high level of protection of freedom of expression, with the authorities thus having a particularly narrow margin of appreciation, will normally be accorded where the remarks concern a matter of public interest."²⁰

However, the Court does not appear to follow this logic when determining the margin of appreciation concerning expression that offends religious feelings. This inconsistency has provoked criticism from legal scholars, particularly for the potential to lead to unpredictable case law where different interpretative standards are applied depending on which rights are

¹⁵ ECHR (n 3).

¹⁶ McCrea (n 2) Chapter 4.

¹⁷ *ibid.*

¹⁸ ECHR (n 3) article 10(2).

¹⁹ *Handyside v United Kingdom* (n 4) para 49.

²⁰ *Morice v France* (n 1) para 125.

being balanced.²¹ Considering that balancing is described as one of the Court's core judicial tools, this is a concerning trend.

Over recent years, the Court has used the balancing exercise to become increasingly deferential to states in matters of restricting freedom of expression in favour of protecting religious feelings.²² Of course, religious morality varies significantly across Europe (take for example, Turkey's Islamic tradition compared to Hungary's Christian nationalism)²³ and this affects the application of the margin of appreciation; the less consensus between states on blasphemy laws, the wider the margin. However, Member States have been getting closer to achieving consensus on the undesirability of blasphemy laws, demonstrated by the 2013 guidelines unanimously agreed to by EU foreign ministers.²⁴ This called for blasphemy laws to be repealed in the context of EU foreign policy, and which state that the EU "should firmly oppose any attempt to criminalise freedom of speech in relation to religious issues, such as blasphemy laws."²⁵ It should follow that when considering European consensus the ECtHR should regard countries with blasphemy laws as the outliers, producing a narrower margin of appreciation. As the case law shows, this has not been the consequence.

V. A Comparative Analysis of Three Categories of Case

Case 1 – Sexual Expression Without Religious Content: Müller v Switzerland

An example of sexual expression without religious content, *Müller v Switzerland*, saw the applicants contend that the phrasing of Article 204 of the Swiss Criminal Code prohibiting possessing, distributing, and displaying obscene pictures and films in public was too vague, particularly the use of the word 'obscene', to allow individuals to regulate their conduct.²⁶ The

²¹ Marko Novak, 'Three Models of Balancing (in Constitutional Review)' (2010) 23 *Ratio Juris* 101, 106.

²² Eleanor Spaventa, 'What Is the Point of Minimum Harmonization of Fundamental Rights?: Some Further Reflections on the Achbita Case' (*EU Law Analysis Blog*, 21 March 2017) <http://eulawanalysis.blogspot.com/2017/03/what-is-point-of-minimum-harmonization.html> accessed 17 April 2026.

²³ See, respectively, Kim Shively, *Islam in Modern Turkey* (Edinburgh University Press 2021) and Susanna Mancini and Michel Rosenfeld, 'Politicized Religion and the Reframing of Fundamental Rights' in Michel Rosenfeld and András Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

²⁴ European Parliament recommendation to the Council of 13 June 2013 on the draft EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief (2013/2082(INI)).

²⁵ *ibid.*

²⁶ *Müller v Switzerland*, App no 10737/84 (ECtHR, 24 May 1988).

Court rejected this, noting the need for flexibility to allow legislation to 'keep pace with changing circumstances'.²⁷ For the legitimacy of the aim, the Court found a 'natural' connection between the protection of public morals and the protection of the rights of others.²⁸ The judgment is notable for the width of the margin afforded to Switzerland: the Court did not find the view of the Swiss courts that the paintings were “liable grossly to offend the sense of sexual propriety of persons of ordinary sensibility” to be unreasonable.²⁹ There is an important parallel here with the blasphemy cases: in both *Müller* and the religious offence cases, the Court accepts a right not to be offended in public as a sufficient basis for restricting expression, despite having previously held in *Handyside* that there is no such right.

However, the critical difference from the sexualised blasphemy cases is that in *Müller* the Court engaged directly with the nature and context of the sexual imagery on its own terms, analysing the circumstances of the exhibition, the public nature of the display, and the absence of content restrictions. In the sexualised blasphemy cases, the Court conspicuously avoids this engagement, retreating to a wider margin of appreciation without providing equivalent analysis.

Cases 2, 3, and 4 – Sexualised Blasphemy: Otto-Preminger, I.A. v Turkey, and E.S. v Austria

To understand why this has been the case, it is essential to analyse the role of the sexual element. The first blasphemy case to come before the ECtHR, *Otto-Preminger-Institut v Austria*, concerned 'Das Liebeskonzil', a film planned for six restricted screenings, advertised with warnings that Christianity would be ridiculed and caricatured.³⁰ Although the Court noted the importance of the film having an explicitly sexual element as essential to awarding Austria a wide margin of appreciation, it gave this consideration no weight in its formal reasoning, stressing only that religious offence was very likely to be caused. The sexual element, mostly concerning the sexualisation of Jesus Christ and the Mother Mary's relationship, is only referred to in the partly dissenting opinion of Mr. F. Ermacora, joined by Mm. A. Weitzel and L. Loucaides:

²⁷ *ibid* para 29.

²⁸ *ibid* para 30.

²⁹ *ibid* para 36.

³⁰ *Otto-Preminger-Institut v Austria* (1995) 19 EHRR 34.

The film's version of Jesus Christ as a mentally deficient and voluptuous young man who approaches Mary in a sexual way cannot be justified as satirical. It is out of any proportion as an attack against religious feelings and the common understanding of the image of Jesus Christ prevailing in countries where the majority of peoples belong, at least formally, to the Christian religion - an image which has prevailed over centuries in objects of art and in the public life of the society in the Tyrol.³¹

No particular explanation is given for why the sexual element aggravates the offence; it is presumed to be understood. The fact that it is not the 'historical' depiction of Jesus Christ cannot be a satisfying explanation in itself; religious practices are constantly evolving and this is one of the reasons that the Court has avoided defining characteristics of specific religions, known as the 'religious question doctrine'.³² In its various expressions, this doctrine bars courts from engaging in the resolution of disputes on the tenets of religion – whether those involve fundamental theological claims or factual questions concerning the beliefs or practices of particular individuals or faith communities.³³ It is now well established in constitutional law that courts must refrain from involving themselves in such matters.³⁴ What goes unsaid but is heavily implied is that the Court considers persons with religious convictions to be more sensitive to sexual imagery — a presumption that, if it underlies the reasoning, should have been supported by evidence and made explicit.

It would be reasonable to suggest the Court's approach comes from the fact that sexual conduct is a sensitive topic in religion and, depending on which religious sect is at issue, is often regulated by the relevant holy book: the Bible condemns sexual immorality as sins both against God and one's own body (Leviticus 18); the Quran has stringent rules against extramarital sex (*zina*) and encourages chastity outside of marriage (Quran 17:32); the Torah regulates sexual activity within marriage, forbidding adultery, incest, etc. (Leviticus 18,

³¹ *ibid* para 83.

³² Cécile Laborde, 'Dworkin's Freedom of Religion without God' (2014) 94(4) *Boston University Law Review* 1255, 1270-71.

³³ Jared A Goldstein, 'Is There a Religious Question Doctrine? Judicial Authority to Examine Religious Practices and Beliefs' (2005) 54 *Catholic University Law Review* 497.

³⁴ Anna Su, 'Judging Religious Sincerity' (2016) 5(1) *Oxford Journal of Law and Religion* 28, 29.

Deuteronomy 23:18). An example of the manifestation of such tenets is that religious schools often choose not to include sexual health in their relationships and sex education, believing these to be private matters, taught to children by their families in line with their religious beliefs.³⁵ Additionally, many religions construct traditions requiring abstinence from sexual activity. Catholicism, for example, dictates that “only celibate hands can administer the sacraments.”³⁶ As sacred figures are often perceived as inviolable, sexual imagery of said figures can act as a tool of de-sacralisation, possibly constituting a violation of Article 9 rights.

There is scope for such an argument, and Abdou (2022) argues that the reason why believers are particularly vulnerable to offensive speech based on their beliefs, whether sexual or not, is that it involves an interaction with a fundamental element of the forum internum of the Article 9 freedom of religion, one that involves the believer’s innate identity of “identifying with the divine and its omnipresent existence”.³⁷ Abdou argues this has resulted in the creation of an enumerated ECHR right: the right not to be offended in your beliefs.³⁸ This would certainly seem to be the case considering how deferential the Strasbourg Court has been considering blasphemy generally. Proponents of strong freedom of expression protection, on the other hand, argue that there is no right not to have one’s beliefs insulted, and this needs to be distinguished from the fact that speech likely to lead to imminent violence should be restricted and that prohibiting certain speech prevents discrimination, which Letsas identifies as being irrelevant to the goal of restricting speech which is “rather to promote distributive justice.”³⁹ Either way, the Court has failed so far to make an argument justifying its findings, leaving its judgments with an insufficiently developed coherence. Virgili identifies this as an inherent flaw in the Court’s reasoning; “either religious feelings are a corollary of freedom of

³⁵ J Mark Halstead and Sue Waite, ‘Love and Trust’: Making Space for Feelings in Sex Education (2003) 21(2) *Education and Health* 23.

³⁶ Daniel C Maguire, ‘Sex and the Sacred’ (2004) 54(3) *CrossCurrents* 23, 24.

³⁷ Noureldin Abdou, ‘A Brief Account of Offending Public Morals and Religious Sensibilities Before the European Court of Human Rights’ (2022) 3(1) *International Journal of Doctrine, Judiciary and Legislation* 135.

³⁸ *ibid.*

³⁹ George Letsas, ‘Is There a Right Not to Be Offended in One’s Religious Beliefs?’ in Lorenza Zunna (ed), *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge University Press 2011) 258.

religion, in which case their protection, in the form of a blasphemy law of some sort, should not be left to the margin of appreciation but be mandatory for the state[...]; or they are not.”⁴⁰

This same incoherent pattern recurs in *İ.A. v Turkey*, where the Court upheld a conviction for a novel containing sexually explicit passages involving the Prophet Muhammad, including passages depicting him as having sexual relations with his wife immediately after prayers.⁴¹ The majority found that the interference with Article 10 was proportionate, citing the fact that the speech in the case extended past that covered by *Handyside*, constituting “an abusive attack on the Prophet of Islam.”⁴² The dissent, by contrast, argued that the importance of freedom of speech, the ability of people to avoid purchasing such a book, and the “chilling effect” of imposing fines is “dangerous” for democracy.⁴³ As with *Otto-Preminger*, the sexual element is present but its legal relevance is neither explained nor justified: the Court simply treats it as self-evidently aggravating. However, important to note about *İ.A.* is that Judges Costa, Cabral Barreto and Jungwiert noted in their final joint dissenting opinion that “the time has perhaps come to ‘revisit’ this [blasphemy] case law”, which it notes as potentially having been too deferential to states, reflecting “an overcautious and timid conception of freedom of the press.”⁴⁴ Although this holds no legal weight, it is interesting to see that at least some of the Court’s judges have become aware of the dangers of its increasingly deferential stance and its chilling effect on freedom of expression, including that of the media. Additionally, the dissenting judges stressed the opinion in *Handyside* that freedom of expression also includes shocking and offensive expression, implying that the ECtHR’s judgments have taken on a “ritual[istic]” structure where cases like *Handyside* are quoted, only to be given no weight.⁴⁵ However, the case was decided in 2005 and the Court’s deference has stayed consistent to the present day.

⁴⁰ Tommaso Virgili, ‘Rabczewska v Poland and Blasphemy Before the ECtHR: A Neverending Story of Inconsistency’ (Strasbourg Observers, 21 October 2022) <https://strasbourgobservers.com/2022/10/21/rabczewska-v-poland-and-blasphemy-before-the-ecthr-a-neverending-story-of-inconsistency/> accessed 6 May 2026.

⁴¹ *İ.A. v Turkey* App no. 42571/98 (ECtHR, 13 September 2005).

⁴² *ibid* para 29.

⁴³ *ibid* Joint Dissenting Opinion of Judges Costa, Cabral Barreto and Jungwiert.

⁴⁴ *ibid* Joint Dissenting Opinion of Judges Costa, Cabral Barreto and Jungwiert at 8.

⁴⁵ *ibid*.

A more recent example of this consistency, *E.S. v Austria*, can be considered the most doctrinally complex of the sexualised blasphemy cases.⁴⁶ The applicant, a member of the Freedom Party in Austria, held a series of seminars she called 'Basic Information on Islam', open to both party members and the public. After making comments on the Prophet Muhammad's sexuality, the applicant was charged under Articles 188 and 283 of the Austrian Criminal Code, for disparaging religious doctrines and inciting hatred respectively. The statements that were upheld at the case before the ECtHR involved the applicant suggesting that the Prophet was a paedophile due to his marriage to Aisha, a seven-year-old girl, with whom he had a sexual relationship.

The ECtHR applied the three-part proportionality test, finding that the interference had been prescribed by law, that the legitimate aim was to safeguard religious peace and protect religious feelings, and that it was necessary in a democratic society in the event of an improper or even abusive attack on an object of religious veneration, engaging State responsibility for Article 9 rights.⁴⁷ The Court referred to the absence of a uniform European conception of the requirements of balancing these rights, giving the Member State a broader margin of appreciation, making specific reference to the *Otto-Preminger* case.⁴⁸

An important analytical problem in *E.S.* is that the Court considered the definition of 'paedophilia' to reach its conclusion. According to the Court, "the common definition of paedophilia was a *primary* sexual interest in children who had not yet reached puberty."⁴⁹ The Court drew from this definition that Muhammad was not a paedophile as he had purportedly only had one sexual relationship with a child and had stayed married to her after she had become an adult. This is an arbitrary definition; the general public would consider an adult man who had had even one sexual relationship with a nine-year-old to be a paedophile, even if the relationship lasted into adulthood, particularly in the context of contemporary understanding of grooming. The fact that the ECtHR gave weight to establishing the definition of paedophile demonstrates that the Strasbourg Court conflated or, at the very least, combined principles of

⁴⁶ *E.S. v Austria* App no. 38450/12 (ECtHR, 25 October 2018).

⁴⁷ *ibid* paras 39-58.

⁴⁸ *ibid* para 44.

⁴⁹ *ibid* para 14 (emphasis added).

determining value and fact judgements.⁵⁰ As Smet points out, it is verging on ridiculous to balance a case on the question of whether having a sexual relationship with *only* one child over one thousand years ago is enough to be considered a paedophile today.⁵¹ It also resulted in the Court coming perilously close to interpreting Islamic scripture and doctrine which, although consistent with the Court's previous engagement in making distinctions "where a statement amounts to a value judgment" where it noted that "the proportionality of an interference [depends] on whether there exists a sufficient factual basis for the impugned statement", is something it has deliberately sought to avoid and which scholars have determined should not be the role of secular courts.⁵²

This difficulty directly contradicts the religious question doctrine. By borrowing defamation law principles when determining the distinction between value judgements and statements of fact and applying them to determine whether a statement about a religious figure is disproportionate, the Court effectively treated the Prophet as a legal person, raising a troubling hierarchy of rights, with those of a historical or religious figure placed above the rights of a living member of society. The absorption of this reasoning from the local court, without critical scrutiny, is precisely the kind of doctrinal inconsistency that an excessively wide margin of appreciation enables.

Additionally, the Court states in its judgment that there is an "absence of a uniform European conception" of blasphemy laws, seemingly ignoring the 2013 Resolution and Guidelines on the Promotion and Protection of Religion or Belief adopted by the European Parliament which shows evidence of a growing hostility to blasphemy laws.⁵³ Again, countries which overly restrict freedom of expression in the name of religious feelings should be regarded as the exception, not the rule, and a narrow margin of appreciation should be applied accordingly. This begs the question of why the Court continues to be deferential to countries

⁵⁰ Stijn Smet, 'Free Speech versus Religious Feelings, the Sequel: Defamation of the Prophet Muhammad in *E.S. v Austria*' (2019) 15 *European Constitutional Law Review* 158, 165–66.

⁵¹ Stijn Smet, 'E.S. v Austria: Freedom of Expression Versus Religious Feelings, the Sequel' (Strasbourg Observers, 7 November 2018) <https://strasbourgobservers.com/2018/11/07/e-s-v-austria-freedom-of-expression-versus-religious-feelings-the-sequel/> accessed 1 May 2026.

⁵² *E.S. v Austria* (n 46) paras 47–48.

⁵³ *ibid* 44.

in cases of blasphemy, and particularly why it considers sexualised blasphemy to warrant an especially wide margin.

In contending with blasphemy cases on the whole, references to the right not to be offended in one's belief has proven the willingness of the ECtHR to extend the text of the ECHR, going beyond the rights it is supposed to be interpreting.⁵⁴ This allows its excessive deference to domestic authorities, which it justifies by declaring them better-suited to decide on what would cause offence in their territory, with some critics proposing this results in an "illusionary clash" as freedom of religion is not in itself prevented by transgressive expression; believers continue to enjoy their full right to believe and manifest their beliefs.⁵⁵

VI. Compound Deference

As observed in each of the sexualised blasphemy cases, the Court avoids explaining why the sexual element aggravates the religious offence. This is not an oversight: it reflects the fact that any explanation would require the Court to take a position on what constitutes appropriate sexual conduct in a religious context, which would in turn require it to evaluate the content of religious doctrine, precisely what the religious question doctrine prohibits. This type of reflection would require delving into the private, a realm the Strasbourg Court does not seek to regulate as a human rights court.⁵⁶ The result is a double bind from which the Court escapes only by maximising deference to national authorities.

VII. The Public/Private Distinction and Its Theoretical Foundations

This private/public distinction has direct implications for how human rights adjudication works in practice. For Rawls, the justification of restrictions on liberty in a pluralist society must be capable of being defended by appeal to public reasons accessible to all citizens regardless of their comprehensive moral or religious views.⁵⁷ For Habermas, constitutional principles' legitimacy depends on them being grounded in a shared political culture that brackets comprehensive moral doctrines, producing what he calls constitutional patriotism

⁵⁴ Abdou (n 37).

⁵⁵ Smet (n 50) 142.

⁵⁶ For a critique of the public/private divide in human rights, see Andrew Clapham, *Human Rights in the Private Sphere* (Oxford University Press 1993).

⁵⁷ John Rawls, *The Law of Peoples: With "The Idea of Public Reason Revisited"* (Harvard University Press 2001).

(*Verfassungspatriotismus*).⁵⁸ These concepts clearly apply in the European context where EU member states act as a multicultural democratic society held together by a shared political culture founded in constitutional principles, instead of nationality or ethnicity. According to Habermas, this will result in a form of patriotism more compatible with diverse societies.⁵⁹ If this is the underlying aim of the Court as Habermas theorises, then having to define what should be 'religion' or 'sexuality' would contradict the liberal ideals – namely pluralism, tolerance, diverse social inclusion, and mutual respect – underscoring the ECtHR's foundation.⁶⁰ On either account, a restriction on freedom of expression that is justified solely by reference to the offence it causes to the religious sensibilities of one group of citizens is problematic because it privileges a particular comprehensive doctrine over the rights of others.

Sexualised blasphemy is doubly problematic in this regard because it implicates both religion and sexuality, two domains that liberal theory insists belong to the private sphere and which state institutions should not regulate or rank. The ECtHR, as a court committed to liberal democratic principles, faces an acute difficulty. To explain why sexualised depictions of religious figures are more offensive than non-sexualised ones, it would have to appeal either to the religious doctrine that regards certain sexual behaviour as sinful or to a general moral claim that sexual imagery is inherently more harmful. The first requires adjudicating on religious doctrine; the second requires defining acceptable sexual morality. Both move the Court away from the public reasons it bases its judgments on and, according to liberal legal theory, on which its authority is based. The solution, expanding the margin of appreciation until the problem disappears into state deference, is expedient but doctrinally corrosive.

This deference has forced the Strasbourg Court to turn away from the traditional justifications for limiting freedom of expression, as laid out earlier, and take on novel approaches presented by the Member States. Most notably, this involves the connection between the sexualised blasphemy cases and the Court's broader 'living together' jurisprudence.

VIII. 'Living Together' as Doctrinal Evasion

⁵⁸ Jürgen Habermas, *Europe: The Faltering Project* (Polity Press 2009) 66–70.

⁵⁹ Jürgen Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe' (1992) 12(1) *Praxis International* 1.

⁶⁰ Trispiotis (n 13) 595.

An important development in the ECtHR's stronger approach to freedom of religion was seen in *Eweida v United Kingdom* (henceforth *Eweida*).⁶¹ Although this case concerned freedom of religious expression at work and not blasphemy laws, analysing the Court's approach to Article 9 rights is useful to understand the evolution of its attitude towards interferences with other ECHR rights. In *Eweida*, the Court distanced itself from the previous case law where the right to resign was held as a feasible solution for problems with manifesting religion at work.⁶² This is now not a constitutive reason in itself and must be paired with other factors when considering the proportionality of the restriction imposed.⁶³ In its consideration that restrictions on wearing religious symbols at work constitute *prima facie* violations of manifestation of religion rights (Article 9 ECHR), the scope of freedom of religion was greatly expanded by the ECtHR.⁶⁴

In line with this stronger protection of Article 9 rights, the Court expanded what could constitute a restriction 'necessary in a democratic society' in *SAS v France*.⁶⁵ After rejecting the gender equality argument proposed by the French government to justify banning veiling, the Court cited a novel human right: the right to living together. This right was developed as being necessary as "under certain conditions the 'respect for the minimum requirements of life in society' referred to by the Government, or of 'living together', can be linked to the legitimate aim of the 'protection of the rights and freedoms of others'."⁶⁶ This was justified by the importance of being able to see people's faces, which "plays an important role in social interaction", although there is no right under the ECHR to see another person's face and the Court rejected France's security argument regarding this.⁶⁷

However dubious it may be, the majority accepted the 'living together' argument and ruled that France's Law no. 2010-1192 banning face coverings in public, also known as the 'French burqa-ban', did not violate Articles 8 (right to respect for private and family life), 9

⁶¹ *Eweida and Others v United Kingdom* (2013) 57 EHRR 8.

⁶² *Stedman v United Kingdom* (1997) 23 EHRR CD 168.

⁶³ Michelle Biddulph and Dwight Newman, 'Eweida v United Kingdom' (2013) 20 *Australian International Law Journal* 183.

⁶⁴ *ibid.*

⁶⁵ *SAS v France* App no 43835/11 (ECtHR, 1 July 2014) 38 BHRC 475.

⁶⁶ *ibid* para 121.

⁶⁷ *ibid* para 122.

(freedom of thought, conscience and religion) or 14 (prohibition of discrimination) of the ECHR. This may come as no surprise considering the Court has yet to find a violation of the right to manifest one's religion or belief, bar the case of *Ahmet Arslan v Turkey*, wherein it found a violation of Article 9 rights where ordinary citizens had been convicted for wearing religious clothing in public under a law intended for persons in official roles.⁶⁸ Nonetheless, it would be reasonable to consider that the definitive prohibition on face coverings infringed on ordinary citizens' Article 9 rights to freedom of religion. The 'living together' justification was considered weak by the dissenting judges, who questioned how this abstract concept could justify finding that the veil violates “the rights and freedoms of others.”⁶⁹ Of particular concern was what rights were being infringed, the dissenting judgment stating that “[t]he very general concept of ‘living together’ does not fall directly under any of the rights and freedoms guaranteed within the convention” and that even if it did, the concept was too “vague”.⁷⁰ The dissent also references the fact that the Court confused manifestation of religion and practice of religion, noting it is not the veil which may be “perceived as aggressive per se, but [...] the philosophy presumed to be linked to it.”⁷¹ This is an important distinction to make as it affects the application of Article 9 religious rights, with manifestation not being an absolute right, and applies equally to the sexualised blasphemy cases: the blasphemy in itself does not create real harm for believers; it is what the blasphemous expression represents in terms of both casting doubt on religious tenets and the potential of inspiring hostility in those opposed to religion. If the Strasbourg Court took this stance, it would be more reasonable for states to be afforded a narrower margin of appreciation as the ‘harm’ being done to religious feelings would be (and arguably is indeed) a symbolic one.

According to Berry, 'living together' pursues a distinctly assimilationist agenda, risking that minorities will be asked to submit to the rule of the majority rather than pursuing the more integrationist aims of 'pluralism, tolerance and broadmindedness' that the Strasbourg Court

⁶⁸ *Ahmet Arslan and others v. Turkey* App no 41135/98 (ECtHR 23/02/2010).

⁶⁹ *SAS v France* (n 65) para 121.

⁷⁰ *ibid* joint partly dissenting opinion of Judges Nussberger and Jäderblom, para 5.

⁷¹ *ibid* para 6.

cites when conducting proportionality tests.⁷² Vickers similarly contends that 'living together' is “one of the weakest legitimate aims” in the interpretation of the ECHR.⁷³ The problem with the idea of 'living together' is that the Government must necessarily have an interest in requiring that citizens share certain values, such as national fraternity and the “minimum requirements of civility facilitating social interaction in their individual decisions”,⁷⁴ which is difficult to align with the concept of the atomistic liberal individual that modern human rights law is based upon.⁷⁵

The critical argument, which the original cases do not make explicit, is this: 'living together' is particularly damaging as a justificatory device in sexualised blasphemy cases because it requires prioritising the emotional comfort of religious believers over the expressive freedom of those who critique religion in sexual terms. In such cases, the 'living together' rationale effectively requires the Court to rank religious sensibilities above other forms of expression, creating an asymmetry the Convention does not authorise. As McCrea observes, “the symbolic status granted to religion by the state or previously largely symbolic laws relating to matters such as blasphemy have come to be seen in a new light as the cultural consensus that limited their impact breaks down.”⁷⁶ This argument is clearly aligned with France’s approach to multiculturalism, which Gill and Engeland describe as prioritising Republican values whilst being integrationist, treating “requests to be treated differently as a result of religion, culture or tradition [...] as threats to the Republic”.⁷⁷ It is arguably not so much the value of ‘living together’ that the face veil ban aims to achieve, but of ‘continuing to live the French way’.

⁷² Stephanie Berry, ‘S.A.S. v France: Does Anything Remain of the Right to Manifest Religion?’ (*EJIL: Talk!*, (2 July 2014) <https://www.ejiltalk.org/sas-v-france-does-anything-remain-of-the-right-to-manifest-religion/> accessed 17 April 2026).

⁷³ Lucy Vickers, ‘Conform or Be Confined: *S.A.S. v France*’ (Oxford Human Rights Hub, 8 July 2014) <https://ohrh.law.ox.ac.uk/conform-or-be-confined-s-a-s-v-france/> accessed 17 April 2026.

⁷⁴ *SAS v France* (n 65) para 153.

⁷⁵ Trispiotis (n 13) 599.

⁷⁶ McCrea (n 2) 262.

⁷⁷ Aisha Gill and Ineke van Engeland, ‘Criminalisation or “Multiculturalism without Culture”? Comparing British and French Approaches to Tackling Forced Marriage’ (2014) 36 *Journal of Social Welfare and Family Law* 241, 248.

It follows that if 'living together' justifies suppressing sexualised critiques of religion, the Court risks prioritising emotional comfort over resilient democratic principles, including the very pluralism it seeks to protect. Reorienting the purpose of Article 10 away from principles of democracy to preserving social peace both affords religion special rights not given to non-religious belief (contrary to the ECtHR's commitment to equality) and privileges majoritarian moral sensibilities. Bending to the tyranny of the religious majority transforms the margin of appreciation from a doctrine of sovereignty and subsidiarity into a mechanism for insulating dominant moral orthodoxies from critique.

IX. *Wingrove* and the Rule of Law Problem

The same issue arose in *Wingrove v UK*, one of the last cases before blasphemy was removed as a criminal offence in England and Wales by the Criminal Justice and Immigration Act 2008. Blasphemy was governed by the conditions in the Obscene Publications Acts 1959 and 1964 and the Public Order Act 1986, defining the elements of blasphemy as publication and causing distress, which were, on any fair reading, incredibly vague. The judicial definition of blasphemy identified in *R v Lemon*,⁷⁸ quoted in the Court's judgment, is as follows: "any 'contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible' [where t]he question is not of the matter expressed, but of its manner, i.e. 'tone, style and spirit' in which it is presented."⁷⁹ This also provides no concrete answer as to what kind of conduct constitutes blasphemy or what kind of spirit must be presented. This was one of the issues raised by the applicant, who specifically cited that "there is no uniform law of blasphemy in Britain", which could easily be applied both to the fact that each British jurisdiction had their own blasphemy law and the irregular application of blasphemy laws before the British courts.⁸⁰ Whether the legislation was sufficiently clear to satisfy the rule of law should have been one of the key factors the ECtHR considered when interpreting the blasphemy law, as it is with any other legislation. For example, the Strasbourg Court ruled in *Cumhuriyet Halk Partisi v Turkey* that the relevant Turkish law was too vague to satisfy the 'prescribed by law' element required by Article 11(1), the right to peaceful protest, which is equally a requirement for justifying interferences with Article 10 rights.⁸¹ Based on the issues raised by the applicant, the Court's

⁷⁸ *R v Lemon* [1979] AC 617.

⁷⁹ *Wingrove v United Kingdom* App no 17419/90 (ECtHR, 25 November 1996) para 13.

⁸⁰ *ibid* para 16.

⁸¹ *Cumhuriyet Halk Partisi v Turkey* App no 19920/13 (ECtHR, 26 April 2016); ECHR, article 10(2).

analysis of the rule of law in *Wingrove* is therefore unsatisfying but this precedent has been followed in subsequent cases nonetheless.

Wingrove concerned a short film depicting Saint Teresa of Ávila experiencing erotic visions of Jesus Christ; the sexual element was central to the impugned expression. The Court upheld the conviction, reasoning that given the vague nature of blasphemy as an offence, the law regulating it necessitates a certain degree of flexibility, which it reasoned should not be an issue as long as its scope and exercise are laid out with sufficient clarity.⁸² Viewed through the comparative lens developed in this essay, *Wingrove* occupies the same category as *Otto-Preminger* and *E.S.*: sexualised blasphemy cases where the Court's reasoning is at its least transparent and the margin at its widest. The sexual element is present, the doctrinal engagement is minimal, and the formal reasoning relies on deference that the Court's own rule of law standards should have precluded.

Case 5 – Non-Sexual Blasphemy: Rabczewska and the Possibility of a Narrower Margin

The more recent case of *Rabczewska v Poland* demonstrates the difference in the Court's approach to non-sexual blasphemy in comparison to sexualised speech. In *Rabczewska*, the Court found a violation of Article 10 where a Polish pop singer had been convicted under Article 196 of the Polish Criminal Code for claiming the Bible was written by people under the influence of drugs and alcohol.⁸³ The ECtHR found that while Article 196 was sufficiently clear to be 'prescribed by law', and that the aim of protecting the religious rights of others was legitimate, the Polish courts had failed to assess whether the applicant's statements were factual claims or value judgements, and had not proportionately balanced her rights with believers' rights.⁸⁴ The Court made specific reference to the disproportionate fine imposed, which was the maximum fine in this context. *Rabczewska* suggests the Court is indeed capable of scrutinising blasphemy restrictions more closely, and of narrowing the margin of appreciation where expression does not have a sexual element. However, it is noteworthy that the dissenting judgment still considered that "religiophobic speech constitutes an indirect incitement to more serious offenses against religious groups or their members" and advocated for the Court to

⁸² *Wingrove v United Kingdom* (n 79) para 40.

⁸³ *Rabczewska v Poland*, app no 8257/13 (ECtHR, 15 September 2022).

⁸⁴ *ibid* para 60.

adopt a wider margin of appreciation, while implying that the Court was more protective towards Islam than other religions.⁸⁵ Evidently, the shift in the application of the margin of appreciation, if it occurs, will be incremental, not instantaneous, and not without its own critiques.

As the case did not have a sexual element its significance for the argument of this essay is double-edged. On the one hand, it shows that the Court can and will scrutinise blasphemy restrictions more carefully and find violations, which suggests the margin in non-sexual blasphemy cases may be narrowing. This is consistent with the claim that non-sexual blasphemy cases attract more searching review than sexualised ones. On the other hand, it does not directly test whether a sexual element would have changed the outcome in *Rabczewska*. The absence of a sexual element leaves open the question of whether the Court's greater willingness to find violations in cases like *Rabczewska* will ever extend to cases involving sexual content, or whether the compound deference identified in this essay will persist regardless of other doctrinal developments.

One case does not change an approach, but *Rabczewska* does suggest that there is a coherent and principled basis on which the Court could apply a narrower margin in blasphemy cases generally. The extension of that narrower margin to sexualised blasphemy cases would require the Court to be more transparent about the role of the sexual element in its reasoning. It must explain, rather than assume, why the sexual element aggravates the offence, and to test whether that explanation can be sustained on grounds of public reason rather than majoritarian religious sensibility.

X. Concluding Remarks

When looking at the overall picture, it is clear that the ECtHR is gradually adjusting its approach to balancing rights, moving away from the traditional legitimate aims for interference allowed by the Convention. The Strasbourg court's treatment of blasphemy cases concerning a sexual element is evidence of a wider pattern of applying a wide margin of appreciation, justified by 'living together' or 'cultural sensitivity', a concept not enshrined in the ECHR but which has been increasingly adopted by the Court.

⁸⁵ *ibid*, Dissenting Opinion of Judge Wojtyczek.

This is democratically defensible in one narrow sense: it respects the diversity of moral views across Member States on matters the Convention does not explicitly resolve. But it is doctrinally weak. The Court's silence on the sexual element in cases like *Otto-Preminger* and *E.S.* leaves much to be inferred from case law rather than decided from concrete decisions, producing an inconsistent and unpredictable body of jurisprudence. This is particularly pertinent considering that the 'lack of uniform conception' of blasphemy in European legal systems cited so often by the Court is no longer truly the case; the 2013 Resolution and Guidelines on the Promotion and Protection of Religion or Belief showcase this. More fundamentally, granting a wide margin of appreciation risks transforming it from a doctrine of subsidiarity into a shield for dominant moral orthodoxies, insulating them from the very critical and symbolic challenge that Article 10 was designed to protect.

The conclusion of *Handyside*, that freedom of speech protects that which 'offends, shocks or disturbs', cannot be overlooked. It should not simply be used as an incantation the Court recites before delivering judgments on freedom of expression without truly considering its doctrinal basis. If the Strasbourg Court is to take seriously its commitment to freedom of expression, a freedom it has repeatedly stressed is essential for liberal democracy, it must be prepared to explain why sexualised depictions of religious figures fall outside that protection. The case for doing so on principled grounds, rather than by reference to an increasingly vague conception of 'living together', grows more pressing as Europe's religious demographics continue to diversify and the cultural consensus that once underwrote these restrictions continues to erode.

Europe's changing religious demographic increasingly causes issues for the ECtHR, as religion is not being phased out as many scholars during the twentieth century theorised it would be.⁸⁶ The ECtHR's struggle to balance states' internal religious regulation and the expression of human rights is symptomatic of the Court's requirement to rely on the ECHR, a rights-focused text, which cannot on its own provide the solution to the regulation of the relationship between religion, law and state powers. As the ECHR is a 'living instrument', following novel legal concepts is not totally outwith the Strasbourg Court's remit, however,

⁸⁶ Ronan McCrea (n 11) 118.

the Court should be more transparent about the fact that it is drawing on alternative sources when ruling on the relationship between religion and the state. To invoke ‘living together’ without explaining whose way of living is being protected, and at whose expressive cost, is not judicial restraint; it is judicial evasion, and it is in tension with the fundamental rights the Convention was designed to guarantee.

