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General introduction

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The Fall and Rise

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& TOM HERRENBURG

of

Blasphemy

Law

with a foreword by
Flemming Rose

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The Fall and Rise of Blasphemy Law

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Paul Cliteur & Tom Herrenberg

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1 General Introduction

Paul Cliteur & Tom Herrenberg

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This volume centres around two trends that are currently influencing freedom of expression. The first trend is the fact that many Western countries have become, over a long period of time, less strict about sacrilegious expression—many repealed their blasphemy laws or became less harsh in their punishment of blasphemy. Hence "the fall of blasphemy law." The second trend goes in the opposite direction. Over recent decades, Western societies have witnessed multiple attempts to suppress speech that defames religion. Hence "the rise of blasphemy law." A particularly vicious way of re-energising the suppression of blasphemy came from radical believers seeking to remove blasphemy from the public domain by violent means. Examples include Ayatollah Khomeini calling for the death of British novelist Salman Rushdie in 1989, the murder of Dutch filmmaker and polemicist Theo van Gogh in 2004, and the murders of *Charlie Hebdo* staff members in Paris in 2015.

In all these cases, Islamists took the law into their own hands to deliver harsh worldly punishments for blasphemous speech in the West, or encouraged others to do so (Khomeini). According to Khomeini, Rushdie had written a blasphemous novel for which he and others involved in the publication had to be executed. The reason for the murder of Theo van Gogh was, in the words of his killer Mohammed Bouyeri, that Van Gogh "had offended the Prophet. According to the law he deserved the death penalty, and I have executed it. ... Theo van Gogh considered himself a soldier. He fought against Islam. On 2 November 2004, Allah sent a soldier who slit his throat."¹ The two brothers who attacked the offices of *Charlie Hebdo*—the magazine that had featured caricatures of the prophet Muhammad a number of times—wanted to "avenge the prophet."²

1 Gerechtshof Den Haag (The Hague Court of Appeal), 23 January 2008.

2 <http://www.bbc.com/news/world-europe-30710883>.

Besides terrorism, there have been non-violent attempts to suppress free speech. These include the resolutions tabled at the United Nations aimed at banning "defamation of religion," and pressure from Saudi Arabia to censor the airing of the documentary *Death of a Princess* on Western media outlets in the early 1980s.

Whilst this "rise of blasphemy law" is a relatively modern trend in Western societies, so is the "fall of blasphemy law." For many centuries, speaking ill of objects of religious veneration got people into serious trouble, even before the advent of monotheism. One of the best-known trials in history occurred centuries before the birth of Christianity, when Greek philosopher Socrates (c. 470–399 BC) stood trial—which resulted in him being forced to drink hemlock—for questioning the accepted gods of Athens. The charge of "impiety" levelled against Socrates, which "signified shocking and abhorrent ideas about religion"³ to the Greeks, had been made earlier against Socrates' brother-in-arms, the Greek military commander Alcibiades (c. 450–404 BC). His run-in with the authorities is recounted as follows by the historian Leonard W. Levy:

In 415 BC, when Athenians were preparing an expeditionary force against Sparta, the city awoke one morning to an appalling discovery: nearly every statue celebrating Hermes, son of Zeus, the king of gods and men, had been desecrated during the night. Impiety on so vast a scale seemed the work of a conspiracy. The event was taken as a bad omen for the expedition and for the survival of Athenian democracy. Informers, responding to offers of rewards, implicated Alcibiades, and further investigation uncovered a second crime of impiety. If the first was comparable to smashing statues of the Madonna in all the religious shrines in a Catholic town during the Middle Ages, the second was comparable to a Black Mass. One night when the spirits had been high and the flagons low, according to informers, Alcibiades had led a blasphemous parody of the sacred Eleusinian Mysteries, which honoured Demeter, the earth goddess. Impersonating the high priest, Alcibiades had revealed and mocked the secret rites.⁴

3 Leonard W. Levy, *Blasphemy: Verbal Offenses Against the Sacred, from Moses to Salman Rushdie* (Chapel Hill & London: The University of North Carolina Press 1993), 31.

4 *Ibid.*, 5.

Alcibiades was sentenced to death in absentia but went to Sparta before the sentence could be delivered.

While crassly insulting religion is still prohibited in Greece 2,500 years later, the penalties are far less severe.⁵ Many other Western countries have also softened their approach to combatting blasphemy. Some countries even went all the way and decriminalised blasphemy altogether. Examples include England, which abolished the common law offences of blasphemy and blasphemous libel in 2008, and the Netherlands, which repealed the three provisions prohibiting blasphemy in the Criminal Code in 2014.⁶ This is in line with recommendations of the Venice Commission—the Council of Europe’s advisory body on constitutional matters—made on the subject of blasphemy laws in 2008: “the offence of blasphemy should be abolished ... and should not be reintroduced.”⁷

On the global level, human rights protecting freedom of expression also push in the direction of the decriminalisation of blasphemy *simpliciter*. The current United Nations Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt (b. 1958), stated that “In the human rights framework, respect always relates to human beings ... The idea of protecting the honour of religions themselves would clearly be at variance with the human rights approach.”⁸ A workgroup comprised of international experts brought together by the Office of the United Nations High Commissioner for Human Rights argued that “States that have blasphemy laws should repeal these as such laws have a stifling impact on the enjoyment of freedom of religion or belief and healthy dialogue and debate about religion.”⁹ Lastly, the Human Rights Committee—the body that monitors implementation of the International Covenant on Civil and Political Rights—holds that “Prohibitions of displays

5 See arts 198 and 199 of the Greek Criminal Code. A recent blasphemy trial took place in 2014, when a Greek man named Filippus Loizos created a page on social networking website Facebook in which he satirised a deceased Orthodox monk. He was sentenced to 10 months in prison. See “Man sentenced to jail in Greece for mocking monk,” *Reuters News*, 17 January 2014.

6 See also (partially outdated) *Blasphemy, Insult and Hatred: finding answers in a democratic society* (report) (Luxembourg: Council of Europe Publishing, 2008), 19.

7 *Ibid.*, 32.

8 *Report of the Special Rapporteur on freedom of religion or belief*, 2013, U.N. Doc. A/HRC/25/58, para. 33.

9 Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, 2012, 5.

of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant ..."¹⁰

INDIRECT BLASPHEMY LAWS

Thus far we have mentioned two trends regarding blasphemy. The first is the decline of blasphemy laws in the West. The second is the de facto revival of bans on blasphemy by radical believers, and political pressure on Western states and international fora to censor blasphemy. Yet there is another way in which the suppression of blasphemy can be revived, namely via an extensive interpretation of laws against "group defamation" or "inciting hatred." Such laws are a common feature of the regulation of public discourse in most advanced democracies—the United States being a notable exception. Laws of this type are different from straightforward blasphemy laws, which are generally speaking directed at protecting religion and religious symbols as such instead of a group of people. Nonetheless, they may, when extensively applied, have the effect of stifling criticism of religion and thus function as "indirect" blasphemy laws.

In 2002, French novelist Michel Houellebecq (b. 1956) was prosecuted for stating that Islam is "the most stupid religion" and that the Qur'an is "badly written." Houellebecq was charged with "inciting religious and racial hatred" but acquitted.¹¹ In the Netherlands a defamation trial took place for the displaying of a poster that read, inter alia, "Stop the tumour called Islam." After the defendant was convicted by both the trial court and the appellate court of "defamation of a group of people on the basis of their religion," the Dutch Supreme Court eventually acquitted him in 2009.¹²

A recent example of these types of cases is that about the German-Egyptian political scientist Hamed Abdel-Samad (b. 1972). Abdel-Samad has published a number of works, partly autobiographical, about Islam and Islam-related topics.¹³ Some of what he has said and written has led

¹⁰ Human Rights Committee, General comment no. 34, U.N. Doc. CCPR/C/GC/34, para. 48.

¹¹ "Calling Islam stupid lands author in court," *The Guardian*, 18 September 2002; "Author Charged for Islam Remark Is Acquitted," *The New York Times*, 23 October 2002.

¹² Hoge Raad (The Dutch Supreme Court), 10 March 2009.

¹³ Abdel-Samad, Hamed, *Der Islamische Faschismus: Eine Analyse* (Munich: Droemer Verlag, 2014); Abdel-Samad, Hamed, *Islamic Fascism* (Amherst, NY: Prometheus Books, 2016); Abdel-Samad, Hamed, *Der Untergang der islamischen Welt: Eine Prognose* (Munich: Droemer Verlag, 2010); Abdel-

to considerable controversy. In 2013 he went into hiding after receiving death threats over a speech he had given in Egypt. In the speech Abdel-Samad had criticised radical Islam and Egypt's Muslim Brotherhood, and accused them of spreading "religious fascism."¹⁴ His book "Mohamed. A settlement"—*Mohamed. Eine Abrechnung*—also sparked controversy. In the book, published in 2015, Abdel-Samad not only writes that Islamism is a "fascist ideology," he also calls the prophet Muhammad a "mass murderer and a sick tyrant."¹⁵ In an interview with German television channel *Das Erste*, Abdel-Samad argued that "Muhammad is not questioned by Muslims, he is mystified and elevated. And I believe that it is time for a settlement."¹⁶ He wanted to "create more commotion," Abdel-Samad explained. "It's time that Muhammad is discussed as a person. Muhammad died 1,400 years ago, but he isn't really buried. He lies in his coffin and rules from his coffin. He holds power over our present world."¹⁷ Abdel-Samad argued that he wanted to normalise criticism of Islam and Muhammad, and he hoped that no author would have to fear for his life for such criticism.¹⁸

Abdel-Samad faced a legal backlash over the book. A complaint was filed for *Volksverhetzung*, which is prohibited under section 130 of the German Criminal Code, and Abdel-Samad was interrogated by the Berlin public prosecutor.¹⁹ The crime of *Volksverhetzung*—"incitement to hatred"—can be

Samad, Hamed, *Krieg oder Frieden: die Arabische Revolution und die Zukunft des Westens* (Munich: Droemer Verlag, 2011); Abdel-Samad, Hamed, *Mein Abschied vom Himmel: Aus dem Leben eines Muslims in Deutschland* (Munich: Knauer Taschenbuch Verlag, 2009).

¹⁴ "German author in hiding after receiving Islamist death threats," *Deutsche Welle*, 11 June 2013.

¹⁵ See Michael Wolffsohn, "Der Islamkritiker als Volksverhetzer?," *Die Welt*, 16 March 2016, available at: <http://www.welt.de/debatte/kommentare/article153357890/Der-Islamkritiker-als-Volksverhetzer.html>.

¹⁶ "Der Prophet Mohammed – eine Abrechnung von Hamed Abdel-Samad," available at: <http://www.daserste.de/information/wissen-kultur/tt/sendung/sendung-vom-20092015-120.html>.

¹⁷ Ibid.

¹⁸ Ibid. In 2012, during the violent aftermath of the *Innocence of Muslims* video in which the prophet Muhammad is depicted in a derogatory way, Abdel-Samad said that "Muslims have to learn over time that the Prophet Muhammad does not just belong to them, but he's part of the history of humanity. Not everyone sees the prophet the way a faithful Muslim sees him": see "Violence in the name of Allah," *Deutsche Welle*, 13 September 2012.

¹⁹ Michael Wolffsohn, "Der Islamkritiker als Volksverhetzer?," *Die Welt*, 16 March 2016, available at: <http://www.welt.de/debatte/kommentare/article153357890/Der-Islamkritiker-als-Volksverhetzer.html>; "Anzeige gegen Hamed Abdel-Samad. Islamkritik = Volksverhetzung?," available at: <http://hpd.de/artikel/islamkritik-volksverhetzung-12840>.

found in the "Offences against public order" chapter of the German Criminal Code. The first subsection of the article reads as follows:

Whosoever, in a manner capable of disturbing the public peace (1) incites hatred against a national, racial, religious group or a group defined by their ethnic origins, against segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population or calls for violent or arbitrary measures against them; or (2) assaults the human dignity of others by insulting, maliciously maligning an aforementioned group, segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population, or defaming segments of the population, shall be liable to imprisonment from three months to five years.²⁰

In March 2016, German historian Michael Wolffsohn (b. 1947) wrote an article in the magazine *Die Zeit* about Abdel-Samad. In his article, Wolffsohn defends Abdel-Samad against the *Volksverhetzung* allegation. Wolffsohn points to article 5 of the German Constitution, which prescribes that everyone has "the right freely to express and disseminate his opinions in speech, writing and picture" and that "arts and sciences, research and teaching shall be free." Will the Berlin prosecutor, of all people, violate the constitution? Wolffsohn asks.

Unsurprisingly, the allegation also frustrated Abdel-Samad. He posted some of his grievances on his Facebook page.

How is it possible to measure *Volksverhetzung*? If one counts the number of heads that will be cut off because of my book, the number will be zero. Nobody will be expelled nor will anyone lose his job as a result of my book. ... In the Islamic world, critics of Islam have to take the death penalty, imprisonment, and lashing into account. In Europe they have to fear radical Islamists. They are unwanted by politicians, or at least 'not helpful.' They are bullied, defamed, and criticised by the left-wing and dialogue professionals. The fact that the German justice system also takes part in these sanctions, is, to me, a scandal!²¹

²⁰ See https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

²¹ Quoted in: Michael Wolffsohn, "Der Islamkritiker als Volksverhetzer?," *Die Welt*, 16 March 2016, available at: <http://www.welt.de/debatte/kommentare/article153357890/Der-Islamkritiker-als-Volksverhetzer.html>.

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1 We believe cases such as those of Houellebecq and Abdel-Samad are problematic. Our evaluation of powerful historical symbols, whether economic, political or religious in nature, must be uninhibited. The fact that Abdel-Samad, if prosecuted, might be acquitted, as was the case with Houellebecq, does not alter this. Interrogations and prosecutions are, regardless of their outcomes, burdensome and can potentially have serious "chilling effects" on public expression about religion. In a truly inclusive society that values plurality of opinion, the state has to treat those who praise religious symbols the same as those who despise them. Suppression of blasphemy, whether directly via blasphemy laws or indirectly via the application of laws against "group defamation" or "incitement to hatred," erodes that inclusiveness and plurality.

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Chapter 2 examines the history of blasphemy in the West from the medieval period. It finds blasphemy significantly overshadowed by the medieval church's focus upon heresy. By the eighteenth century punishments for the crime had been relaxed and the whole offence was suddenly problematised by the ideological consequences of both the American and French revolutions. From here until well into the modern period high-profile court cases attracted the attention of both reformers and the media, leading to a significant questioning of the state's right to, and justification for, legislating on matters that amounted to individual religious conscience. By the end of the third quarter of the twentieth century most blasphemy laws in the west were considered anachronisms that would inevitably pass away very soon. This view was starkly disturbed by demands from non-Christian religions within the West's now plural societies—ones which increasingly had their legal autonomy curbed or removed by much larger legal frameworks. This chapter then argues that this new development systematically introduced a tension within Western social democracies between guaranteeing freedom of speech and protecting vulnerable minorities. From this tension blasphemy law became entwined with new legal thinking around the concept of hate crime and new pieces of legislation emerged which often conflated the two. The chapter concludes by discussing the history of this development alongside

calls for its revoke as offering an unenvisioned incentive and precedent for other nations to reimagine and potentially reconstruct blasphemy laws of their own.

Chapter 3 describes the history of blasphemy under the English common law from its development by the courts in the seventeenth century, through its apparent liberalisation in the nineteenth century to its eventual abolition by Parliament in 2008. However, as Ivan Hare points out, that seemingly linear progress towards greater protection for freedom of expression on religious matters masks a much more complex story: a story in which the breadth and flexibility of the definition of blasphemy were used to bring prosecutions against disfavoured groups and against important works of literature and political philosophy. Hare argues that much of this complexity derives from the failure for 300 years to question the original normative foundation of the law. The chapter concludes with a discussion of whether it is possible to regard the recently enacted offences of stirring up religious hatred as a modern successor to the law of blasphemy.

Chapter 4 discusses the Dutch blasphemy law that was in the Criminal Code from 1932 until 2014. The minister of justice who drafted the blasphemy law was incredibly upset by attacks on the Christian God and Jesus by communists. The law drafted to combat these attacks criminalised “scornful blasphemy in a manner offensive to religious feelings.” The first decades of the law’s existence saw prosecutions and convictions for blasphemous utterances, yet in the 1960s Dutch novelist Gerard Reve’s trial, over two passages in which he described sexual acts between God and a donkey, reduced the law’s power. Later “blasphemers,” most notably Theo van Gogh, did not have much to fear from the Dutch Prosecution Service, but rather from radical Islam. The chapter also discusses events surrounding Van Gogh’s death.

Chapter 5 looks at the pressure exerted by Saudi Arabia to censor the airing of the documentary *Death of a Princess* on Western television in the early 1980s. This documentary was based on the true story of Princess Masha’il Bint Fahd Al Saud, a 19-year-old Saudi Princess who was, together with her lover, publicly executed for adultery. After a description of the film’s content, the chapter elaborates on the attitude Western political leaders adopted in dealing with the diplomatically sensitive issue of (not) airing the film.

Chapter 6 deals with what might be considered the *locus classicus* of the modern era of Westerners being threatened by radical believers for blasphemous expression: the publication of Salman Rushdie’s novel *The*

Satanic Verses in 1988 and Khomeini's death threat that followed in 1989. This chapter discusses some of the criticism that has been levelled against Salman Rushdie for writing his book.

Chapter 7 discusses the burning of the Quran by American pastor Terry Jones in light of one of the best-known quotations about free speech: "If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind" (John Stuart Mill). With Jones, we have such an extremely unpopular opinion that virtually "all mankind minus one" objected to it. The chapter explores the free speech controversies and dilemmas this real-life "mankind minus one" situation gives rise to.

Chapter 8 is about the international dimension of blasphemy, in particular the so-called United Nations "defamation of religion resolutions." The adoption of these resolutions was pushed for by the Organisation of Islamic Cooperation. Contrary to human rights standards, these resolutions were aimed at protecting religion and religious symbols as such. The chapter discusses the background of these resolutions and their relationship to international standards of freedom of expression.

Chapter 9 focuses on a number of social developments concerning multiculturalism and blasphemy in England. The chapter discusses, inter alia, the difference between social responses to blasphemy directed at the Christian religion and those directed at other religions. While responses to the 1979 religious satire comedy film *Life of Brian* were largely supportive of artistic expression, in cases of non-Christian blasphemy freedom of expression was trumped, due to the ideology of "multiculturalism," by the importance of protecting ethnic minority sensibilities. The chapter concludes by arguing that the threat of censorship on the grounds of blasphemy remains imminent in England, not for legal reasons—the English law of blasphemy having been repealed in 2008—but because of academia and popular media engaging in self-censorship, out of either fear of violence or the fear of offending minority sensibilities.

We would like to emphasise that the chapters differ in both content and style. Generally speaking, chapters 2, 3 and 4 present legal and historical analysis of blasphemy laws, while other chapters look at blasphemy and censorship from a cultural or international perspective, or discuss moral and political dilemmas that blasphemous expression can give rise to. We believe that this multi-level approach is a strength rather than a weakness.

Nonetheless, all contributions are concerned with the issues of freedom of expression and blasphemy.

The chapters on the development of blasphemy law in modern times indicate that, contrary to what is commonly assumed, suppression of blasphemy is not in decline but on the rise, albeit not always under the explicit name of "blasphemy law." Common epithets are "incitement to religious hatred," "defamation of religion," and other new concepts that are being used to stifle freedom of speech, especially the freedom to criticise religion. These chapters also try to demonstrate that the contemporary decline (or "fall") of free speech (and concomitant "rise" of blasphemy law) is intimately connected with terrorist attacks on those who exercise their right to free speech. The Rushdie affair, the Danish cartoon controversy and the murders of the *Charlie Hebdo* staff are the best-known examples of this phenomenon, but, as this book makes clear, some other incidents are also an important part of the context of this development.

We are fully aware that some readers might find some chapters in the book (i) a little polemical or (ii) supportive of a "radical" conception of free speech. Let us comment on both of these interpretations.

First, we have tried not to be polemical in the sense that nowhere do we polemicise against other authors. Instead, we want to present historical material that is largely unknown, and the relevance of which has not been fully grasped. For example, no one could have missed the attack on *Charlie Hebdo*, but the fact that as early as 1980 Western governments were under severe pressure not to broadcast a film about the Saudi royal family is largely forgotten (see chapter 5 on *Death of a Princess*).

Second, these chapters may be interpreted as taking a more "radical" stance on free speech than most authors do. As editors we do not subscribe to this view. We do not advocate a more "radical" conception of free speech, but the maintenance of a conception that was common in the seventies and eighties of the twentieth century (see for example the *Handyside* case of 1976, in which the European Court of Human Rights stated that free speech was also applicable to expression that "offends, shocks and disturbs"). There is nothing "radical" in the idea that a novelist can publish a novel that some religious believers might consider blasphemous, insulting or offensive. What might be considered "radical" is the slow and hardly noticed erosion of these civil liberties in our time.

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