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SEARCHING FOR COMMON EUROPEAN STANDARDS REGARDING BLASPHEMY? ANALYSIS OF ITALIAN, IRISH, AUSTRIAN REGULATIONS IN THE LIGHT OF THE ECHR

ABSTRACT

The purpose of the presented article is to resolve the issue of the existence of the common European standard regarding the blasphemous speeches and examine its efficiency for possible mechanisms of resolving the conflict between freedom of expression and freedom of religion. The presented analysis will be commenced with reference to the judicial practice of the European Court of Human Rights regarding the tension between freedom of expression and freedom of religion with respect to blasphemy. By virtue of such an analysis, the author formulates the hypothesis of the considerable diversity among the States of the Council of Europe as far granting priority for one of the aforesaid freedoms in case of blasphemy is concerned. A second question refers to the influence of the said diversity for the efficiency of protecting both of the following: freedom of expression and freedom of religion. Subsequently, the author will analyse the domestic regulations of Italy, Ireland and Austria to illustrate the occurring differences as well as to search for the optimal model of protection. The author will also refer to the pronouncements of the selected representatives of human rights doctrine. We shall conclude with formulating recommendations for increasing the efficiency of the common European standard regarding the presented issue. The author will rely mainly on legal dogmatic methodology with reference to the actual wording of the legal regulations as well as judicial practice of the European Court of Human Rights as well as comparative analysis to unveil similarities and differences within presented States' legal systems.

Keywords: blasphemy; freedom of expression; freedom of religion; ECtHR; Italy; Ireland Austria; common standard

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1. INTRODUCTION

The very aim of this paper is to resolve the issue of the existence (or the lack thereof) of common standards regarding dealing with blasphemy cases within the States of the Council of Europe in the light of their cultural, religious and social diversity. Such problematics shall be perceived as a derivative of the broader tension between the freedom of expression and freedom of religion which has been frequently addressed within the agenda of the European Court of Human Rights. Consequently, it must be also stated that to certain extent the current shape of the jurisprudence of the ECtHR determines the scope of protection granted towards these two rights within the domestic legal systems. Therefore, the initial part of the studies will be dedicated to the standard arising from the European Convention on the Human Rights itself as well as from the judicial practice of the Strasbourg Court. It shall be stated that certain differences in the scope of protection granted towards freedom of expression and freedom of religion arises solely from the actual wording of provisions safeguarding such freedoms, especially from the construction of the limitation clauses as well as axiological basis attributed to both of these rights. Another important factor determining the scope of protection is the margin of appreciation granted for the national authorities to respect the cultural diversity of the member states. Prior to conducting the relevant analysis, it is therefore important to reconstruct the width of such a margin with respect to both of the analyzed freedoms which will further influence their regulations regarding blasphemous speech.

However, from the perspective of the presented paper the primary importance shall be given to the doctrine of the existence of the common European standard which directly determines the width of the margin of appreciation and has a bearing on the effectiveness of protection mechanisms. The hypothesis presented by the author refers to the lack of one uniform standard regarding the presented issue as there is no single homogenous concept of morality adhered to throughout the European Union. However, it is important to mention that there are certain common tendencies visible within the practice of most states in question which may in the future evolve into more complex common standard. Despite such tendencies, ECtHR in its jurisprudence rather sticks to the view that such a European standard is still wanting, which leads to broadening the scope of the domestic margin of appreciation and as a consequence – puts into question the efficiency of the mechanisms adapted by the Council of Europe. Therefore, the second stage of the article shall analyse the cases of: Italy, Ireland and Austria with regard to the implementation of thus distinguished possible solutions. The choice of such countries may be motivated by various factors. According to the report of the United States Commission on International Religious Freedom, Italy has enacted the most severe law in Europe regarding blasphemy, which has been often compared to the approach of Islamic states to the protection granted towards religion. By contrast, Ireland is believed to have the most liberal blasphemy law. This state of affairs obtained in 2018 after 'medieval' blasphemy law was ousted in the constitutional referendum. Austria was a respondent State with many proceedings issued before the European Court of Human Rights, including the most controversial judgment of *Otto Preminger Institut*. Such analysis will serve the purpose of establishing an appropriate compromise between the necessity of the common European standard and respect for states' cultural diversity and formulating recommendation for both: further judicial practice of the European Court of Human Rights as well as domestic legislation of the analysed States. The applied methodology will mostly consist of dogmatic method, based upon the analysis of the actual wording of the legal regulations

of both Strasbourg standard as well as domestic standards as well as judicial practice of the European Court of Human Rights. The author will also immensely rely on the comparative analysis between the solutions adopted by various analyzed States especially in case of the resolution of the issue of existence of common European standard, with the standard being reducible to the law pertaining to blasphemy. The innovation of the present article stems from the fact that the currently existing publications rarely show the problem of the lack of the common European standard through the prism of differences in domestic regulations. Furthermore, rarely do they seek to indicate the mutual relations between a domestic standard and the Strasbourg standard. Moreover, the advantage of the presented paper stems from the analysis of the differences within the legal systems of respective States of the Council of Europe through the prism of legal principle, especially the one of legal certainty. Furthermore, the recommendations regarding establishment of the mechanisms for resolution the tension between freedom of expression and freedom of religion would take into account not only the necessity of enforcing efficiency in protection of both freedoms, but also of ensuring the vital role of legal standards.

2. MATERIAL AND METHODS

2.1. THE BLASPHEMY WITHIN THE STRASBOURG SYSTEM

2.1.1. FREEDOM OF EXPRESSION

Freedom of expression has been safeguarded by the article 10 of the Convention. Pursuant to the above regulation:

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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
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, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Initially one shall refer to the Preamble to the Convention which stipulates that the fundamental freedoms prescribed in the Convention are the foundation of justice and peace in the world and are best maintained, on the one hand, by an effective political democracy. Such statement unveils inextricable link between all rights and freedoms within the Convention and the political regime of democracy. From this perspective, Jacek Skrzydło emphasized the special link between the protection of freedom of expression and notion of democratic society (Skrzydło 2013, p. 289). While concretizing the role of the concept of democratic society for the freedom of expression, it shall be stipulated that each intervention of the public authorities of the State in such freedom must fulfill the requirement of the necessity in a democratic society. With reference to the vast majority of doctrine, what is meant by such a society is the

one in which public life has been organized in conformity with the democratic principles. Among the most fundamental principles of the democratic society one can mention: the sovereignty of the people, exercising of the power by representatives who derive their mandate from the general elections, multiparty system, legally stated competences of the public authorities, trias politica principle, equality before the law as well as respect of fundamental rights and freedoms (Marks 1995, p. 228). With respect to the freedom of expression, the notion of democratic society mostly determines the scope of the domestic margin of appreciation. Consequently, when the speech on the public (especially political) topics is taken into consideration, the ECtHR grants to the State authorities narrow margin of discretion as in its view such speech is of particular significance for the democratic process. One of the few exceptions which allows for broadening the domestic margin of appreciation is the threat for national security when freedom, perhaps, should give way to more weighty considerations.

Due to the concept of democracy, the national margin of appreciation can be broadened in cases of the speeches on artistic and commercial topics, as according to the ECtHR their importance for the process of democratization is marginal. As it has been illustrated by this example, the clause of democratic society serves as the normative axiological framework which not only justifies the protection of the freedom of expression but also determines its scope, also in collision with other freedoms. Such notion will significantly impact the perception of blasphemous speech as they are often justified in the light of artistic speech. As it has been stated by the ECtHR in the judgement of *Handyside v. the United Kingdom*, freedom of expression shall be perceived as the cornerstone for democratic society as well as one of the essential conditions of its progress as well as a *sine qua non* condition of the development of each human being. Moreover, pursuant to article 10 (2) ECHR it shall be applied not only to the information or ideas which are widely accepted or perceived as non-detrimental, but also for such which are offensive, shocking or are raising anxiety within the society as it is also perceive as the crucial element of the democratic society (*Handyside v. the United Kingdom* 1976). According to J. Skrzydło, such judgements amount to the proof that democracy is not only decorum deprived of any practical meaning, but they also point to some interpretative hint which the ECtHR shall take into consideration, with the hint being related to the problem of which speech acts should be deemed justified, and should therefore merit some perimeter of legal protection (Skrzydło 2013, p. 297). However, as it can be observed that this notion remains in conflict with the perception of the clause of democratic society which, within Strasbourg jurisprudence has been restricted mainly to speeches constituting part of public debate. This circumstance leads to decreasing the effectiveness of the standard of protecting freedom of expression within the Strasbourg system

The scope of margin of discretion is not the only factor which leads to the decreasing of the said degree of protection. Another one stems from the sole construction of the article 10 ECHR, especially the article 10 (2) ECHR, which is also known as limitation clause for the freedom of expression. Apparently, the construction of this provision has been typical for the limitation clauses for articles 8-11 ECHR which all consist of:

- the requirement of legality – the intervention of the State authorities in the concrete right and freedom shall be prescribed by law. Moreover, this requirement has to fulfill the conditions of specificity and foreseeability.
- the requirement of advisability – the intervention must be justified by the necessity of protecting one of the objectives stated within the limitation clause for the concrete

right. The catalogue of such objectives vary, taking into consideration the nature of the concrete right.

- the requirement of necessity which has been a combination of the following three conditions: the existence of pressing social need for intervention, principle of proportionality as well as sufficient and relevant grounds for intervention.

Despite the fact that such construction of limitation clauses occurs within all rights and freedoms prescribed in the articles 8-11 ECHR, there are numerous important factors which significantly decrease a degree of protection granted towards freedom of expression. At first, according to the jurisprudence of the ECtHR there is no uniform definition regarding the term intervention and the decision whether certain conduct of State authorities counts as such an intervention is taken *a casu ad casum*. For instance, the intervention does in fact occur by the injunction of deportation in the situation in which the applicant has not breached the prohibition of speaking about political issues and was subjected to harsh criticism, pursuant to the policy of pursued by French authorities (*Piermont v. France* 1995). On the other side of the spectrum, the decision of the employer regarding the termination of or refusal to enter the labour contract with the person whose political outlook is not shared by the employer does not constitute such an intervention (*Glassenapp v. Germany* 1986). As a result, the criteria upon which the ECtHR qualifies certain conduct as an intervention are not precise and uniform which poses a threat of contradictory decision, which runs counter to the principle of foreseeability. Another important factor which may decrease the effectiveness of protecting the freedom of expression may arise from relatively broad (in comparison for instance to freedom of religion) catalogue of objectives justifying such an intervention.

2.1.2. FREEDOM OF RELIGION

Such remarks shall be subsequently confronted with the Strasbourg standard regarding the freedom of religion and conscience. Such freedom has been prescribed within the article 9 ECHR 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.
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.

From this perspective, to state that the protection of freedom of religion is implied by the freedom of expression freedom of expression is to state a triviality. Moreover, according to the current jurisprudence of the ECtHR even the cases which indicate apparent connection with the freedom of religion has been resolved upon the basis of article 10 ECHR as the *lex specialis* (Wieruszewski 2012, p. 222). This only proves that also freedom of religion has been understood in the light of democratic society. Although, opposite to the freedom of expression, such observation causes rather the widening than narrowing of the scope of the granted protection, which is line with the requirement of pluralism. This requirement relies on the peaceful coexistence of various religious beliefs. Due to that the fundamental role of the public authorities is to create conditions for such peaceful coexistence as well as respect

towards various religious beliefs. However, such postulate cannot be realized through the elimination of the pluralism from the public debate which would fly in the face of the essence of democratic process (Hasan and Chausch v. Bulgaria 2000). What is more, according to the Strasbourg jurisprudence, art. 9 ECHR shall be interpreted in the close connection with the freedom of association and assembly safeguarded within the article 11 ECHR.

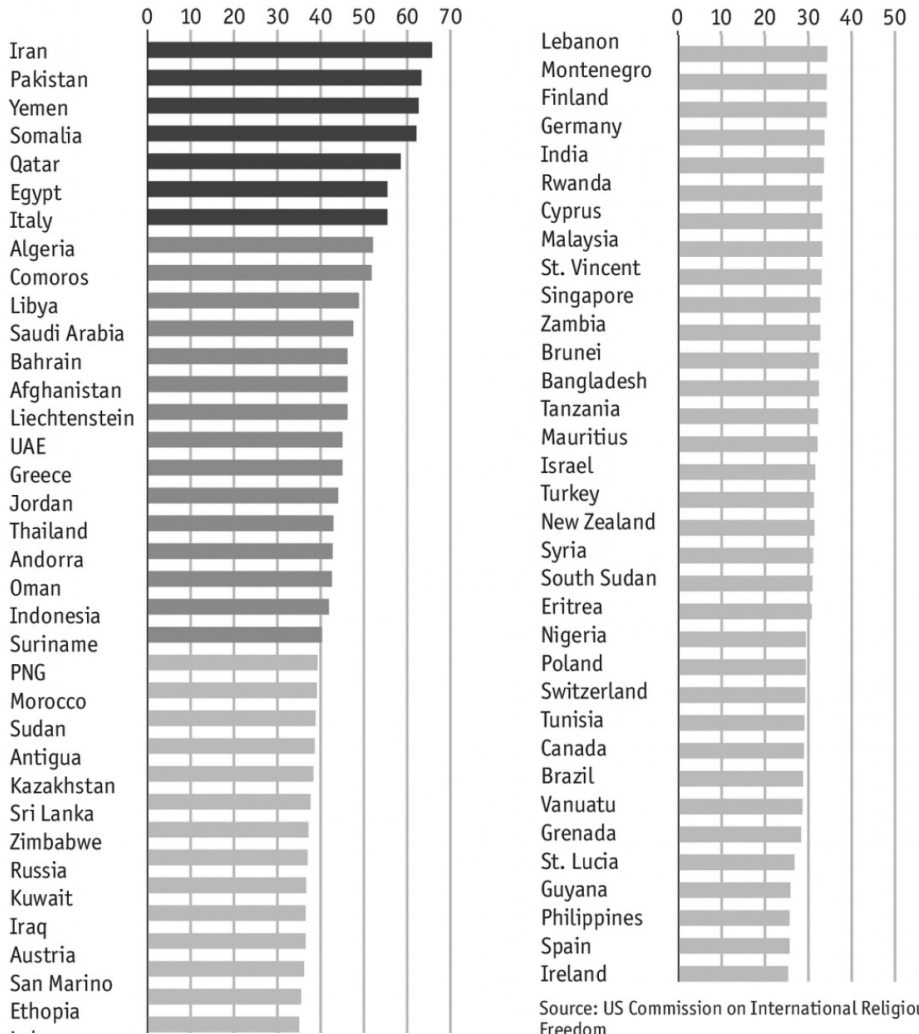
An important role in shaping the Strasbourg standard regarding blasphemy shall be also attributed to the limitation clause from art. 9 (2) ECHR. Apparently, it has a similar construction as the one justifying limitations of the freedom of expression; however, certain important differences must be indicated. The *prima facie* difference manifests itself in the fact that the catalogue of the objectives justifying intervention within the freedom of religion is narrower in comparison to the freedom of expression. Such objectives are only limited to the threatened interests of public security, the protection of public order, health, morality and the protection of rights and freedoms of the others. It omits first of all the national security of the State involved. This circumstance would be of primary importance during the process of classifying certain conduct as the enjoyment of the freedom either of expression or of religion. Moreover, in case of the freedom of expression the intervention can be undertaken in each case of exercising this freedom. On the other hand, as far the freedom of religion goes, intervention is only legally permissible in case of the manifestation of one's religious faith in public (the so-called *forum externum*). Consequently, there is a separate sphere of internal beliefs or outlooks regarding the adopted views as well as the possibility of modifying them or refusing to accept them altogether, which must be free from any kind of intervention (*forum internum*). It has been already stated, that within its jurisprudence, the ECtHR relatively seldom enforces article 9 ECHR while the case apparently relating to the freedom of religion can be solved upon the basis of the different regulation. It is especially crucial in the case of tension between the freedom of expression and freedom of religion.

For instance, any speech act, even a minor speech or protest would be always classified as the exercise of the right granted by the article 10 ECHR. Such problem looks different in case of the protection of religious feelings. In this case, the same expression can be classified as the infringement on the freedom of religion (right not to be accused can to some extent constitute a part of the freedom of religion), but it could be also classified as the interest of another person from the article 10 (2) ECHR so as one of the values justifying intervention in the freedom of expression. The choice of one of the two presented conceptions can lead to two radically different legal solutions (Wieruszewski 2012). Treating such conduct as constituting the part of freedom of religion would mean that it belongs to the sphere of *forum internum*, which means unconditional violation of the article 9 ECHR. On the other hand, when it would be classified in the light of the article 10 ECHR, the freedom of expression will emerge as the general rule, while religious sensitivity of the individual as a potential exception. However, it must be stated that the relation between such a general rule and its exceptions is also blurred. This situation unveils a problem of unforeseeability of the legal classification stipulated by ECtHR for all the entities the said classification is applicable to: States, individuals and groups.

Illustration 1. Severity of blasphemy law

For God's sake

Countries with laws against blasphemy
July 2017, score (100=highest deviation from
international and human rights law principles)



Source: ERASMUS (2017, August 13). Ranking Countries by their Blasphemy Laws. Retrieved 15 March 2019 from <https://www.economist.com/erasmus/2017/08/13/ranking-countries-by-their-blasphemy-laws>

2.2. THE NATIONAL STANDARDS REGARDING BLASPHEMY

2.2.1. INITIAL REMARKS

It is important to commence with some remarks of general character. One of the most vital refers to the fact that according to the authors of the campaign End Blasphemy Laws – 14 countries have laws against “blasphemy”, “insult” or “offence” to religion and related restrictions on free expression within their domestic systems (End of Blasphemy Laws 2017) and 13 European countries have specifically blasphemy legislations with punishment ranging from fines to prison sentences (United States Commission on International Religious Freedom 2017, Economist 2017). As already demonstrated by such remark, the relevant punishment adopted in such countries are varying fairly considerably. This is also confirmed by the Report from the United States Commission on International Religious Freedom, which assesses 71 countries that punished blasphemy, with the report having been conducted in July 2017 (United States Commission on International Religious Freedom 2017, Economist 2017). It identified 71 countries which punished blasphemy – two of which, Denmark and Malta, repealed their laws very recently – and ranked them according to respective laws’ severity. The countries were assessed on the basis of the harshness of their penalties, the vagueness or precision of the offence, and the degree to which the blasphemy laws underpinned discrimination against some religious groups. As it has been already stated, this report has been conducted for 71 countries worldwide; however, due to its range, the paper will focus mainly on the selected European States. The results of the report are presented in the illustration 1.

According to the results represented in the diagram above, among the European States – Italy is the State with the most severe blasphemy regulations. Therefore, it would be the first State to be subject to analysis. The regulation implemented within the Italian legal system amounts to a serious deviation from human rights standards and therefore it is essential to verify whether it meets the standards established by the European Court of Human Rights. To answer this question affirmatively may unveil a serious threat for the effectiveness of the Strasbourg system of human rights protection. On the opposite side of the spectrum there is located Ireland with the blasphemy regulations which amount to a negligible deviation from the perspective of the human rights standard. As an instance of rather moderate laws, the author will also analyze the Austrian blasphemy law.

2.2.1.2. THE ITALIAN REGULATIONS

This section shall commence with the observation that in the Italian legal system, the protection of religious beliefs has traditionally meant the protection of the Roman Catholic religion, which is practiced by the majority of the population. Even before the Italian Unification, in 1860, in the Kingdom of Sardinia some court recorded some cases of blasphemy against intellectuals whose writings called into question the dogmas of the Roman Catholic religion. With the advent of the Rocco Criminal Code in 1932 the protection of the Roman Catholic religion was not due to conceiving of religion as an individual interest, but rather due to its preservation as the condition of social peace as well as the defense of the community religious identification (Loprieno 2015, p. 148).

Consequently, according to J. Temperman, the Roman Catholic religion contributed to the definition of the moral structure of the nation and its protection was necessary to

maintain the social order. Due to that, the provisions regarding the protection of religion were interpreted in the light of the article 1 of the Lateran Treaty, wherein it was stressed that the Roman Catholic religion was the religion of the Italian State (Temperman, Koltay 2017, p. 342). A direct consequence of this stipulation was the introduction of the article 402 and 724 into the Italian criminal code. Those regulations explicitly condemned any instances of defamation of religion and blasphemy only if such conduct was aimed at damaging the dogmatic heritage of the Roman Catholic religion. In comparison, other religions were granted smaller perimeter of protection as under the article 406 of the Criminal Code penalty was reduced when the abovementioned offence was committed against a religion other than Catholicism. With the enactment of the Italian Constitution in 1948 the situation got complicated as the constitution affirmed equality of all religions before the law as well as freedom of religion. Moreover, it did away with the former confessional structure. However, the Rocco Criminal Code has not been amended adequately just after the adoption of the new Constitution, but slowly begun to show its inadequacies. Initially, the Italian Constitutional Court assumed the view that the expression “state religion” shall be interpreted as unequivocally referring to the Roman Catholic religion in spite of abandoning the confessional principle. This opinion has been followed for about 20 years.

The first step of progress was made in 1979 when the Constitutional Court affirmed the equality of rights for the non-religious. Then, another one had come after the Villa Madama Agreements of 1984 as the new agreement modified the Concordat of 1929 and formally abandoned the confessional principle stemming from the article 1 of the Lateran Treaty. Three years later, *laicità* (secular neutrality with respect to religions) became a Constitutional Principle. According to the Italian Constitutional Court: “supreme principles of constitutional order prevail over other laws or constitutional norms, such as when the Court maintained that even the prescriptions of the Concordat, which enjoy particular constitutional protection, are not excluded from scrutiny for conformity to the supreme principles of constitutional order (Judgments 183/1973 and 170/1984). From 1995 onwards the afore-stated principle has been also applied to the protection of religion in criminal law. In this area, two vital judgements shall be mentioned. First, in the judgement 508/2000 the Court ruling was the lack of conformity of the article 508 of the Criminal Court which established the crime of contempt of State religion. It has been claimed to be incoherent with the principles of equality as well as equal liberty for all citizens (judgment 508/2000). Subsequently, in the decision of 168/2005, the Court held article 403 of the Criminal Court, providing for the crime of contempt of the Catholic religion by offending a Catholic person or minister to be invalid (judgment 168/2005). In this context it must be mentioned that Vittoria Barsotti referred to those rulings of the Court which claim *laicità* to be “supreme principle”, characterizing the form of Italian State as a pluralistic one in which diverse faiths, culture and traditions coexist in equal liberty” (judgment 440/1995; Barsotti & Carozza 2015, p. 117).

Despite the importance of these reforms, they were only a tip of the iceberg. Another crucial step contributed to the modification of the status of blasphemy according to article 724 of the Criminal Code. This regulation criminalized blasphemy if it was uttered against the “Divinity or Symbols or Persons venerated in the religion of the State”. Until that moment the Court had been always upholding the validity of that rule, resorting to the fact that the Roman Catholic religion is the faith professed by the majority of the Italian population, with Roman Catholicism being also deeply inextricably intertwined with the national culture.

Since that moment the cited expression was divided into two parts, stating that the rule was constitutionally illegitimate only in the part which refers to Divinity or Symbols or Persons venerated in the religion of the State”, with its illegitimacy being due to the violation of the principle of equality. Thus, right after this judgment the crime of blasphemy against the Divinity per se remained in effect. As a result, the concept of Divinity was not further elaborated for this term must just as well denote any other deity of any other religion. Another important step concerned shifting the blasphemous conduct from the criminal offense into the administrative offense in 1999. By contrast, the defamation of religion is still considered a criminal offense under articles 403 and 404 of the Criminal Code. This crime is penalized with imprisonment. In this case it must be conceded that the case of Italy legislating the above laws is not exceptional at all for according to the data of Venice Commission from 2010, about a half of member States established religious insult as a criminal offence. (European Commission for Democracy through Law 2010, p. 19).

However, as it has been already stated, the case of Italy is quite peculiar. One cannot help but agree with the view professed by V. Barsotti, who stated that “in the Italian cases the problems originated almost exclusively from the presence of crucifixes in polling stations, courtrooms and classrooms” (Barsotti & Carozza 2015, p. 119). As illustrated above, even the religious equality in the Italian society was a relatively novel concept. Moreover, the situation is still far from conforming to human rights standards. When we refer to the previously cited report, Italy received the same score as Egypt on Severity of the Penalty and Discrimination Against Groups. Moreover, as for State Religion Protections, Italy received even a higher score than Egypt (6,7 out of 10 points for Egypt, and 10 out of 10 points for Italy). According to U.S. Commission on International Religious Freedom, in Italy the Catholic Church still receives a plethora of privileges, benefits and subsidies from the government, although the Church itself is independent. This poses a threat not only to religious equality, but also to the freedom of expression, especially when it collides with the religious feelings of Catholics. Italian domestic law may serve as an example of the cultural diversity of the States standing in contradistinction to the common heritage of the Council of Europe (U.S. Commission on International Religious Freedom 2017, p. 31). This state of affairs does not allow for the balancing of rights according to the circumstances of the concrete case, but gives the primacy to the freedom of (Catholic) religion and justifies it with the concept of morality operative in the Italian nation.

2.2.1.3. THE IRISH REGULATIONS

According to the report, among the States with blasphemy regulations at the moment of conducting the analysis, the lesser deviation from the observance of human rights have been caused by the Irish regulations. Therefore, the aim of this section will be to unveil the differences between the Italian and Irish standards as well as to present the general pattern of the Strasbourg model. By ‘Irish standards’ the author means the blasphemy standards which were in force at the time of the data gathering for the analyzed report. However, it is important to underline that as a result of the national referendum conducted in October 2018, the Irish citizens decided to remove the offence of blasphemy from domestic legal system. However, prior to presenting the present situation and its consequences, it is essential to go back in time to analyze the previous regulations regarding blasphemy.

The first important factor touches upon the fact that in July 2009, the Irish Parliament shocked the world by passing a law that imposes criminal penalties and heavy fines for the “crime” of blasphemy. That law also allows government authorities to forcibly enter and search suspected premises for copies of “blasphemous” statements. Enacting such law has been subject to incendiary discussions not only within the European States, but also on the international arena. First and foremost, the language of the Irish blasphemy law has been used by Pakistan and the Organization of Islamic Conference to press the UN Ad Hoc Committee on the Elaboration of Complementary Standards to recognize the so-called “defamation of religions” as a new normative principle of international law (Araujo 2009). From this perspective, the Irish example seem to serve to legitimate the necessity of enacting blasphemy laws worldwide and thus to decrease the standard of protecting freedom of expression, legal certainty as well as the principle of religious equality (Temperman, Koltay 2017, p. 64). However, in such context one shall agree with the statement of Neville Cox that such criticism was at least partly misguided as the statutory regulation (contrary to the opinion of wide public) did not constitute the crime of blasphemy in Ireland. Under the article 40(6)1 of the Irish Constitution from 1937, it is provided that the publication or an utterance of blasphemous material is a crime which shall be punishable by law. In other words, the Constitution does not merely say that the blasphemy law is permissible, but it simply requires its existence (Cox 2000). As a result, we must take into consideration that there must have been blasphemy law in force since 1937 at least, albeit that was never enforced nor fleshed out. Due to that, the 2009 Defamation Act has just provided the statutory definition to the constitutional crime and did it in a way which arguably rendered the crime unenforceable. After all, it merely is the case that commitment of such crime required both: the material published shall be grossly abusive or insulting in relation to sacred matters “thereby causing outrage among a substantial number of the adherents of the religion” and also that a publisher intends by such publication or utterance of the matter concerned, to cause such offence but, in addition the section provides that: “it shall be a defence to proceedings for an offence under this section for a defendant to prove that a reasonable person would find genuine literary, artistic, political, scientific or academic value in the matter to which the offence relates. In such context some authors present the opinion that “it is virtually impossible to think of any material which could fulfill the criteria of the offence which could not be defended by reference to its literary, artistic, political, scientific or academic value, and thus it is highly unlikely that such Irish crime would have any impact in practice whatsoever” (Temperman & Koltay 2017, p. 65). The author of this paper concurs: there is a low probability of implementing this regulation in practice. However, bearing in mind the ECtHR decision in *Otto Preminger Institute*, it suffices to say that the term “artistic value” is a vague expression and the notion of reasonable man depends on various factor, such as nationality, religious affiliation or cultural background of a person whose conduct is considered. By the same token, the possibility that a given actor did not intend to commit the offence of blasphemy shall exclude the necessity of examining his speech in terms any feasible value the speech in question might be a vehicle for.

However, even taking into consideration such drawbacks, the regulation prescribes higher degree of protection than the standards of the European Convention of Human Rights. Despite that, some threat may stem from the systemic interpretation - as it was underlined by Tarlach McGonagle, the provision of the Constitution from 1937 shall be characterized with vague, unsatisfactory wording, such as: “the publication or utterance of blasphemous,

sedition or indecent matter is an offence” (McGonagle 2011, p. 302). On the other hand, paradoxically enough, it is obvious that the primary objective of the statute is to sharpen the provision of the Constitution. Fortunately, the above-stated threat was rather of theoretical character as the cases of prosecution for a blasphemy were rare in Irish society.

What shall be also underlined is the perception of the blasphemy by the Irish citizens. For the vast majority of doctrine, such offence has been regarded as anachronistic and anomalous (Temperman, Koltay 2017, p. 65). As a consequence, it shall be pointed out that over the years there have been regular persuasive calls for its abolition from a wide range of national and international entities. The surprising fact in this context may be the recalcitrant nature of the offence in the face of prevailing criticism and calls for its abolition. The main explicans of this phenomenon comes from the enshrinement of the blasphemy within the Irish Constitution and as a result its amendment or abolition would require constitutional referendum which eventually took place in October 2018. In the referendum, 64.85% of voters voted for removing the prohibition on blasphemy, with 35.15% being in favour of retaining it. A total of 951,650 people voted for the change, with 515,808 opposing the move.

The Irish standards regarding blasphemy seem to constitute an opposition to previously analyzed Italian regulations. Even when the blasphemous legislation was in force, it has rather constitute an illusionary legal institution which has been eventually abolished as a result of referendum. Despite that, both States show one common tendency of moderating the previously existing standard and striving for giving higher priority to the freedom of expression. However, in Ireland there was a pressing social need for such changes and the referendum simply satisfied this need, whereas in Italy the deeply rooted primacy of Catholic Church does not allow for striking the right balance between freedom of expression and freedom of religion.

2.2.1.4. THE AUSTRIAN REGULATIONS

As it has been already indicated, the choice of Austria is justified with its status of respondent State in many cases regarding blasphemy before ECtHR. One of the most controversial has been *Otto-Preminger Institut v. Austria*. This case refers to the seizure of the movie which has allegedly insulted the religious feelings of Christians. In this context, it shall be stated that the display of the movie was scheduled for the intimate, private cinema for the viewers aged over 17 years old and exclusively after purchasing a ticket. Despite that, under Austrian proceedings the defendant has been found guilty of offending religious feelings and the movie was subject to preventive censorship. As a result, the defendant issued a complaint before the ECtHR for alleged violation of his freedom of expression. Having examined the matter, the ECtHR invoked the formula regarding “duties and responsibility” which are imposed upon the individual enjoying his rights and freedoms. In this manner the ECtHR emphasized the necessity of protecting believers of various religions. Consequently, in case of speeches which touch upon religious beliefs or views there is a relevant duty to avoid phrases which gratuitously insult others in any way which is at the same time not *capable of furthering progress in human affairs*. Simultaneously, it shall be indicated that the understanding of such formula was not appropriately developed by the ECtHR (*Otto-Preminger Institut v. Austria* 1994).

Such judgment has been subject to immense criticism by certain judges as well as human rights doctrine. Firstly, it is important to recall the dissenting opinion of the following judges: Elisabeth Palm, Raimo Pekkanen and Jerzy Makarczyk. All of the aforesaid judges expressed the opinion that considering the collision between two different values, two principles are of

utmost importance. Firstly, article 10 ECHR protects also shocking and offensive speeches. Therefore, the possibility of the intervention within the freedom of expression shall be limited to narrow cases. Such situation leads to efface the relationship between protection of certain right/freedom as the rule of general character and legitimate limitations as exception which cannot be subject to the excessive interpretation. Secondly, as stipulated by the cited judges the Convention does not confer on believers of any religion the right against others that the latter should not assault the religious views of the former (unless the assault in question is undertaken in the violent or insulting form). The above statements were also confirmed by the vast majority of doctrine. One of the most vivid examples was a claim made by Patrick Wachsmann, according to whom such judgment has been a disgrace of the European Court of Human Rights. Moreover, he warns against a serious consequences of any judgement which relativizes the protection of the freedom of speech and transforms the claim against its violations into the discussion about defence of the religious feelings (Wachsmann 1994). Similarly, according to Jean Manuel Larralde, this judgement means the emergence of a new right, viz., the right to defence against insulting one's religious feelings. The cited author emphasized the fact that within the current judicial practice of the Strasbourg Court the sole offensive speech cannot be classified as the obstacle for religious views of an individual as well as it does not disturb any form of worship (Larralde 1997). Similarly, Ireneusz Kamiński underlines the disturbance of a general relation between the protection of a certain right as a rule and all its limitations as exceptions which shall not be subject to excessive interpretation (Kamiński 2002, p. 400–402).

The presented judgment unveiled the weaknesses of the Strasbourg system already indicated in the introductory part of the paper. Moreover, it proved the severity of the Austrian approach towards blasphemy law which was prescribed by the article 188 of the Austrian Criminal Code. Such regulation criminalizes:

Anyone who publicly disparages a person or thing that is the object of worship of a domestic church or religious society, or a doctrine, [or other] behavior is likely to attract legitimate offense.

The perpetrator of such a crime can be held liable to a prison sentence of up to six months or a fine up to 360 daily rates. This constitutes a conspicuous difference as compared with theoretically more severely ranked Italian blasphemy law in which blasphemy constitutes an administrative offence. However, within the Italian law insulting religious feelings was also penalized with imprisonment. While referring to Hashemi, it shall be underlined that the Austrian blasphemy law criminalizes insults against all recognized religions – and not only against the dominant one.

The vital point is that UN Human Rights Committee has taken an interest in Austrian domestic measures to prevent hate speech as well as laws which restrict statements against religious groups in particular (UN Doc. A/47/40 (1994), p. 25, para. 111; Taylor 2005, p. 102). The Committee requested clarification of the legal basis, interpretation and application of article 188 of the Criminal Code, which provided for penalties in cases in which a belief, custom or institution was ridiculed or discredited, and asked which person was duly authorized by law, pursuant to article 14 of the Basic Law, to compel another person to take part in religious activities. In this point it shall be stated that according to the General Comment no. 34 regarding the freedom of expression, Prohibitions of displays of lack of respect for a religious 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 which is the limitation clause for freedom of expression. Especially, as stated within the General Comment, such prohibitions cannot be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith (Human Rights Committee 2011). In such context, it seems that the Human Rights Committee ensures wider degree of protection against blasphemy laws than the jurisprudence of the European Court of Human Rights.

The cases of application of the article 188 of the Austrian Criminal Code are relatively common in the practice of prosecuting and fining individuals. Consequently, an analyzed regulation shall not be perceived only as a theoretical instrument, but as a real mechanism which can distract the just balance between freedom of expression and freedom of religion. It is worth recalling the case from 2009 in the circumstances of which Austrian politician - Susanne Winter was sentenced by a court in Graz to pay a \$24,000 fine for "humiliating a religion" by saying, among other things, that Muhammad was a pedophile (G. Taylor 2015). The last of the cited cases reveals the tension between enabling the freedom of expression and the necessity to prevent racial discrimination and xenophobia, which has been also noticed within the human rights doctrine. For instance, M. Monshipouri emphasizes the fact that the protection of religious minorities is important in environments wherein dominant groups demonstrated a tendency to resort to religious hate speech to provoke racism and xenophobia. In her opinion, the remark of Susanne Winter constitutes an example of how antireligious rhetoric became a racial and xenophobic speech in disguise (M. Monshipouri 2011, p. 98). According to that author, there seems to be the increasing acceptance of the idea of preventing hate speech targeting religious minorities in liberal democracies, which after all emphasize multiculturalism. This opinion has been expressed also by Rhoda E. Howard-Hasmann, who, taking the example of Canadian leaders, stipulates the necessity of distinguishing between blasphemy targeting the religions adhered to by minorities from a blasphemous speech aimed at religions adhered to by the majority of a given population. She agrees that blasphemy against certain religious minorities constitutes a hate speech. This view is based on the stipulation that identity is essential to one's self-respect and consequently individuals belonging to the minority should be protected from speech that violates their identity, particularly if such violation perpetuate prejudice and discrimination. Assuming this view leads to ensuring the protection of minorities against the hate speech even if that requires limiting the free speech of minority (Howard- Hassmann 2000, p. 109–138).

Albeit well-meaning, the above idea is open to several objections. Firstly, as the human rights are universal and inhere in all human beings, regardless of their race, sex, nationality, ethnicity, language, religion, or any other property, such a sharp distinction between the rights of minority and majority cannot be validly maintained. It does not exclude the possibility of undertaking some extra measures to protect minorities' rights, but they must be proportionate and compatible with the other rights prescribed by Convention. Secondly, neither the European Convention on Human Rights, nor any other relevant human rights treaties prescribe the right not to have one's religious feelings insulted and this right cannot be automatically derived from the religious freedom. Thirdly, the freedom of expression is of particular importance not only as an individual right, but also as a necessary condition for increasing social welfare as well as endorsing a pluralistic democratic society. Therefore, this very placement of the relation between two analyzed freedoms poses a threat of excessively

far-reaching chilling effect for the entire public debate. Lastly, as according to the ECtHR the role of the State is to create conditions for peaceful coexistence between various religions; and the protection focused solely on the minority religions does not meet this requirement. Unfortunately, this approach shows that the Strasbourg bodies as well as States authorities have not done their homework after the *Otto Preminger* case, which may take its toll.

A real test for both Austrian domestic provisions and the stability of Strasbourg standard was a case of *Elizabeth Sabaditsch-Wolff*. She was convicted of offending religion because she exclaimed, relating to Prophet Muhammad's nine-year-old wife, "What do we call it, if it is not paedophilia?" Having been convicted by the domestic courts and having exhausted all the available legal remedies, relying on Article 10 of the Convention, *Sabaditsch-Wolff* complained that Austrian courts failed to address the substance of her statements in the light of her right to freedom of expression. The ECHR ruled that states could restrict the free speech rights enshrined in Article 10 of the Convention if such speech was "likely to incite religious intolerance" and was "likely to disturb the religious peace in their country." The ECtHR noted that the domestic courts comprehensively explained why they considered that the defendant's statements had been capable of arousing justified indignation; specifically, they had not been made in an objective manner contributing to a debate of public interest (e.g. on child marriage), but could only be understood as having been aimed at demonstrating that Muhammad was not worthy of worship. As a result, the Court held further that even in a lively discussion it was not compatible with Article 10 ECHR to pack incriminating statements into the wrapping of an otherwise acceptable expression of opinion and claim that this rendered passable those statements exceeding the permissible limits of freedom of expression. Lastly, the ECtHR stated that the fine imposed upon an applicant was on the lower end of the statutory range of punishment and therefore could not to be considered as disproportionate (*Elisabeth Sabaditsch-Wolff v. Austria* 2019).

3. RESULTS AND DISCUSSION

Having gathered the results regarding the general characteristics of Strasbourg system as well as having recognized the contours of domestic regulations of three selected states (Italy, Ireland and Austria) now it is possible to formulate certain recommendations regarding the effectiveness of the mechanisms arising from the European Convention on Human Rights as well as jurisprudence of European Court of Human Rights.

Such recommendations are as follows:

1. Providing clear definition of the uniform Strasbourg standard
2. Recognizing the importance of protecting the artistic freedom for the democratic society

I. Clearly defining the notion of the uniform Strasbourg standard

As it has been already illustrated, the issue of the existence of common uniform standards regarding the place of religion within society is still contentious. It is mainly due to the fact that in its jurisprudence, the ECtHR ceased to define the boundaries of this standard. In other words, it failed to specify whether this standard shall consist in compliance with particular conduct (declining criminalization of blasphemy) or just in certain common tendencies (tendency to mitigate the blasphemy-related policy but in a variety of ways). While analyzing

the Report from the United States Commission on International Religious Freedom, we can easily observe the drastic differences between the scrutinized States and presenting the severity of their respective legislations on blasphemy. From that perspective, one can agree with the ECtHR and the vast majority of doctrine that there is a lack of the uniform standard. As it has been already stipulated, in the view of the Strasbourg Court the lack of this common standard, or in other words - the large quantity of different conceptions justifies the widening of the range of margin of appreciation granted towards national authorities. However, this matter is much more complex. While comparing the tendencies occurring in most of the European States, it is common for them to mitigate the severity of their blasphemy regulations, with Ireland even ousting them from their legal systems. There were numerous States which decided to repeal their blasphemy laws since the year 2015. These encompass Denmark, France, Iceland, Malta and Norway (End Blasphemy Laws 2017). Partially this tendency has been strengthened by the activity of European Humanist Federation (EFH), which is the leading humanist and secular organisation in Europe and has always strongly advocated freedom of expression. It ought to be emphasized that the European Humanist Federation has also been a recognized partner of the European Union, with the former regularly meeting with the European Commission, the European parliament and the rotating Presidencies of the Council of the EU. Moreover, the European Humanist Federation has been also engaged in the drafting of the 2013 the EU Guidelines on the promotion and protection of freedom of religion or belief (Guidelines on the promotion and protection of freedom of religion or belief 2013) and made sure that those guidelines respected the rights of believers and non-believers alike, while ensuring the respect of freedom of expression. The subject of freedom of expression was also brought to the Latvian, Italian and Greek presidencies in the past year and a half. This confirms that not only several States themselves, but also the European Union as an entity noticed the necessity to undertake discussions and reform the blasphemy law with respect for the freedom of expression as the cornerstone for a democratic society. What is more, even in cases of European States with the harshest blasphemy law, the vivid tendency for its mitigation can be observed. The change of the blasphemy status from criminal offense into administrative offense within the Italian law corroborates the above thesis. Therefore, despite the lack of uniform complex standard regarding blasphemy in Strasbourg jurisprudence, a common tendency for greater degree of protection of freedom of expression exists. This tendency shall have an impact on the scope of margin of appreciation granted towards national authorities and result in narrowing of its range to ensure efficient protection of freedom of speech, which previously has been automatically given less weight compared to the freedom of religion. However, the tendencies to mitigate the general approach towards blasphemy have not been clearly visible within the scope of Strasbourg margin of discretion in such cases. In such a manner, the Convention seems not to entirely reflect the view of the Member States, but also the European Union which tend to lenify the perception of blasphemous speech. This situation stands contrary to the living tree instrument and moreover threatens the legal certainty as the criterion of common standard.

II. Amplifying the protection towards artistic freedom and recognizing its importance for democratic society

The necessity of the right balance between the freedom of expression and the freedom of religion has slowly been indicated also within the jurisprudence of the ECtHR. As it has been already emphasized, after the judgment of *Otto Preminger Institut* the formula regarding the

duties and responsibilities of the rights holders (especially individuals enjoying the freedom of expression) arose much controversies. This conception has been already repudiated in the case of *Wingrove v. the United Kingdom* (*Wingrove v. the United Kingdom* 1995). The facts of this case were as follow: British film director wrote a script based on the life and writings of St. Teresa of Avila. The British authorities refused to certify the film for the reason of violating the criminal law of blasphemy. It reasoned that the film gave rise to “outrage at the unacceptable treatment of a sacred subject”. It shall be stated that similarly to the *Otto Preminger* case, the ECtHR decided that freedom of religion outweigh the freedom of expression. Still, certain representatives of the doctrine argue that this case is better and more carefully drafted (Henrard 2000, p. 97). The statement regarding better draft of the *Wingrove* results from the fact that ECtHR placed certain hints regarding the notion of common standard. The Court reiterated that decriminalizing blasphemy either through amendment of the penal law, or through *desuetudo* would justify the view that in Europe we have a common standard regarding the relation between two of the analyzed freedoms. This stipulation implies vital practical consequences. At first, it indicates that while public authorities of the States with an intention to justify intervention in freedom of expression apply different regulation, for instance regarding defamation or infringement of personal interest, they won't be granted wide margin of appreciation as it was in *Otto Preminger Institut*. As a consequence, the State authorities could be granted the broad margin of appreciation only if the normative basis for the intervention has been constituted by the provision specifically protecting the religious feelings (Kamiński 2008). In this context, it shall be emphasized that neither the European Convention nor any of the domestic systems prescribe right not to have one's religious feelings insulted (Larralde 1997).

In this context it ought to be stated that both *Otto Preminger* and *Wingrove* put too much emphasis on conformism or uniformity of thought, which also implies an overcautious and timid conception of the freedom of press (Cismas 2014, p. 212). This approach has been subject to gradual evolution. This thesis can be supported by the dissenting opinion in the case of *I.A. v. Turkey* (*I.A. v. Turkey* 2005). In the circumstances of this case, the author of the book was sentenced for insulting Allah, religion, Prophet and Quran. The dissenting judges expressed the opinion that the judgements of *Otto Preminger* and *Wingrove* were not appropriate and shall be overruled. The previously existing standard exposing mostly the conformism and uniformity of thought shall be replaced with the adoption of a new standard as the democratic society is not a theocratic society and certain words of a novel, interpreted out of its context cannot justify imposing criminal measures on the author. This opinion has crucially influenced the recent judicial practice of the ECtHR, where the most prominent example is the case of *VBK v. Austria* (*Vereinigung Bildender Künstler v. Austria* 2007). In this case, during an exhibition was displayed a controversial painting named “Apocalypse”. The painting presented Mother Theresa and one of the Austrian cardinals as naked with sexual activities going on amongst them. While examining this case, the ECtHR claimed satire as the form of artistic expression which intentionally aims at provoking its viewers. This ruling significantly varies from the tendency observed in earlier blasphemous cases. Despite that one shall agree with Javaid Rehman, that whilst acknowledging a possible shift in the approach of the ECtHR, a precautionary approach needs to be taken as the case was still brought as the violation of the article 10 ECHR (Rehman 2010, p. 213). If it had been examined in the light of article 9 ECHR, this proportion could be reversed, which testifies to the lack of legal certainty within the Strasbourg system.

4. CONCLUSIONS

From the conducted analysis, one can derive three basic recommendations to increase effectiveness of the Strasbourg system:

1. Providing clear definition of the uniform Strasbourg standard
2. Recognizing the importance of protecting the artistic freedom for the democratic society

As it has been proved throughout the conducted analysis, the tensions between freedom of expression and freedom of religion in the area of blasphemy law poses a serious threat for effectiveness of human rights protection as well as the realization of the rule of law principle. This matter has been additionally complicated by the lack of precise and internally coherent jurisprudence of ECtHR regarding such issue. Its initial judgment as well as the construction of Strasbourg limitation clauses prescribed within the article 9(2) and 10(2) ECHR grant primacy to the freedom of religion. Moreover, the freedom of speech protection has been disproportionately limited by the formula of duties and responsibilities of the holder of such rights. Most importantly, the ECtHR has justified the wider margin of appreciation with the fact that there is no uniform standard regarding the place of religion in the society. This view has been shared by the majority of the doctrine representatives, however there are also dissenting opinions. The analysis of the domestic regulations of Italy, Ireland and Austria has shown that despite the lack of one complex and holistic standard, there is a vivid tendency to mitigate or even repeal the blasphemy law in order to increase the protection granted towards freedom of expression. This tendency is slowly being visible also within Strasbourg jurisprudence which was shown in the case of *VBK v. Austria*.

However, the presented problem has not yet been solved and still poses a serious threat to the rule of law as one of the fundamental principles of a democratic society. Firstly, the scope of protection has been based on the vague and imprecise criterion of the common European standard without providing the explanation of how detailed this standard should be. Moreover, this issue also touches upon the problem of religious equality which has been differently solved in various States. Despite nominally protecting all religious groups, Italy still grants primacy to the Catholic Church as a dominant State religion. There are also some voices which express the opinion that blasphemy against religious minority requires stronger protection as it is aimed at preventing racial discrimination and xenophobia. Both of the presented views may contradict the universal and inherent nature of both analyzed freedoms and rule out the equality before the law. Finally, a rapid shift from the conception adopted in *Otto-Preminger* and *VBK* does not maintain the principle of legal certainty and the foreseeability of the judicial practice of the ECtHR. The lack of precise standards is a threat to both individuals and States which without the guidelines from the Strasbourg Court are not able to genuinely perform their role of the guarantor of peace between different religious groups. Ultimately, the relation between freedom of expression and freedom of religion to some extent reflects the state of our democracy as both of them are cornerstones of the democratic society. Therefore, if ECtHR fails to establish the mechanisms of tension resolution, it will put into question the ideal of pluralism within the Council of Europe.

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