
An Ode to Contextualisation: *İ.A. v Turkey*

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Introduction

The central feature of *İ.A. v Turkey*¹ — a conviction arising out of “an abusive attack on the Prophet of Islam” — could hardly be more topical and one could legitimately have expected the European Court of Human Rights to have provided instructive guidance on the interplay of relevant principles in the case. This was not to be, however. The Second Section of the Court held that there had been no violation of Article 10 ECHR, but the judgment was split (by four votes to three)² and the joint dissenting opinion was unusually forthright in its suggestion that “the time has perhaps come to ‘revisit’” the case-law on which the instant case was based. Nevertheless, the case was not referred to the Grand Chamber under Article 43 ECHR³ and, as a result, we have been left none the wiser as to the workings of the murky doctrinal interface between the rights to freedom of expression and religion.

Facts

The applicant was the owner and managing director of a publishing company which published a novel, *Yasak Tümceler* (“The forbidden phrases”), in 1993. As noted by the European Court of Human Rights, the book “conveyed the author’s views on philosophical and theological issues in a novelistic style”.⁴ Two thousand copies of the book were printed in a single print-run. In 1994, the Istanbul public prosecutor charged the applicant with blasphemy against “God, the Religion, the Prophet and the Holy Book” under Article 175 §§ 3 and 4 of the Criminal Code for having published the novel. The public prosecutor’s indictment was based on a

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¹ Judgment of the European Court of Human Rights (Second Section) of 13 September 2005.

² Judges Baka, Turmen, Ugrekhelidze and Mularoni subscribed to the majority opinion, whereas Judges Costa (Section President), Cabral Barreto and Jungwiert issued a joint dissenting opinion.

³ Article 43 (“Referral to the Grand Chamber”) reads as follows:

“1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber. 2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance. 3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.”

⁴ *İ.A. v Turkey*, *op. cit.*, para 5.

specially requested expert report, drawn up by a professor in the Faculty of Theology at Marmara University. In a submission to the Istanbul Court of First Instance, the applicant contested the expert report and requested a second opinion, arguing that as a novel, the book should have been analysed by literary experts, while also questioning the impartiality of the author of the report.

Subsequently, a second report was drafted by three other professors, but its accuracy was also contested by the applicant, who argued that it was a copy of the first report. He further argued that the novel was neither blasphemous nor insulting in the sense of Article 175 § 3 of the Criminal Code and that it merely expressed the philosophical views of the author. Ultimately, his arguments failed to prevail in the Court of First Instance and he was sentenced to two years' imprisonment and a fine. The aforementioned second report and the following excerpt from the impugned book would appear to have weighed on the Court's reasoning:

"Look at the triangle of fear, inequality and inconsistency in the Koran; it reminds me of an earthworm. God says that all the words are those of his messenger. Some of these words, moreover, were inspired in a surge of exultation, in Aisha's arms. ... God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual relations with a dead person or a live animal."⁵

The Court of First Instance commuted the applicant's prison sentence to a fine, which in effect meant that he was ordered to pay a total sum of approximately 16 USD. He appealed against his conviction in the Court of Cassation, but it upheld the judgment of the Court of First Instance.

Judgment of the European Court of Human Rights

The European Court of Human Rights followed its customary approach to cases involving the right to freedom of expression. It dispensed with the first questions in its standard enquiry expeditiously, noting that both parties accepted that the applicant's conviction did amount to an interference with his right to freedom of expression under Article 10(1) and that the interference was prescribed by law and pursued legitimate aims under Article 10(2), i.e., the prevention of disorder and the protection of morals and the rights of others. The case therefore turned on whether the interference was "necessary in a democratic society".⁶

The Court, as is its wont, re-emphasised the central importance of freedom of expression in democratic society and recalled that, subject to Article 10(2), "it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb".⁷ The exercise of the right, however, comes with concomitant

⁵ *ibid*, para 13.

⁶ *ibid*, para 22.

⁷ *ibid*, para 23.

duties and responsibilities, including — in the context of religious beliefs — “a duty to avoid expressions that are gratuitously offensive to others and profane”. In consequence, “as a matter of principle it may be considered necessary to punish improper attacks on objects of religious veneration”.⁸

In the absence of any “uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions”, Member States are afforded a wide margin of appreciation when addressing “matters liable to offend intimate personal convictions within the sphere of morals or religion”.⁹ Although it may be legitimate for a State to adopt measures aimed at repressing certain activities, including the dissemination of information and ideas, when such activities are judged to be incompatible with Article 9 ECHR, the European Court of Human Rights is the final arbiter of whether or not such measures are consistent with the Convention. In that capacity, the Court assesses whether, in the circumstances of a particular case, the interference in question corresponds to a “pressing social need” and is “proportionate to the legitimate aim pursued”.¹⁰ The Court also recalled that in the spirit of pluralism, tolerance and broadmindedness that is constitutive of democratic society, members of religious groups “cannot reasonably expect to be exempt from all criticism”: “They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith”.¹¹

After setting out the foregoing principles (as well as certain details of its own *modus operandi*), the Court then proceeded to apply them to the circumstances of the case at hand. It did so in just one paragraph:

“However, the present case concerns not only comments that offend or shock, or a ‘provocative’ opinion, but also an abusive attack on the Prophet of Islam. Notwithstanding the fact that there is a certain tolerance of criticism of religious doctrine within Turkish society, which is deeply attached to the principle of secularity, believers may legitimately feel themselves to be the object of unwarranted and offensive attacks through the following passages: ‘Some of these words were, moreover, inspired in a surge of exultation, in Aisha’s arms. ... God’s messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual intercourse with a dead person or a live animal.’”¹²

It then found that the measures interfering with the applicant’s freedom of expression aimed to offer protection against offensive attacks on matters regarded as sacred by Muslims and as such, corresponded to a “pressing social need”.¹³ It

⁸ *ibid*, para 24.

⁹ *ibid*, para 25.

¹⁰ *ibid*, para 26.

¹¹ *ibid*, para 28.

¹² *ibid*, para 29.

¹³ *ibid*, para 30.

affirmed that the Turkish authorities had not overstepped their margin of appreciation and that the stated reasons for the impugned restrictions were “relevant and sufficient”.¹⁴ As regards the proportionality question, the Court referred to the fact that copies of the book had not been seized and also to the “insignificant” nature of the fine imposed.¹⁵

Joint Dissenting Opinion

The joint dissenting opinion of Judges Costa, Cabral Barreto and Jungwiert is rather forceful, particularly in its candid criticism of the doctrinal precedents on which the instant judgment relies so heavily (see further *infra*). Their dissent raises a number of highly pertinent concerns about the Court’s application of key general principles gleaned from its jurisprudence to the specific facts of the instant case.

The joint dissenting opinion begins by cautioning against being *blasé* about the Court’s seminal pronouncement in *Handyside* (cited, *infra*), or using it in a merely sloganistic way.¹⁶ It emphasises the “limited practical impact on society of the author’s statements”¹⁷ and points out that the likelihood that unorthodox religious views would “offend or shock the faith of the majority of the population” is an insufficient reason “in a democratic society to impose sanctions on the publisher of a book”.¹⁸ It readily acknowledges that the attacks on Muhammad contained in the passage from the book quoted *supra* “may cause deep offence to devout Muslims, whose convictions are eminently deserving of respect.” In the same vein, it also refers to the “sacred” status of the Prophet in Islam.¹⁹ Nonetheless, it rejects the idea that an entire book be condemned and its publisher criminally sanctioned on the basis of isolated passages in the book. It particularly rues the institution of criminal proceedings by the public prosecutor — and not by an offended member of the public — in the present case.²⁰ The dissenting judges also took issue with the perceived proportionality of the sanctions imposed on the applicant. They insist that any criminal conviction gives rise to a chilling effect and leads to increased incidence of self-censorship.²¹

The joint dissenting opinion also advances three main critiques of the *Otto-Preminger*²² and *Wingrove*²³ cases, on which the present case draws extensively. First,

¹⁴ *ibid*, para 31.

¹⁵ *ibid*, para 32.

¹⁶ Joint dissenting opinion, *ibid*, para 1.

¹⁷ Joint dissenting opinion, *ibid*, para 2.

¹⁸ Joint dissenting opinion, *ibid*, para 3.

¹⁹ Joint dissenting opinion, *ibid*, para 4.

²⁰ Joint dissenting opinion, *ibid*, para 5.

²¹ Joint dissenting opinion, *ibid*, para 6.

²² *Otto-Preminger-Institut v Austria*, Judgment of the European Court of Human Rights of 20 September 1994, Series A, no 295-A.

²³ *Wingrove v United Kingdom*, Judgment of the European Court of Human Rights of 25 November 1996, Reports of Judgments and Decisions, 1996-V.

there is the crucial difference between the impact that is likely to be achieved by a novel (in the instant case) and a film (in *Otto-Preminger*) and a short experimental video (in *Wingrove*). Second, it points out that in both cases, the Court occasioned a *volte-face* from the decisions of the Commission²⁴ and that the final Court judgments were themselves divided.²⁵ Finally, the real thunder-clap of the dissenting opinion bursts open: “the time has perhaps come to ‘revisit’ this case-law, which in our view seems to place too much emphasis on conformism or uniformity of thought and to reflect an overcautious and timid conception of freedom of the press.”²⁶

Commentary

Broadly speaking, apart from one — potentially significant — discrepancy, there is little amiss with the Court’s normative principles concerning permissible limits to freedom of expression when the exercise of the right interferes with the religious beliefs and convictions of others (summarised *supra*). Where the Court’s approach misfires, and has repeatedly misfired in the past, is in its application of those principles to specific factual situations.

Relevant Case-Law

The critical discharge of the joint dissenting opinion in the *Ī.A.* case was aimed specifically at the cases of *Otto-Preminger-Institut v. Austria* and *Wingrove v United Kingdom*. In *Otto-Preminger*, the applicant association (a private film-house) claimed (ultimately unsuccessfully) that its rights under Article 10, ECHR, had been violated by the seizure and forfeiture of a film (*Das Liebeskonzil*) it had planned to screen. The domestic Austrian courts found the characterisations of God, Jesus and Mary in the film to come within the definition of the criminal offence of disparaging religious precepts. Before it could actually be shown, the film was seized by the relevant national authorities in the context of criminal proceedings against the manager of the applicant association concerning the film. At issue in the *Wingrove* case was the rejection by the British Board of Film Classification of an application for a classification certificate for the applicant’s film, *Visions of Ecstasy*. The film, a short experimental video work, portrayed Saint Teresa engaging in acts of an overtly sexual nature, including with the body of the crucified Christ.²⁷

Other relevant cases that were not explicitly targeted by the dissenting judges in *Ī.A.*, but which will be referred to in passing *infra*, include: *Gay News Ltd. & Lemon*

²⁴ For example, in the *Otto-Preminger* case, the Commission voted by nine votes to five that there had been a violation of Article 10 as regards the seizure of the film, and by 13 votes to one that there had been a violation of Article 10 as regards the forfeiture of the film. The Opinion of the Commission is appended to the Judgment of the Court, *op. cit.*

²⁵ In *Otto-Preminger*, the Court held by six votes to three that there had been no violation of Article 10 in respect of either the seizure of the film or its forfeiture. In *Wingrove*, the Court held by seven votes to two that no breach of Article 10 had taken place.

²⁶ Joint dissenting opinion, *ibid*, para 8.

²⁷ Paras 9, 61.

v United Kingdom,²⁸ *Müller & Others v Switzerland*,²⁹ *Choudhury v United Kingdom*,³⁰ *Murphy v Ireland*³¹ and *Giniewski v France*.³²

Rough Coherence of Principles

Pluralism and tolerance are among the most powerful of the ECHR's animating principles. Time and again, the Court has averred in its case-law on freedom of religion that [societal] pluralism has been hard-won over the ages and that it is indissociable with democratic life. In the same vein, the Court has consistently held in its case-law on freedom of expression that pluralism, along with its kindred concepts of tolerance and broadmindedness, constitutes one of the essential hallmarks of democratic society. Pluralism entails diversity and divergence, which

²⁸ *X. Ltd. & Y. v United Kingdom*, Application No. 8710/79, Decision of inadmissibility of the European Commission of Human Rights of 7 May 1982, 28 DR 77 (November 1982). The case involved a conviction for blasphemy arising out of the publication of a poem, "The Love that Dares to Speak its Name" by Prof. James Kirkup, in a magazine called *Gay News*. According to the headnote of the House of Lords' decision in the case, the poem "purported to describe in explicit detail acts of sodomy and fellatio with the body of Christ immediately after his death and ascribed to Him during His lifetime promiscuous homosexual practices with the Apostles and other men." — cited in *ibid*, para 1.

²⁹ *Müller & Others v Switzerland*, Judgment of the European Court of Human Rights of 24 May 1988, Series A, No. 133. In this case, the applicant artists were convicted and their paintings confiscated on the grounds that the latter were obscene; the Court found that the measure served the legitimate aim of protecting public morals and held that Article 10 had not been violated.

³⁰ *Choudhury v United Kingdom*, Decision of inadmissibility of the European Commission of Human Rights of 5 March 1991, Application No 17439/90. The applicant "sought to have criminal proceedings brought against the author and publisher of "Satanic Verses" in order to vindicate his claim that the book amounted to a scurrilous attack on, inter alia, his religion" — *ibid*, para 1.

³¹ Judgment of the European Court of Human Rights (Third Section) of 10 July 2003. In this case, the applicant (a pastor affiliated to the Irish Faith Centre — "a bible based Christian ministry in Dublin" *ibid*, para 7) argued unsuccessfully that the refusal to broadcast an advertisement for the Irish Faith Centre, pursuant to a legislative prohibition on the broadcasting of religious advertising in Ireland, violated his rights under Articles 9 and 10, ECHR. Although the case was not *prima facie* about offence to the religious beliefs of others, the issue was considered in the Court's judgment.

³² *Giniewski v France*, Judgment of the European Court of Human Rights (Second Section) of 31 January 2006. This case involved the conviction of a journalist (however, he was acquitted on appeal, but ordered to pay nominal damages and to foot the bill for the publication of the appellate decision in one national newspaper) for defamation in respect of an article he had written criticising a Papal Encyclical and exploring possible links between a particular doctrine and the origins of the Holocaust. The European Court of Human Rights found that the applicant's right to freedom of expression had been violated because his article did not set out to attack religious beliefs, but to contribute to an ongoing debate on topics of interest to the general public.

in turn can often involve a certain amount of contention and even antagonism.³³ This is all part of the democratic experiment;³⁴ the cut and thrust of debate that is free, robust and uninhibited.³⁵ Thus, as famously stated in the *Handyside* case, information and ideas which “offend, shock or disturb the State or any sector of the population” must be allowed to circulate in order to safeguard the “pluralism, tolerance and broadmindedness” that underpin “democratic society”.³⁶ In principle, this vigorous conception of freedom of expression applies to all matters of general public interest, including religious beliefs and affairs.³⁷

But the concepts of pluralism and tolerance, as developed by the European Court of Human Rights, are clearly contiguous. Indeed, we could perhaps — without any sleight of hand — merge the concepts into one and speak more meaningfully about pluralistic tolerance,³⁸ a notion that implies a certain degree of reciprocal respect between the different constituent groups of any democratic society. Pluralistic tolerance can be well served by robust protection for freedom of expression, for example, when offensive expression advances discussions on matters of public interest. As posited by Robert Post: “Outrageous speech calls community identity into question, practically as well as cognitively, and thus it has unique power to focus attention, dislocate old assumptions, and shock its audience into the recognition of unfamiliar forms of life”.³⁹ However, the operative definition of “outrageous speech” is crucial here and would have to be qualified. In any case, if the right to freedom of expression is to be interpreted consistently with the notion of pluralistic tolerance, the protection of the rights of others must be borne in mind.

In this respect, Article 10(2) refers explicitly to the “duties and responsibilities” on which the exercise of the right to freedom of expression is contingent, and also the

³³ *Kokkinakis v Greece*, Judgment of the European Court of Human Rights of 19 April 1993, para 33; *Metropolitan Church of Bessarabia and Others v Moldova*, Judgment of the European Court of Human Rights of 13 December 2001, para 123; *Hasan & Chaush v Bulgaria*, Judgment of the European Court of Human Rights of 26 October 2000, para 78; *Serif v Greece*, Judgment of the European Court of Human Rights of 14 December 1999, para 49; *Agga v Greece*, Judgment of the European Court of Human Rights of 17 October 2002, paras 53, 56; *Manoussakis v Greece*, Judgment of the European Court of Human Rights of 29 August 1996, para 44; *Supreme Holy Council of the Muslim Community v Bulgaria*, Judgment of the European Court of Human Rights of 16 December 2004, para 93.

³⁴ Paraphrasal of Holmes, J, dissenting, in *Abrams v US*, 250 US 616 (1919), at p 630, when he described both the US Constitutional enterprise and life itself as being experimental.

³⁵ Paraphrasal of the United States Supreme Court in *New York Times Co. v Sullivan*, 376 U.S. 254 (1964).

³⁶ *Handyside v the United Kingdom*, Judgment of the European Court of Human Rights of 7 December 1976, Series A, No 24, para 49.

³⁷ However, a crucial caveat to this general proposition will be entered *infra*.

³⁸ J Raz sometimes uses the term “pluralist toleration”, which seems to have essentially the same meaning: J Raz, “Free Expression and Personal Identification”, 11 *Oxford Journal of Legal Studies* (No 3, 1991), pp 303–324, at 322.

³⁹ RC Post, *Constitutional Domains: Democracy, Community, Management* (Harvard University Press, Cambridge, Massachusetts, 1995), p 139.

legitimacy of restricting the exercise of the right in order to protect the rights of others. As regards the application of these considerations to religious beliefs and affairs, the Court recognises the need to protect the deepest feelings and convictions of “others” from substantial or serious offence.⁴⁰ Similarly, it considers that the “respect for the religious feelings of believers as guaranteed in Article 9 [...] can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance [...]”.⁴¹ This is because the beliefs in question are qualitatively different to other types of beliefs. One commentator has explained that qualitative difference by observing that “The recognition of what is ‘sacred’ involves an affirmation of what is believed to be of ultimate value in experience, and of what is of deepest concern in life”.⁴² That is the transformative factor that legitimates the special consideration for earnestly and deeply held religious beliefs.

Having said that, it is imperative that the exceptional regard in which religious beliefs can be held not be used as a convenient excuse for stifling debate on matters of interest to the public.⁴³ Again, to cite David Edwards: “The determination of spiritual value is a matter of persuasion, of exposition, and (perhaps) argument, and in any such process there must be the possibility of contradiction, condemnation and offence”.⁴⁴

Nigging Definitional Discrepancy

In the *Otto-Preminger-Institut* case, the European Court of Human Rights held that “in the context of religious opinions and beliefs”, the duties and responsibilities which accompany the right to freedom of expression, may legitimately include:

“an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.”⁴⁵

Whether by accident or design, the reformulation of this principle in *Wingrove v United Kingdom* and in *Murphy v Ireland* differs from its original articulation in *Otto-Preminger*. This is not a problem in itself; indeed, many principles are reworked and refined by the Court in the course of subsequent applications. In this case, however, some unexplained shifts of definitional emphasis appear to have been introduced. Instead of referring to expressions that are gratuitously offensive to others *and* an infringement of their rights *and* worthless from the perspective of public debate, the Court uses the more terse, alternative formula, “gratuitously offensive to others

⁴⁰ *Wingrove v United Kingdom*, *op. cit.*, para 58.

⁴¹ *Otto-Preminger-Institut v Austria*, *op. cit.*, para 47.

⁴² David Edwards, “Toleration and the English blasphemy law”, in J Horton and S Mendus, Eds., *Aspects of Toleration* (Methuen & Co, London & New York, 1985), pp 75–98, at 84.

⁴³ See, in this respect, *Giniewski v France*, *op. cit.*, paras 50 & 51.

⁴⁴ *ibid*, p 82.

⁴⁵ *op. cit.*, para 49; *Giniewski v France*, *op. cit.*, para 43.

and profanatory”.⁴⁶ No explanation is offered as to why the cumulative elements of the infringement of rights of others and the absence of any contribution to public debate were dropped. Nor is any attempt made to tease out the definitional scope of the notion of profanity, although it could be deduced from *Wingrove* that the “degree of profanation” would have to be “high” and the extent of insult to religious feelings “significant”.⁴⁷ As a result of this inconsistent use of phraseology in the Court’s approach to offensiveness in the context of religious opinions and beliefs, it is not possible to state with much confidence or precision what the official barometer actually is.

Misfiring of the Court

Frederick Schauer has claimed that in previous and ongoing efforts to elucidate the scope of the right to freedom of expression, “there has been too much distillation and not enough dissection”.⁴⁸ The *I.A.* case illustrates Schauer’s point perfectly. It will be recalled that the essence of the Court’s judgment in the case is a distillation of the main principles from its relevant case-law. The Court’s application of those principles to the facts of the case is limited to one paragraph. In other words, what is missing is the dissection of key principles through their application to a set of specific factual circumstances.

I have argued elsewhere⁴⁹ that when the Court applies its normative principles to specific factual circumstances, it should systematically examine whether sufficient weighting has been given to factors such as: the intent of the speaker; “contextual variables”,⁵⁰ and the demonstrably harmful impact of the impugned expression. The intent or motivation of the speaker is important as it can have significant bearing on how expression that is offensive to religious convictions is evaluated. There is a world of difference between misguided or thoughtless expression and that which is deliberately calculated to be offensive or which is fuelled by some kind of *animus*. Therefore, proof of an element of *scienter* (i.e., knowledge that the expression will or is likely to cause offence) should be required in order for liability to attach in civil proceedings,⁵¹ and proof of *mens rea* in criminal proceedings.⁵² Contextual variables could include the nature and impact of the medium used to

⁴⁶ *Wingrove v United Kingdom*, *op. cit.*, para 52. The formulation, “gratuitously offensive to others and profane”, was used in *Murphy v Ireland*, *op. cit.*, para 65.

⁴⁷ *Wingrove v United Kingdom*, *op. cit.*, para 60.

⁴⁸ F Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, New York 1982), p 85.

⁴⁹ T McGonagle, *Minority Rights and Freedom of Expression: A Dynamic Interface* (Ph.D. thesis, University of Amsterdam, 2008).

⁵⁰ M Rosenfeld, “Hate Speech in Constitutional Jurisprudence: A Comparative Analysis”, 24 *Cardozo L. Rev.* 1523 (2003), at 1565.

⁵¹ By analogy, the *scienter* element is quite a common feature of (campus) hate speech codes: see further, R Delgado & J Stefancic, *Understanding Words That Wound* (Westview Press, USA, 2004), p 115.

⁵² It should however be noted in passing that the European Commission of Human Rights found the strict liability nature of the crime of blasphemous libel unobjectionable in the facts of *Gay News Ltd. & Lemon v United Kingdom*, *op. cit.*, para 12.

convey the expression; audience-related considerations; socio-political factors; the nature and severity of the sanction imposed, etc. The requirement of “demonstrably harmful impact” is a safeguard measure that insists on the establishment of a clear causal link between the impugned expression and the alleged resultant harm to others (e.g. gratuitous offence to their religious convictions).

Limited Impact of Publication

The joint dissenting opinion in *Ī.A.* emphasises the likely impact of the publication. It had a limited,⁵³ once-off print-run, and the evidence before the Court did not indicate how many people actually read the book. The dissenting judges deduce from the fact that the book was not reprinted that the number of actual readers was small. Thus, one of the frequently-invoked rationales for regulating or restricting expression, *viz.* the impact/influence argument, offers a rather weak justification for interfering with the applicant’s right to freedom of expression in the circumstances of the present case. Furthermore, as pointed out by the same section of the Court just a few months before it returned its *Ī.A.* judgment, the novel as a medium is “a form of artistic expression that appeals to a relatively narrow public compared to, for example, the mass media”.⁵⁴ By counterpoising a novel with the “mass media”,⁵⁵ the Court seeks (albeit with clumsy wording) to distinguish between different media on the basis of their circulation, and by extension, their potential reach and impact. The specificity of a particular medium and its potential impact on the public are rightly considered by the Court to be relevant contextualising factors in many cases.⁵⁶ For instance, as the Court has repeatedly pointed out, “the audiovisual media have often a much more immediate and powerful effect than the print media”.⁵⁷

For present purposes, it should additionally be noted that there can be no suggestion of a captive audience here, and that members of the public would have had to buy the book in order to be confronted with its content. However, arguments such as these have not had a particularly happy history before the adjudicative organs of the ECHR, or at least not in the context of offence to religious beliefs. They do not, for instance, correspond to the approach taken by the European Commission of Human Rights in the *Gay News Ltd. & Lemon v United Kingdom*.⁵⁸ In that case, the

⁵³ Note that para 5 of the Court’s judgment refers to a print-run of 2,000 copies, whereas para 2 of the joint dissenting opinion refers to 2,500. The correct figure would appear to be 2,000 copies, as the original French-language versions of the judgment and joint dissenting opinion both refer to 2,000 copies.

⁵⁴ *Alinak v Turkey*, Judgment of the European Court of Human Rights (Second Section) of 29 March 2005, para 41.

⁵⁵ One could, for instance, argue that a novel could be included in a definition of “mass media”; it is submitted here that the Court actually intended to distinguish between novels on the one hand, and newspapers and broadcasting on the other.

⁵⁶ *Murphy v Ireland*, *op. cit.*, para 69.

⁵⁷ *Jersild v Denmark*, Judgment of the European Court of Human Rights of 23 September 1994, Series A, no. 298, para 31; *Murphy v Ireland*, *op. cit.*, para 69; *Radio France v. France*, Judgment of the European Court of Human Rights of 30 March 2004, para 39, and (for very similar wording) *Purcell v Ireland*, Decision of inadmissibility of the European Commission of Human Rights of 16 April 1991, Application No 15404/89.

⁵⁸ *op. cit.*

Commission observed that “The issue of the applicants’ journal containing the incriminated poem was on sale to the general public, *it happened to get known in some way or other* to the private prosecutor who was so deeply offended that she decided to take proceedings against the publication of this poem [...]”.⁵⁹

Although the case of *Müller v Switzerland* involved (sexual) morals rather than offence to religious convictions, it offers a useful analogy on the question of the public’s exposure to potentially offensive material. In that case, a crucial consideration for the Court was that the impugned paintings were:

“painted on the spot — in accordance with the aims of the exhibition, which was meant to be spontaneous — and the general public had free access to them, as the organisers had not imposed any admission charge or any age-limit. Indeed, the paintings were displayed in an exhibition which was unrestrictedly open to — and sought to attract — the public at large.”⁶⁰

Another — little-known — case, *S. v Switzerland*,⁶¹ also concerning the display of obscene material to the general public, is analogously useful as well. The European Commission of Human Rights concluded from the facts of the case that “There was no danger of adults being confronted with the film against or without their intention to see it” and that it was undisputed “that minors had no access to the film” either.⁶² The Commission continued by stating that “since no adult was confronted unintentionally or against his will with the film [...] there must be particularly compelling reasons justifying the interference at issue”.⁶³

In its *Otto-Preminger* judgment, the Court observed that access to the (proposed) screening of the film was subject to an admission fee and an age-limit. As “the film was widely advertised”, “[t]here was sufficient public knowledge of the subject-matter and basic contents of the film to give a clear indication of its nature”. The Court then offers a baffling *non sequitur*: “for these reasons, the proposed screening of the film must be considered to have been an expression sufficiently ‘public’ to cause offence”.⁶⁴ This finding goes against the grain of the relevant reasoning relied upon in *Müller, supra*. The dissenting judges reached a very different conclusion, *viz.* that the advance publicity material issued by the applicant cinema: (i) aimed to warn the public about the critical way in which the film dealt with the Roman Catholic religion, and (ii) actually “did so sufficiently clearly to enable the

⁵⁹ (Emphasis added), *ibid*, para 12. The poem in question was: “The Love that Dares to Speak its Name”, written by Prof J Kirkup. It appeared in a magazine called *Gay News*. According to the head-note of the House of Lords’ decision in the case, the poem “purported to describe in explicit detail acts of sodomy and fellatio with the body of Christ immediately after his death and ascribed to Him during His lifetime promiscuous homosexual practices with the Apostles and other men.” — cited in *ibid*, para 1.

⁶⁰ *op. cit.*, para 36.

⁶¹ *S. v Switzerland*, Report of the European Commission of Human Rights of 14 January 1993, Application No. 17116/90, para 62.

⁶² *ibid*, para 62.

⁶³ *ibid*, para 65.

⁶⁴ *op. cit.*, para 54.

religiously sensitive to make an informed decision to stay away". These conclusions prompted two further conclusions of note by the dissenting judges: (i) there was "little likelihood" of "anyone being confronted with objectionable material unwittingly", and (ii) the applicant association had acted "responsibly in such a way as to limit, as far as it could reasonably have been expected to, the possible harmful effects of showing the film".⁶⁵ It is submitted here that the dissenting opinion is more convincing than the majority opinion on this particular point.

In the *Wingrove* case, the European Commission had placed considerable store by the probability that a short experimental video work would have a very limited reach and impact. The Delegate of the Commission submitted to the Court that "The risk that any Christian would unwittingly view the video was therefore substantially reduced and so was the need to impose restrictions on its distribution".⁶⁶ The possibility of further restricting distribution of the video to licensed sex shops was mooted and it was also pointed out that the boxes containing the video cassettes would have included a description of its content.⁶⁷ The Court, however, responded by pointing out that once available, videos can be "copied, lent, rented, sold and viewed in different homes, thereby easily escaping any form of control by the authorities".⁶⁸ Thus, it found the consideration of the UK authorities that the film "could have reached a public to whom it would have caused offence" to be "not unreasonable" in the circumstances of the case.⁶⁹

Specificity of Genre

A novel should ordinarily be "entitled to be judged by the criteria relevant to that genre including a considerable freedom of imaginative exploration".⁷⁰ The applicant argued in domestic proceedings that the impugned novel should have been analysed by literary specialists. This argument does not appear to have been pursued by the applicant before the European Court, which limited itself to acknowledging that the author's views were conveyed in a "novelistic style", without probing the matter any further. The joint dissenting opinion, likewise, failed to adequately pick up on the argument. In its case-law, the Court has consistently held that Article 10 "protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed".⁷¹ It is submitted here that in order to adequately protect the substance of ideas and

⁶⁵ *ibid*, Joint dissenting opinion of Judges Palm, Pekkanen and Makarczyk, para 9.

⁶⁶ *ibid*, para 62.

⁶⁷ *ibid*.

⁶⁸ *ibid*, para 63.

⁶⁹ *ibid*.

⁷⁰ B Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Second Edition) (Palgrave Macmillan, New York, 2006), p 320. Parekh's supporting example relates specifically to Salman Rushdie's novel, *The Satanic Verses*, but it is nevertheless illustrative of a broader range of possibilities: he points out that "The offensive passages occur within the dream of a demented man, and hence not in the same category as unambiguous expressions of abuse and ridicule by the author", *ibid*.

⁷¹ See, amongst other authorities, *De Haes & Gijssels v Belgium*, Judgment of the European Court of Human Rights of 24 February 1997, Reports of Judgments and Decisions 1997-I, para 48.

information expressed in a novel, the Court ought to give due consideration to stylistic and other specificities that are relevant to the genre. Indeed, this is the thrust of one of its main lines of reasoning in the aforementioned *Alinak* case.⁷²

By selecting the passages in the book that were deemed to be the most offensive, isolating them and examining them out of context, the conclusion that they were unacceptably abusive was a foregone one. The same conclusion might very well have been reached if the passages had been examined in their original context (as intended by the author), but the conclusion would have been all the stronger for having been subjected to such an embedded analysis. As it stands, without the benefit of any insights that might have been generated by such an analysis, the Court's conclusion may be intuitively correct from a moral perspective, but it lacks methodological rigour.

Proportionality of Sanctions

The Court has frequently observed that “the nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference”,⁷³ especially when the penalty in question risks creating a chilling effect on discussion of matters of public interest.

In the present case, the Court takes cognisance, first of all, of the fact that the domestic authorities did not seize the book. Puzzlingly, this seems tantamount to praising the Turkish authorities merely for abstaining from a course of action that is generally regarded as anathema to freedom of expression. As a measure effectively constituting prior restraint, the seizure of the impugned novel would rightly have been regarded as a very far-reaching infringement of the applicant's freedom of expression. However, in the stream of case-law currently under discussion, prior restraint has encountered considerably less resistance than in other types of Article 10 cases. In *Otto-Preminger*, neither the seizure nor the forfeiture of the film was found to amount to a violation of Article 10. However, the dissenting judges in that case did warn that “There is a danger that if applied to protect the perceived interests of a powerful group in society, such prior restraint could be detrimental to that tolerance on which pluralist democracy depends”.⁷⁴ In *Wingrove*, the ban on the video was total, a fact which prompted the Court to acknowledge that the prior restraint involved in the case called for “special scrutiny”.⁷⁵ In the heel of the hunt, the measure of “special scrutiny” required was arguably not forthcoming, as the Court professed its satisfaction at the “high threshold of profanation embodied in the definition of the offence of blasphemy under English

⁷² *op. cit.*, paras 41-45.

⁷³ *Stirek v Turkey (No. 1)*, Judgment of the European Court of Human Rights of 8 July 1999, Reports of Judgments and Decisions, 1999-IV, para 64.

⁷⁴ *op. cit.*, Joint dissenting opinion, para 4.

⁷⁵ *ibid.*, para 58, following its earlier findings in *Observer & Guardian v United Kingdom*, Judgment of the European Court of Human Rights of 26 November 1991, Series A, no 216, para 60. See also in this connection the dissenting opinions of Judges De Meyer and Lohmus in the *Wingrove* case.

law” and ceded a wide margin of appreciation to the national authorities in the matter.⁷⁶

Secondly, the Court also takes cognisance of the [monetary] insignificance of the fine imposed. The joint dissenting opinion concedes that the fact that the prison sentence was commuted into a modest fine is significant, but the fears of the dissenting judges have not been completely allayed: “Freedom of the press relates to matters of principle, and any criminal conviction has what is known as a ‘chilling effect’ liable to discourage publishers from producing books that are not strictly conformist or ‘politically (or religiously) correct’”.⁷⁷

Generally speaking, the Court’s approach to the dissuasive impact of a criminal sanction tends to vary according to the circumstances of the case.⁷⁸ The least that could be said about the Court’s handling of the issue in the present case is that it should have been less perfunctory.

Conclusion

It is most unlikely that the Court will formally take the bold step of severing its own doctrinal chain, as it was urged to do by the dissenting judges in the *Ī.A.* case. But perhaps such a radical step, with all the political and face-losing consequences it would likely entail, is not entirely necessary in order to reshape relevant case-law in its future judgments. To the extent that the principle of *stare decisis* “creates a chain of cases, in which each decision is an interpretation of immediately prior decisions”, it offers the flexibility of distinguishing between the application of relevant principles in previous and new sets of circumstances.⁷⁹ As has been argued throughout this note, the relevant principles are — by and large — sound; it is the application of those principles that has been a source of disappointment. As the principles are not objectionable, there is no pressing need to repudiate them; rather, the focus should be on ensuring that whenever the Court applies relevant principles in the future, it does so in a way that distinguishes unsatisfactory precedents set by the mis application of principles in its earlier case-law. The recent case of *Giniewski* provides useful relevant examples of how this can be done: it distinguishes, *inter alia*, certain contextualising elements of the *Otto-Preminger* and *Ī.A.* cases, from the circumstances with which it was faced.⁸⁰ A recurrent problem in the relevant case-law of the Court is the inadequate attention it has tended to give to contextualising factors when assessing whether impugned practices measure up to its principles. Contextualising factors can often have a relativising (or occasionally, even a transformative) impact on the interpretation of the bare facts of a case, and the Court

⁷⁶ *ibid*, para 61.

⁷⁷ Joint dissenting opinion, *Ī.A. v Turkey*, *op. cit.*, para 6.

⁷⁸ Contrast, for example, *Süreç v Turkey (No. 1)*, *op. cit.*, paras 63 and 64 and *Chauvy & Others v France*, Judgment of the European Court of Human Rights (Second Section) of 29 June 2004, para 78, with *Jersild v Denmark*, *op. cit.*, para 35 and *Giniewski v France*, *op. cit.*, para 55.

⁷⁹ R Post, “Theories of Constitutional Interpretation”, in R Post, Ed., *Law and the Order of Culture* (California, University of California Press, 1991), pp 13–41, at 20.

⁸⁰ *op. cit.*, para 52.

should pay increased attention to the importance of contextualising factors in the future.

The foregoing section details specific examples of contextualising factors that have been under-explored in the relevant case-law of the Court. Finally — to round off the foregoing critical dissection with further critical distillation — another lingering problem with *Otto-Preminger* and its jurisprudential progeny must be addressed, or at least flagged for more thorough discussion at a later stage. The problem concerns the lax and seemingly unquestioning manner in which the Court has tended to apply the margin of appreciation doctrine in relevant cases.

It cannot be gainsaid that religious affairs have an immense inherent capacity for contentiousness. It is also generally true that States authorities are in the best position to take the measure of local religious sensitivities (but whether they can be trusted to do so fairly and objectively is another matter entirely). Nevertheless, the margin of appreciation doctrine must not be allowed to become a smoke screen behind which States and the European Court can hide, instead of facing up to complex, divisive issues. In all of the cases analysed *in detail* in this note, the Court has readily endorsed States authorities' justifications of measures restricting the right to freedom of expression. Those justifications have often included the preservation of religious peace and harmony and the avoidance of societal divisions — even when those goals do not seem to be particularly threatened by the impugned expression.⁸¹ The outcome, in each case, has been in favour of majoritarian or orthodox or conventional religious beliefs. Quite simply, as David Richards has pointed out, “the measure of constitutional protection for conscientiously dissenting speech could not be the dominant orthodoxy that it challenged, for that would trivialize the protection of free speech to whatever massaged the prejudices of dominant majorities.”⁸² Greater critical engagement with the particular circumstances of individual cases is required in order to ensure that the Court's judgments in this area are realistic and convincing.

Context may not be everything (although an old platitude of literary criticism tells us otherwise), but if the European Court of Human Rights continues to ignore the importance of contextualising factors in its jurisprudence, it will surely do so at its peril.

⁸¹ For example, it seems both implausible and incongruous that the broadcasting of an informative, inoffensive advertisement for a particular minority religious group would lead to “unrest” in contemporary Ireland. That argument, however, factored into the Court's reasoning in the *Murphy* case: see: *Murphy v Ireland*, *op. cit.*, paras 73 *et seq.*

⁸² DAJ Richards, *Free Speech and the Politics of Identity* (Oxford University Press, Inc., New York, 1999), p 197.

