Princes and prophets: democracy and the defamation of power

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Princes and Prophets: Democracy and the Defamation of Power

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Preface

This thesis concerns (the legitimacy of) three restrictions on freedom of expression that protect powerful entities, symbols, or institutions:

(1) *lèse-majesté*, the defamation of a *national head of state*;[1]

(2) the defamation of *foreign heads of state*; and

(3) *blasphemy*, disparaging expression directed at *religion or religious symbols*.

Many countries have laws against these types of defamation. For example, a 2019 report identified over a dozen countries with a *lèse-majesté* ban.[2] A 2017 study by the Organization for Security and Co-operation in Europe mentioned eighteen European countries that have laws against the *defamation of foreign heads of state* on their books,[3] while these laws are also found in numerous countries outside Europe.[4] Moreover, a 2020 report by the United States Commission on International Religious Freedom listed 84 countries that maintain some sort of *blasphemy* ban.[5]

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[1] More literally the terms translates to 'hurt or violated majesty.' *The Oxford Essential Dictionary of Foreign Terms in English* defines it as 'the insulting of a monarch or other ruler.' See J. Speake & M. LaFlaur, *The Oxford Essential Dictionary of Foreign Terms in English*, Oxford: Oxford University Press 2002. These laws are designed to prohibit insults directed at national heads of state, which could be a King or Queen in a monarchy, but also a President in a republic.

[2] Overseas Security Advisory Council, *Lèse Majesté: Watching what you say (and type) abroad* (report), 2019, https://www.osac.gov/Content/Report/e48a9599-9258-483c-9cd4-169f9c8946f5. Some countries mentioned in the report, such as Belgium and the Netherlands, have repealed, or are in the process of repealing their *lèse-majesté* ban.

[3] Organization for Security and Co-operation in Europe, *Defamation and Insult Laws in the OSCE Region: A Comparative Study*, 2017, p. 23, https://www.osce.org/files/f/documents/b/8/303181.pdf.

[4] These include Afghanistan (article 243 Criminal Code), Botswana (article 60 Criminal Code), Cameroon (article 153 Criminal Code), Egypt (article 181 Criminal Code), Ethiopia (article 264 Criminal Code), Indonesia (article 144 Criminal Code), Iraq (article 227 Criminal Code), Israel (article 168 Criminal Code), Senegal (article 165 Criminal Code), South Korea (article 107 paragraph 2), and Thailand (article 133 Criminal Code).

[5] U.S. Commission on International Religious Freedom, *Violating Rights: Enforcing the World's Blasphemy Laws*, 2020, p. 7, https://www.uscirf.gov/publication/violating-rights-enforcing-worlds-blasphemy-laws. See

Despite their archaic tinge, controversies over, and prosecutions for the defamation of powerful entities, symbols, or institutions continue to persist. In 2016, an international row emerged over the initial prosecution (abandoned at a later stage) of the German comedian Jan Böhmermann for an offensive poem that targeted the Turkish President Recep Tayyip Erdoğan.[6] In 2018, Spanish rapper Valtonyc was sentenced to three and a half years' imprisonment for charges including *lèse-majesté*.[7] Blasphemy too continues to lead to

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also A. Clooney & P. Webb, 'The Right to Insult in International Law,' *Columbia Human Rights Law Review*, 2017, p. 53: 'Insulting religion (…) is widely criminalized around the world. Although blasphemy has been de-criminalized in many Western countries, it remains an offence in many others and it is often expressed in vague terms that cast a wide net over insulting speech.' For the state of free speech in many of these countries, see e.g. the periodical reports from the International Humanist and Ethical Union (*Global Report on Discrimination against Humanists, Atheists and the Nonreligious*) and the United States Commission on International Religious Freedom.

[6] 'Germany reviewing Turkey demand for charges over 'bestiality' satire,' *Agence France Presse*, 11 April 2016.

[7] 'Rapper jailed for three and a half years after criticising Spanish royal family', 24 February 2018, https://www.independent.co.uk/arts-entertainment/music/news/rapper-jailed-lyrics-spanish-royal-family-valtonyc-josep-miquel-arenas-beltran-a8226421.html. In a twist of events, this case led to the Belgium Constitutional Court invalidating the Belgian *lèse-majesté* ban of 1847. In 2018, in anticipation of his imprisonment, Valtonyc fled to Belgium. Subsequently, the Spanish authorities requested the extradition of Valtonyc. Because of the principle of double (or dual) criminality in extradition cases, which means that the crime for which extradition is requested must exist in both countries, the issue arose during the extradition dispute whether the basis on which Valtonyc was convicted in Spain, namely a specific *lèse-majesté* law, was also a crime in Belgium. In this context, a Belgian Court asked the Belgian Constitutional Court the following preliminary question: 'Violates Article 1 of the Act of 6 April 1847 on the punishment of insults to the King, which criminalizes inter alia publicly expressed insulting statements, shouts, and threats to "the person of the King", Article 19 of the Constitution (which protects freedom of expression, added) read in conjunction with Article 10 ECHR?' (see Constitutional Court of Belgium, 28 October 2021, cause list number (*rolnummer*) 7434, ruling no. (*Arrest nr.*) 157/2021, I). Article 1 of the Act of 6 April 1847 states, in short, that anyone who insults the person of the King shall be punished with imprisonment ranging from six months to three years' and a fine of 300 to 3,000 francs. The Constitutional Court concluded that, in terms of the scope of the offense as in terms of the penalty, the provision at issue provides a greater protection of the reputation of the person of the King vis-à-vis the protection of the reputation of others. The Court submitted that the provision does not correspond to a pressing social need and is disproportionate to the objective the reputation of the person of the protect king. Hence, the Belgian *lèse-majesté* ban was incompatible with the right to free expression guaranteed by the Belgian Constitution, read in conjunction with article 10 of the European Convention on Human Rights.

controversy. Although many countries in the West have repealed their blasphemy bans, recent examples include England (2008), the Netherlands (2014), and Ireland (2020), other states still prohibit sacrilegious expression.[8] On top of the legal dimension, blasphemy has also raised issues of 'extra-legality' due to vigilantes taking the law into their own hand and executing or threatening blasphemers, the *Charlie Hebdo* affair being perhaps the most prominent example of this in recent years.

Both history as well as the present show that political or religious authority have a challenging relationship with the right to free expression. Given that free expression is essential for a liberal democracy, this raises the question of the legitimacy of bans that prohibit criticizing, satirizing, of defaming powerful entities, symbols, or institutions. This thesis engages with this topic by describing and analysing these bans, and examining them in light of democratic free speech theory.[9]

[8] A notable recent case is *E.S. v. Asutria*, decided by the European Court of Human Rights in 2018 (see chapter 4).

[9] Parts of this thesis have been published before. Chapter 2 is based on T. Herrenberg, 'Belediging van een bevriend staatshoofd,' *Nederlands Juristenblad*, 2016, and, particularly, T. Herrenberg, 'Historical and Human Rights Perspectives on the Dutch Ban on Insulting Foreign Heads of State', *Human Rights Law Review*, 2021. Chapter 4 is based on P. Cliteur & T. Herrenberg, 'On the Life and Times of the Dutch Blasphemy Law (1932–2014),' in: P. Cliteur & T. Herrenberg (eds.), *The Fall and Rise of Blasphemy Law*, Leiden: Leiden University Press 2016. Chapter 5 is partially based on T. Herrenberg, 'Freedom of Expression,' in: M. Sellers & S. Kirste (eds.), *Encyclopedia of the Philosophy of Law and Social Philosophy*, Springer 2019. Chapter 6 is based on T. Herrenberg, 'Politici, de vrijheid van meningsuiting en Innocence of Muslims,' *Nederlands Juristenblad*, 2013 and T. Herrenberg, 'Denouncing Divinity: Blasphemy, Human Rights, and the Struggle of Political Leaders to defend Freedom of Speech in the Case of Innocence of Muslims', *Ancilla Iuris*, 2015. Everything presented in this thesis is the result of my own work and includes nothing which is the work of others. As for work jointly authored by me and one or more colleagues, I have worked into this thesis only those parts of the joint publication that were solely written by me.

Contents

Chapter 1 Introduction

Introduction

This thesis is concerned with the regulation of the defamation of powerful entities, symbols, or institutions. More specifically, this thesis is concerned with (the legitimacy of) three restrictions on freedom of expression:

(1) *lèse-majesté*, the defamation of a *national head of state*;[10]

(2) the defamation of *foreign heads of state*; and

(3) *blasphemy*, the defamation of *religion or religious symbols*.

The commonality of these types of expression is that they all challenge various types of power: religious or secular, foreign or national. Such expression may spark strong emotions, as is evidenced by multiple controversies that arose over such expression over the last years. We have been made witness of the horrific murders of six journalists of the French satirical magazine *Charlie Hebdo* in 2015,[11] as well as the killing of Samuel Paty in 2020; the French teacher who, during a class on freedom of expression, showed the blasphemous cartoons depicting the prophet Muhamad published by *Charlie Hebdo*.[12] A decade earlier, offence to religious symbols sparked controversy during the *Danish cartoon controversy* over the

[10] More literally the terms translates to 'hurt or violated majesty.' *The Oxford Essential Dictionary of Foreign Terms in English* defines it as 'the insulting of a monarch or other ruler.' See J. Speake & M. LaFlaur, *The Oxford Essential Dictionary of Foreign Terms in English*, Oxford: Oxford University Press 2002. These laws are designed to prohibit insults directed at national heads of state, which could be a King or Queen in a monarchy, but also a President in a republic.

[11] 'Charlie Hebdo: Major manhunt for Paris gunmen', 8 January 2015, https://www.bbc.com/news/world-europe-30719057.

[12] 'For a teacher in France, a civics class was followed by a gruesome death', 17 October 2020, https://www.reuters.com/article/france-security-school-parents-idINKBN27201Z.

publication of pictures of the prophet Muhammad in the Danish newspaper *Jyllands-Posten*. These are extreme examples of the pressure put on free expression by extra-legal forces. Although the offence of blasphemy, both in terms of scope as in the severity of penalties, has gradually declined in many (but certainly not all) countries, these events show that blasphemy continues to spark controversy in largely secular, modern democratic societies.

Another type of defamation is that of insults directed at foreign heads of state. Although this type of expression has fortunately sparked less extreme responses, it has led to significant tension. For example, the defamation of the Turkish President Recep Tayyip Erdoğan by the German comedian Jan Böhmermann in 2016 caused a diplomatic row between Germany and Turkey. The offensive poem resulted in the Turkish Government requesting the German government to prosecute Böhmermann under Section 103 (1) of the German Criminal Code (*Strafgesetzbuch*).[13] This provision prohibited the defamation of a foreign head of state.[14] Charges were initially brought against Böhmermann, but later dropped.

A third example is the defamation of a national head of state, also known as *lèse-majesté*. In 2018, Spanish rapper Valtonyc was sentenced to three and a half years' imprisonment for charges including *lèse-majesté* for song lyrics that included 'The king has a rendezvous at the village square, with a noose around his neck,'[15] accompanied by a death wish for corrupt politicians and the Bourbon monarchy, referring to them as 'pigs.'[16]

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[13] 'Germany reviewing Turkey demand for charges over 'bestiality' satire,' *Agence France Presse*, 11 April 2016.

[14] It has been repealed as of 2018. See *Gesetz zur Reform der Straftaten gegen ausländische Staaten, Bundesgesetzblatt*, 2017, no. 48.

[15] 'Spanish rapper on the run after 'terror lyrics' prison sentence', 25 May 2018, https://www.bbc.com/news/blogs-trending-44253045.

[16] 'Rapper jailed for three and a half years after criticising Spanish royal family', 24 February 2018, https://www.independent.co.uk/arts-entertainment/music/news/rapper-jailed-lyrics-spanish-royal-family-valtonyc-josep-miquel-arenas-beltran-a8226421.html.

1. Laws against defamation: a dynamic area of law

Despite their archaic tinge, laws against *lèse-majesté*, the defamation of *foreign heads of state*, and *blasphemy* are still widespread. A 2019 report identified over a dozen countries, including, Thailand, Jordan, Kuwait, Bahrain, and Turkey, with a *lèse-majesté* ban.[17] A 2017 study by the Organization for Security and Co-operation in Europe mentioned eighteen European countries that have laws against the *defamation of foreign heads of state* on their books, including Cyprus, Denmark, Greece, Iceland, Norway, Poland, Portugal, Switzerland, and Turkey,[18] while these laws are also found in numerous countries outside Europe.[19] Lastly, *blasphemy* too is still widely prohibited by law. A 2020 report by the United States Commission on International Religious Freedom identified criminal blasphemy law provisions in 84 countries, over a third of the total number of countries.[20] According to the report, 'the Asia-Pacific and Middle East

[17] Overseas Security Advisory Council, *Lèse Majesté: Watching what you say (and type) abroad* (report), 2019, https://www.osac.gov/Content/Report/e48a9599-9258-483c-9cd4-169f9c8946f5. Some countries mentioned in the report, such as Belgium and the Netherlands, have repealed, or are in the process of repealing their *lèse-majesté* ban.

[18] Organization for Security and Co-operation in Europe, *Defamation and Insult Laws in the OSCE Region: A Comparative Study*, 2017, p. 23. Some countries mentioned in the report have meanwhile repealed their ban against defaming foreign heads of state.

[19] These include Afghanistan (article 243 Criminal Code), Botswana (article 60 Criminal Code), Cameroon (article 153 Criminal Code), Egypt (article 181 Criminal Code), Ethiopia (article 264 Criminal Code), Indonesia (article 144 Criminal Code), Iraq (article 227 Criminal Code), Israel (article 168 Criminal Code), Senegal (article 165 Criminal Code), South Korea (article 107 paragraph 2), and Thailand (article 133 Criminal Code).

[20] U.S. Commission on International Religious Freedom, *Violating Rights: Enforcing the World's Blasphemy Laws*, 2020, p. 13. The report covers provisions in force from January 2014 through December 2018. See U.S. Commission on International Religious Freedom, *Violating Rights: Enforcing the World's Blasphemy Laws*, 2020, p. 13. See also A. Clooney & P. Webb, 'The Right to Insult in International Law,' *Columbia Human Rights Law Review*, 2017, p. 53: 'Insulting religion (…) is widely criminalized around the world. Although blasphemy has been de-criminalized in many Western countries, it remains an offence in many others and it is often expressed in vague terms that cast a wide net over insulting speech.' For the state of free speech in many of these countries, see e.g. the periodical reports from the International Humanist and Ethical Union (*Global Report*

regions accounted for 84% of the world's enforcement of blasphemy (or other) laws',[21] while Europe accounted for 11% of the reported cases of criminal blasphemy enforcement.[22]

Prohibitions against *lèse-majesté*, the defamation of foreign heads of state, and blasphemy have proven to be dynamic, in the sense that notable legal developments have occurred in this area of defamation law in recent years. Various countries, Belgium and the Netherlands being examples, have repealed or are in the process of repealing their *lèse-majesté* ban. The Netherlands did so in 2020, while a Bill to that extent is being considered in Belgium.[23] Cambodia, on the other hand, introduced a *lèse-majesté* ban in 2018.[24] As for the ban on defaming foreign heads of state, France abolished its law in 2004,[25] Belgium in 2005,[26] Germany in 2018,[27] while the Netherlands did so in 2020.[28] Lastly, during 2014-2020, blasphemy bans have been introduced or amended in Kazakhstan, Nepal, Oman, Mauritania,

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on Discrimination against Humanists, Atheists and the Nonreligious) and the United States Commission on International Religious Freedom.

[21] U.S. Commission on International Religious Freedom, *Violating Rights: Enforcing the World's Blasphemy Laws*, 2020, p. 8.

[22] U.S. Commission on International Religious Freedom, *Violating Rights: Enforcing the World's Blasphemy Laws*, 2020, p. 19.

[23] Parliamentary documents, Belgian House of Representatives (*Belgische Kamer van volksvertegenwoordigers*), 3 March 2021, Doc. No. 55 1824/001. Moreover, an extradition case regarding Spanish rapper Valtonyc led to the Belgian Constitutional Court invalidating the Belgian *lèse-majesté* ban in October 2021. See Constitutional Court of Belgium, 28 October 2021, cause list number (*rolnummer*) 7434, ruling no. (*Arrest nr.*) 157/2021.

[24] 'Cambodia parliament adopts lese-majeste law, prompting rights concerns', 14 February 2018, https://www.reuters.com/article/us-cambodia-king-idUSKCN1FY0RV.

[25] See Article 52 *Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité*.

[26] See J. Foakes, *The Position of Heads of State and Senior Officials in International Law*, Oxford: Oxford University Press 2014, p. 70 n. 161.

[27] See *Gesetz zur Reform der Straftaten gegen ausländische Staaten*, *Bundesgesetzblatt* (2017) no. 48; See also 'Lèse-Majesté in Germany – A Relic of a Long-Gone Era?', 23 February 2017, https://blogs.loc.gov/law/2017/02/lse-majest-in-germany-a-relic-of-a-long-gone-era/.

[28] Bulletin of Acts and Decrees (*Staatsblad*) 2019, no. 277.

Morocco, and Brunei,[29] while the Netherlands, Iceland, Norway, Malta, Denmark, Ireland, Canada, New Zealand, and Greece have repealed such laws in this period.[30] Earlier, the United Kingdom repealed its anti-blasphemy law in 2008. Even in countries where blasphemy no longer is a criminal offence, instances of blasphemy may nonetheless still lead to social and political discussion about the re-introduction of a blasphemy ban. For example, after the murder on French teacher Samuel Paty, a debate arose in the Netherlands about the re-introduction of a ban prohibiting the defamation of prophets.[31]

2. Beyond legality

Of the three restrictions (*lèse-majesté*, the defamation of a foreign head of state, and blasphemy) mentioned, blasphemy differs from the other two in the sense that it has a noticeable 'extra-judicial' or 'informal' aspect to it. In its survey of blasphemy bans, the United States Commission on International Religious Freedom observed that 'Imminent threats, mob activity, and violence at the hands of private, non-state actors was a recurring phenomenon, even when states did not enforce their criminal blasphemy laws. Like state enforcement, extrajudicial violence aimed at upholding blasphemy laws legitimizes the laws.'[32] A recent example is that of Stephen Masih, a Pakistani Christian. As of October 2021, Masih is awaiting trial for

[29] U.S. Commission on International Religious Freedom, *Violating Rights: Enforcing the World's Blasphemy Laws*, 2020,p. 7.

[30] U.S. Commission on International Religious Freedom, *Violating Rights: Enforcing the World's Blasphemy Laws*, 2020,p. 7.

[31] See for example, 'Debat over de vrijheid van meningsuiting', 12 November 2020, https://www.tweedekamer.nl/kamerstukken/plenaire_verslagen/kamer_in_het_kort/debat-over-de-vrijheid-van-meningsuiting.

[32] U.S. Commission on International Religious Freedom, *Violating Rights: Enforcing the World's Blasphemy Laws*, 2020, p. 14.

allegedly committing blasphemy. A statement released by UN experts[33] released in October 2021 states that:

> 'In March 2019, following an argument with one of his neighbours in Imran Pura Badian village, Mr. Masih was attacked by a group of people accusing him of committing blasphemy. His family home was also set on fire. Local police filed a First Information Report (FIR) against him and arrested him on 15 March 2019. He was informed about the blasphemy charges only three months later.'[34]

Also the West has been confronted with vigilantes seeking to suppress blasphemy, or punish blasphemers, extra-judicially. The aforementioned terrorist attack on the offices of *Charlie Hebdo*, as well as the killing of French teacher Samuel Paty are striking examples. Other examples include the (in)famous *The Satanic Verses* controversy over Salman Rushdie's novel in 1989, the killing of Dutch film director Theo van Gogh in 2004, and the publication of the blasphemous 'Danish cartoons' in 2005, which sparked global unrest.[35] In November 2019, a Dutch court sentenced a man to 10 years' imprisonment for preparing a terrorist attack on Dutch politician Geert Wilders. The man traveled from Pakistan to the Netherlands to murder Wilders for intending to hold a cartoon contest about the prophet Muhamad. The court stated that

[33] Those being the Special Rapporteur on freedom of religion or belief, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on minority issues, and the Special Rapporteur on the right to physical and mental health.

[34] See 'Pakistan: Christian on blasphemy charges must be freed – experts', 21 October 2021, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27681&LangID=E.

[35] See, generally, J. Klausen, *The Cartoons that Shook the World*, New Haven/London: Yale University Press 2009; P. Cliteur & T. Herrenberg (eds.), *The Fall and Rise of Blasphemy Law*, Leiden: Leiden University Press 2016; P. Cliteur, *Theoterrorism v. Freedom of Speech: From incident to precedent*, Amsterdam: Amsterdam University Press 2019.

> 'What the suspect intended with the murder of [victim] was to remove a prominent politician from this public debate, so that he could no longer proclaim his political message. The suspect wanted to commit this murder in one of the buildings of parliament: the actual heart of Dutch democracy.'[36]

This thesis discusses one relatively recent episode of this informal aspect of blasphemy, namely that of *Innocence of Muslims*. In ways resembling the Rushdie and Danish cartoons affairs, this video containing blasphemous content was followed by unrest in various parts of the world.

3. Research question and methodology

The above cases and developments indicate that controversies regarding criticisms, or the defamation of powerful entities, symbols, or institutions have all but vanished from our world today. Bans on this type of expression are still commonplace. However, since democracies must also adhere to a broad free speech principle that allows for discussion on matters of public concern, this creates a tension. Therefore, the research questions of this thesis are construed as follows.

1) Are bans on *lèse-majesté*, defaming foreign heads of state, and blasphemy legitimate in a democracy?
2) What were the reasons for the introduction, application, and, if applicable, repeal of the various types of bans?
3) What international developments have recently occurred with regard to these speech crimes?

[36] Court of The Hague, 18 November 2019, ECLI:NL:RBDHA:2019:12069.

The doctrinal method of legal research is chosen as the primary method, in which one focuses 'on mapping the applicable law, as laid down in sources of written and unwritten national, European or international rules, principles, concepts, doctrines and court rulings.'[37]

By using the Netherlands as case study of national law, the underlying assumptions and justifications of the laws against defamation of the aforementioned powerful entities are examined. The Dutch Constitution protects freedom of expression in article 7. As is common, this right is subjected to various limitations, including criminal provisions. The Dutch Criminal Code contains a general framework for defamation (Title XVI), with provisions such as against slander (*smaad*; article 261 paragraph 1) and libel (*smaadschrift*; article 261 paragraph 2). Furthermore, prior to their repeal, the Criminal Code listed a number of 'special' defamation provisions that were based on the capacity of the targeted individual: articles 111-113 concerned the Dutch *lèse-majesté* ban and contained defamation provisions designed to protect a number of royal dignitaries, while articles 118-119 covered defamation against *foreign* dignitaries. Moreover, the Dutch blasphemy ban was included in a section (Title V) with speech crimes that are concerned with the protection of the public order, such as incitement to commit a crime (article 131d), group defamation (article 137c), and incitement to hatred (article 137d). With regard to the European and international human rights law dimensions: the choice has

[37] See G. Van Dijck, M. Snel & T. Van Golen, *Methoden van rechtswetenschappelijk onderzoek*, Den Haag: Boom juridisch 2018, p. 84. I. Dobinson & F. Johns, 'Qualitative Legal Research', in: M. McConville & W.H. Chui (eds.), *Research Methods for Law*, Edinburgh University Press 2007, p. 18-19 describe this approach as follows: 'Doctrinal or theoretical legal research can be defined in simple terms as research which asks what the law is in a particular area. The researcher seeks to collect and then analyse a body of case law, together with any relevant legislation (so-called primary sources). This is often done from a historical perspective and may also include secondary sources such as journal articles or other written commentaries on the case law and legislation. The researcher's principal or even sole aim is to describe a body of law and how it applies. In doing so, the researcher may also provide an analysis of the law to demonstrate how it has developed in terms of judicial reasoning and legislative enactment. In this regard, the research can be seen as normative or purely theoretical.'

been made to examine two important human rights documents, namely the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

4. Structure

This thesis is comprised of five chapters followed by a general conclusion. Chapter 2 discusses defamation of foreign heads of state. The chapter traces the roots of this crime in Dutch law back to 1816, when measures were adopted in response to pressure from foreign powers in order to maintain 'cordial relations with other nations.' Chapter 3 examines the development of the Dutch crime of *lèse-majesté*; the prohibition on defaming the national monarch. Chapter 4 examines the Dutch blasphemy ban. Chapter 5 synthesizes the studies of the three speech crimes and examines them in light of democratic free speech theory. Chapter 6 of this thesis focuses on the informal aspect of blasphemy, by discussing the background of and responses to the *Innocence of Muslims* video.

Chapter 2 The defamation of foreign heads of state

Introduction

Contemptuous expression directed at sovereigns may have an internal or an external dimension. In the first instance, contempt is directed at national figures (for example a King or Queen) while in the second case, insults are directed at *foreign* sovereigns. This chapter addresses the Dutch, European, and international law perspectives of the defamation of foreign heads of state.[38]

In the Netherlands, measures against the defamation of foreign rulers were adopted in the early nineteenth century. The law of 28 September 1816 as well as the failed Bill of 1818 will be discussed. The work thereafter focuses on the ban that was enacted in 1886. Under this provision, the former article 117 of the Criminal Code, people were convicted for insulting, among others, Adolf Hitler, Franco, and Lyndon B. Johnson. Next, the legal framework that succeeded article 117 will be discussed. Hereafter, a 2016 Bill proposing to repeal the crime of insulting foreign heads of state, which entered into force in 2020,[39] will be discussed. Lastly, bans on defaming foreign heads of state will be discussed in light of European and international human rights law.

[38] In the Netherlands, the crime is commonly referred to as 'insulting heads of *friendly* states' (*belediging van bevriende staatshoofden*) instead of '*foreign*.' The legal term 'friendly state' (*bevriende staat*) is defined in article 87of the Dutch Criminal Code as 'a foreign power with which the Netherlands is not engaged in armed conflict.'

[39] Bulletin of Acts and Decrees 2019, no. 277.

A. National law

1. The Penal Code of the Kingdom of Holland, the *Code Pénal*, and the freedom of the press after Napoleon's censorship

The Penal Code of the Kingdom of Holland (*Crimineel Wetboek voor het Koningrijk Holland*) of 1809 contained a provision on the defamation of foreign dignitaries. Article 92, incorporated in a Title on mutiny, riot, and breaches of public authority, prescribed that the defamation provisions of that Title (which included expression intended to defame, deride or taunt higher or lower powers, such as the King)[40] also applied to insults directed at foreign powers, with which 'this realm is in peace and friendship, or at their envoys or retinue, or at foreign couriers, parlementaires or prisoners of war, or at whoever who, according to the law of nations, can count on special protection afforded by the sovereign of the country in which they reside.'

After the annexation of the Kingdom of Holland by the First French Empire, the *Code Pénal* became the law of the land in 1811.[41] This code did not contain a special provision tailored to the defamation of foreign powers, but only a number of general defamation provisions.[42]

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[40] Article 89 Penal Code of the Kingdom of Holland. See also chapter 3.

[41] The *Code Pénal* entered into force on 1 January 1811. See O. Moorman van Kappen, 'Bijdrage tot de codificatiegeschiedenis van ons strafrecht rond het begin van de negentiende eeuw: het ontwerp-lijfstraffelijk wetboek van 1804', *BMGN – Low Countries Historical Review*, 1978, p. 309.

[42] Articles 367-378 of the *Code Pénal*. It appears that a trial against Charles de Ceulleneer, the editor of the journals *Mercure des Pays Bas* and *Mercure Surveillant* was a catalyst for a supplementary law of 28 September 1816 that introduced a special provision tailored to the insult of foreign sovereigns, which is discussed in the next section. On 29 May 1816, De Ceulleneer was convicted by the court of Liège for publishing an article entitled *La Sainte Alliance*. This article was largely a translation of an article entitled The Holy Alliance, which had appeared in the English paper The Morning Chronicle of 19 February 1816. De Ceulleneer was sentenced to imprisonment for a term of one month, and was ordered to pay a fine of 100 francs. In addition, he was ordered to pay the costs of the proceedings, and his civil rights were revoked for a period of five years. De Ceulleneer

On 24 January 1814, the 'Sovereign Prince of the United Netherlands' (*Souverein Vorst der Vereenigde Nederlanden*) Willem I enacted an order 'regarding the book trade and ownership of literary works.'[43] Article 1 of this order provided that 'The French Laws and Regulations concerning Printing Houses and the Book Trade, including those concerning Newspapers, are, as of now, fully abolished.' The preamble of this order explained that those French laws and regulations had not only caused 'adverse congestion in the Book Trade', but they also purported 'to suppress entirely the freedom of the press, to prevent the advancement of the enlightenment, and to subject everything to arbitrary censorship, utterly contrary to the liberal way of thinking that every true Dutchman cherishes most deeply.'

An example of such censorship is the imperial decree of 5 February 1810. This decree prescribed, among other things, that no work was allowed to be printed that did not correspond with the duties of the subjects towards the Sovereign, or to the interests of the State.[44] As a

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was convicted on the basis of article 367 of the *Code Pénal*. Sautyn Kluit argues that 'the prosecution against Ch. De Ceulleneer must have been the primary reason for the law of 28 September 1816. The evil that that law sought to counter was to be found in Belgium. *There* lived (…) many supporters of Napoleon who were driven away from France (…).' (W.P. Sautyn Kluit, 'Dagblad-vervolgingen in België; 1815-1830', in: R. Fruin (ed.), *Bijdragen voor Vaderlandsche Geschiedenis en Oudheidkunde*, 's-Gravenhage 1892, p. 319-320). Colenbrander writes that 'vitriol against Bourbon France', which could be found in the *Mercure Surveillant* as well as in 'other publications by refugees', had led to a flood of complaints from 'the French legation and from allies that are very touchy on press offences.' (H.T. Colenbrander, 'Willem I en de mogendheden (1815-1824)', in: D. van Blom et al (ed.), *De Gid*s, 1931, p. 380). According to Colenbrander, to be better able to counter insults directed at foreign sovereigns, the law of 28 September 1816 made such insults a separate crime, (see H.T. Colenbrander, 'Willem I en de mogendheden (1815-1824)', in: D. van Blom et al (ed.), *De Gid*s, 1931, p. 380). The information presented in this footnote about the trial against Charles de Ceulleneer stems largely from the hand-written judgment in this case, kept in the public archives (*Rijksarchief*) of Liège, Belgium. Photo-copies are available upon request.

[43] Published in the Netherlands Government Gazette (*Nederlandsche Staatscourant*) of 2 February 1814.

[44] See A.C. van Heusde, *De vrijheid van drukpers hier te lande uit een historisch oogpunt beschouwd*, Haarlem: Van Loghem Jr 1847, p. 26. For a detailed discussion of the system of censorship, including examples of 'faulty' works, see B. Verheijen, *Nederland onder Napoleon: Partijstrijd en natievorming 1801-1813*, Nijmegen: Vantilt 2017, p. 225-250. See also J. Weijermars, *Stepbrothers: Southern Dutch Literature and Nation-building Under Willem I, 1814-1834*, Leiden/Boston: Brill 2015, p. 50-59.

result of this decree, according to Van Heusde writing in 1847, the 'freedom of the press was totally erased' and 'writers found themselves exposed to the capriciousness of often incompetent people.'[45] Article 4 of the order of 24 January 1814 broke with this system of censorship and introduced a system of 'individual accountability,'[46] in which the necessity of prior permission was replaced by the possibility of subsequent punishment, a system that, in essence, is in place to this day.[47]

2. The law of 28 September 1816

While the freedom of the press was enshrined in the Constitution of 1815,[48] it would still be subject to restrictions.[49] One of these restrictions was a law entitled 'the law of 28 September 1816, introducing penalties for those who insult foreign Powers.'[50] Article 1 of this law punished 'Those who, in their writings, insult or deride the character of foreign Sovereigns or Monarchs, deny or question the legality of their lineage and government, or criticize their deeds in deriding or insulting terms.' It was eventually decided not to adopt the penalty that was

[45] A.C. van Heusde, *De vrijheid van drukpers hier te lande uit een historisch oogpunt beschouwd*, Haarlem: Van Loghem Jr. 1847, p. 27. Bodel Nyenhuis speaks of a decree in which most provisions were 'pervaded with a despotic zeal for power.' See J.T. Bodel Nyenhuis, *De wetgeving op drukpers en boekhandel in de Nederlanden tot in het begin der XIX^{DE} eeuw*, Amsterdam 1892, p. 229.

[46] See also D. Simons, *De vrijheid van drukpers in verband met het Wetboek van Strafrecht*, 's-Gravenhage: Belinfante 1883, p. 15.

[47] See article 7 of the Dutch Constitution.

[48] In article 227: 'Each person is permitted to express his thoughts and feelings in the press, as an efficient means of disseminating knowledge and to advance understanding, without the need to have prior permission, yet remaining accountable to society or particular persons for anything he writes, prints, publishes or distributes that may infringe their rights.'

[49] For a detailed discussion, see B. Delbecke, *De lange schaduw van de grondwetgever: Perswetgeving en persmisdrijven in België (1831-1914)*, Gent: Academia Press 2012, in particular p. 10-20.

[50] Bulletin of Acts and Decrees 1816, no. 51.

originally thought of, namely public whipping and branding with a hot iron.[51] Instead, the penalty would be a fine of 500 guilders or, in cases where the convicted was unable to pay this sum, imprisonment of six months. Repetition of the offence carried a penalty of between one and three years' imprisonment.[52]

According to the Royal Message (*Koninklijke Boodschap*) that accompanied the Bill, the measure was necessary to 'put a stop to insults directed at neighbouring Governments and Sovereigns, with which We live in peace and in good relations.'[53] The Royal Message explained that the Dutch government wanted to 'preserve friendly relations with other nations' and that it wanted to 'cultivate the benevolence of their Governments.'[54] The proposed law was meant to articulate the 'duty to ensure that no new disturbances or upheaval can ever be attributed to the citizens of a realm whose founding principles are the affirmation of general peace and rest.'[55]

The Royal Message pointed out that 'abuses of the press' had led to repeated complaints being lodged with the Dutch government.[56] Diplomatic correspondence shows that the writings of French refugees located in the southern part of the Netherlands caused commotion in the

[51] See Chad to Lord Castlereagh, 9 September 1816, in: H.T. Colenbrander, *Gedenkstukken der Algemeene Geschiedenis van Nederland van 1795 tot 1840. Achtste deel. Eerste stuk. Regeering van Willem I 1815-1825*, 's-Gravenhage 1915, p. 40; Chad to Lord Castlereagh, 13 September 1816, in: H.T. Colenbrander, *Gedenkstukken der Algemeene Geschiedenis van Nederland van 1795 tot 1840. Achtste deel. Eerste stuk. Regeering van Willem I 1815-1825*, 's-Gravenhage 1915, p. 40.

[52] Furthermore, article 2 of this law contained a provision declaring the penalties mentioned in article 1 applicable to printers, publishers, peddlers, and sellers of insulting works. Convicted printers, publishers, and sellers would lose their patent for three years, or six years for a repeat offence. Article 3 provided that articles copied from another publication or foreign newspaper would not have a mitigating effect. Article 4 was a procedural provision.

[53] Proceedings of the States General, 1815-1816, no. XLII, 1, p. 1028.

[54] Proceedings of the States General, 1815-1816, no. XLII, 1, p. 1028.

[55] Proceedings of the States General, 1815-1816, no. XLII, 1, p. 1028.

[56] Proceedings of the States General, 1815-1816, no. XLII, 1, p. 1028.

months prior to the introduction of the law of 28 September 1816.[57] The Dutch Foreign Secretary, Van Nagell, had received complaints from foreign representatives, and he expressed his concerns about those complaints to King Willem I. On 10 April 1816, he wrote to the King: 'The style of the writers of Liège, meanwhile, has crossed all boundaries of discretion, and if similar miscreants continue to distribute their pestilence, frankly, I must say to you, Your Majesty, that I foresee dire consequences.'[58] The matter seemed to be quite serious. In early September 1816, France threatened to 'cease all diplomatic relations between France and Holland [unless] some decisive measures are adopted against the licentiousness of the Belgian press.'[59]

3. The Bill in Parliament

The law of 28 September 1816 made insults directed at foreign dignitaries a separate crime. Two weeks after the Bill was sent to the Dutch House of Representatives (*Tweede Kamer*), it was up for debate. During this debate on 25 September 1816, a total of nine representatives took the opportunity to share their views on the Bill. Most of the speakers endorsed the Bill, which corresponded with a widely held view that insults directed at foreign powers needed to

[57] For example, see James to Lord Castlereagh, 29 March 1816, in: H.T. Colenbrander, *Gedenkstukken der Algemeene Geschiedenis van Nederland van 1795 tot 1840. Achtste deel. Eerste stuk. Regeering van Willem I 1815-1825*, 's-Gravenhage: Martinus Nijhoff 1915, p. 25; James to Lord Castlereagh, 12 April 1816, in: H.T. Colenbrander, *Gedenkstukken der Algemeene Geschiedenis van Nederland van 1795 tot 1840. Achtste deel. Eerste stuk. Regeering van Willem I 1815-1825*, 's-Gravenhage: Martinus Nijhoff 1915, p. 28-29.

[58] Van Nagell to the King, 10 April 1816, in: H.T. Colenbrander, *Gedenkstukken der Algemeene Geschiedenis van Nederland van 1795 tot 1840. Achtste deel. Tweede Stuk. Regeering van Willem I 1815-1825*, 's-Gravenhage: Martinus Nijhoff 1915, p. 36.

[59] Chad to Lord Castlereagh, 5 September 1816, in: H.T. Colenbrander, *Gedenkstukken der Algemeene Geschiedenis van Nederland van 1795 tot 1840. Achtste deel. Eerste stuk. Regeering van Willem I 1815-1825*, 's-Gravenhage: Martinus Nijhoff 1915, p. 39.

be suppressed.[60] For example, representative Van Sasse van Ysselt argued that 'The outrageous slander which, since a long time, spews out the crudest defamation against acknowledged Monarchs, proves unquestionably the necessity to curb this abuse.'[61] He gained support from his colleague De Nieuport, who asked whether article 227 of the Constitution, which protected the freedom of the press, allowed for 'scoffing with impunity the entire world, and in particular foreign Sovereigns.' 'Certainly not', was his answer. 'Diatribes, insults, profanity have never advanced understanding', and article 227 of the Constitution 'gave no license to such debauchery.'[62] Ultimately, the Bill was adopted in the House of Representatives by a wide margin: sixty-four votes were in favour of the Bill, and only four were against it.[63] On 28 September 1816, the representatives were informed that the Senate (*Eerste Kamer*) had also approved the Bill,[64] which was published in the Bulletin of Acts and Decrees (*Staatsblad*) the same day.

4. The failed Bill of 1818

In a letter to Wellington on 16 September 1816, the Dutch Foreign Secretary Van Nagell expressed confidence that 'the law against the licence of the press' would be effective. 'We shall be able to prevent the odious publications, and the set of disturbers must go to other

[60] See also Proceedings of the States General, 1815-1816, XLII, 3, p. 1029 (*Algemeen Verslag der Centrale Afdeling*).

[61] Proceedings of the States General, 1815-1816, 25 September 1816, p. 265-266.

[62] Proceedings of the States General, 1815-1816, 25 September 1816, p. 266.

[63] Proceedings of the States General, 1815-1816, 25 September 1816, p. 269; Netherlands Government Gazette of 26 September 1816, second supplement.

[64] Proceedings of the States General, 1815-1816, 28 September 1816, p. 272.

countries to distil their heinous poison', Van Nagell wrote.[65] He also wrote that he hoped that the law 'proved the sincere desire of my Royal Master to do what is in his power to promote the tranquillity of France.'[66]

Yet, things turned out differently. In February 1818, the Minister of Justice, Van Maanen, wrote that the provisions of the law proved 'insufficient to combat the abuses of the press.'[67] Van Maanen complained in Parliament that 'people managed to escape punishment by sophisticated and cunning arguments about the true sense and aim of the law.'[68] Again at the insistence of foreign powers,[69] the Minister introduced a new Bill.[70] This Bill aimed to sharpen the terms and broaden the scope of the law of 28 September 1816.

Everything that had been prohibited in the law of 28 September 1816 was also included in the new Bill, but the new Bill went further. For example, article 1 of the Bill also criminalized those whose 'writings purport to incite the citizens of friendly States to unrest, rebelliousness, or disobedience vis-à-vis their legitimate governments.' Article 2 punished the defamation,

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[65] Van Nagell to Wellington, 16 September 1816, in: H.T. Colenbrander, *Gedenkstukken der Algemeene Geschiedenis van Nederland van 1795 tot 1840. Achtste deel. Eerste stuk. Regeering van Willem I 1815-1825*, 's-Gravenhage: Martinus Nijhoff 1915, p. 41.

[66] Van Nagell to Wellington, 16 September 1816, in: H.T. Colenbrander, *Gedenkstukken der Algemeene Geschiedenis van Nederland van 1795 tot 1840. Achtste deel. Eerste stuk. Regeering van Willem I 1815-1825*, 's-Gravenhage: Martinus Nijhoff 1915, p. 41.

[67] Proceedings of the States General, 1817-1818, no. XX, 2, p. 293. 'The press remained as hostile as before' according to E.H. Karsten, 'Fransche uitgewekenen in het Koningrijk der Vereenigde Nederlanden', in: J.W. Bok & W.B.J. van Eyk (eds.), *Vaderlandsche letteroefeningen*, Utrecht 1865, p. 80.

[68] Proceedings of the States General, 1817-1818, 3 February 1818, p. 216.

[69] See G.W. Vreede, 'Een woord over de Wet van 28 September 1816 (Staatsblad no. 51), tot vaststelling van straffen voor hen, die vreemde Mogendheden beleedigen', in: C.A. den Tex & J. van Hall (eds.), *Nieuwe bijdragen voor regtsgeleerdheid en wetgeving. Tweede deel voor het jaar 1852*, Amsterdam 1852, p. 189: '(…) the Government felt compelled to give in to the pressure of the envoy of Louis XVIII, marquis de La Tour du Pin, by introducing a broader proposal.' See also W.J.F. Nuyens, *Geschiedenis van het Nederlandsche volk, van 1815 tot op onze dagen. Eerste deel*, Amsterdam: C.L. van Langenhuysen 1883, p. 113-114; W. Lemmens, 'Het ontluikend liberalisme: Franse migranten, hun netwerken en journalistieke activiteiten in de Zuidelijke Nederlanden (1815-1820)', *Belgisch Tijdschrift voor Filologie en Geschiedenis*, 2011, p. 1187.

[70] Proceedings of the States General, 1817-1818, no. XX, 2, p. 293-294, 295-296.

insult, or taunting of 'the person or character of Ambassadors, Ministers and other diplomatic Agents of foreign Powers, who are accredited by the Government of the Netherlands, and who are entitled, under the law of nations, to special protection from the Sovereign in whose country they reside.' The proposed sanctions were anything but mild. Violation of the provisions in this law carried a sentence of six months' to three years' imprisonment and possibly a fine of three to five hundred guilders. Repetition of the offence carried a penalty of three to five years' imprisonment, a fine of 500 guilders, and a permanent ban on printing, publishing, or selling any work.

The House of Representatives was much less keen on this Bill than it was on the law of 28 September 1816. While a large majority of representatives was in favour of the latter law, a small majority opposed the 1818 Bill: it was rejected by thirty-nine votes to thirty-six.[71] It was argued that the Bill expressed 'an indulgence towards foreign powers' while 'similar measures with regards to the interests of our Realm are lacking.'[72] The response from Minister Van Maanen contains an interesting feature of the attempts to regulate the press. Namely, Van Maanen made it clear that combatting insults was a matter of *self-interest*:

> 'The Bill is not a result of any indulgence towards foreign Powers, it is not only in their interest; instead it is in the interests of His Majesty's own subjects; the Bill is a result of the King's conviction that He has to do all that is possible to prevent everything that could damage the common cause, or the interests of His subjects, by the weakening of friendly relations with foreign Governments, which could be utterly pernicious in so many ways.'[73]

[71] Proceedings of the States General, 1817-1818, 20 February 1818, p. 272.

[72] Netherlands Government Gazette of 21 February 1818, p. 1.

[73] Netherlands Government Gazette of 21 February 1818, p. 1.

The failure of this proposal meant that the law of 28 September 1816 remained in place. Yet, this law was very seldom applied. In an article from 1852, Vreede speaks of a 'well-nigh forgotten law.'[74] He mentions only one case in which the law was indirectly addressed.[75] In his review of insult legislation, Kann calls the law 'from the nature of things, of extremely rare use.'[76] He does not mention any cases in which the law was applied.

5. Article 117 of the 1886 Criminal Code

The main reasons for the attempts to restrict the freedom of the press in the turbulent post-Napoleon era were maintaining peace on the continent and friendly relations with other nations. These issues were regarded as a matter of national interest. These themes recurred in subsequent insult legislation.

In 1886, a new Criminal Code entered into force in the Netherlands. This code contained a provision that can be regarded as the successor of the law of 28 September 1816.[77] Article 117 provided that 'the intentional insult of a ruling sovereign or other head of a friendly state is punishable by a term of imprisonment of not more than four years or a fine of 300 guilders.' The scope of this prohibition was broader than that of the law of 1816 in the sense that the 1816 law only applied to insults of *Sovereigns* or *Monarchs*, and not to heads of state in other forms

[74] G.W. Vreede, 'Een woord over de Wet van 28 September 1816 (Staatsblad no. 51), tot vaststelling van straffen voor hen, die vreemde Mogendheden beleedigen', in: C.A. den Tex & J. van Hall (eds.), *Nieuwe bijdragen voor regtsgeleerdheid en wetgeving. Tweede deel voor het jaar 1852*, Amsterdam 1852, p. 185.

[75] Namely, Dutch Supreme Court, 16 February 1841 (regarding an insult to the King), in J. van den Honert, *Verzameling van arresten van den Hoogen Raad der Nederlanden. Strafrecht en strafvordering. Derde Deel*, Amsterdam 1841, p. 281-290.

[76] H.E. Kann, *Overzigt der hedendaagsche Nederlandsche wetgeving in zake van laster, hoon, en belediging*, 's-Gravenhage 1866, p. 78.

[77] The law of 1816 was repealed by way of the law of 15 April 1886 (*Invoeringswet Wetboek van Strafrecht*), articles 2 and 3 (c).

of government (for example, the President of the United States).[78] Article 117 protected 'he who, either in a republic or a monarchy, is vested with the highest authority.'[79] In addition, article 118 made it a crime to 'intentionally insult a representative of a foreign power, acting in his quality as representative', while article 119, put briefly, prohibited the distribution or display of material insulting to said foreign officials.

6. Judges applying article 117

As there does not seem to be that much (published) case law on article 117 in the early decades of its existence, there is reason to suspect that article 117 was either relatively rarely invoked by public prosecutors for policy reasons, or there were simply not that many insults made.[80] However, the law was certainly not a dead letter. The following paragraphs discuss a number of cases in which this provision was applied. The common thread of these cases is that one could express 'sober' criticism of foreign heads of state, yet judges tended to regard abusive terms or criticism expressed in a 'needlessly offensive tone' as a violation of article 117.[81]

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[78] The title and preamble of the law of 28 September 1816 are somewhat misleading, as they speak of insults to foreign *powers*. However, this broader term does not appear in the provisions of that law.

[79] Proceedings of the States General, 1878-1879, no. 110, 3, p. 85.

[80] The following databases have been searched: *Delpher* for news reports about court cases and *Weekblad van het Recht* for records of court cases. An overview in *Weekblad van het Recht* of 16 December 1918 lends some credence to the presumption that there were few court cases. This overview of the years 1913-1917 shows that in 1914 one person was convicted for violating article 117, while in 1915 a total of four people, one recidivist among them, were convicted.

[81] Although there have been exceptions. In a case against a scholar of history who had written about the 'betrayal' of the Italian king, who, in the view of the historian 'had broken the oath he had taken on the constitution', the court – after hearing a professor of modern history (and a colleague of the defendant), who gave testimony of the defendant's bona fides – acquitted the defendant and argued that 'serious historians are entitled to discuss matters such as the one in question.' See *Koning van Italie beleedigd. Literator staat terecht*, Provinciale Overijsselsche en Zwolsche Courant 1 October 1934; *Beschuldigd van beleediging van den Koning van Italië*, Nieuwsblad van Friesland 1 October 1934; *Beleediging van een bevriend staatshoofd. Interessante*

One of the first trials based on the ban on insulting foreign heads of state was that of an anarchist by the name of W.H. Methöfer.[82] In 1893, Methöfer stood trial for complicity in the distribution of a pamphlet that incites to criminal acts and in which the ruling sovereign of a friendly state is insulted.[83] Methöfer stood trial for receiving and storing in his house over 7,000 copies of a handbill in which people were incited to commit criminal acts and in which the German emperor was called a 'rascal' (*Lause junge*) and a 'scoundrel' (*der Schurke Seine Majestät*).[84] Methöfer was ultimately sentenced to three months' imprisonment.[85]

Another conviction took place in 1914. In this case a man had written a critical political commentary in which he nicknamed the German emperor 'the Disloyal One' (*de Trouwelooze*). While the court of first instance acquitted the defendant – the court was of the opinion that while the phrase was in itself of an insulting nature (*van krenkenden aard zijn voor genoemd staatshoofd*), yet the intent to insult was not established.[86] Yet, upon appeal, the defendant was less fortunate. The court of appeal regarded – similar to the court in first instance – most of the political commentary within the limits of the law, except for the disparaging nickname. The usage of that nickname, the appellate court argued, was 'needlessly offensive' and 'impugns the honour and good name of the German emperor.' As for the requirement of intent, the

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quaestie voor historici, Eindhovensch Dagblad 1 October 1934; *Smaadschrift? Dr. W. van Ravesteijn vrijgesproken*, Leeuwarder Nieuwsblad 5 October 1934. Another exception concerned political satire. In this case the chief editor of a newspaper that had published a cartoon that mocked Hitler was, ultimately, acquitted. See *Beleediging van Hitler*, Leidsch Dagblad 16 October 1936; Dutch Supreme Court 24 May 1937, in *Weekblad van het Recht* 14 September 1938.

[82] In July 1891, a criminal report was made against a man on the grounds of intentionally insulting a foreign head of state, during a gathering of social democrats. See Algemeen Handelsblad 22 July 1891; Provinciale Overijsselsche en Zwolsche Courant 21 July 1891.

[83] *Zaak-Methöfer te Arnhem*, Algemeen Handelsblad 27 June 1893.

[84] *Zaak-Methöfer te Arnhem*, Algemeen Handelsblad 27 June 1893; Weekblad van het Recht 18 August 1893.

[85] *Beleediging van den Duitschen Keizer*, Nieuwsblad van het Noorden 26 September 1894. I suspect that the severity of the penalty was largely due to the incitement to commit criminal acts.

[86] Court of Amsterdam, 15 October 1914, in *Weekblad van het Recht*, 28 October 1914.

appellate court found that that requirement was fulfilled since the defendant had used the offensive phrase 'knowingly and willingly.'[87] The defendant was sentenced to pay a fine of 100 guilders for violating article 117 – a much less severe punishment than the one proposed by the prosecutor, which was three months' imprisonment.[88] Furthermore, people were convicted for calling the Tsar of Russia a 'blood tsar' (*bloedtsaar*)[89] and for insulting Tsar Boris III of Bulgaria.[90]

The 1930s saw multiple convictions for insults directed at people who are considered to be responsible for one of the darkest periods of modern European history. In 1935, a defendant was ordered to pay a fine of 60 guilders for calling Hitler a 'murderer.'[91] In 1938, a defendant was ordered to pay a fine of 40 guilders for publicly stating that Hitler was a 'coward.' According to the judge, the fine was intended to teach the defendant 'to henceforth set a guard over his mouth.'[92] In the same year, the Dutch playwright Maurits Dekker was convicted over a short pamphlet published in 1936 entitled 'Hitler: an attempt at explanation' (*Hitler: een poging tot verklaring*). In it, Dekker called Hitler a clown, a liar, a bungler, and a buffoon.[93] Dekker argued that he had not intended to insult Hitler, but that he wanted 'to act, as a Dutchman and a Jew, against the fateful ideas that threaten to infect our people.'[94] His plea was

[87] Amsterdam Court of Appeal, 2 December 1914, in *Weekblad van het Recht* 28 December 1914.

[88] Amsterdam Court of Appeal, 2 December 1914, in *Weekblad van het Recht* 28 December 1914.

[89] *Beleediging van den tsaar*, De Telegraaf 8 June 1915; *Beleediging van den Tsaar*, Arnhemse Courant 14 June 1915.

[90] *Majesteitsschennis?*, De Tribune 26 June 1925.

[91] Arnhem Court of Appeal, 31 October 1935, in *Weekblad van het Recht* 8 January 1936; *Een bevriend staatshoofd beleedigd*?, De Telegraaf 18 October 1935.

[92] Court of Groningen 11 January 1938, in Weekblad van het Recht 25 March 1939.

[93] *Maurits Dekker over Hitler. Honderd gulden boete geëischt wegens beleediging van Hitler*, Bataviaasch Nieuwsblad 4 May 1938.

[94] *Maurits Dekker over Hitler. Honderd gulden boete geëischt wegens beleediging van Hitler*, Bataviaasch Nieuwsblad 4 May 1938.

of no avail as he was fined 100 guilders.[95] Another case involved a local politician who was prosecuted for calling Franco a 'bandit' (*bandiet*) in a meeting of 5 March 1939.[96] Even though the politician admitted that he had uttered the insulting term, he claimed that he did not know for certain whether or not Franco was a friendly head of state at the time of his remark[97] (in fact, the Dutch government had recognized the Franco regime less than two weeks prior, on 24 February 1939).[98] The judge in the case looked upon the affair as 'a regrettable mistake' but still imposed a fine of 25 guilders.[99]

7. The ratio legis of article 117

What is interesting about this last case is that it provides a glimpse into the rationale of article 117. The nineteenth century parliamentary records are almost silent on the *raison d'être* of the prohibition. Article 117 was placed in a section of the Criminal Code (Book 2, Title III) entitled 'crimes against heads and representatives of friendly states.' The provisions in this section, the government wrote in the explanatory memorandum of the 1886 Criminal Code, were required by 'obligations under international law, and the interests of the state to meet those obligations.'[100] The legislative history does not tell us much more about the *ratio legis* of article

[95] *Hitler beleedigd*, Bataviaasch Nieuwsblad 6 May 1938; *Maurits Dekker tot f 100 boete veroordeeld. Rechtbank acht brochure opzettelijk beleedigend*, Algemeen Handelsblad 6 May 1938.

[96] *Beleediging van Franco*, De Bredasche Courant 15 March 1939; *Beleediging van Franco*, De Maasbode 27 May 1939.

[97] *Beleediging van Franco*, De Maasbode 27 May 1939.

[98] *Nederland erkent Franco de jure*, De Leidsche Courant 24 February 1939.

[99] *Beleediging van Franco*, De Maasbode 27 May 1939. Another case concerning an insult to Franco took place in 1952. In this case a local politician for the communist party was sentenced to a fine of 30 guilders, or alternatively six days imprisonment, for calling Franco 'the murderer of the Spanish people' at an outdoor meeting. See *Mag Franco een moordenaar genoemd worden?*, De Waarheid 13 March 1952.

[100] Proceedings of the States General, 1878-1879, no. 110, 3, p. 85.

117, nor did the government specify which provisions in international law required the ban on defaming foreign heads of state.[101] 'There are no traces of a debate about the principle; apparently it was regarded as being entirely self-evident', the Dutch Ministers Polak and Luns wrote in 1971.[102] However, in the case against the politician who called Franco a bandit, the public prosecutor mentioned that 'present-day circumstances demand that provocative things are avoided.'[103]

The prosecutor's remark indicates a fear that insults could weaken ties with foreign countries, or worse, and that article 117 was intended to prevent this from happening. This was even more clearly stated in a 1933 case of a Member of Parliament who was accused of insulting *Reichspräsident* Paul von Hindenburg by calling him 'the greatest slaughterer of 1914-1918, who was instrumental in the killing of hundreds of thousands of people.'[104] During the trial, the public prosecutors explained that insults directed at foreign heads of state should not take place 'in view of friendly relations between the states,'[105] and that 'diplomatic relations with a friendly state, such as Germany, may not be disrupted.'[106] That was considered to be a 'requirement of self-preservation', because 'leaving insults unpunished could constitute a *casus*

[101] Cf. the Proceedings of the States General, 1880-1881, 29 October 1880 (*Vaststelling van een Wetboek van Strafregt* (*Beraadslaging over de artt. 55 – 156*)), p. 180, which only mentions that the provisions were approved 'without parliamentary discussion and without a roll call vote.'

[102] Parliamentary documents, House of Representatives, 1970-1971, no. 11249, 3, p. 6. See also: C.A. Groenendijk, 'Belediging van bevriende staatshoofden (art. 117 Wetboek van Strafrecht)', *Rechtsgeleerd Magazijn Themis*, 1968, p. 4: 'The legislative history is not clear on the reasons for the provisions of Title III.'

[103] *Beleediging van Franco,* De Maasbode 27 May 1939. Writing in the context of articles 117 and 118, Simons regarded 'friendly relations with other nations' as a 'primary requirement of our national interest.' See D. Simons, *De vrijheid van drukpers in verband met het Wetboek van Strafrecht*, 's-Gravenhage: Belinfante 1883, p. 156.

[104] *Lou de Visser voor de rechtbank*, Provinciale Geldersche en Nijmeegsche Courant 18 May 1933.

[105] *Beleediging van president Von Hindenburg*, Het Vaderland 18 May 1933; *Lou de Visser verdacht van beleediging*, Dagblad De Grondwet 20 May 1933.

[106] *L. de Visser staat terecht,* Algemeen Handelsblad 30 June 1933.

belli.'[107] Despite differing political contexts, the principles embodied in the law of 28 September 1816 are also visible in the application of its successor, namely to foster international relations, and to prevent arousing the wrath of (mightier) foreign powers by leaving insults directed at their leaders unpunished.

8. The 1960s: insults directed at President Lyndon B. Johnson

The 1960s were a decade that turned out to be of great significance for the future of article 117. This decade saw many prosecutions – the Minister of Justice, Polak, spoke of 'massive numbers of perpetrators'[108] – for insults of Lyndon B. Johnson, President of the United States from 1963 to 1969. America's increased involvement in Vietnam during Johnson's administration led to intense protests in the Netherlands. Popular expressions of dislike of American foreign policy were the phrases 'Johnson, Murderer', and 'Johnson, a war criminal according to the principles of Nuremberg and Tokyo.'

Yet, in line with earlier case law, this violated article 117. In 1966, a student was sentenced to three weeks' imprisonment, of which two weeks were suspended, for calling Johnson a murderer.[109] The Dutch Supreme Court upheld the conviction and reasoned that the words 'Johnson, murderer' 'impugn the honour and reputation [of President Johnson] and, as such, are of an insulting nature.'[110] The Supreme Court dismissed the defendant's argument that article 117 should not be applied because Johnson was also a 'practicing politician' as well as

[107] *L. de Visser staat terecht*, Algemeen Handelsblad 30 June 1933.

[108] Parliamentary documents, Senate, 1967-1968, 13 March 1968, p. 449.

[109] *Cassatieberoepen demonstranten verworpen*, Algemeen Handelsblad 8 November 1967.

[110] Dutch Supreme Court, 7 November 1967, in *Nederlandse Jurisprudentie* 1968/44.

a head of state. Moreover, the Supreme Court put aside the argument that article 117 required that diplomatic relations with another state could be actually jeopardized by an insult.[111]

Another form of protest, slightly subtler than calling Johnson a 'murderer', was to call the president a 'war criminal, according to the principles of Nuremberg and Tokyo.' Yet again, this was not protected by the freedom of expression. In this case, the Supreme Court argued that the phrase 'contained such a serious accusation that the defendant must have understood that it was capable of impugning the honour and reputation of the head of state in question.'[112] The Supreme Court argued that article 117 'should not be an obstacle in criticizing the policies of foreign heads of state, on the condition that such criticism can be deemed to serve the general interest'; and 'The use of needlessly offensive descriptions can never be justified by pleading to act in the general interest.'[113]

Cases for insulting President Johnson typically resulted in – partially suspended – sentences of two to four weeks' imprisonment, sometimes accompanied by a fine.[114] The outcome of these cases caused societal discontent, and the desirability of article 117 was called into question.[115] During a debate in the Senate on 13 March 1968, the Minister of Justice Polak stated that 'article 117 is not tailored to modern constitutional situations.'[116]

9. The 1978 legal framework

[111] Dutch Supreme Court, 7 November 1967, in *Nederlandse Jurisprudentie* 1968/44.

[112] Dutch Supreme Court, 5 November 1968, in *Nederlandse Jurisprudentie* 1969/78.

[113] Dutch Supreme Court, 5 November 1968, in *Nederlandse Jurisprudentie* 1969/78.

[114] C.A. Groenendijk, 'Belediging van bevriende staatshoofden (art. 117 Wetboek van Strafrecht)', *Rechtsgeleerd Magazijn Themis*, 1968, p. 1.

[115] See for example J.D. van der Meulen, *De belediging van hoofden van bevriende staten. Preadvies uitgebracht voor de Nederlandse Vereniging voor Rechtsvergelijking*, Deventer 1970, p. 16; J.M. van Bemmelen, 'Belediging en vrijheid van meningsuiting', *Nederlands Juristenblad*, 1969, p. 434.

[116] Parliamentary documents, Senate, 1967-1968, 13 March 1968, p. 449.

Efforts were made to change the Criminal Code. In 1971, the government introduced a Bill entitled 'New regulations concerning criminal insults,'[117] which was eventually adopted in 1978.[118] The legislative changes of 1978 created two regimes of regulating insults directed at foreign heads of state. Firstly, two provisions were included in Title III, entitled 'Crimes against heads of friendly States and other internationally protected persons.' Article 118 of the Criminal Code provided that

1. The intentional insult directed at the head or a member of the government of a friendly state, in the exercise of his duties staying in the Netherlands, is punishable by a term of imprisonment of not more than two years or a fine of the fourth category.
2. Subject to the same punishment is the intentional insult directed at a representative of a friendly state admitted officially to the Dutch government, acting in his or her quality.

The third paragraph of article 118 offered the possibility of imposing additional penalties,[119] while article 119 of the Criminal Code made it a crime to distribute or publicly display insulting material involving the said dignitaries.

Secondly, an aggravating provision, article 267 paragraph 3, was added to the section of the Criminal Code dealing with general defamation. This section, Title XVI, includes provisions against slander (*smaad*; article 261 paragraph 1), libel (*smaadschrift*; article 261 paragraph 2), and general insults that do not fall under either of the above categories (*eenvoudige belediging*; article 266 paragraph 1). Article 267 paragraph 3 prescribed that the terms of imprisonment of the provisions in Title XVI may be increased by one third if the defamation is made in regard of the head or a member of the government of a friendly state.

[117] Parliamentary documents, House of Representatives, 1970-1971, no. 11249, 2.

[118] The law of 23 March 1978, published in the Bulletin of Acts and Decrees 1978, no. 155.

[119] These are mentioned in article 28 paragraph 1 (1) and (2): the convicted person can be deprived of the right to hold certain offices and/or the right to serve in the armed forces.

The general provisions of Title XVI were applicable in cases that did not fall under any of the 'special provisions' of Title III. For example, in case the head of a foreign state was not in the Netherlands at the time the insult was uttered, which was required under article 118 ('The intentional insult directed at the head or a member of the government of a friendly state, *in the exercise of his duties staying in the Netherlands* (…)').

In justifying articles 118 and 119, the government argued that a tempering of criticism would be appropriate when the object of that criticism was in the Netherlands as a guest of the Dutch government.[120] The special legal protection afforded to heads of foreign states was considered to be 'in the interests of diplomatic and consular relations, and for the purpose of complying with international obligations.'[121]

There are a number of notable differences between the special provisions of Title III and the general defamation provisions of Title XVI. Firstly, they differ with regard to the severity of the maximum sentences, ranging from three months' imprisonment (article 266 paragraph 1) to two years' imprisonment (article 118). Secondly, other than articles 118 and 119, the defamation of foreign dignitaries under Title XVI required an official complaint from the targeted individual. Thirdly, articles 118 and 119 lacked two exceptions that are part of Title XVI, namely the 'truth defence' and the 'public interest defence.'[122]

10. The law in practice: decades of dormancy

[120] Parliamentary documents, House of Representatives, 1970-1971, no. 11249, 3, p. 10.

[121] Parliamentary documents, House of Representatives, 1975-1976, no. 11249, 6, p. 8. With regard to the 'international obligations', the government mentioned 'international obligations aimed at guaranteeing the unimpeded exercise of the functions of foreign officials.' The government referred to a number of international provisions, including article 29 of the Vienna Convention on Diplomatic Relations.

[122] See A.L.J. Janssens & A.J. Nieuwenhuis, *Uitingsdelicten*, Deventer: Kluwer 2011, p. 151.

The 1978 prohibitions against insulting foreign dignitaries turned out to be almost dormant. In April 2016, the Secretary of State for Justice and Security mentioned that 'recent decades have shown almost no cases of insults to friendly heads of state.'[123] Since 1995, there have been only two criminal trials about the defamation of a foreign head of state. In the first case the defendant, who wanted to protest during the visit of then President of Israel Shimon Peres, carried a sign stating 'Boycott Israel' and 'JUDEO, NAZI, NOT WELCOME' near the Peace Palace in the Hague. However, the defendant was acquitted as he was apprehended before Peres had arrived.[124] The most recent court decision took place in 2019, when a man was prosecuted under Title XVI for sending e-mails to the Turkish Embassy in the Hague in which the Turkish President Erdogan was called a 'goat fucker' (*geitenneuker*), a 'pig' (*zwijn*), and that compared him to Hitler.[125] Although these unsavoury terms undoubtedly constitute defamation under Dutch law, the defendant, who claimed to be a computer-illiterate, was acquitted as the court could not determine whether he was the person who had sent the e-mails.[126]

11. The 2016 Bill

At the time of the 2019 court case, a Bill proposing to abolish articles 118 and 119 as well as the aggravated provision of article 267 paragraph 3 was being considered by Parliament.[127]

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[123] Secretary of State for Justice and Security, Letter of 20 April 2016 concerning 'punishable insults to heads, or members of the government, of a friendly state', https://zoek.officielebekendmakingen.nl/kst-29279-316.html.

[124] Court of The Hague, 12 May 2015, ECLI:NL:RBDHA:2015:5392, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:5392.

[125] 'OM wil geen straf voor beledigende Erdogan-mails Limburgse 'digibeet'', 8 February 2019, https://nos.nl/artikel/2271072-om-wil-geen-straf-voor-beledigende-erdogan-mails-limburgse-digibeet.html.

[126] 'Vrijspraak voor belediging Turkse president', 22 February 2019, https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Den-Haag/Nieuws/Paginas/Vrijspraak-voor-belediging-Turkse-president.aspx.

[127] See Parliamentary documents, House of Representatives, 2015-2016, no. 34456, 2.

Although the explanatory memorandum to the Bill stresses that the criminal law 'maintains a role' with regard to insults of foreign heads of state, it explained that the *special* protection afforded by articles 118, 119, and 267 paragraph 3 was no longer adequate. Thus, the Bill did not intend to bring about the decriminalization of the defamation of foreign heads of state *tout court*; it sought to remove from the Dutch defamation framework all the special elements concerning the defamation of foreign heads of state.

Opinions in Parliament were divided but largely supportive of the Bill. Members of the People's Party for Freedom and Democracy (*Volkspartij voor Vrijheid en Democratie*), indicated that the criminalization of insults to foreign heads of state was 'a thorn in their side.'[128] For the Democrats 66 (*D66*), the Bill ensured a better protection of freedom of expression and it helped bring Dutch defamation law better into line with settled case law of the European Court of Human Rights.[129] The Labour Party (*Partij van de Arbeid*) supported the Bill as well, and considered the Bill as a way to adjust the old defamation regulations to more modern times.[130] The green political party *GroenLinks* voted in favour of the Bill,[131] as did the Socialist Party (*Socialistische Partij*). For the socialists, the Netherlands is a democracy, 'in which citizens should be able to speak freely and always be able to criticize power. (…) [a] head of state who cannot not be criticized by our citizens is by definition not a friendly head of state to us.'[132] Also the nationalist, right-wing populist Party for Freedom (*Partij voor de Vrijheid*) welcomed the proposed removal of the extra protection for foreign heads of state. 'We do not

[128] Parliamentary documents, House of Representatives, 2016-2017, no. 34456, 7, p. 1-2.

[129] Parliamentary documents, House of Representatives, 2016-2017, no. 34456, 7, p. 2.

[130] Proceedings of the States General, House of Representatives, 2017-2018, 8 February 2018, p. 22.

[131] *Eindstemming wetsvoorstel*, 10 April 2018 (House of Representatives); Parliamentary documents, Senate, 2018-2019, 19 March 2019 (*Stemming Belediging van staatshoofden en andere publieke personen en instellingen*) (Senate).

[132] Proceedings of the States General, House of Representatives, 2017-2018, 8 February 2018, p. 6.

want touchy foreign leaders to be able to affect Dutch freedom of expression through the courts', the party's representative stated during parliamentary debate.[133]

Critical voices came from the Christian Democratic Alliance (*Christen Democratisch Appèl*) and the Christian Union (*ChristenUnie*). The Christian Democratic Alliance disapproved of the Bill,[134] while the Christian Union questioned the utility and necessity of the proposal.[135] Also the Reformed Political Party (*Staatkundig Gereformeerde Partij*) was sceptical. This party submitted that the Bill suggests that insults to foreign dignitaries are not that bad. For this party, the special provisions still had their value.[136]

The Bill rests on two justifications: social equality and developments in human rights law. The explanatory memorandum to the Bill argues that the special protection afforded to dignitaries rests on an outdated perception of social relations.[137] The 'main objection' to the regime of special protection is that it 'deviates unnecessarily from the rules for everybody else.'[138] Moreover, the drafter of the Bill stated that 'although public institutions and offices have a special place in society, this does not imply that they are more deserving of respect than citizens or private legal entities.'[139]

The second justification for the Bill consists of developments in human rights law. The explanatory memorandum to the Bill mentions the critical reception of special defamation provisions by human rights bodies.[140] The representative who drafted the Bill submitted that

[133] Proceedings of the States General, House of Representatives, 2017-2018, 8 February 2018, p. 14.

[134] Parliamentary documents, House of Representatives, 2016-2017, no. 34456, 7, p. 2.

[135] Parliamentary documents, House of Representatives, 2016-2017, no. 34456, 7, p. 2.

[136] Parliamentary documents, House of Representatives, 2016-2017, no. 34456, 7, p. 2.

[137] Parliamentary documents, House of Representatives, 2015-2016, no. 34456, 3, p. 1-3.

[138] Parliamentary documents, House of Representatives, 2015-2016, no. 34456, 3, p. 6.

[139] Parliamentary documents, House of Representatives, 2016-2017, no. 34456, 4, p. 6.

[140] Parliamentary documents, House of Representatives, 2015-2016, no. 34456, 3, p. 4-6. See also Parliamentary documents, House of Representatives, 2016-2017, no. 34456, 8, p. 9.

repealing the special protections afforded to foreign heads of state 'is in line with international legal developments.'[141] The following section examines these developments.

B. European and international human rights law

Human rights law places a special value on uninhibited public discourse. Consequently, human rights bodies are critical of laws that limit free expression by criminalizing statements about government leaders and other public officials. This section discusses bans on the defamation of foreign heads of state from the perspective of two important human rights treaties: the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

1. The European Convention on Human Rights

The Netherlands ratified the European Convention on Human Rights on 31 August 1954.[142] Article 10 paragraph 1 of this Convention protects the right to free expression.

> '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.'

This right may be subjected to limitations under article 10 paragraph 2. Any interference must comply with the 'three-part test,' meaning that the interference must be provided by law, serve

[141] Parliamentary documents, House of Representatives, 2016-2017, no. 34456, 8, p. 9.

[142] https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=U6CfaEGg.

at least one of the legitimate aims mentioned in article 10 paragraph 2, and must be necessary in a democratic society.[143]

The European Court of Human Rights regards freedom of expression as 'one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment.'[144] According to the Court, freedom of expression 'is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population (the 'Handyside-criterion').'[145] The Court considers the freedom to debate political matters especially important.[146] In *Lingens v. Austria* the Court observed that

> 'freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.'[147]

[143] See, extensively, D. Bychawska-Siniarska, *Protecting the right to freedom of expression under the European Convention on Human Rights: A handbook for legal practitioners*, Council of Europe 2017, p. 31-45.

[144] European Court of Human Rights, 8 July 1986, 9815/82, par. 41 (*Lingens v. Austria*).

[145] European Court of Human Rights, 7 December 1976, 5493/72, par. 49 (*Handyside v. United Kingdom*).

[146] See A. Mowbray, *Cases, Materials, and Commentary on the European Convention on Human Rights*, Oxford: Oxford University Press 2012, p. 627: 'The most protected class of expression has been political expression.'

[147] European Court of Human Rights, 8 July 1986, 9815/82, par. 42 (*Lingens v. Austria*). In *Castells v Spain* the Court stated that 'the limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician.' European Court of Human Rights, 23 April 1992, 11798/85, par. 46 (*Castells v. Spain*).

The case of *Colombani and others v. France* is of particular importance because in this case the Court directly addressed a provision prohibiting the defamation of a foreign head of state.[148] The case revolved around two journalists from the French newspaper *Le Monde* who had published articles that questioned the determination of Moroccan authorities, in particular the King, to combat the increase in hashish trafficking from Morocco.[149] The King of Morocco made an official request to the French Minister of Foreign Affairs for criminal proceedings to be instituted.[150] Subsequently, the journalists were prosecuted under section 36 of the Freedom of the Press Act of 29 July 1881 for publicly insulting a foreign head of State. This section read: 'It shall be an offence punishable by one year's imprisonment or a fine of 300,000 francs, or both, publicly to insult a foreign head of State, a foreign head of government or the minister for foreign affairs of a foreign government.'[151] The Paris Court of Appeal found the journalists guilty of insulting a foreign head of State and ordered them to pay a fine of 5,000 French francs.[152] The Court of Cassation dismissed the journalists' appeal.[153]

Yet, the European Court of Human Rights was of the opinion that the journalists' convictions constituted a violation of article 10 of the European Convention on Human Rights, which protects freedom of expression. The Court argued:

> 'While the press must not overstep the bounds set, inter alia, for 'the protection of the reputation of others', its task is nevertheless to impart information and ideas on political issues and on other matters of general interest. As to the limits of acceptable criticism, they are wider with regard to a politician acting in his public capacity than in relation to a private individual. A politician inevitably

[148] European Court of Human Rights, 25 June 2002, 51279/99 (*Colombani and others v. France*).

[149] European Court of Human Rights, 25 June 2002, 51279/99, par. 13, 59 (*Colombani and others v. France*).

[150] European Court of Human Rights, 25 June 2002, 51279/99, par. 14 (*Colombani and others v. France*).

[151] European Court of Human Rights, 25 June 2002, 51279/99, par. 22 (*Colombani and others v. France*).

[152] European Court of Human Rights, 25 June 2002, 51279/99, par. 19 (*Colombani and others v. France*).

[153] European Court of Human Rights, 25 June 2002, 51279/99, par. 21 (*Colombani and others v. France*).

> and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism. He is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of open discussion of political issues, since exceptions to freedom of expression must be interpreted narrowly.'[154]
>
> (…)
>
> 'The Court notes that the effect of a prosecution under section 36 of the Act of 29 July 1881 is to confer a special legal status on heads of State, shielding them from criticism solely on account of their function or status, irrespective of whether the criticism is warranted. That, in its view, amounts to conferring on foreign heads of State a special privilege that cannot be reconciled with modern practice and political conceptions. Whatever the obvious interest which every State has in maintaining friendly relations based on trust with the leaders of other States, such a privilege exceeds what is necessary for that objective to be attained. Accordingly, the offence of insulting a foreign head of State is liable to inhibit freedom of expression without meeting any 'pressing social need' capable of justifying such a restriction. It is the special protection afforded foreign heads of State by section 36 that undermines freedom of expression, not their right to use the standard procedure available to everyone to complain if their honour or reputation has been attacked or they are subjected to insulting remarks.'[155]

Thus, the Court rejects an increased protection against defamation of foreign heads of state solely on the basis of their (higher) social status. The Court also explicitly rejects the 'friendly relations argument,' which was the justification of the Dutch ban, as a sufficient basis for limiting free expression by way of a special defamation provision. The Court's critical stance towards special defamation provisions is in line with International Covenant on Civil and Political Rights, which will be discussed in the following section.

[154] European Court of Human Rights, 25 June 2002, 51279/99, par. 56 (*Colombani and others v. France*).

[155] European Court of Human Rights, 25 June 2002, 51279/99, par. 68-69 (*Colombani and others v. France*).

2. The International Covenant on Civil and Political Rights

The Netherlands ratified the International Covenant on Civil and Political Rights (ICCPR) on 11 December 1978.[156] Article 19 paragraph 2 of this treaty protects the right to freedom of expression.

> 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.'

The Human Rights Committee is the body that monitors implementation of the ICCPR by its State parties. This committee consists of 18 independent human rights experts,[157] who are elected to serve a four-year term.[158]

The Human Rights Committee has stated that 'the right to freedom of expression is of paramount importance in any democratic society.'[159] The committee holds that

> 'the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.'[160]

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[156] Treaty Series (*Tractatenblad*) 1978 no. 177, p. 31.

[157] See article 28 ICCPR.

[158] See article 32 ICCPR.

[159] Human Rights Committee, *Tae Hoon Park v Republic of Korea*, UN Doc. CCPR/C/64/D/628/1995 at par. 10.3; Human Rights Committee, *Rafael Marques de Morais v Angola*, UN Doc. CCPR/C/83/D/1128/2002 at par. 6.8.

[160] Human Rights Committee, General comment No. 34, UN Doc. CCPR/C/GC/34, 2011, par. 13. Cf. O'Flaherty, 'Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34', *Human Rights Law* Review, 2012, p. 627-654.

Regarding expression about political figures, the Committee has observed that 'the value placed by the Covenant upon uninhibited expression is particularly high.'[161]

Restrictions to the right of free expression are allowed for by article 19 paragraph 3. Any restriction must meet the conditions of legality, necessity and proportionality, and legitimacy.[162] Defamation laws are examples of such restrictions. On defamation laws, the Human Rights Committee observed that they

> '(…) must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognized as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties. Where relevant, States parties should place reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party. States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others.'[163]

[161] *Zeljko Bodrožić v Serbia and Montenegro*, UN Doc. CCPR/C/85/D/1180/2003 at par. 7.2; see also Human Rights Committee, General comment No. 34, UN Doc. CCPR/C/GC/34, 2011, par. 34 and 38.

[162] See for example Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 6 April 2018, A/HRC/38/35 at par. 7; Human Rights Committee, General comment No. 34, UN Doc. CCPR/C/GC/34, 2011, par. 22.

[163] Human Rights Committee, General comment No. 34, UN Doc. CCPR/C/GC/34, 2011, par. 47.

Moreover, regarding public figures such as heads of state, the Committee has stated that they

> 'are legitimately subject to criticism and political opposition. Accordingly, the Committee expresses concern regarding laws on such matters as *lèse-majesté*, *desacato*, disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials, and laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned.'[164]

While state parties 'should consider the decriminalization of defamation' in general, 'imprisonment is never an appropriate penalty' for defamation, according to the Committee.[165] Thus, bans on defaming foreign heads of state that allow for imprisonment as a possible punishment, such as the Dutch ban mentioned above, are at odds with the ICCPR.[166]

In a letter of October 2016 to the Dutch government, the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, expressed concern that the Dutch provisions on defaming foreign heads of state 'limit the right to freedom of expression in contradiction with article 19 of the International Covenant on Civil and Political Rights.'[167] The Special Rapporteur stated that 'criminal sanctions, in particular imprisonment (…), for insults and defamation are not deemed

[164] Human Rights Committee, General comment No. 34, UN Doc. CCPR/C/GC/34, 2011, par. 38.

[165] Human Rights Committee, General comment No. 34, UN Doc. CCPR/C/GC/34, 2011, par. 47.

[166] Cf, generally, A. Clooney & P. Webb, 'The Right to Insult in International Law,' *Columbia Human Rights Law Review*, 2017, p. 53: 'laws imposing criminal sanctions for (…) defamation of the head of state (…) are not in compliance with international law and should be abolished.'

[167] D. Kaye, 'Letter of 14 October 2016 concerning the defamation laws, in particular the law of lese majesty, set out in the Dutch Criminal Code', p. 3, https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL_NLD_2016.pdf.

proportional with an effective exercise of the right to freedom of expression.'[168] He welcomed the 2016 Bill to repeal articles 118, 119, and 267 paragraph 3, which would 'ensure better conformity of the Dutch legislation with the standards of international human rights law.'[169]

Although special defamation provisions are *in tension* with international law, it is not entirely clear whether they are *incompatible* with international law. Instead of declaring incompatibility, the Human Rights Committee 'expressed concern' over such bans. The international law scholar Foakes states that:

> 'It seems likely (…) that where settled legal procedures (such as the collection of evidence in a criminal investigation or the proper conduct of litigation) are involved, a foreign head of State is entitled to no more protection than any ordinary citizen, provided inviolability or immunity from jurisdiction are not compromised. Such procedures may, of course, embarrass a head of State and give rise to some criticism and adverse publicity, but unless an element of gratuitous and or deliberately insulting conduct is involved they will not amount to an attack on the dignity of that foreign head of State. *It is unclear to what extent international law imposes a positive obligation on States to prevent offensive conduct by private individuals in other contexts*. In the past, States were often prepared to take a fairly hard line in suppressing material and conduct which they considered offensive to a friendly foreign head of State and frequently proffered apologies. *It was not always clear, however, whether such States saw themselves as acting because they were under an international obligation to do so or because local law required them to do so*.'[170]

[168] D. Kaye, 'Letter of 14 October 2016 concerning the defamation laws, in particular the law of lese majesty, set out in the Dutch Criminal Code', p. 4, https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL_NLD_2016.pdf.

[169] D. Kaye, 'Letter of 14 October 2016 concerning the defamation laws, in particular the law of lese majesty, set out in the Dutch Criminal Code', p. 4, https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL_NLD_2016.pdf.

[170] J. Foakes, *The Position of Heads of State and Senior Officials in International Law*, Oxford University Press 2014, p. 68-69 (my emphasis).

On the other hand, Clooney and Webb take a slightly firmer stand on this issue and argue that 'laws imposing criminal sanctions for (…) disrespect for authority, disrespect for flags and symbols, defamation of the head of state (…) are not in compliance with international law and should be abolished.'[171]

Conclusion

This chapter has described the development of the Dutch law against defaming foreign heads of state. This type of ban is still found in numerous countries inside[172] and outside[173] of Europe. Such limits on free expression are typically[174] adopted to foster cordial relations with other nations, which was also the justification of the Dutch ban. However, the Human Rights Committee and the European Court of Human Rights are critical of 'special' laws that afford heads of state increased protection against insults as these limit free expression to an unnecessary extent in a democratic society. On 1 January 2020, the Netherlands, under the

[171] A. Clooney & P. Webb, 'The Right to Insult in International Law,' *Columbia Human Rights Law Review*, 2017, p. 53.

[172] See Organization for Security and Co-operation in Europe, *Defamation and Insult Laws in the OSCE Region: A Comparative Study*, 2017, p. 23, https://www.osce.org/files/f/documents/b/8/303181.pdf.

[173] These include Afghanistan (article 243 Criminal Code), Botswana (article 60 Criminal Code), Cameroon (article 153 Criminal Code), Egypt (article 181 Criminal Code), Ethiopia (article 264 Criminal Code), Indonesia (article 144 Criminal Code), Iraq (article 227 Criminal Code), Israel (article 168 Criminal Code), Senegal (article 165 Criminal Code), South Korea (article 107 paragraph 2), and Thailand (article 133 Criminal Code).

[174] For example, Cyprus criminalizes expression that aims to 'humiliate, insult or expose to hatred or contempt a foreign head of state (…) with the goal of compromising the peace and friendship between Cyprus and the foreign country.' See Organization for Security and Co-operation in Europe, *Defamation and Insult Laws in the OSCE Region: A Comparative Study*, 2017, p. 23, https://www.osce.org/files/f/documents/b/8/303181.pdf. Similarly, section 103 (1) of the German Criminal Code was rooted in notions of undisturbed diplomatic relations with foreign countries. See H. Satzger, 'Strafbare Beleidigung eines ausländischen Staatsoberhaupts durch politische Satire? – Was kann Deutschland aus dem Fall Böhmermann lernen?', 2017, *Juridiska Föreningens Tidskrift*, p. 711.

influence of human rights law, repealed its centuries old law against defaming foreign heads of state. By doing so, the Netherlands has joined other European countries, such as France, Belgium, and Germany, that over the past decade and a half have repealed similar bans.

Chapter 3 *Lèse-majesté*

Introduction

The previous chapter showed that the early nineteenth century proved to be a turbulent era for the Netherlands in terms of its relations with foreign powers. In order to maintain *external* tranquility, the Dutch government found it necessary to adopt a law that prohibited contemptuous expression directed at foreign powers. The crime that is at the center of this chapter, *lèse-majesté,* has its roots in considerations of *internal* peace and public order.

Lèse-majesté is characterized by the importance of maintaining a monarch's dignity or reputation, that is the quality of being esteemed in the view of others, for *state* interests such as public order. A good illustration of this is England, where *lèse-majesté* amounted to a crime as serious as sedition. In 1908, Folkard wrote the following on the English law of seditious libel:

> 'Every subject of the King has an undoubted right to speak, to write, and to petition, within certain limits; but he must not, by reckless and seditious language, endanger the fundamentals of the constitution; he must not shake what is rooted, nor bring again into discussion, with a view of disturbing, what is settled; he may impute error and suggest improvement: he may present a memorial or a remonstrance, but he must not provoke the passions of the populace to overawe the laws, and recast the system of the State. All writings, therefore, which tend to bring into hatred or contempt the King, the Government, or the constitution as by law established, to promote insurrection, or to encourage or Libel, excite the people to resist the laws, or the administration of justice, are termed seditious libels.'[175]

[175] H. C. Folkard, *The Law of Slander and Libel: Including the Practice, Pleading, and Evidence, Civil and Criminal, with Forms and Precedents: Also Contempts of Court and the Procedure in Libel by Indictment and Criminal Information*, London: Butterworth & co. 1908 (7th ed.), p. 370-371.

Similarly, *Stephen's Commentaries on the Laws of England* of 1922 states that 'Sedition embraces all those practices which do not amount to treason, but, whether by word, deed, or writing, directly tend to have for their object (…) to bring into hatred or contempt, or to excite disaffection against, the King or the Government and Constitution of the United Kingdom (…).'[176] According to *Stephen's Commentaries*, 'speaking or writing against the King, cursing or wishing him ill, giving out scandalous stories concerning him, or doing anything that may tend to lessen him in the esteem of his subjects, or which may weaken his government, or raise jealousies between him and his people, amounts to sedition.'[177]

While these considerations may appear archaic, they have not disappeared from the legal reality in some jurisdictions. For example, the Thai government has referenced the 'stabilizing role' of the Thai monarchy[178] in justifying its strict and actively applied[179] *lèse-*

[176] H.J. Stephen, *Stephen's Commentaries on the Laws of England*, London: Butterworth 1922 (17th ed.), p. 153.

[177] H.J. Stephen, *Stephen's Commentaries on the Laws of England*, London: Butterworth 1922 (17th ed.), p. 153.

[178] As stated by a representative of the Thai government in a report of the Human Rights Committee. In full: 'The lese-majesty provisions were set out in section 112 of the Criminal Code, rather than in separate legislation. The monarchy, closely linked to Thai national identity, played an essential stabilizing role.' See Human Rights Committee, UN Doc. CCPR/C/SR.3350, p. 4.

[179] See, generally, D. Streckfuss, 'Kings in the Age of Nations: The Paradox of Lèse-Majesté as Political Crime in Thailand', *Comparative Studies in Society and History*, 1995, p. 445- 475; 'Thailand: Absurd lese-majeste charges against 85-year-old scholar for comments on 16th Century battle', 7 December 2017, https://www.amnesty.org/en/latest/news/2017/12/thailand-absurd-lese-majeste-charges-against-85-year-old-scholar-for-comments-on-16th-century-battle/; 'Press briefing note on Thailand', 13 June 2017, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21734&LangID=E; 'Man jailed for 35 years in Thailand for insulting monarchy on Facebook', 9 June 2017, https://www.theguardian.com/world/2017/jun/09/man-jailed-for-35-years-in-thailand-for-insulting-monarchy-on-facebook.

majesté law,[180] for which it has been scrutinized by human rights advocates.[181] This ban has also has its roots in treason. 'Prior to the late nineteenth century, Thai political crimes were subsumed within a single charge: rebellion', Streckfuss states. 'Any act against the king was viewed as a form of rebellion, lèse-majesté, treason. As the king and state were perfectly identified with each other, all offenses against the state were offenses against the king and vice versa.'[182]

This chapter addresses the Dutch, European, and international law perspectives of *lèse-majesté* bans. It starts off with the national, Dutch context. This part begins with a discussion of a 1830 law that banned disparaging statements about the King, and the context in which that law was enacted. Next, this chapter discusses the *lèse-majesté* ban in the Criminal Code of 1886, and the Bill of 2016 that proposed to repeal the ban. The work thereafter focuses on *lèse-majesté* in European and international law.

A. National law

1. Political instability in the United Kingdom of the Netherlands

[180] Section 6 of the Constitution of Thailand stipulates that 'The King shall be enthroned in a position of revered worship and shall not be violated. No person shall expose the King to any sort of accusation or action.' Article 112 of the Criminal Code of Thailand states that 'Whoever, defames, insults or threatens the King, the Queen, the Heir-apparent or the Regent, shall be punished with imprisonment of three to fifteen years.'

[181] Thailand has been called upon by the United Nations Special Rapporteur on the promotion of freedom of opinion and expression, 'to stop using lèse-majesté provisions as a political tool to stifle critical speech.' See 'Thailand: UN rights expert concerned by the continued use of lèse-majesté', 7 February 2017, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21149&LangID=E.

[182] D. Streckfuss, 'Kings in the Age of Nations: The Paradox of Lèse-Majesté as Political Crime in Thailand', *Comparative Studies in Society and History*, 1995, p. 468.

The Penal Code of the Kingdom of Holland of 1809 contained a section on high treason.[183] This section contained provisions regarding attempts on the King's or crown prince's life, and being in league with the enemy.[184] Moreover, this Penal Code contained a provision, included in a section on mutiny, riot, and breaches of public authority, about acts or writings that intent to defame, deride or taunt 'higher or lower powers',[185] which included the King.[186] The penalty for this crime was imprisonment, or exile, or a combination thereof, for a term not exceeding six years.[187] The *Code Pénal* of 1811 did not list the defamation of the King as a special crime. There were no provisions other than the general (private) provisions[188] that dealt with insults.[189]

However, on 1 June 1830, a supplementary law was enacted that criminalized violating 'the dignity, the authority, or the rights of the King or the Royal dynasty' and 'slandering, deriding, or defaming the person of the King.'[190] This law was enacted in the context of great political instability and social tensions. In the years leading to the adoption of this law, the Southern parts (roughly contemporary Belgium) of the United Kingdom of the Netherlands (*Verenigd Koninkrijk der Nederlanden*) became alienated from the Northern parts. There were a number of reasons for this alienation.

[183] Fourth Title, Penal Code of the Kingdom of Holland.

[184] Articles 62-69 Penal Code of the Kingdom of Holland.

[185] Article 89 Penal Code of the Kingdom of Holland.

[186] See J.C.L.M van Gils, *Eenige Aantekeningen op de Artikelen 111 en 112 van het Wetboek van Strafrecht*, Amsterdam: Delsman & Nolthenius 1895, p. 25.

[187] Article 89 Penal Code of the Kingdom of Holland.

[188] See the section on Calumny, Slander, and Disclosure of Secrets (articles 367-378) of the *Code Pénal*.

[189] J.C.L.M van Gils, *Eenige Aantekeningen op de Artikelen 111 en 112 van het Wetboek van Strafrecht*, Amsterdam: Delsman & Nolthenius 1895, p. 21, 27.

[190] Bulletin of Acts and Decrees 1830, no. 15.

First, there were disputes over the national language. The Southern regions cherished the French language whereas King Willem I mandated that, with a view on unification,[191] the Dutch language should become the standard language in official correspondence.[192] William had enacted multiple decrees to this end.[193] This endeavour was perceived in the southern regions as a reformation of the South imposed by the North.[194]

A second dispute revolved around religion and education.[195] In a time where nearly three quarters of the United Kingdom of the Netherlands consisted of Catholics,[196] William attempted to unite Protestants and Catholics in a single state church.[197] The King supported limiting the influence of religion on education. Willem I envisioned that a religiously neutral educational system would promote society's well-being, and thus, he wanted to reform education in the Southern regions.[198] Koch writes that the King was of the opinion that 'driving back the Catholic Church's influence on education was an act of enlightenment, rationalism and citizenship against obscurantism and pointless piety.'[199] To achieve this, the King mandated the establishment of the *Collegium Philosophicum* at the State University of Leuven in 1825.[200]

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[191] L. Wils, 'De taalpolitiek van Willem I', *Bijdragen en Mededelingen betreffende de Geschiedenis der Nederlanden*, 1977, p. 81; J.C. Kennedy, *Een beknopte geschiedenis van Nederland*, Amsterdam: Prometheus 2017, p. 248.

[192] J.C. Kennedy, *Een beknopte geschiedenis van Nederland*, Amsterdam: Prometheus 2017, p. 248.

[193] J. Koch, *Koning Willem 1 1772-1843*, Amsterdam: Boom 2013, p. 412. An example is the Royal Decree of 15 September 1819, see G. Luttenberg, *Luttenberg's chronologische verzameling der wetten en besluiten, betrekkelijk het openbaar bestuur in de Nederlanden sedert de herstelde orde van zaken in 1813*, Zwolle: W.E.J. Tjeenk Willink 1844, p. 83-85.

[194] J. Koch, *Koning Willem 1 1772-1843*, Amsterdam: Boom 2013, p. 413.

[195] J.C. Kennedy, *Een beknopte geschiedenis van Nederland*, Amsterdam: Prometheus 2017, p. 249-250.

[196] J.C. Kennedy, *Een beknopte geschiedenis van Nederland*, Amsterdam: Prometheus 2017, p. 249.

[197] J.C. Kennedy, *Een beknopte geschiedenis van Nederland*, Amsterdam: Prometheus 2017, p. 249.

[198] J. Koch, *Koning Willem 1 1772-1843*, Amsterdam: Boom 2013, p. 419.

[199] J. Koch, *Koning Willem 1 1772-1843*, Amsterdam: Boom 2013, p. 418.

[200] J. Koch, *Koning Willem 1 1772-1843*, Amsterdam: Boom 2013, p. 419; W.J.F. Nuyens, *Geschiedenis van het Nederlandsche volk, van 1815 tot op onze dagen. Eerste deel*, Amsterdam: C.L. van Langenhuysen 1883, p. 134; E.H. Kossmann, *The Low Countries 1780-1940*, Oxford: Clarendon Press 1978, p. 128.

From that point on, individuals aspiring to become priests had to undergo their education at this state controlled institute. Nuyens describes the establishment of the *Collegium Philosophicum* as 'a measure that, more than anything else, embittered the Southerners.'[201] Koch speaks of a 'smack in the face' of the Catholic Church in the Southern parts.[202] Catholics in the South were dismayed, as they felt disrespected in their religious liberty.[203] The fact that the government assumed it knew best how to raise the next generation of the Roman Catholic clergy upset many Catholics in the South, according to Koch.[204] Hence, William's religious policies caused anger and alienation among Catholics.[205]

Third, there were grievances about the state's finances and taxation. King Willem, who was 'fascinated by wealth,'[206] loosely managed the state's finances. The King financed large infrastructure projects without the consent of Parliament.[207] Moreover, Willem increased the taxes on the Southerners, who were taxed unevenly. Kennedy states that 'about 45 to 50 percent of the tax revenue came from the South, yet only 20 to 23 percent flowed back.'[208]

Lastly, the character of King Willem and his way of doing politics also played a part. 'Willem I governed, but didn't do politics', Koch writes in his biography of the King.[209] 'Instead of mediating between the interests and wishes of different sections of society, or to win over his subjects for his plans, he imposed his reforms without much explanation. His subjects'

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[201] W.J.F. Nuyens, *Geschiedenis van het Nederlandsche volk, van 1815 tot op onze dagen. Eerste deel*, Amsterdam: C.L. van Langenhuysen 1883, p. 134.

[202] J. Koch, *Koning Willem 1 1772-1843*, Amsterdam: Boom 2013, p. 419.

[203] J.C. Kennedy, *Een beknopte geschiedenis van Nederland*, Amsterdam: Prometheus 2017, p. 249.

[204] J. Koch, *Koning Willem 1 1772-1843*, Amsterdam: Boom 2013, p. 420.

[205] J.C. Kennedy, *Een beknopte geschiedenis van Nederland*, Amsterdam: Prometheus 2017, p. 249; J. Koch, *Koning Willem 1 1772-1843*, Amsterdam: Boom 2013, p. 420.

[206] J. Koch, *Koning Willem 1 1772-1843*, Amsterdam: Boom 2013, p. 401.

[207] J. Koch, *Koning Willem 1 1772-1843*, Amsterdam: Boom 2013, p. 402.

[208] J.C. Kennedy, *Een beknopte geschiedenis van Nederland*, Amsterdam: Prometheus 2017, p. 248.

[209] J. Koch, *Koning Willem 1 1772-1843*, Amsterdam: Boom 2013, p. 411.

desires slowly occurred to him.'[210] Willem I ruled, but he wasn't very responsive, an attitude that ultimately led to alienation, Koch writes.[211] The King was a 'lonely man', 'capable neither of delegating power nor of collaborating with other people', who 'regarded his ministers as his servants.'[212] Kennedy speaks of a 'self-willed and stubborn King',[213] while Van Roon also mentions the authoritarian side of King Willem. The 'stubborn Willem ruled with an iron fist and showed scant regard for criticism,' Van Roon states.[214] Evidence of the unpopularity of the King and his policies are the hundreds of petitions with grievances, signed by hundreds of thousands, the King received between 1828 and 1830.[215]

These factors, as well as an economic recession in 1830,[216] led to increased dissatisfaction among the citizens over King Willem's politics, and ultimately to the Belgian Revolution (*Belgische Opstand*) and the secession of the southern regions.

2. The law of 1 June 1830

Within this context of friction and instability, a Bill that sought to 'curb derision and defamation' (*Beteugeling van hoon en laster*) was proposed. This Bill, 'a fairly restrictive Press

[210] J. Koch, *Koning Willem 1 1772-1843*, Amsterdam: Boom 2013, p. 411.

[211] J. Koch, *Oranje in revolutie en oorlog: Een Europese geschiedenis 1772-1890*, Amsterdam: Boom 2018, p. 173.

[212] E.H. Kossmann, *The Low Countries 1780-1940*, Oxford: Clarendon Press 1978, p. 116.

[213] J.C. Kennedy, *Een beknopte geschiedenis van Nederland*, Amsterdam: Prometheus 2017, p. 251.

[214] E. van Roon, 'Majesteitsschennis onder Willem I. Hoon, laster, en smaad in Zuid-Holland tijdens de Belgische Opstand', *HOLLAND. Historisch Tijdschrift*, 2019, p. 4.

[215] J.C. Kennedy, *Een beknopte geschiedenis van Nederland*, Amsterdam: Prometheus 2017, p. 250; E.H. Kossmann, *The Low Countries 1780-1940*, Oxford: Clarendon Press 1978, p. 149.

[216] J.C. Kennedy, *Een beknopte geschiedenis van Nederland*, Amsterdam: Prometheus 2017, p. p. 250.

Bill,'[217] was sent to the House of Representatives on 11 December 1829. On 1 June 1830 this Bill became law. Article 1 of this law read:

> 'All those who maliciously and publicly, in any way or by any means, shall violate the dignity, the authority of the King, or the rights of the Royal dynasty, or who shall slander, deride or defame the person of the King, will be liable to a term of imprisonment of two to five years.'[218]

The second article of the law prohibited 'slander, derision or defamation directed at any member of the Royal House', punishable by one to three years' imprisonment. The third article of the law made it a crime, carrying a sentence of six months' to three years' imprisonment, to maliciously and publicly assault the binding force, or to incite to disobedience of the laws. Lastly, the law provided for an increased penalty in case of a repetition of the offence in article 4, while articles 5, 6, and 7 contained a number of procedural clauses.

According to the Royal Message that accompanied the Bill, freedom of the press, which was 'aimed at the expansion of knowledge and understanding', was 'degraded by malicious individuals in order to breed resentment, discontent, hatred of religion, partisanship, and rebellion', and it had 'undermined the public order, the force of the State (…).'[219]

3. The Bill in Parliament

The Parliament was overwhelmingly in favor of the Bill: on 22 May 1830 the House of Representatives approved of the Bill by 93 votes for and 12 against,[220] while a week later the

[217] E.H. Kossmann, *The Low Countries 1780-1940*, Oxford: Clarendon Press 1978, p. 149.

[218] 'The law of 1 June 1830, to curb derision and defamation and other offences against public authority and general peace', published in the Bulletin of Acts and Decrees 1830, no. 15.

[219] Proceedings of the States General, 1829-1830, no. XXI (*Beteugeling van hoon en laster*), no. 1, p. 741.

[220] Proceedings of the States General, 1829-1830, 22 May 1830, p. 543.

Senate adopted the Bill with 35 votes in favor and 1 opposing vote.[221] Representative Luyben called the Bill a 'monstrosity in a constitutional monarchy.'[222] Representative Van Dam van Isselt felt the law was inappropriate as he deemed it unwise to 'chain ourselves because some senseless individuals had confused freedom with debauchery.'[223]

On the other hand, representative Van Toulon was in favor of the Bill. For Van Toulon, 'the intentional and public derision and defamation of the dignity, the authority or the rights of the King is an overthrow of the societal order (…) of the worst kind.'[224] In the view of Van Toulon, the type of insult of regulated by the Bill was 'no special [insult], no *injuria privata*' but a public insult done to the State.[225] He considered the proposed two to five years' imprisonment too light of a punishment for this crime.[226] According to Van Toulon, it was 'the solemn promise of, the by all right-minded individuals beloved and respected King, to protect and preserve our internal tranquility, our constitutional institutions (…).'[227]

4. The Netherlands as a 'deference society'

At the time of the adoption and application of the law of 1 June 1830, the Netherlands could be described as a 'deference society.' The historian Thompson describes this concept as follows:

> 'The essence of the deference society was the habitual respect which the upper classes (…) were accustomed to receive from the community at large. This respect was the natural attitude of a world

[221] Proceedings of the States General, 1829-1830, 29 May 1830, p. 583.
[222] Proceedings of the States General, 1829-1830, 17 May 1830, p. 490.
[223] Proceedings of the States General, 1829-1830, 18 May 1830, p. 494.
[224] Proceedings of the States General, 1829-1830, 18 May 1830, p. 508.
[225] Proceedings of the States General, 1829-1830, 18 May 1830, p. 508.
[226] Proceedings of the States General, 1829-1830, 18 May 1830, p. 508.
[227] Proceedings of the States General, 1829-1830, 18 May 1830, p. 508.

> in which each man knew his place and acknowledged his superiors, who were superior by reason of their style, authoritative manner and air of gentility and who were acknowledged as such because they claimed the rights of their social position with self-assurance.'[228]

According to Post a 'deference society' is a society 'in which ascribed social roles are pervasive and well established, and in which such roles provide the point of reference both for the ascription of social status and for the normative standards of personal conduct.'[229] In such a society, Post observes,

> 'the preservation of honor (…) entails more than the protection of merely individual interests. Since honor is (…) created by (…) shared social perceptions that transcend the behavior of particular persons, honor is a public good, not merely a private possession. An insult to the king involves not only injury to the king's personal interests, but also damage to the social status with which society has invested the role of kingship.'[230]

The explanatory statement to the Dutch Bill on 'derision and defamation', as well as considerations of representatives during the parliamentary debate on the Bill, both indicate that defaming the King was more of a *public* and less of a private matter. The Bill was explained in terms of 'the public order and the powers of the State,' and an 'overthrow of the social order.'

5. Early case law

[228] F.M.L. Thompson, *English Landed Society in the Nineteenth Century*, London: Routledge & Kegan Paul 1963, p. 184.

[229] R. C. Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution', *California Law Review*, 1986, p. 701.

[230] R. C. Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution', *California Law Review*, 1986, p. 702.

The law of 1 June 1830 was applied dozens of times after the Belgian Revolution commenced in August 1830. The historian Van Roon points out that between October 1830 and January 1832, 262 criminal cases took place concerning the 'undermining of the state', 65 of which regarded defamation of the King or the Royal House.[231] 22 of these 65 cases took place in South Holland, a province up North from the border of the Southern regions. The fact that many cases took place in South Holland – and not, as one might expect, in the unstable border provinces – is, according to Van Roon, partially due to the fact that South Holland functioned as a passage for conscripts on the way south to their stations.[232] Apart from conscripts, offenders were labourers, businessmen, as well as craftsmen.[233]

Many of the transgressions took place in taverns. There, the Belgian Revolution 'was the talk of the day.'[234] Under the influence of alcohol, some political discussions got out of hand.[235] Van Roon gives a few examples of utterances that got people prosecuted. These include 'What kind of guy is the King (…) he should be here, but he lets us down, he is a scumbag,' 'the King should be hanged and guillotined,' and 'the King is a goddamn thief.'[236] According to Van Roon, these offenders were not so much driven by political zeal but rather they were

[231] E. van Roon, 'Majesteitsschennis onder Willem I. Hoon, laster, en smaad in Zuid-Holland tijdens de Belgische Opstand', *HOLLAND. Historisch Tijdschrift,* 2019, p. 7.

[232] E. van Roon, 'Majesteitsschennis onder Willem I. Hoon, laster, en smaad in Zuid-Holland tijdens de Belgische Opstand', *HOLLAND. Historisch Tijdschrift,* 2019, p. 7.

[233] E. van Roon, 'Majesteitsschennis onder Willem I. Hoon, laster, en smaad in Zuid-Holland tijdens de Belgische Opstand', *HOLLAND. Historisch Tijdschrift,* 2019, p. 7.

[234] E. van Roon, 'Majesteitsschennis onder Willem I. Hoon, laster, en smaad in Zuid-Holland tijdens de Belgische Opstand', *HOLLAND. Historisch Tijdschrift,* 2019, p. 7.

[235] E. van Roon, 'Majesteitsschennis onder Willem I. Hoon, laster, en smaad in Zuid-Holland tijdens de Belgische Opstand', *HOLLAND. Historisch Tijdschrift,* 2019, p. 7-8.

[236] E. van Roon, 'Majesteitsschennis onder Willem I. Hoon, laster, en smaad in Zuid-Holland tijdens de Belgische Opstand', *HOLLAND. Historisch Tijdschrift,* 2019, p. 8-9.

'intoxicated, simple people who let their frustrations run wild in a daze or out of thoughtless indolence.'[237]

After the secession of Belgium, the law of 1830 continued to be applied in the Netherlands. For example, in December 1840 a defendant named Eilert Meeter was convicted for various instances of defaming the King. Meeter was an author for, and editor of a paper entitled *Tolk der Vrijheid* (loosely translated: 'Interpreter of Freedom'). In a series of three articles published in this medium, Meeter wrote of the King that he had 'publicly misled, maligned, and mocked the Nation', that he had 'raped the Constitution', and that he had disgracefully lied in a Royal Message directed at the States General.'[238] Moreover, Meeter was convicted for repeatedly shouting 'Away with the King, away with the King of Holland, live the republic' on a public street in May 1840. Meeter was also convicted for assaulting the binding force of, and inciting disobedience to the laws, as he had written that the residents were no longer obliged to follow the Constitution and tax laws. Lastly, Meeter was convicted for an insult directed at a mayor. For all this, he was convicted to four years' imprisonment and a fine of 100 Guilders.[239] In 1856, a man named Van der Steen was convicted by both the court of first instance as well as the court of appeal, on the basis of article 1 of the law of June 1830. He had derided the King of the Netherlands by vociferously stating at an inn: 'I don't give a damn

[237] E. van Roon, 'Majesteitsschennis onder Willem I. Hoon, laster, en smaad in Zuid-Holland tijdens de Belgische Opstand', *HOLLAND. Historisch Tijdschrift*, 2019, p. 11.

[238] Provinciaal Geregtshof Groningen, 21 October 1840, in *Weekblad van het Regt* 27 December 1840 (No. 142) (mentioning of the impugned articles and phrases in the left column (*Tolk der Vrijheid* issues numbers 16, 18 en 19 regard the defamation of the King)) and *Weekblad van het Regt* 31 December 1840 (No. 143) (containing the second part of the judgement, with the final verdict).

[239] Provinciaal Geregtshof Groningen, 21 October 1840, in *Weekblad van het Regt* 31 December 1840 (No. 143). Affirmed by the Dutch Supreme Court, see Dutch Supreme Court, 16 February 1841 in *Weekblad van het Regt* 8 March 1841 (No. 162); A. Brocx & J.C. Stuart, *Nederlandsche regtspraak, of verzameling van arresten en gewijsden van den Hoogen Raad der Nederlanden en verdere rechtscollegien* (Zevende deel), 's Gravenhage: De gebroeders Van Cleef 1841, p. 131-132.

about the King, I don't give a damn about Willem III!'[240] The court in first instance convicted the man to two years' imprisonment. Upon appeal the defendant claimed, among other things, that he lacked the intention to commit the crime due to him being in a state of drunkenness when he uttered his words. Yet, this was to no avail as the appellate court upheld the judgement.[241]

6. The 1880s: Ferdinand Domela Nieuwenhuis and the Dutch socialists

The 1880s was a decade 'of political as well as cultural innovation', according to the historian Kossmann.[242] There were developments regarding the press, as journals and magazines became cheaper and more popular.[243] Moreover, a vibrant socialist workers' movement was developing.[244] It was also a time when, according to Bos, European political leaders were 'routinely exposed as frauds', prominent companies were shown to be 'involved in malversations', and 'perverse sexual splurges among the highest elites' were exposed.[245] The socialists 'made clever use of the possibilities provided by the press' to 'capitalize on the moral defects of their political opponents.'[246]

The 1880s was also a decade of significant political turbulence. Kossmann speaks of 'The crisis of the 1880s', where 'socialists preached revolution with such passion that they

[240] The published court documents are redacted, and state: '*Ik heb s(…), aan den Koning, s(…) aan Willem III*!'). See *Weekblad van het Recht* 6 November 1856.

[241] See *Weekblad van het Recht* 6 November 1856. The Supreme Court dismissed the appeal. See *Weekblad van het Recht 5* April 1858.

[242] E.H. Kossmann, *The Low Countries 1780-1940*, Oxford: Clarendon Press 1978, p. 310.

[243] D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007, p. 12.

[244] D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007, p. 12.

[245] D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007, p. 12

[246] D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007, p. 12.

amazed and frightened even people who refused to listen to them.'[247] Pointing at the bombing of Russian Tsar Alexander II in 1881, the murder of US President Garfield in the same year, and the attempted murder of German Emperor Wilhelm I in 1878, Bos points out that 'the times were highly uncertain for the rulers of the world', which provided for 'an ominous undertone of the rise of the socialist workers' movement.' [248]

Apart from political tensions, the 1880s was marked by economic problems.[249] The Netherlands was affected by the Great Depression of 1873–1896. 'The period from 1882 to 1886', Kossmann writes, 'was particularly unpleasant.'[250] 'Public opinion was greatly concerned by the misery of the poor', and 'in 1885 particularly, tension rose to such heights that many doubted whether even armed force could still keep the situation under control.'[251]

Within this context, a socialist movement in the Netherlands was brewing. Central to the Dutch socialist movement was Ferdinand Domela Nieuwenhuis.[252] He was 'the first political champion of socialism in the Netherlands.'[253] 'The originality of Dutch socialism owed much to the eccentricity of one person – Domela Nieuwenhuis', Kossmann states.[254] Domela Nieuwenhuis was 'by far the most high-profile leader of the early socialist movement in the Netherlands'[255] and 'probably the most charismatic leader the Dutch labour movement has ever

[247] E.H. Kossmann, *The Low Countries 1780-1940*, Oxford: Clarendon Press 1978, p. 314.

[248] D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007, p. 19.

[249] E.H. Kossmann, *The Low Countries 1780-1940*, Oxford: Clarendon Press 1978, p. 314.

[250] E.H. Kossmann, *The Low Countries 1780-1940*, Oxford: Clarendon Press 1978, p. 315.

[251] E.H. Kossmann, *The Low Countries 1780-1940*, Oxford: Clarendon Press 1978, p. 315.

[252] E.H. Kossmann, *The Low Countries 1780-1940*, Oxford: Clarendon Press 1978, p. 345: 'The rise of Dutch socialism is inconceivable without Domela Nieuwenhuis'; D. van der Meulen, *Koning Willem III 1817-1890*, Amsterdam: Boom 2013, p. 566.

[253] J.C. Kennedy, *Een beknopte geschiedenis van Nederland*, Amsterdam: Prometheus 2017, p. 289.

[254] E.H. Kossmann, *The Low Countries 1780-1940*, Oxford: Clarendon Press 1978, p. 311.

[255] J.W. Stutje, 'Ferdinand Domela Nieuwenhuis (1846-1919), Revolte en melancholie. Romantiek in Domela's kritiek op de moderniteit', *Tijdschrift voor Sociale en Economische Geschiedenis*, 2008, p. 3.

known.'[256] He was 'an agitator', who 'with his direct use of words and with his almost mystical mesmerizing appearance, appealed to new masses.'[257] According to Kossmann, Domela Nieuwenhuis 'gave the impression of (…) suffering from a dangerous form of self-gratification' and he was 'worshipped as [a prophet] by [his] followers.'[258]

Domela Nieuwenhuis was the editor of *Recht voor allen* ('Justice for all'),[259] the most important socialist publication. *Recht voor allen*, launched in 1879,[260] was an activist weekly paper that, besides publishing recipes and instructions for explosives,[261] routinely lampooned the King.[262] For example, *Recht voor allen* published satirical 'weekly statistics' in which, in two columns, 'the work delivered by citizen William and the wages he received for it' were listed. For example, in the edition of 26 May 1886, the overview states

Work delivered	Wages received
? ? ? ?	*f.* 20 000
(Spent the country's money abroad, went for walks and drives, ate, drank, and slept, etc. etc.)	at least with a house with appurtenances

[256] J.W. Stutje, 'Ferdinand Domela Nieuwenhuis (1846-1919), Revolte en melancholie. Romantiek in Domela's kritiek op de moderniteit', *Tijdschrift voor Sociale en Economische Geschiedenis*, 2008, p. 4.

[257] J.W. Stutje, 'Ferdinand Domela Nieuwenhuis (1846-1919), Revolte en melancholie. Romantiek in Domela's kritiek op de moderniteit', *Tijdschrift voor Sociale en Economische Geschiedenis*, 2008, p. 7-8.

[258] E.H. Kossmann, *The Low Countries 1780-1940*, Oxford: Clarendon Press 1978, p. 345-346. 'Domela Nieuwenhuis sometimes seemed to prefer to sacrifice himself to his ideals and to represent the suffering Messiah of the nineteenth century.' See: E.H. Kossmann, *The Low Countries 1780-1940*, Oxford: Clarendon Press 1978, p. 346.

[259] J.W. Stutje, 'Ferdinand Domela Nieuwenhuis (1846-1919), Revolte en melancholie. Romantiek in Domela's kritiek op de moderniteit', *Tijdschrift voor Sociale en Economische Geschiedenis*, 2008, p. 6.

[260] E.H. Kossmann, *The Low Countries 1780-1940*, Oxford: Clarendon Press 1978, p. 345; D. van der Meulen, *Koning Willem III 1817-1890*, Amsterdam: Boom 2013, p. 565-566.

[261] D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007, p. 20.

[262] D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007, p. 20-25.

Referring to Domela's sense of grandeur, historian Van der Meulen writes that 'In fact [Domela] lacked only one thing to complete the parallel with that other Savior: a crucifixion. And Domela got that too, in a somewhat weakened form – thanks to the king.'[263]

What really sparked the interest of the Dutch Prosecution Service was an article published in *Recht voor allen* in April 1886. This article, entitled *De Koning komt!* ('The King is coming!'), addressed the King's upcoming annual visit to the capital of the Netherlands. The cynical commentary read, in part:

> 'The large newspapers have announced that the king will have his annual visit to the capital. We shall again witness the mumbo-jumbo, called H.M.'s arrival at the enclosed station and the appearance of H.M., accompanied by wife and daughter, at the balcony of the Royal Palace of Amsterdam. The large newspapers will devote long stories of this event and lie about the love of the House of Orange for the Dutch people and of the people's enthusiasm for its sovereign.'[264]

The article slammed the uncritical reporting of the major newspapers towards the deeds of the King. Those newspapers contained 'only useless and insipid reports regarding the acts of the King, which are unable to elicit any respect, devotion, nor enthusiasm for someone who makes so little of his job.'[265]

For this, Ferdinand Domela Nieuwenhuis was prosecuted. Van der Meulen 'suspects that the prosecution was prompted by a fear of the revolutionary socialists.'[266] Van der Meulen mentions the international context of the revolutionary socialists, including the bombing of the

[263] D. van der Meulen, *Koning Willem III 1817-1890*, Amsterdam: Boom 2013, p. 566.

[264] *De Koning komt!*, Recht voor Allen 24 April 1886.

[265] *De Koning komt!*, Recht voor Allen 24 April 1886.

[266] D. van der Meulen, *Koning Willem III 1817-1890*, Amsterdam: Boom 2013, p. 568.

Russian Tsar Alexander II in 1881 by a member of the revolutionary political organization *Narodnaya Volya*. 'Although the methods of the Russian revolutionaries were harsher than those of the Dutch socialists, their ideals were very similar', Van der Meulen writes.[267] On top of this, what didn't help the socialists were the facts that recipes for explosives were published every now and then in *Recht voor allen*, and that a shot was fired during a large demonstration by the socialists on 4 July 1886, which was attended by Domela.[268] 'The violent reputation of the socialists, also those in the Netherlands, was established,' Van der Meulen states, 'just as the danger that they posed to the king.'[269]

Before the court, Domela Nieuwenhuis denied that he had intended to insult the King; he argued that the article only sought to criticize the major newspapers.[270] However, the court decided that the wording and continuous contemptuous tone of the phrases was in violation of the respect owed to the King. The court referenced in particular the phrases 'lies by the House of Orange' and 'the King makes so little of his job.'[271] The court found that 'malicious intent' to insult the King was present, as Domela had not just referred to the major newspapers' conduct in writing about the King, but he had added his *own* opinion about the King's supposed lack of love towards the people, the lies of the King, and the poor job the King was doing.[272] The court gave Domela Nieuwenhuis a harsh sentence: one year of solitary confinement and a fine of 50 guilders for 'maliciously and publicly slandering, deriding, and defaming the person of the King.[273] The court's decision was upheld by the court of appeal, and complaints about

[267] D. van der Meulen, *Koning Willem III 1817-1890*, Amsterdam: Boom 2013, p. 568.

[268] D. van der Meulen, *Koning Willem III 1817-1890*, Amsterdam: Boom 2013, p. 568.

[269] D. van der Meulen, *Koning Willem III 1817-1890*, Amsterdam: Boom 2013, p. 568.

[270] Court of The Hague, 17 June 1886, in *Weekblad van het Recht* 15 July 1886.

[271] Court of The Hague, 17 June 1886, in *Weekblad van het Recht* 15 July 1886.

[272] Court of The Hague, 17 June 1886, in *Weekblad van het Recht* 15 July 1886.

[273] Court of The Hague, 17 June 1886, in *Weekblad van het Recht* 15 July 1886.

the appellate court's decision were rejected by the Supreme Court on 10 January 1887.[274] Domela served seven months in prison, after which he was pardoned by the King.[275]

5. *Lèse-majesté* in the Criminal Code of 1886

The trial of Ferdinand Domela Nieuwenhuis must have been one of the latest based on the law of 1830, as the law was repealed in September 1886 when a new Criminal Code was enacted.[276] Although the law of 1830 was repealed, the crime of *lèse-majesté* was preserved in this new Criminal Code. Articles 111 and 112 would prohibit 'the intentional insult directed at the King or Queen', respectively 'the intentional insult directed at the heir presumptive, at a member of the Royal House, or at the Regent', while article 113 made it a crime to distribute or publicly display insulting material involving the said dignitaries.[277]

According to the explanatory memorandum to the Criminal Code, these crimes 'violate royal dignity and therefore, must be, in the public interest, combatted unconditionally.'[278] The legislative history does not provide much information about the *ratio legis* of the articles

[274] Dutch Supreme Court, 10 January 1887, in *Weekblad van het Recht* 20 January 1887.

[275] D. van der Meulen, *Koning Willem III 1817-1890*, Amsterdam: Boom 2013, p. 567.

[276] See the law of 15 April 1886 (Invoeringswet Wetboek van Strafrecht), articles 2 and 3 (c).

[277] Over time, the wording of these provisions changed. The latest formulation prior to their appeal in 2020 was as follows. Article 111 read: 'The intentional insult directed at the King is punishable by a term of imprisonment of not more than five years or a fine of the fourth category'; article 112 read: 'The intentional insult directed at the spouse of King, at the heir presumptive to the King, at his spouse, or at the Regent, is punishable by a term of imprisonment of not more than four years or a fine of the fourth category'; while article 113 prohibited, in short, distributing, publicly displaying or posting written material or an image insulting the King, the King's consort, the King's heir apparent or his spouse, or the Regent.' This crime carried a penalty of imprisonment not exceeding one year or a fine of the third category.

[278] H.J Smidt, *Geschiedenis van het Wetboek van Strafrecht : volledige verzameling van regeeringsontwerpen, gewisselde stukken, gevoerde beraadslagingen, enz (Tweede Deel)*, Haarlem: H.D. Tjeenk Willink 1891, p. 39.

protecting royal dignity,[279] other than mentioning the 'great interests that are being protected.'[280] However, Simons, writing shortly after the provisions were enacted, justifies them (specifically, their strong penalties) by referencing 'the exceptional positions' of the reputation of the persons covered by the provisions. 'Insults directed at the sovereign (…) may cause him to lose his prestige; they damage his authority; and as such are of a far more dangerous, and thus criminal, nature than insults directed at private persons.'[281]

Simons argued that because of the close relationship between heirs to the throne or members of the Royal House on one side, and the King on the other side, insults directed at them indirectly affect the sovereign, which also warranted their special protection.[282] Simons draws a connection between insults directed at these dignitaries and the state interest (*het staatsbelang*) being at stake.[283] Thus, similar to the law of 1 June 1830, the elevated, special position of the King (or the Royal House in general) as a symbol of the nation justifies a special protection against verbal attacks.

6. King Gorilla

[279] See also Proceedings of the States General, 1880-1881, 29 October 1880 (*Vaststelling van een Wetboek van Strafregt (Beraadslaging over de artt. 55 – 156*)), p. 180, which mentions that the articles were approved 'without parliamentary discussion and without a roll call vote.' The *Commissie van Rapporteurs* only made an editorial, not a substantial remark on the provisions. See Proceedings of the States General, 1879-1880, report of 16 July 1880, p. 118. All things considered, the parliamentary records are mostly quiet on the justifications of the provisions.

[280] Proceedings of the States General, 1878-1879, no. 110, 3, p. 85.

[281] D. Simons, *De vrijheid van drukpers in verband met het Wetboek van Strafrecht*, 's-Gravenhage: Belinfante 1883, p. 152.

[282] D. Simons, *De vrijheid van drukpers in verband met het Wetboek van Strafrecht*, 's-Gravenhage: Belinfante 1883, p. 152-154.

[283] D. Simons, *De vrijheid van drukpers in verband met het Wetboek van Strafrecht*, 's-Gravenhage: Belinfante 1883, p. 154-155.

The conviction of Ferdinand Domela Nieuwenhuis, finalized by the Supreme Court on 10 January 1887, by no means meant the end of the socialists' opposition. In fact, the conviction of Domela Nieuwenhuis infuriated the socialists.[284] In February 1887, a 24-page anonymous[285] pamphlet entitled 'Of the life of King Gorilla' (*Uit het leven van Koning Gorilla*) was published. It grew out of three articles that had appeared in *Recht voor allen* in the months prior.[286]

This pamphlet was published on the occasion of the King's 70th birthday on 19 February 1887.[287] The King's 70th birthday was, 'especially in [the capital of] Amsterdam, an event that concerned authorities.'[288] There, 'socialists proved to be highly troublesome and noisy' and authorities feared that the festivities could lead to new uprisings and disturbances.[289] Memories of riots in the *Jordaan*, a neighbourhood in Amsterdam, during the previous Summer were still fresh. In July 1886, residents of the *Jordaan*, among them many socialists,[290] clashed with the police, leaving 26 people dead and dozens wounded.[291]

The King's birthday 'turned out to be a historic day for the Dutch socialists.'[292] It would be the start of 'a wave of violence against the socialists in Amsterdam.'[293] The *Jordaan* was generally 'a bastion of support for the Royal House,' yet the rise of the socialists had changed

[284] D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007, p. 26.

[285] The author turned out to be Sicco Roorda van Eysinga.

[286] D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007, p. 26; D. van der Meulen, *Koning Willem III 1817-1890*, Amsterdam: Boom 2013, p. 569.

[287] D. van der Meulen, *Koning Willem III 1817-1890*, Amsterdam: Boom 2013, p. 569.

[288] D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007, p. 51.

[289] D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007, p. 51.

[290] D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007, p. 51.

[291] D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007, p. 51-52; D. van der Meulen, *Koning Willem III 1817-1890*, Amsterdam: Boom 2013, p. 574.

[292] D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007, p. 52.

[293] D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007, p. 52.

this as the neighbourhood was also the 'cradle of early socialism' in the Netherlands.[294] On the King's birthday, supporters of the King clashed with socialists.

> 'On 19 February, 1887, residents of the Jordaan took to the streets, not only to celebrate [the King's birthday], but also to teach the socialists some lessons. While chanting "Hop, hop, hop, hang the socialists!"[295] they went to bookstores that were selling the pamphlet about King Gorilla. They smashed the windows and hung up strips of orange paper [orange is the colour of the Royal Family, added].'[296]

Thus, it is fair to say that the pamphlet *Uit het leven van Koning Gorilla* was a popular as well as controversial piece of satire. In essence, *Uit het leven van Koning Gorilla* was a 'reflection of stories circulating among the public' about the King.[297] It was a brief but explosive *exposé* of the 'scandalous life of a rude, sadistic, and completely perverted monster, who freely reigns over a poor and oppressed people.'[298] Although the King's name was never mentioned in the pamphlet, everybody knew who the primate represented.[299] The pamphlet starts of by stating that it 'will sketch some scenes of the criminal life of King Gorilla,' who 'was the eldest son of a sovereign, who bore the same name and belonged to a Gorilla family that by misgovernment and extortion had made the people deeply unhappy.'[300] In general, the pamphlet describes the life of 'King Gorilla' as one filled with all types of vices, including

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[294] D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007, p. 52.

[295] The rhyme gets lost in translation. Original: 'Hop, hop, hop, hang de socialisten op!'

[296] D. van der Meulen, *Koning Willem III 1817-1890*, Amsterdam: Boom 2013, p. 574. See also D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007, p. 7.

[297] D. van der Meulen, *Koning Willem III 1817-1890*, Amsterdam: Boom 2013, p. 569.

[298] D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007, p. 7.

[299] D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007, p. 7; D. van der Meulen, *Koning Willem III 1817-1890*, Amsterdam: Boom 2013, p. 569.

[300] The pamphlet is inculded in D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007.

drunkenness, theft, extortion, and cruelty. By focusing on the lack of morals of 'King Gorilla', the socialist tapped into the *zeitgeist* of that time, as a continuous stream of royal scandals was already in the public eye.[301]

Authorities were mute in their legal response to the pamphlet. At the time, it was suspected that Sicco Roorda van Eysinga authored the pamphlet.[302] Yet, he resided in Switzerland and was untouchable for the Dutch Prosecution Service.[303] However, a proof-reader for *Recht voor allen*, Alexander Cohen, did get in trouble for an incident somewhat related to the pamphlet. On 16 September 1887, the King was in the Hague to deliver his 'speech from the throne' (*Troonrede*).[304]

At the moment the King passed him by in his carriage, Cohen shouted 'Long live Domela Nieuwenhuis! Long live Socialism! Away with Gorilla!'[305] The court of The Hague convicted Cohen under article 111 and sentenced him to six months' imprisonment.[306] Cohen was the only person to be prosecuted for acts (indirectly) associated with the pamphlet about 'King Gorilla.'[307] Bos suspects that the reason nobody directly involved in the writing or publication of the pamphlet got prosecuted was because 'the pamphlet contained so many truths

[301] D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007, p. 26.

[302] D. van der Meulen, *Koning Willem III 1817-1890*, Amsterdam: Boom 2013, p. 571.

[303] D. van der Meulen, *Koning Willem III 1817-1890*, Amsterdam: Boom 2013, p. 571; D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007, p. 41.

[304] The annual speech from the throne, perhaps best compared to a State of the Union address, is required by article 65 of the Dutch Constitution, which states that: 'A statement of the policy to be pursued by the Government shall be given by or on behalf of the King before a joint the two Houses of the States General that shall be held every year on the third Tuesday in September or on such earlier date as may be prescribed by Act of Parliament.'

[305] D. van der Meulen, *Koning Willem III 1817-1890*, Amsterdam: Boom 2013, p. 571.

[306] Court of The Hague, 17 November 1887, in *Weekblad van het Recht* 19 January 1888.

[307] D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007, p. 66.

that the authorities preferred to forgo a public trial in which the scandalous accusations of *King Gorilla* would reappear before the public.'[308]

In the following years, convictions over the *lèse-majesté* ban continued. These convictions include a man who, while in a barroom in a state of drunkenness, stated that 'the government are a bunch of shitty guys' and the King a 'whore-hopper and a bastard.' The court of first instance showed leniency for the defendant and acquitted him on the basis that he could not recall, because of his drunkenness, having uttered the offensive words, and if he did, he had no intention of insulting the King, for whom the defendant adduced he had a lot of respect. The court could not prove the intent to insult and acquitted him.[309] Yet, the Court of Appeal found that the intention to insult was innate to the words chosen by the defendant and that the fact that he was drunk did not decrease his criminal responsibility. Subsequently, the appellate court sentenced the defendant to eight days' imprisonment.[310] In October 1888, a defendant stood trial over the accusation that he had repeatedly stated in public: 'long live the social democrats!, long live Domela Nieuwenhuis!, away with the King of the Netherlands, away with the ministry, they only make you pay your taxes.' Although the Court declared the charges proven, the defendant was nonetheless discharged (*ontslagen van rechtsvervolging*) and did not receive a sentence, for the Court was of the opinion that the defendants' statements 'tended to be more a political, republican opinion than an insult directed at the King.'[311] Another case revolved around three youngsters who out on the streets during the night of 1 September 1888 had chanted 'I got my shoes polished, to kick the King to death' (the rhyme is lost in translation, in Dutch: '*Ik heb mijn schoenen laten lappen, om den Koning dood te trappen*'). The next night they repeated their chant in the streets, as well as cheering 'Away with Willem III' at a bar.

[308] D. Bos, *Willem III, Koning Gorilla, met een inleiding van Dennis Bos*, Soestgeest: Aspekt 2007, p. 66.

[309] Court of Leeuwarden, 7 April 1888, in *Weekblad van het Recht* 31 July 1888.

[310] Leeuwarden Court of Appeal, 31 May 1888, in *Weekblad van het Recht* 31 July 1888.

[311] Court of Amsterdam, 5 October 1888, in *Weekblad van het Recht* 22 October 1888.

The Leeuwarden Court of Appeal convicted the three men to four months' imprisonment, a significantly harsher punishment than the eight days' imprisonment that was decided by the court of first instance.[312] On 2 June 1896, a man was convicted of having insulted the Queen and the Regent by blowing a whistle at the moment Queen Wilhelmina and Queen-Regent Emma drove by in an open carriage. The court was of the opinion that 'hissing at somebody is an act that signals disdain.' It considered that 'such an act goes against the respect and deference each individual owes to the Royal dignity and thus to those who are vested with it; that that dignity is so elevated, that it is defamed by any act that loses sight of the respect and deference that is due.' The defendant was found guilty under articles 111 and 112 of the Criminal Code and sentenced to three months' imprisonment.[313]

These cases indicate that defamations of the King were serious matters. Different from the ban on insulting foreign heads of 1816, which was seldom if at all enforced, the 1830 ban on defaming the *national* head of state was actively applied. Although mild criticism of the monarchy seemed to be possible without violating the law, indicating the King was essentially a slacker, or calling him names such as 'Gorilla' landed people in hot water.

6. The Second World War and the 1960s

According to Janssens and Nieuwenhuis, the *lèse-majesté* ban was, compared to the pre-war era, relatively often applied during Second World War. They link this fact to the bond between the home country and the Royal House during the German occupation; as showing contempt to the royals indicated solidarity with the occupiers.[314] In 1946, the *Bijzondere Raad van*

[312] Leeuwarden Court of Appeal, 17 January 1889, in *Weekblad van het Recht* 11 February 1889.

[313] Court of Amsterdam, 2 June 1896, in *Weekblad van het Recht* 18 September 1896. In addition to the jail sentence, the court ordered the destruction of the seized whistle 'by which the crime was committed.'

[314] A.L.J. Janssens & A.J. Nieuwenhuis, *Uitingsdelicten*, Deventer: Kluwer 2011, p. 257.

Cassatie, an institution founded as part of the temporary post-war legal system that dealt with a number of crimes committed during the war, decided a case in which the defendant had publicly referred to the Queen as 'that miserable bitch.'[315] The *Bijzondere Raad van Cassatie* held that 'the honour and good name of the bearer of the highest authority in the Kingdom of the Netherlands must be protected much stronger than that of other persons.'[316] The court felt that 'the crime committed is of a very serious nature (…) and the gravity of the offence is increased as the enemy of the homeland during its occupation has on multiple occasions smeared the honour of the Queen, making it such that the defendant, by uttering the impugned statement, showed solidarity with the enemy.'[317] The defendant was convicted to six-months' imprisonment.

In the 1960s, the Netherlands underwent significant cultural changes. 'The country was changing rapidly in ways that were already undermining old social relations and old commitments', according to the historian Kennedy.[318] In a 'liberizing climate', 'new challenges to authority and established norms could thrive, however dismaying these challenges were to considerable parts of the populace and the political establishment.'[319] According to Janssens and Nieuwenhuis, 'the 1960s led to a questioning of all forms of authority, also that of royal authority and the position of the King in society.'[320]

Convictions for defaming royals continued to take place. In 1966, two men were convicted to a conditional one-month jail sentence for critiquing the marriage between princess Beatrix and prince Claus. The two men had painted slogans on a wall that replaced the 'x' in Beatrix's name with the swastika, while the name of prince Claus was written as 'Clauss', the

[315] Bijzondere Raad van Cassatie, 12 August 1946, in *Nederlandse Jurisprudentie* 1946/654.

[316] Bijzondere Raad van Cassatie, 12 August 1946, in *Nederlandse Jurisprudentie* 1946/654.

[317] Bijzondere Raad van Cassatie, 12 August 1946, in *Nederlandse Jurisprudentie* 1946/654.

[318] J.C. Kennedy, *A Concise History of the Netherlands*, Cambridge: Cambridge University Press 2017, p. 406.

[319] J.C. Kennedy, *A Concise History of the Netherlands*, Cambridge: Cambridge University Press 2017, p. 411.

[320] A.L.J. Janssens en A.J. Nieuwenhuis, *Uitingsdelicten*, Deventer: Kluwer 2011, p. 257.

double ‘ss’ referring to the Nazi paramilitary organization *Schutzstaffel*.[321] Four people were convicted in 1967 for a number of defamatory statements directed at prince Bernhard and the royal family, made in a number of articles. The statements included the phrases ‘money grabbing royal family’, and ‘bastards, stinkers and rabbit heads’ (*schoften, stinkerds en konijnenkoppen*). Moreover, a conviction took place for throwing a smoke bomb at the Royal Carriage, which was deemed by the judge to be a defamatory act.[322]

Also in 1967, the Amsterdam Court of Appeal convicted two editors of a student magazine to three weeks’ imprisonment for insulting princess Beatrix. On the front page of a volume of the magazine, which appeared in the same month the princess was set to marry, a photograph of Beatrix was printed. On this photograph a few police officers with batons were drawn on the head of the princess. The index of the volume stated: ‘On the centrefold page you will find the Netherlands’ playgirl of the year, put her up.’ The centrefold contained a picture of a scantily clad young woman with a crown drawn on one of her short trouser legs.[323] In 1969 a man was convicted for distributing a comic magazine that included a cartoon of the Queen, depicted as a prostitute.[324] Despite the ‘liberizing climate’ of the 1960s, there were no efforts made (different from the ban on insulting foreign heads of state) to substantively alter the *lèse-majesté* ban.

7. *Lèse-majesté* in the 21st century

[321] See *Leuzen-kladden voorwaardelijk gestraft*, Het vrije volk: democratisch-socialistisch dagblad 16 March 1966; *Wegens opzettelijke belediging veroordeeld*, Algemeen Handelsblad 16 March 1966.

[322] *Anti-Oranje Provo’s voor de rechter*, Het Parool 11 February 1967.

[323] *Drie weken voor redacteuren van ‘Bikkelacht’*, Leeuwarder courant 24 February 1967.

[324] Mentioned in: Noyon-Langemeijer-Remmelink, *Het Wetboek van Strafrecht*, art. 111 Sr (aant. [comment] 4). See also *Peter Schat zwijgend voor hof*, Het vrije volk: democratisch-socialistisch dagblad 18 September 1969.

Although the total number of convictions in the early 21st century was very low,[325] there were a number of *lèse-majesté* cases that attracted a lot of (media) attention. In 2005, a defendant was convicted to a fine of 250 euros for throwing a paint bomb at the Royal Carriage carrying the presumptive heir to the throne Willem-Alexander Prins van Oranje, and his wife Maxima Zorreguieta Prinses van Oranje-Nassau. This event took place on 2 February 2002, the wedding day of the royal couple. The defendant argued that throwing a bag of paint should be seen as an act of protest, protected by article 10 of the European Convention on Human Rights. It was claimed that there was no 'pressing social need' to convict the defendant. However, the Supreme Court was of the opinion that in the circumstances of the case, throwing a 'paint bomb', even if rooted in a certain conviction, could not be seen as participating in public debate.[326]

In 2007, a person was convicted for publicly stating that 'The Queen of the Netherlands is a whore. I'm going to fuck her in the ass. She likes that.' The judge in this case considered that 'in examining the accusation of *lèse-majesté,* the question must be asked whether there is a matter of social critique or of political expression that deserves protection. In other words: public office holders, including the queen, must be able to take a beating.' Yet, 'in the context of this case, however, no such expression worthy of protection has been found. (…) [H]e deliberately addressed his insults to the Queen in very harsh terms. It is difficult to interpret these terms in any other way than as directed against the Queen personally. These words were only intended to express his personal frustration. An appeal to the fundamental right to freedom of expression therefore cannot succeed.'[327]

[325] According to statistics of the Dutch Public Prosecution Service, 16 people were convicted in first instance during 2000-2012. See Parliamentary documents, House of Representatives, 2012-2013, Supplement (*Aanhangsel*) no. 1467, p. 1-2.

[326] Dutch Supreme Court, 19 April 2005, in *Nederlandse Jurisprudentie* 2005/566.

[327] Court of Amsterdam, 30 July 2007, ECLI:NL:RBAMS:2007:BB1044.

In a case that was ultimately decided by the Dutch Supreme Court in 2014, the defendant had misbehaved himself on *Prinsjesdag* 2010.[328] On this day in 2010, the defendant had thrown a heavy tea light holder of 625,9 grams in the direction of the Royal Carriage, which carried Queen Beatrix as well as the presumptive heir to the throne Willem-Alexander Prins van Oranje and his wife. While throwing the tea light holder, the defendant shouted 'Crooks', 'Thieves', 'Nazi's' and 'Traitors.' Before the court of appeal, the defendant argued, referring to article 10 of the European Convention on Human Rights, that his actions should be understood as participating in public debate. More specifically, throwing the tea light holder was 'symbolic speech.' Yet, the court of appeal was of the opinion that the defendant's expression 'only consisted of insults directed at the passengers of the carriage.' His utterances nor the action of throwing the tea light holder 'could reasonably be regarded as a contribution to public debate.' Subsequently, the court of appeal convicted him to five months' imprisonment, a decision which was upheld by the Supreme Court.[329]

A case with a different outcome was that of an activist named Abulkasim Al-Jaberi. During a demonstration against racism and *Zwarte Piet* (lit. 'Black Pete', a controversial character that is part of the annual feast of St. Nicholas), the activist had said 'Fuck the King, fuck the Queen, and fuck the Royal House.' The decision to prosecute was criticized in society, and, ultimately, the Dutch Public Prosecution Service decided to drop the case, as the impugned statements were made 'within the context of public debate' according to the prosecutor.[330]

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[328] Every third Tuesday of September is known as *Prinsjesdag* ('Budget Day' or 'Prince's Day'). On this day, the parliamentary year is officially opened. At *Prinsjesdag*, the monarch of the Netherlands speaks to a joint the two Houses of Parliament (the Dutch Senate and House of Representatives). During this day, the monarch as well as other members of the Royal Family arrive at the Houses of Parliament via the Royal Carriage. See https://www.government.nl/topics/budget-day/princes-day.

[329] Dutch Supreme Court, 4 November 2011 ECLI:NL:HR:2014:3083.

[330] 'Geen vervolging voor 'fuck de koning' - valt binnen context publiek debat', 28 May 2015, https://www.nrc.nl/nieuws/2015/05/28/geen-vervolging-om-in-zaak-fuck-de-koning-a1415969; 'Geen

8. The 2016 Bill

The Bill that proposed to repeal the crime of insulting foreign heads of state (discussed in the previous chapter) also proposed to repeal the *lèse-majesté* ban. Specifically, it proposed to repeal articles 111, 112, and 113 of the Criminal Code. Moreover, the Bill initially proposed to add a requirement for the King to file an individual complaint (as opposed to an *ex officio* prosecution) in case of an insult. Such a complaint is part of the general rules of defamation in the Dutch Criminal Code (and thus it is a way to equate the King with 'ordinary people').[331] The reason for the requirement to file a complaint with the authorities in Dutch defamation law is that, if the authorities would prosecute *ex officio*, the subsequent trial could give publicity to the case matter, which could be perceived as harmful by the targeted individual. The trial would add injury to insult, as it were. The requirement to file a complaint enables the targeted individual to weigh up the pros and cons of a procedure, and prioritizes the interest of the individual above the general interest.[332]

The explanatory statement to this Bill reflects upon social developments over the course of almost 200 years. It signaled a changing society, one in which the King no longer holds the elevated position he did in the nineteenth century.[333] While the proposer of the Bill was not of

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vervolging in 'fuck de koning'-zaak', 28 May 2015, https://www.ad.nl/binnenland/geen-vervolging-in-fuck-de-koning-zaak~a4d5ab56/?referrer=https://www.google.com/.

[331] See Parliamentary documents, House of Representatives 2016-2017, no. 34456, 8, p. 11: 'Insofar as the offensive criticism is (…) directed at persons, for example the King or a friendly head of state, the persons involved deserve the protection against insult offered by the criminal law like everyone else. That requires filing a complaint.'

[332] See Parliamentary documents, House of Representatives, 2016-2017, no. 34456, 4, p. 6-7, referring to Dutch Supreme Court, 19 June 1998, in *Nederlandse Jurisprudentie* 1998/800, r.o. 4.5.

[333] Parliamentary documents, House of Representatives, 2015-2016, no. 34456, 3, p. 1-2.

the opinion that the King should be allowed to be insulted, he thought it no longer appropriate to grant the King increased protection via the special *lèse-majesté* provisions.[334]

> 'States should not forbid strong criticism of its institutions on the ground that it would be offensive, regardless of whether it is the kingship or another institution. This also applies to "insulting" other symbols, such as flags. (…) [R]espect for institutions arises when an open debate can be held. It is not appropriate to criminalize certain forms of criticism, certainly against abstractions such as "institutions" or "public authority". Insofar as the offensive criticism is also directed at persons, for example the King or a friendly head of state, the persons involved deserve the protection against insult offered by criminal law like everyone else.'[335]

The Bill aims to express that the special protection offered by articles 111, 112, and 113, is based on 'an outdated vision on kingship and the state.' The drafter of the Bill adheres to a different foundation, namely popular sovereignty. Here, the state belongs to 'us all' and the King derives his position and modest amount of power in our state system from the Constitution.[336] The drafter of the Bill stated that the King nowadays is more and more regarded as a *Bekende Nederlander* (lit. 'Famous Dutchman', 'a celebrity'). As such, the King 'has access to professional spokespersons and a sophisticated media strategy.'[337]

Equating the King with 'ordinary people' was criticized during the legislative process. The Council of State (*Raad van State*), a constitutionally mandated advisory body on legislation, was critical of the classification of the King as a *Bekende Nederlander* as well as the idea to add the requirement of an individual complaint. It considered that

[334] Parliamentary documents, House of Representatives, 2015-2016, no. 34456, 3, p. 3.

[335] Parliamentary documents, House of Representatives, 2016-2017, no. 34456, 8, p. 11

[336] Parliamentary documents, House of Representatives, 2016-2017, no. 34456, 8, p. 8.

[337] Parliamentary documents, House of Representatives, 2016-2017, no. 34456, 8, p. 3.

> ‘The fact that it must be possible to criticize the functioning of government institutions and the people who operate within them does not mean that public institutions and offices no longer play a special role in society and therefore do not deserve special respect. The existing institutions in our democratic constitutional state have not lost importance over time. To the contrary, precisely at a time when visions of the state and philosophical and cultural backgrounds diverge, shared values and norms are becoming increasingly important. This applies *a fortiori* to the King, as a special symbol of the national community. The comparison of the King with any ‘Famous Dutchman’ stands at odds with this. [The explanatory memorandum to the Bill] ignores that institutions, acting as ‘stabilizers’ in changing circumstances (…) must ensure the balance between change and preservation, between democracy and law. This stabilizing role of institutions becomes more important as social changes go faster and are less predictable, as the need for certainty and social cohesion increases. The legislator must take this role into account when considering it. Within the Dutch context, this applies in particular to the role of the head of state who symbolizes community and unity above political divisions.’[338]

Specifically regarding the introduction of the requirement to file an individual complaint, the Council of State stated that:

> ‘As for the King and the other persons mentioned in the current [*lèse-majesté*] provisions, the royal dignity opposes the role as “prosecutors” in criminal proceedings. Moreover, the requirement of a complaint is incompatible with the vulnerable position of the King as a constitutional institution. According to article 42, second paragraph of the Constitution, the King is inviolable and the Ministers are responsible. The ministerial responsibility applies to all public actions and public expressions of the King. This relationship entails limitations on the way the King can participate in public debate. He will have to take into account the political consequences his statements may have. A reserved attitude fits with what he is allowed to say or say back, which makes the King vulnerable. It is not inconceivable that this special position would prevent the King from filing a complaint. This would in fact mean that, even in exceptional cases, no punishment would take place, while any

[338] Parliamentary documents, House of Representatives, 2016-2017, no. 34456, 4, p. 5.

> other person in a similar situation could count on punishment from the offender. Now that the King's spouse, the King's presumed heir to the throne, his spouse or the Regent are directly involved in the exercise of the Royal office, they will also exercise the necessary restraint. In this sense, these people are also vulnerable. Also with regard to these persons, the requirement of a complaint does not fit their vulnerable position.'[339]

Apart from the Council of State, there were also critical voices in Parliament. While there were many voices in the House of Representatives in favour of the Bill, and ultimately the Bill would be adopted by a wide margin, namely 120 against 30,[340] there also was considerable criticism regarding the proposal. For example, the members of the Christian Democratic Appeal rejected the Bill in its totality. The proposal to repeal the special provisions protecting the royals from insults 'generated the most revulsion' among these representatives.[341] The members were of the opinion that 'the King and other existing institutions in our country deserve mere respect' and shared the analysis of the Council of State, namely that 'precisely at a time when visions of the State and philosophical and cultural backgrounds vary, shared values and norms become more important. This applies in particular to the King, a special symbol of the national community.' 'Does the drafter of the Bill realize that the interest of the *lèse-majesté* provisions lies in the infrastructure of the State and not primarily in the person of the king?', they wondered.[342] Moreover, they wondered whether 'it is not the case that citizens always tell us

[339] Parliamentary documents, House of Representatives, 2016-2017, no. 34456, 4, p. 7-8.

[340] See *Eindstemming wetsvoorstel*, 10 April 2018.

[341] Parliamentary documents, House of Representatives, 2016-2017, no. 34456, 7, p. 2.

[342] Parliamentary documents, House of Representatives, 2016-2017, no. 34456, 7, p. 3. The drafter agreed that 'The king is more than a person. Kingship is also more than an office: it is an institution, a symbol, an important connecting institution for the Netherlands.' Yet, this did not meant, in the view of the drafter, that the special provisions were appropriate. See Parliamentary documents, Senate, 2018-2019, 12 March 2019. See also: 'The drafter recognizes that public institutions and offices play a special role in society, which can sometimes be of a stabilizing nature. But that does not imply that they deserve more than citizens or private legal entities. And even if that were different, that does not imply that this respect must be enforced by special criminal protection.'

that they value values and tradition', and referred to the fact that 'the vast majority [of the people] has a great appreciation for the royal family and the way in which it acts.'[343]

Members of the Christian-democratic political party Christian Union did not share the Bill's evaluation of the social and legal developments that inspired an amendment of the criminal law. Instead, they were of the opinion 'that the Dutch head of state has an exceptional and special responsibility that can justify extra protection.'[344] In addition, these representatives found that 'criminalization of insulting the symbol of our democratic constitutional state and the constitutional monarchy of the Kingdom of the Netherlands itself also has a symbolic function.'[345]

Similarly, the orthodox Reformed Political Party felt that the Bill does not 'solve a problem so much, but rather evokes the suggestion that insulting the King (…) is not so bad.'[346] The representatives argued that the Bill 'ignores the special position and vulnerability that [the dignitaries] have with regard to ordinary citizens.'[347]

The Reformed Political Party was of the opinion that the Bill reflected an exaggerated notion of equality.[348] Representative Van Dam of the Christian Democratic Alliance also opposed the Bill, and stressed decency in public debate. As the King, who is part of the government, is limited in speaking out in public, he is less able to defend himself. As a consequence, he deserves special protection, Van Dam argued.[349] For Van Dam, the role of the

[343] Parliamentary documents, House of Representatives, 2016-2017, no. 34456, 7, p. 4.

[344] Parliamentary documents, House of Representatives, 2016-2017, no. 34456, 7, p. 2.

[345] Parliamentary documents, House of Representatives, 2016-2017, no. 34456, 7, p. 2.

[346] Parliamentary documents, House of Representatives, 2016-2017, no. 34456, 7, p. 2.

[347] Parliamentary documents, House of Representatives, 2016-2017, no. 34456, 7, p. 2.

[348] Proceedings of the States General, House of Representatives, 2017-2018, 8 February 2018, p. 7.

[349] Proceedings of the States General, House of Representatives, 2017-2018, 8 February 2018, p. 9.

King as a unifying force and someone who 'represents the honour of our society' justified a special provision that criminalizes insults directed at the King.[350]

Others were more welcoming of the Bill. The Party for Freedom (PVV) stated that it stood 'for the greatest possible freedom of expression for all Dutch people. Everyone should be able to express his or her opinion without fear of persecution.' The party's representative felt that 'In an open, free society you have to be able to say what you want and at the same time you have to be able to take criticism', and that, in the view of the PVV, the limit to free expression is incitement to violence.[351]

As a result of the Council of State's report and the debate in the House of Representatives, the classification of the King as a *Bekende Nederlander* was dropped in a subsequent version of the explanatory memorandum.[352] Moreover, the Bill was amended in March 2018. While the special regime of articles 111, 112, and 113 of the Criminal Code would still be repealed, a new provision was proposed in article 267 of the Criminal Code that provided for an increase of a third of the maximum punishment of a number of general defamation provision in case the target of an insult is the King, the King's spouse, the presumed successor to the King, his or her spouse, or the Regent. Furthermore, the King, the King's spouse, the presumed successor to the King, his or her spouse, or the Regent would be exempt from the requirement of filing an individual complaint in case of an insult; this exemption was incorporated in article 269 of the Criminal Code. It was argued by the drafter of the Bill's amendment that 'these persons [mentioned in article 267] have an interest in maintaining a

[350] Proceedings of the States General, House of Representatives, 2017-2018, 8 February 2018, p. 10, also 11: 'As the King keeps the honour of our nation, so do we have to honour and protect the King. An effective, special provision against insults goes with that.'

[351] Proceedings of the States General, House of Representatives, 2017-2018, 8 February 2018, p.13-14.

[352] Parliamentary documents, House of Representatives, 2016-2017, no. 34456, 6, p. 3.

certain anonymity in cases where a prosecution for insults directed at them takes place. Dropping the requirement to file a complaint contributes to that anonymity.'[353]

In sum, the Bill proposed (1) to repeal the special provisions of articles 111, 112, 113; (2) to regulate insults directed at the King, the King's spouse, the presumed successor to the King, his or her spouse, or the Regent via the general rules of Title XVI of the Criminal Code; with two differences regarding the general defamation rules, these being a) the addition of the possible increase of a third of the maximum sentence in cases of where the target of the insult is the King, the King's spouse, the presumed successor to the King, his or her spouse, or the Regent, and b) the omission of the requirement to file a complaint in cases of where the target of the insult is the King's spouse, the presumed successor to the King, his or her spouse, or the Regent.[354]

Thus, in the ultimate version of the Bill that was passed by the House of Representatives and which was sent to the Senate, where it was adopted by 58 to 17 votes,[355] there was no longer a *total* equation of the King with 'ordinary people.'[356] In January 2020, the Bill became law.[357]

B. European and international human rights law

[353] Parliamentary documents, House of Representatives, 2016-2017, no. 34456, 15, p. 1-3.

[354] See Parliamentary documents, Senate, 2017-2018, no. 34456, A.

[355] Parliamentary documents, Senate, 2018-2019, 19 March 2019 (*Stemming Belediging van staatshoofden en andere publieke personen en instellingen*).

[356] See also comments by the CDA in the Senate: Parliamentary documents, Senate, 2017-2018, no. 34456, B, p. 2 and the statements by the drafter of the Bill in Parliamentary documents, Senate, 2018-2019, no. 34456, C, p. 2-3.

[357] Bulletin of Acts and Decrees (*Staatsblad*) 2019, no. 277.

The 2016 Bill was inspired by developments in international and European human rights law. The drafter argued that international and European law has become highly critical of any special protections based on the status of the targeted individual.[358] This section discusses *lèse-majesté* bans from the perspective of the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

1. The European Convention on Human Rights

Over the last two decades, the European Court of Human Rights has decided a number of cases concerning the defamation of national heads of state. The thread of these cases is that special privileges conferred to people solely on the basis of their status are incompatible with the European Convention on Human Rights. Consequently, the Court has found violations of article 10 of the Convention in cases where citizens were convicted on the basis of *lèse-majesté* bans.

In *Eon v. France*, the European Court of Human Rights placed an emphasis on the context of a particular contemptuous expression. In February 2008, the French President at the time, Sarkozy, said to a man who refused to shake his hand '*Casse toi pov'con*' ('Get lost, you sad prick').[359] In August of that same year, Hervé Eon displayed a placard carrying that same statement during a visit of Sarkozy in the town of Laval. Eon was apprehended at the scene and later convicted to a fine of 30 Euros for insulting the President.[360] While the Court observed that the phrase '*Casse toi pov'con*' was, 'in literal terms, insulting to the President', the Court argued that the phrase should nevertheless 'be examined in the light of the case as a whole,

[358] Parliamentary documents, House of Representatives, 2015-2016, no. 34456, 3, p. 4-6.

[359] See (after 30 seconds) https://www.youtube.com/watch?v=Eau5_Gi3icQ.

[360] European Court of Human Rights, 14 March 2013, 26118/10, par. 8-15 (*Eon v. France*).

particularly with regard to the status of the person at whom it was directed, the applicant's own position, its form and the context of repetition of a previous statement.'[361]

The Court was of the opinion that

> 'by adopting an abrupt phrase that had been used by the President himself and had attracted extensive media coverage and widespread public comment, much of it humorous in tone, the applicant chose to express his criticism through the medium of irreverent satire. The Court has observed on several occasions that satire is a form of artistic expression and social commentary which, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate.'[362]

With regard to the importance of satire in a democratic society, the Court considered that 'criminal penalties for conduct such as that of the applicant in the present case are likely to have a chilling effect on satirical forms of expression relating to topical issues. Such forms of expression can themselves play a very important role in open discussion of matters of public concern, an indispensable feature of a democratic society.'[363]

In *Artun and Güvener v. Turkey*, the Court dealt with a conviction by the Turkish courts of a Turkish journalist, Artun, and the editor in chief, Güvener, of the Turkish newspaper *Milliyet*.[364] This newspaper had published two articles, written by Artun, that criticized the Turkish authorities' behavior leading up to, and in response to a heavy earthquake that hit the city of İzmit on 17 August 1999.[365] Artun and Güvener were charged under article 158 of the

[361] European Court of Human Rights, 14 March 2013, 26118/10, par. 53 (*Eon v. France*).

[362] European Court of Human Rights, 14 March 2013, 26118/10, par. 60 (*Eon v. France*).

[363] European Court of Human Rights, 14 March 2013, 26118/10, par. 61 (*Eon v. France*).

[364] Y. Akdeniz & K. Altıparmak, 'Judgement in the case of Artun and Güvener v. Turkey (monitoring report)', *Human Rights Joint Platform*, December 2016, p. 5.

[365] Y. Akdeniz & K. Altıparmak, 'Judgement in the case of Artun and Güvener v. Turkey (monitoring report)', *Human Rights Joint Platform*, December 2016, p. 5.

Turkish Penal Code[366] with defamation of the President and were subsequently sentenced to imprisonment of 1 year and 4 months.[367] According to Akdeniz and Altıparmak, the court of first instance 'stated that although some sections of the articles mentioned the likely responsibility of the authorities for failing to take the necessary measures about the earthquake, other sections directly targeted the personality of the President and exceeded permissible limits of criticism.'[368] The decision was upheld by the higher domestic courts.[369]

Yet, the European Court of Human Rights found that the conviction by the domestic courts violated article 10 of the Convention. It held that the problematic element of the *Colombani v. France* case regarding the special privilege conferred by French law on foreign heads of state 'applies *a fortiori* concerning a State's interest in protecting the reputation of its own head of state: such interest could not justify conferring on the latter a privilege or special protection regarding other people's right to inform or to express opinions about him. To think differently would not be reconcilable with modern political practices and ideas.'[370]

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[366] 'Whoever insults the President of the Republic face-to-face or through cursing shall face a heavy penalty of not more than three years. If the insulting or cursing happens in the absence of the President of the Republic, those who commit the crime will be liable to imprisonment of between one and three years. Even if the name of the President of the Republic is not directly mentioned, allusion and hint shall be considered as an attack made directly against the President if there is presumptive evidence beyond a reasonable doubt that the attack was made against the President of Turkey. If the crime is committed in any published form, the punishment will increase from one-third to one-half.' Cited in: Y. Alexander, E. H. Brenner & S. Tutuncuoglu Krause, *Turkey: Terrorism, Civil Rights, and the European Union*, Routledge: London and New York 2008, p. 133. See also Human Rights Watch, *Turkey: Violations of Free Expression in Turkey*, 1999, p. 22.

[367] Y. Akdeniz & K. Altıparmak, 'Judgement in the case of Artun and Güvener v. Turkey (monitoring report)', *Human Rights Joint Platform*, December 2016, p. 5.

[368] Y. Akdeniz & K. Altıparmak, 'Judgement in the case of Artun and Güvener v. Turkey (monitoring report)', *Human Rights Joint Platform*, December 2016, p. 5.

[369] Y. Akdeniz & K. Altıparmak, 'Judgement in the case of Artun and Güvener v. Turkey (monitoring report)', *Human Rights Joint Platform*, December 2016, p. 5.

[370] Cited in: T. McGonagle, *Freedom of expression and defamation: A study of the case law of the European court of Human Rights*, Council of Europe 2016. See also Y. Akdeniz & K. Altıparmak, 'Judgement in the case of Artun and Güvener v. Turkey (monitoring report)', *Human Rights Joint Platform*, December 2016, p. 5: 'The

The European Court of Human Rights has also ruled directly on cases that involved defamation of a monarch. The case of *Otegi Mondragon v. Spain* involved a conviction under Spain's *lèse-majesté* law. Article 490 § 3 of the Spanish Criminal Code states that

> 'Anyone who falsely accuses or insults the King or any of his ascendants or descendants, the Queen consort or the consort of the Queen, the Regent or any member of the Regency, or the Crown Prince, in the exercise of his or her duties or on account of or in connection with them, shall be liable to a term of imprisonment of between six months and two years if the false accusation or insult is of a serious nature, and otherwise to a day-fine payable for between six and twelve months.'[371]

The applicant in this case, Ortegi Mondragon, was a spokesperson for a Basque separatist parliamentary group in the Parliament of the Autonomous Community of the Basque Country.[372] Ortegi Mondragon was accused of having insulted the King of Spain by calling him 'in charge of the torturers, who defends torture and imposes his monarchical regime on our people through torture and violence.'[373]

Before the Spanish court, the defendant argued that he 'had sought to express political criticism in the context of freedom of expression, one of the foundations of the rule of law and democracy.'[374] While he was acquitted of the charges by the High Court of Justice,[375] the

ECtHR noted that the provisions afforded greater protection to presidents against the expression of information and opinions about them compared to other people and also foresaw a higher punishment for the authors who made defamatory statements against heads of state. The implementation of Article 158 of the Turkish Penal Code was found to be contrary to both the general principles of the established case-law of the Court with regard to the implementation of the punishments against members of the press as well as its case-law on political speech.'

[371] See European Court of Human Rights, 15 March 2011, 2034/07, par. 28 (*Otegi Mondragon v. Spain*).

[372] European Court of Human Rights, 15 March 2011, 2034/07, par. 7 (*Otegi Mondragon v. Spain*).

[373] European Court of Human Rights, 15 March 2011, 2034/07, par. 10 (*Otegi Mondragon v. Spain*).

[374] European Court of Human Rights, 15 March 2011, 2034/07, par. 12 (*Otegi Mondragon v. Spain*).

[375] European Court of Human Rights, 15 March 2011, 2034/07, par. 13 (*Otegi Mondragon v. Spain*).

Supreme Court of Spain set aside this judgement and sentenced Otegi Mondragon to one year's imprisonment, suspended his right to stand for election for the duration of the sentence and ordered him to pay costs and expenses, on the ground of his criminal liability for the offence of serious insult against the King.[376] After Spain's Constitutional Court had found the defendant's appeal inadmissible,[377] the case came before the European Court, where the applicant alleged that the Supreme Court decision finding him guilty of serious insult against the King amounted to undue interference with his right to freedom of expression under article 10 of the Convention.[378] Otegi Mondragon argued before the European Court that article 490 § 3 was not worded with sufficient precision and clarity.[379] Moreover, he claimed that the increased protection provided for by article 490 paragraph 3 had in reality been turned into an absolute defence of the constitutional monarchy, going beyond the defence of individuals' honour and dignity – in the applicant's view, such a broad interpretation of the provision could not be said to be 'prescribed by law' within the meaning of article 10 paragraph 2 of the European Convention.[380] Furthermore, Otegi Mondragon argued that the interference had not pursued a 'legitimate aim' within the meaning of article 10 paragraph 2 of the Convention,[381] while he also contended that his conviction had been neither proportionate to the legitimate aim pursued nor 'necessary in a democratic society.'[382] He also argued that the special protection afforded to the Crown under Spanish criminal law was incompatible with article 10 of the Convention.[383]

[376] European Court of Human Rights, 15 March 2011, 2034/07, par. 16 (*Otegi Mondragon v. Spain*).
[377] European Court of Human Rights, 15 March 2011, 2034/07, par. 20 (*Otegi Mondragon v. Spain*).
[378] European Court of Human Rights, 15 March 2011, 2034/07, par. 32 (*Otegi Mondragon v. Spain*).
[379] European Court of Human Rights, 15 March 2011, 2034/07, par. 35 (*Otegi Mondragon v. Spain*).
[380] European Court of Human Rights, 15 March 2011, 2034/07, par. 35 (*Otegi Mondragon v. Spain*).
[381] European Court of Human Rights, 15 March 2011, 2034/07, par. 36 (*Otegi Mondragon v. Spain*).
[382] European Court of Human Rights, 15 March 2011, 2034/07, par. 37 (*Otegi Mondragon v. Spain*).
[383] European Court of Human Rights, 15 March 2011, 2034/07, par. 38 (*Otegi Mondragon v. Spain*).

The European Court was of the opinion that the interference with the applicant's right to freedom of expression was 'prescribed by law'[384] and that it pursued one of the aims, namely the 'protection of the reputation or rights of others,' namely the protection of the reputation of the King.[385]

After reiterating it's 'general principles' regarding freedom of expression, the Court evaluated Ortegi Mondragon's utterance in question. The Court observed that

> 'the language used by the applicant could have been considered provocative. However, while any individual who takes part in a public debate of general concern – like the applicant in the instant case – must not overstep certain limits, particularly with regard to respect for the reputation and rights of others, a degree of exaggeration, or even provocation, is permitted; in other words, a degree of immoderation is allowed. (…) [W]hile some of the remarks made in the applicant's speech portrayed the institution embodied by the King in a very negative light, with a hostile connotation, they did not advocate the use of violence, nor did they amount to hate speech, which in the Court's view is the essential element to be taken into account .'[386]

Commenting on Spain's *lèse-majesté* law, the Court was of the opinion that article 490 § 3 of the Spanish Criminal Code

> 'affords the Head of State a greater degree of protection than other persons (protected by the ordinary law on insults) or institutions (such as the government and Parliament) with regard to the disclosure of information or opinions concerning them, and which lays down heavier penalties for insulting statements. In that connection, the Court has already stated that providing increased protection by means of a special law on insults will not, as a rule, be in keeping with the spirit of the Convention. In its judgment in *Colombani and Others*, it examined section 36 of the French Act

[384] European Court of Human Rights, 15 March 2011, 2034/07, par. 46 (*Otegi Mondragon v. Spain*).

[385] European Court of Human Rights, 15 March 2011, 2034/07, par. 47 (*Otegi Mondragon v. Spain*).

[386] European Court of Human Rights, 15 March 2011, 2034/07, par. 54 (*Otegi Mondragon v. Spain*).

> of 29 July 1881, which has since been repealed, concerning offences against foreign Heads of State and diplomats. It observed that the application of section 36 of the 1881 French Act conferred on foreign Heads of State a special privilege, shielding them from criticism solely on account of their function or status; this, in the Court's view, could not be reconciled with modern practice and political conceptions. The Court therefore held that it was the special protection afforded to foreign Heads of State by section 36 that undermined freedom of expression, not their right to use the standard procedure available to everyone to complain if their honour had been attacked. In *Artun and Güvener*, the Court took the view that its findings in *Colombani and Others* on the subject of foreign Heads of State applied with even greater force to a State's interest in protecting the reputation of its own Head of State. That interest, in the Court's view, could not serve as justification for affording the Head of State privileged status or special protection *vis-à-vis* the right to convey information and opinions concerning him.'[387]

'

The European Court considered that the principles established in its case law on defaming the head of a state in republican systems are also valid in relation to a monarchy like Spain, 'where the King occupies a unique institutional position.'[388] According to the Court, 'the fact that the King occupies a neutral position in political debate and acts as an arbitrator and a symbol of State unity should not shield him from all criticism in the exercise of his official duties or – as in the instant case – in his capacity as representative of the State which he symbolises, in particular from persons who challenge in a legitimate manner the constitutional structures of the State, including the monarchy.'[389]

Lastly, in examining the proportionality of the interference, the Court noted the 'particularly harsh nature of the penalty imposed.'[390]

[387] European Court of Human Rights, 15 March 2011, 2034/07, par. 55 (*Otegi Mondragon v. Spain*).

[388] European Court of Human Rights, 15 March 2011, 2034/07, par. 56 (*Otegi Mondragon v. Spain*).

[389] European Court of Human Rights, 15 March 2011, 2034/07, par. 56 (*Otegi Mondragon v. Spain*).

[390] European Court of Human Rights, 15 March 2011, 2034/07, par. 58 (*Otegi Mondragon v. Spain*).

Ultimately, the Court found that the applicant's conviction was disproportionate to the aim pursued and the interference in the right to free expression was not 'necessary in a democratic society', and hence that article 10 of the Convention had been violated.[391]

The most recent case the European Court decided with regard to *lèse-majesté* also originated in Spain. In March 2018, the European Court decided on a case of contemptuous symbolic expression, namely the burning by two Spanish citizens of a large photograph (placed upside-down) of the royal couple.[392] The events that led to this criminal case, *Stern Taulats and Roura Capellera v. Spain*, took place in 2007 during a visit of the Spanish King to the city of Girona, Spain.[393] Stern Taulats and Roura Capellera were prosecuted under article 490 § 3 of the Spanish Criminal Code and convicted to a sentence of 15 months' imprisonment.[394] Yet, 'given the personal situation of [Stern Taulats and Roura Capellera], who had never been sentenced to a criminal or correctional sentence, their age and profession, the judge decided to impose a fine of 2,700 euros on each of them as a replacement', under the condition that the two had to serve the prison sentence if they failed to pay the fine.[395] The Constitutional Court of Spain held that their form of protest was not protected by the right to free expression as

[391] European Court of Human Rights, 15 March 2011, 2034/07, par. 61 (*Otegi Mondragon v. Spain*).

[392] European Court of Human Rights, 13 March 2018, 51168/15 and 51186/15, par. 6 (*Stern Taulats and Roura Capellera v. Spain*).

[393] European Court of Human Rights, 13 March 2018, 51168/15 and 51186/15, par. 6 (*Stern Taulats and Roura Capellera v. Spain*).

[394] European Court of Human Rights, 13 March 2018, 51168/15 and 51186/15, par. 9 (*Stern Taulats and Roura Capellera v. Spain*).

[395] European Court of Human Rights, 13 March 2018, 51168/15 and 51186/15, par. 9 (*Stern Taulats and Roura Capellera v. Spain*).

protected by the Spanish Constitution.[396] Instead, the court saw the burning of the photograph as 'incitement to hatred and violence against the King and the monarchy.'[397]

Having established that the interference with the applicants' right to freedom of expression was 'prescribed by law' and that it pursued one of the aims mentioned in article 10 § 2 of the Convention (the protection of the reputation or rights of others), the European Court focused its analysis on the question whether the interference was 'necessary in a democratic society.'

The Court considered the burning of the upside-down photograph within the framework of a political critique of monarchies in general and the Spanish Kingdom in particular, instead of a personal critique.[398] It did so by referencing the specific context in which the applicants' behaviour took place, namely an anti-monarchical demonstration that carried the motto '300 years of Bourbons, 100 years of struggle against the Spanish occupation' ('*300 ans de Bourbons, 100 ans de lutte contre l'occupation espagnole*').[399] According to the Court, the burning of the photograph

> 'was part of a debate on issues of public interest, namely the independence of Catalonia, the monarchical form of the state and criticism of the King as a symbol of the Spanish nation. All these elements allow to conclude that it was not a personal attack directed against the King of Spain, aiming to despise and vilify the person of the latter, but a criticism of what the King represents, as

[396] European Court of Human Rights, 13 March 2018, 51168/15 and 51186/15, par. 14 (*Stern Taulats and Roura Capellera v. Spain*).

[397] European Court of Human Rights, 13 March 2018, 51168/15 and 51186/15, par. 14 (*Stern Taulats and Roura Capellera v. Spain*).

[398] European Court of Human Rights, 13 March 2018, 51168/15 and 51186/15, par. 36 (*Stern Taulats and Roura Capellera v. Spain*).

[399] European Court of Human Rights, 13 March 2018, 51168/15 and 51186/15, par. 36 (*Stern Taulats and Roura Capellera v. Spain*).

> leader and symbol of the state apparatus and the forces which, according to the applicants, had occupied Catalonia – which falls within the realm of political criticism or dissent.'[400]

Subsequently, the Court addressed the three elements of the applicants' behaviour that the Spanish Constitutional Court found to be constituting 'incitement to hatred and violence against the King and the monarchy', namely (1) the use of fire to burn (2) a large-scale photograph (3) placed upside down.[401] The Court noted that

> 'these are symbolic elements which have a clear and obvious relation to the concrete political criticism expressed by the applicants, which concerned the Spanish State and its monarchical form: the effigy of the King of Spain is the symbol of the King as head of the state apparatus, as shown by the fact that it is reproduced on the coin and stamps, or placed in the emblematic places of public institutions; the use of fire and the positioning of the photograph upside down to express a radical rejection, and both are used as a manifestation of political or other criticism; the size of the photograph seemed intended to ensure the visibility of the act in question, which took place on a public square.'[402]

Considering these circumstances, the Court found that 'the acts alleged against the applicants were part of one of those provocative productions which are increasingly used to attract the attention of the media, which (…) do not go beyond the use of a certain amount of provocation permitted for the transmission of a critical message from the angle of freedom of expression.'[403]

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[400] European Court of Human Rights, 13 March 2018, 51168/15 and 51186/15, par. 36 (*Stern Taulats and Roura Capellera v. Spain*).

[401] European Court of Human Rights, 13 March 2018, 51168/15 and 51186/15, par. 37 (*Stern Taulats and Roura Capellera v. Spain*).

[402] European Court of Human Rights, 13 March 2018, 51168/15 and 51186/15, par. 38 (*Stern Taulats and Roura Capellera v. Spain*).

[403] European Court of Human Rights, 13 March 2018, 51168/15 and 51186/15, par. 38 (*Stern Taulats and Roura Capellera v. Spain*).

With regard to the accusation of 'incitement to violence', the Court decided that it was not proven that the intention of Stern Taulats and Roura Capellera was to incite to violent acts against the King.[404] Instead, the Court argued that these types of acts 'must be interpreted as the symbolic expression of dissatisfaction and protest. The staging orchestrated by the applicants in the present case, although having resulted in the burning of an image, is a form of expression of an opinion in the context of a debate on a matter of public interest, namely: the institution of the monarchy', while the Court also referred to its *Handyside*-criterion.[405] Thus, the Court was, other than the Spanish authorities, not of the opinion that the act of burning the photograph 'could reasonably be regarded as an incitement to hatred or violence', also given that the act 'was not accompanied by violent conduct or disturbances to public order.'[406]

As with regard to the other type of speech crime the applicants' conviction was based on, namely the accusation of 'hate speech', the Court first noted that the protection of article 10 of the Convention 'is limited, if not excluded, in relation to hate speech, a term to be understood as covering all forms of expression that propagate, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance.'[407] Yet, the act of burning a photograph of the Spanish royal couple ('the symbolic expression of the rejection and political criticism of an institution') did not fall in this category of expression.[408] Doing so 'would imply an overly broad interpretation of the exception allowed by the Court's

[404] European Court of Human Rights, 13 March 2018, 51168/15 and 51186/15, par. 39 (*Stern Taulats and Roura Capellera v. Spain*).

[405] European Court of Human Rights, 13 March 2018, 51168/15 and 51186/15, par. 39 (*Stern Taulats and Roura Capellera v. Spain*).

[406] European Court of Human Rights, 13 March 2018, 51168/15 and 51186/15, par. 40 (*Stern Taulats and Roura Capellera v. Spain*).

[407] European Court of Human Rights, 13 March 2018, 51168/15 and 51186/15, par. 41 (*Stern Taulats and Roura Capellera v. Spain*).

[408] European Court of Human Rights, 13 March 2018, 51168/15 and 51186/15, par. 41 (*Stern Taulats and Roura Capellera v. Spain*).

case-law, which would be detrimental to pluralism, tolerance and openness, without which no "democratic society",' according to the Court.[409] Moreover, the Court regarded the imposed penalty – a prison sentence to be executed in case the defendants did not pay the fine – as neither proportionate to the legitimate aim pursued nor necessary in a democratic society.[410]

In *Vedat Şorli v. Turkey*, the European Court ruled on a case concerning the defamation of a national head of state in a republic. The applicant in this case, Şorli, was sentenced to 11 months and 20 days imprisonment, with delivery of the judgment suspended for five years.[411]

Şorli was convicted on two counts over images posted on Facebook that were deemed insulting to the President of Turkey. The first count concerned a 'cartoon showing the former US President, Barack Obama, kissing the President of the Republic of Turkey, shown in woman's attire. On a speech bubble placed above the image of the President of the Republic, it was written in Kurdish "Are you going to register the title deed of Syria in my name, my dear husband?."'[412] The second count was about 'photos of the President of the Republic and of the former Prime Minister of Turkey below which was written the following comment: "May your power be fed by blood sink to the bottom of the earth / May your seats that you solidify by dint of taking lives sink to the bottom of the earth / May your luxurious lives that you live with the dreams that you steal sink to the bottom of the earth / May your presidency, your power, your ambitions sink to the bottom of the earth."'[413]

[409] European Court of Human Rights, 13 March 2018, 51168/15 and 51186/15, par. 41 (*Stern Taulats and Roura Capellera v. Spain*).

[410] European Court of Human Rights, 13 March 2018, 51168/15 and 51186/15, par. 42 (*Stern Taulats and Roura Capellera v. Spain*).

[411] European Court of Human Rights, 19 October 2021, 42048/19, par. 1, 9 (*Vedat Şorli v. Turkey*).

[412] European Court of Human Rights, 19 October 2021, 42048/19, par. 5 (*Vedat Şorli v. Turkey*).

[413] European Court of Human Rights, 19 October 2021, 42048/19, par. 5 (*Vedat Şorli v. Turkey*).

The domestic court considered that the content 'was intended to undermine the honor, dignity and reputation of the [President].' [414] The court found that

> 'The content that the accused shared on his Facebook account is of such as to damage the honor, dignity and reputation of the President of the Republic. It is not possible to consider that these contents are protected by the freedom of expression of the accused (…) As the contents did not constitute an exchange of ideas on a question of general interest and that they were shared on a social network visible to all, it is considered that they exceeded the limits of criticism and that they could not be regarded as covered by freedom of expression.'[415]

On 'suspicion of having committed the offenses of insulting the President of the Republic and propaganda in favor of a terrorist organization', Şorli was taken into police custody,[416] kept in pre-trial detention for two months and two days,[417] and charged with insulting the Turkish President.[418]

Şorli was found guilty of the crime of insulting the President of the Republic, based on articles 299 and 125 of the Turkish Penal Code.[419]

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[414] European Court of Human Rights, 19 October 2021, 42048/19, par. 9 (*Vedat Şorli v. Turkey*).

[415] European Court of Human Rights, 19 October 2021, 42048/19, par. 9 (*Vedat Şorli v. Turkey*).

[416] European Court of Human Rights, 19 October 2021, 42048/19, par. 6 (*Vedat Şorli v. Turkey*).

[417] European Court of Human Rights, 19 October 2021, 42048/19, par. 11 (*Vedat Şorli v. Turkey*).

[418] European Court of Human Rights, 19 October 2021, 42048/19, par. 7 (*Vedat Şorli v. Turkey*).

[419] European Court of Human Rights, 19 October 2021, 42048/19, par. 9 (*Vedat Şorli v. Turkey*). Article 299 of the Turkish Penal Code states that: '(1) Anyone who insults the President of the Republic will be punished with imprisonment ranging from one to four years; (2) If this offense is committed in public, the penalty is increased by one sixth; (3) The prosecution of this offense is subject to the authorization of the Minister of Justice.' See European Court of Human Rights, 19 October 2021, 42048/19, par. 14 (*Vedat Şorli v. Turkey*). Article 125 (1) of the Turkish Penal Code reads: 'Whoever attributes an act or a concrete fact to another in such a way as to attack his honor, dignity and reputation or attacks the honor, dignity and reputation of others by insults will be punished by a term of imprisonment ranging from three months to two years or a judicial fine.' Article 125 (3) (a) of the Turkish Penal Code prescribes that 'The minimum sentence shall not be less than one year of

Before the European Court of Human Rights, Şorli claimed his Facebook posts 'constituted critical comments on political news' and that his conviction infringed his right to free expression.[420] Moreover, Şorli alleged that the crime of which he was convicted, insulting the President of the Republic, 'ensured special protection for the Head of State and provided for a greater penalty compared to the offense of ordinary insult' and that it was 'not in accordance with the spirit of the Convention and the case-law of the Court.'[421] Şorli also found his pre-trial detention as well as his criminal conviction to imprisonment to be disproportionate.[422] Lastly, he argued that the decision to suspend the delivery of the judgment created a 'chilling effect on the exercise of his freedom of expression on political matters during the period of suspension of five years.'[423]

On the other hand, the Turkish government submitted that, in case the European Court would find an interference with the applicant's right to free expression, that interference was based on a clear and accessible law, of which the interpretation and application by the national courts in the present case was foreseeable.[424] Moreover, the Turkish government argued that 'Similar provisions protecting the honor and reputation of Heads of State appear in the criminal codes of several European countries and continue to be applied', and that 'defamatory remarks targeting the Head of State do not only undermine him personally, but also the integrity of the position he holds and that in the eyes of Turkish society, a targeted insult to the head of state humiliates the entire nation that the latter represents.'[425]

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imprisonment in the event that the offense of insult is committed against a public official because of his function.'

[420] European Court of Human Rights, 19 October 2021, 42048/19, par. 20 (*Vedat Şorli v. Turkey*).

[421] European Court of Human Rights, 19 October 2021, 42048/19, par. 20 (*Vedat Şorli v. Turkey*).

[422] European Court of Human Rights, 19 October 2021, 42048/19, par. 20 (*Vedat Şorli v. Turkey*).

[423] European Court of Human Rights, 19 October 2021, 42048/19, par. 20 (*Vedat Şorli v. Turkey*).

[424] European Court of Human Rights, 19 October 2021, 42048/19, par. 34 (*Vedat Şorli v. Turkey*).

[425] European Court of Human Rights, 19 October 2021, 42048/19, par. 34 (*Vedat Şorli v. Turkey*).

This, in the view of the Turkish government, 'justified the imposition of a more severe penalty for the offense of insulting the President of the Republic.'[426]

According to the government, the interference pursued the legitimate aim of protecting the reputation or rights of others.[427] The government felt that

> 'the national courts duly weighed the interests at stake within their margin of appreciation. It considers in this regard that the contentious content shared by the applicant (…) attributed to the President of the Republic, who should enjoy the confidence of the public given his important duties and powers, criminal acts, such as profiting from murders and massacres, and illustrated it in a sexually-oriented image without any factual basis. According to the Government, the imposition on the applicant of a short prison sentence, not carried out thanks to the application of the measure of suspension of the delivery of the judgment, was a measure proportionate in the circumstances of the case. [The government] asserts that the criminal proceedings against the applicant were initiated not with the aim of silencing opposing voices and preventing the contribution to a public debate, but because the content in question aimed at the President of the Republic was degrading and defamatory.'[428]

The European Court accepted that the interference in issue was provided for by law, namely Article 299 of the Criminal Code and that this interference pursued the legitimate aim of protecting the reputation or rights of others.[429] With regard to the necessity of the interference, the Court

> 'noted that, in order to convict the applicant, the domestic courts relied on Article 299 of the Criminal Code which grants the President of the Republic a higher level of protection than to other

[426] European Court of Human Rights, 19 October 2021, 42048/19, par. 34 (*Vedat Şorli v. Turkey*).
[427] European Court of Human Rights, 19 October 2021, 42048/19, par. 35 (*Vedat Şorli v. Turkey*).
[428] European Court of Human Rights, 19 October 2021, 42048/19, par. 36 (*Vedat Şorli v. Turkey*).
[429] European Court of Human Rights, 19 October 2021, 42048/19, par. 42 (*Vedat Şorli v. Turkey*).

> persons (…) with regard to the disclosure of information or opinions concerning them, and provides for more serious penalties for the authors of defamatory statements. In this regard, it recalls that it has already repeatedly stated that increased protection by a special law in matters of offense is, in principle, not in accordance with the spirit of the Convention.' [430]

Moreover, the Court '[recalled] having already ruled in *Artun and Güvener v. Turkey* (…) that a state's interest in protecting the reputation of its head of state could not justify conferring on the latter a privilege or special protection vis-à-vis the right to inform and express opinions on his subject (…) and that the contrary cannot be reconciled with current political practice and conceptions.'[431]

Next, the Court criticized the proportionality of the imposed criminal sanction[432] and submitted that 'nothing in the circumstances of the present case was such as to justify the applicant's placement in police custody and (…) pre-trial detention (…), nor the imposition of a criminal sanction, even if (…) it was a prison sentence accompanied by a suspension of the pronouncement of the judgment.'[433]

Ultimately, the European Court took into account the criminal sanction, 'imposed on the applicant pursuant to a special provision providing for increased protection for the President of the Republic in matters of offense, which cannot be considered in conformity with the spirit of the Convention', and found that the Turkish government had failed to show 'that the contested measure was proportionate to the legitimate aims pursued and that it was necessary

[430] European Court of Human Rights, 19 October 2021, 42048/19, par. 43 (*Vedat Şorli v. Turkey*).

[431] European Court of Human Rights, 19 October 2021, 42048/19, par. 43 (*Vedat Şorli v. Turkey*).

[432] European Court of Human Rights, 19 October 2021, 42048/19, par. 45 (*Vedat Şorli v. Turkey*).

[433] European Court of Human Rights, 19 October 2021, 42048/19, par. 45 (*Vedat Şorli v. Turkey*).

in a democratic society within the meaning of Article 10 of the Convention.'[434] Hence, the Court established a violation of that article.[435]

2. The International Covenant on Civil and Political Rights

At the United Nations level, human rights bodies and officials have voiced opinions on *lèse-majesté* bans as well. In general, the Human Rights Committee has 'expressed concern'[436] about *lèse-majesté* in its General comment No. 34.[437] Regarding the freedom of the press, the former Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, has stated that 'All too many States legislate in ways that directly undermine journalism and the freedom of expression. They should be repealing laws that, among other things, criminalize defamation, particularly laws that penalize the insult of government authorities or *lèse majesté*.'[438]

Moreover, individual countries have been scrutinized for *lèse-majesté* bans. A prime example is Thailand, known for having one of the strictest of these bans. According to the United Nations, 404 people were investigated for insulting the monarchy between 2011 and

[434] European Court of Human Rights, 19 October 2021, 42048/19, par. 47 (*Vedat Şorli v. Turkey*).

[435] European Court of Human Rights, 19 October 2021, 42048/19, par. 48 (*Vedat Şorli v. Turkey*).

[436] Human Rights Committee, General comment No. 34, UN Doc. CCPR/C/GC/34, 2011, par. 38.

[437] General comments are authoritative interpretations by the Human Rights Committee of treaty provisions. They are meant to 'assist States parties in fulfilling their reporting obligation.' See the Supplement (No. 40 (A/36/40) to the official records of the 36th the UN General Assembly (1981) Annex VII, Introduction.

[438] See 'UN expert urges governments to end "demonization" of critical media and protect journalists', 3 May 2017, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21557&LangID=E.

2016.[439] A minority of these cases ended in an acquittal.[440] In 2017, the Human Rights Committee expressed concern regarding the facts

> 'that criticism and dissention regarding the royal family is punishable with a sentence of 3-15 years' imprisonment, about reports of a sharp increase in the number of people detained and prosecuted for the crime of *lèse-majesté* since the military coup (of 2014, added) and about extreme sentencing practices, which result in dozens of years of imprisonment in some cases.'[441]

The Committee stated that Thailand 'should review article 112 of the Criminal Code, on publicly offending the royal family, to bring it into line with article 19 of the Covenant.'[442]

Similarly, David Kaye has

> 'called on the Thai authorities to stop using *lèse-majesté* provisions as a political tool to stifle critical speech (…). Public figures, including those exercising the highest political authority, may be subject

[439] 'Press briefing note on Thailand', 13 June 2017, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21734&LangID=E.

[440] 'Press briefing note on Thailand', 13 June 2017, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21734&LangID=E: 'Statistics provided by Thai authorities show there has been a sharp fall in the number of people who have been able to successfully defend themselves against *lèse majesté* charges. From 2011-13, around 24 percent of people charged with the offence walked free, but over the next three years, that number fell to about 10 percent. Last year, that figure was only 4 percent.' See for an example: 'Thailand: Absurd lese-majeste charges against 85-year-old scholar for comments on 16th Century battle', 7 December 2017, https://www.amnesty.org/en/latest/news/2017/12/thailand-absurd-lese-majeste-charges-against-85-year-old-scholar-for-comments-on-16th-century-battle/.

[441] Human Rights Committee, 'Concluding observations on the second periodic report of Thailand', 25 April 2017, UN Doc. CCPR/C/THA/CO/2, par. 37.

[442] Human Rights Committee, 'Concluding observations on the second periodic report of Thailand', 25 April 2017, UN Doc. CCPR/C/THA/CO/2, par. 38.

> to criticism, and the fact that some forms of expression are considered to be insulting to a public figure is not sufficient to justify restrictions or penalties.'[443]

The Human Rights Committee has also decided cases on *lèse-majesté* provisions. In *Aduayom, Diasso and Dobou v. Togo*, the Human Rights Committee ruled on the arrests and detainment of three Togolese citizens who had similar things happen to them. Aduayom was a university teacher who was arrested on 18 September 1985 and charged with the offence of *lèse-majesté*.[444] The charges were dropped 23 April 1986 and he was released.[445] However, his request to be reinstated in his post at the university was declined.[446] Diasso was a professor of economics. He was arrested on 17 December 1985 and charged with the offence of *lèse-majesté* as well. The authorities alleged that he 'was in possession pamphlets criticizing the living conditions of foreign students in Togo and suggesting that money "wasted" on political propaganda would be better spent on improving the living conditions in, and the equipment of, Togolese universities.'[447] After the authorities conceded that the charges against him were unfounded, he was released him on 2 July 1986. Just as Aduayom, Diasso unsuccessfully sought reinstatement in his post of economics professor.[448] Lastly, Dobou was a civil servant at the Ministry of Post and Telecommunications. After being arrested on 30 September 1985,

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[443] 'Thailand: UN rights expert concerned by the continued use of lèse-majesté', 7 February 2017,http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21149&LangID=E.

[444] Human Rights Committee, *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, UN Doc. CCPR/C/51/D/422/1990, 423/1990 and 424/1990, par. 2.1. The case does not tell what he allegedly had done wrong.

[445] Human Rights Committee, *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, UN Doc. CCPR/C/51/D/422/1990, 423/1990 and 424/1990, par. 2.1.

[446] Human Rights Committee, *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, UN Doc. CCPR/C/51/D/422/1990, 423/1990 and 424/1990, par. 2.1.

[447] Human Rights Committee, *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, UN Doc. CCPR/C/51/D/422/1990, 423/1990 and 424/1990, par. 2.2.

[448] Human Rights Committee, *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, UN Doc. CCPR/C/51/D/422/1990, 423/1990 and 424/1990, par. 2.2.

'allegedly because he had been found reading a document outlining in draft form the statutes of a new political party', he was charged with *lèse-majesté*.[449] Again, charges were dropped at a later time, and Dobou unsuccessfully requested reinstatement in his former post.[450]

The wages of all three had been suspended after their arrest 'on the ground that they had unjustifiably deserted their posts.'[451] The authors claimed that the state of Togo violated article 19 ICCPR 'because they were persecuted for having carried, read or disseminated documents that contained no more than an assessment of Togolese politics, either at the domestic or foreign policy level'[452] and requested reinstatement as well as compensation.[453]

It was not disputed that the authors 'were first prosecuted and later not reinstated in their posts (…) for having read and, respectively, disseminated information and material critical of the Togolese Government in power and of the system of governance prevailing in Togo.'[454] In its application of article 19, the Human Rights Committee observed that

> 'the freedoms of information and of expression are cornerstones in any free and democratic society. It is in the essence of such societies that its citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and that they may criticize or openly and publicly evaluate their Governments without fear of interference or punishment, within the limits set by article 19, paragraph 3. On the basis of the information before the Committee, it appears that

[449] Human Rights Committee, *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, UN Doc. CCPR/C/51/D/422/1990, 423/1990 and 424/1990, par. 2.3.

[450] Human Rights Committee, *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, UN Doc. CCPR/C/51/D/422/1990, 423/1990 and 424/1990, par. 2.3.

[451] Human Rights Committee, *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, UN Doc. CCPR/C/51/D/422/1990, 423/1990 and 424/1990, par. 2.4.

[452] Human Rights Committee, *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, UN Doc. CCPR/C/51/D/422/1990, 423/1990 and 424/1990, par. 3.1.

[453] Human Rights Committee, *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, UN Doc. CCPR/C/51/D/422/1990, 423/1990 and 424/1990, par. 3.2.

[454] Human Rights Committee, *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, UN Doc. CCPR/C/51/D/422/1990, 423/1990 and 424/1990, par. 7.4.

> the authors were not reinstated in the posts they had occupied prior to their arrest, because of such activities. The State party implicitly supports this conclusion by qualifying the authors' activities as "political offences" (…); there is no indication that the authors' activities represented a threat to the rights and the reputation of others, or to national security or public order (article 19, paragraph 3). In the circumstances, the Committee concludes that there has been a violation of article 19 of the Covenant.'

Another case regarding the defamation of a national head of state that came before the Human Rights Committee is that of *Rafael Marques de Morais v. Angola*. This case was about the head of state of a republic instead of a monarchy. In this case, Angolan citizen Rafael Marques de Morais complained that a number of his rights granted by the International Covenant on Civil and Political Rights, including that of free expression, were violated by the state of Angola.

The background of this case is as follows. In 1999, Marques de Morais wrote several articles that were critical of Angolan President dos Santos. Marques de Morais had written that the President was responsible 'for the destruction of the country and the calamitous situation of State institutions' and that he was 'accountable for the promotion of incompetence, embezzlement and corruption as political and social values.'[455] Marques de Morais was arrested and later charged with 'materially and continuously committ[ing] the crimes characteristic of defamation and slander against His Excellency the President of the Republic and the Attorney General of the Republic.'[456] Ultimately, he was convicted of 'for abuse of the press on the basis of injury to the President.' The Angolan Supreme Court

> 'considered that the author's acts were not covered by his constitutional right to freedom of speech, since the exercise of that right was limited by other constitutionally recognized rights, such as one's honour and reputation, or by "the respect that is due to the organs of sovereignty and to the symbols

[455] Human Rights Committee, *Rafael Marques de Morais v. Angola*, CCPR/C/83/D/1128/2002, par. 2.1.

[456] Human Rights Committee, *Rafael Marques de Morais v. Angola*, CCPR/C/83/D/1128/2002, par. 2.6.

> of the state, in this case the President of the Republic." It affirmed the prison term of six-month, but suspended its application for a period of five years, and ordered the author to pay a court tax of NKz. 20,000.00 and NKz. 30,000.00 damages to the victim.'[457]

Marques de Morais lodged a number of complaints relating to the rule of law, including complaints about his arbitrary arrest and lack of a fair trial.[458] With regard to his right to free expression, Marques de Morais claimed that his criticism of the Angolan President was covered by article 19 ICCPR.[459]

In its assessment, the Human Rights Committee '[reiterated] that the right to freedom of expression in article 19, paragraph 2, includes the right of individuals to criticize or openly and publicly evaluate their Governments without fear of interference or punishment.'[460] Moreover, the Committee

> '[noted] that the author's final conviction was based on Article 43 of the Press Law, in conjunction with Section 410 of the Criminal Code. Even if it were assumed that his arrest and detention, or the restrictions on his travel, had a basis in Angolan law, and that these measures, as well as his conviction, pursued a legitimate aim, such as protecting the President's rights and reputation or public order, it cannot be said that the restrictions were necessary to achieve one of these aims. The Committee observes that the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. Given the paramount importance, in a democratic society, of the right to freedom of expression and of a free and uncensored press or other media, the severity of the sanctions imposed on the author cannot be considered as a proportionate measure to protect public order or the honour and the reputation of the President, a public figure who, as such, is subject to criticism and opposition. In addition, the Committee considers it an aggravating factor

[457] Human Rights Committee, *Rafael Marques de Morais v. Angola*, CCPR/C/83/D/1128/2002, par. 2.12.

[458] See Human Rights Committee, *Rafael Marques de Morais v. Angola*, CCPR/C/83/D/1128/2002, par. 3.1-3.7

[459] Human Rights Committee, *Rafael Marques de Morais v. Angola*, CCPR/C/83/D/1128/2002, par. 3.8.

[460] Human Rights Committee, *Rafael Marques de Morais v. Angola*, CCPR/C/83/D/1128/2002, par. 6.7

> that the author's proposed truth defence against the libel charge was ruled out by the courts. In the circumstances, the Committee concludes that there has been a violation of article 19.'[461]

These cases show that both the Human Rights Committee as well as the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression are critical of laws that undermine freedom of expression by criminalizing expression that is critical of governments and heads of state.

Thus far I have discussed commentary from United Nations bodies regarding two countries that provide a relatively low level of protection for free expression.[462]

However, the United Nations is also critical of *lèse-majesté* bans in countries that have comparatively high standards of free expression. In a 2016 letter regarding the Dutch *lèse-majesté* provisions, David Kaye, at the time the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 'expressed concern that the [*lèse-majesté*] provisions of the Dutch Criminal Code limit the right to freedom of expression in contradiction with article 19 of the International Covenant on Civil and Political Rights.'[463] Kaye

> 'expressed particular concern at the fact that persons found guilty of insults to the Dutch Royalty (…) may face significantly more severe punishments than those who insult any other persons. In this context, it gives additional reason for concern that in this kind of cases the prosecution and conviction of offenders does not even require a request or complaint from the allegedly insulted or defamed person. In this respect, I would like to remind your Excellency's Government of the

[461] Human Rights Committee, *Rafael Marques de Morais v. Angola*, CCPR/C/83/D/1128/2002, par. 6.8.

[462] Over the last decade, both Thailand and Angola have ranked outside of the first 100 countries listed in the annual Press Freedom Index from Reporters Without Borders, while Togo did not climb higher than place 74 during this period.

[463] D. Kaye, Letter of 14 October 2016, UN Doc., OLNLD2/2016, https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL_NLD_2016.pdf.

> principles set out by the Human Rights Committee on expressing opinions concerning public figures in the political domain and public institutions. In its General Comment No. 34, it stated that "in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high. Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties (…). Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. (…) Moreover, I am concerned that sections 111-113 (…) provide neither a defence of truth nor a public interest exception. I would like to refer again to the General Comment No. 34 which points out that all defamation laws, "in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. (…) In any event, a public interest in the subject matter of the criticism should be recognized as a defence" (CCPR/C/GC/34).' [464]

Hence, the Special Rapporteur is critical of provisions that provide for more severe punishments for defamation on the basis of the status of the targeted individual, and of procedural provisions that differentiate between individuals, such as the requirement to file a complaint.

Applying these supranational norms to the Dutch legal situation, two remarks are in place. First, it is clear that the articles 111, 112, 113 were at odds with the protection provided to free expression by both the European Convention on Human Rights as the International Covenant on Civil and Political Rights. Although the ban on insulting the monarchy had a legal basis and, it could be argued, it pursued one of the aims mentioned in article 10 paragraph 2, namely the 'protection of the reputation or rights of others', case law of the European Court of

[464] D. Kaye, Letter of 14 October 2016, UN Doc., OLNLD2/2016, https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL_NLD_2016.pdf.

Human Rights makes clear that special defamation laws, laws that offer increased protection for a monarch, are incompatible with the Convention. Moreover, articles 111, 112, 113 carried maximum prison sentences of five, four, and one year, which would not be regarded as 'proportionate to the legitimate aim pursued nor necessary in a democratic society.'[465]

Similarly, the Human Rights Committee has stated that laws 'should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned'[466], and that 'imprisonment is never an appropriate penalty' for defamation.[467]

Second, it is not clear that the current situation totally aligns with supranational law. That is because, notwithstanding the repeal of articles 111, 112, and 113, the criminal law maintains special elements in case of insults directed at the monarchy. Namely, article 267 leaves open the possibility of an increase of the maximum sentence of the general defamation provisions in cases of where the target of the insult is the King, the King's spouse, the presumed successor to the King, his or her spouse, or the Regent.[468] Moreover, the current regime does not require the targeted individual to file a complaint in case of *lèse-majesté*, this being another deviation of the general rules of defamation.

12. Conclusion

[465] Cf. European Court of Human Rights, 13 March 2018, 51168/15 and 51186/15, par. 42 (*Stern Taulats and Roura Capellera v. Spain*).

[466] Human Rights Committee, General comment No. 34, UN Doc. CCPR/C/GC/34, 2011, par. 38.

[467] Human Rights Committee, General comment No. 34, UN Doc. CCPR/C/GC/34, 2011, par. 47.

[468] This means that, theoretically speaking, a prison sentence of 32 months for insulting the monarchy is still possible, as article 262 paragraph 1 of the Criminal Code (included in the section regarding general defamation provisions) states that: 'Any person who commits the serious offence of slander or of libel, knowing that the allegation is untrue, shall be guilty of aggravated defamation and shall be liable to a term of imprisonment not exceeding two years or a fine of the fourth category.'

This chapter has discussed the crime of *lèse-majesté*. Over a dozen countries, ranging from relatively free to suppressive, currently ban disparaging statements about their respective Kings, Queens, or Presidents. This chapter has focused particularly on the Dutch *lèse-majesté* ban as well as on international free expression norms. The Dutch *lèse-majesté* ban goes back to the nineteenth century, when 'the law of 1 June 1830' was introduced that banned the defamation of a number of royal figures. This law was enacted in a time of significant political instability and social tensions between parts of the United Kingdom of the Netherlands, including disputes over matters such as religion, language, and taxation. The law of 1 June 1830 was repealed when the new Criminal Code of 1886 was adopted. However, the new code did maintain a *lèse-majesté* ban. Articles 111 and 112 of this code prohibited 'the intentional insult directed at the King or Queen', respectively 'the intentional insult directed at the heir presumptive, at a member of the Royal House, or at the Regent.' *Lèse-majesté* remained controversial in the twenty-first century. On one hand, convictions continued to take place. On the other, the legitimacy of the special protection afforded to royal dignitaries by the *lèse-majesté* ban was questioned. A 2016 Bill proposed to repeal the *lèse-majesté* ban. The Bill was inspired by notions of social equality as well as developments in international law. The Bill became law in 2020. Under the new framework, insults directed at royal dignitaries are generally dealt with via the general defamation rules, with two exceptions to the general regime. First there is the possibility to impose an increase of a third of the maximum punishment of a number of general defamation provision in case the target of an insult is the King, the King's spouse, the presumed successor to the King, his or her spouse, or the Regent. Second, the King, the King's spouse, the presumed successor to the King, his or her spouse, or the Regent are exempt from the requirement of filing an individual complaint in case of an insult. This new regime fits better with European and international human rights norms regarding free expression. The European Court of Human Rights as well as various United

Nations bodies are dismissive of 'special' defamation provisions that provide for an extra protection of dignitaries. The European Court has stated that 'providing increased protection by means of a special law on insults will not, as a rule, be in keeping with the spirit of the Convention' and that the principle stipulated in *Colombani,* namely that special privileges that shield foreign Heads of State from criticism solely on account of their function or status are irreconcilable with the Convention, also applies to national heads of state such as Presidents or Kings. Furthermore, the UN's Human Rights Committee has expressed concern over *lèse-majesté* laws in its authoritative interpretation of article 19 of the ICCPR, and has decided that citizens 'may criticize or openly and publicly evaluate their Governments without fear of interference or punishment, within the limits set by article 19, paragraph 3'. Both the former Special Rapporteur on the right to freedom expression, and the Human Rights Committee have scrutinized countries on the existence and application of *lèse-majesté* laws.

Chapter 4 Blasphemy

Introduction

Blasphemy can be described as 'the willful use of derogatory language or actions that question the existence, nature, or power of sacred beings, items, or texts. Sometimes (…) it is an expression of mocking God's powers, or refers to sanctions upon individuals seeking to take such powers for themselves.'[469]

This crime carries with it a long history. The Greek philosopher Socrates (c. 470–399 BC) was forced to drink the hemlock for questioning the accepted gods of Athens and encouraging the Athenian youth to 'rebel' against the authorities. Socrates was charged with 'impiety', any 'act or expression contemptuous of the gods or depraving holy matters'[470]; impiety 'signified shocking and abhorrent ideas about religion.'[471] This accusation was made earlier against the Greek military commander Alcibiades (c. 450–404 BC). His encounter with the authorities over sacrilegious behaviour is recounted by the historian Leonard Levy as follows:

> 'In 415 B.C., 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

[469] As defined in D. Nash, *Acts against God*, London: Reaktion Books 2020, p. 12.

[470] L.W. Levy, *Blasphemy: Verbal Offenses Against the Sacred, from Moses to Salman Rushdie*, Chapel Hill & London: The University of North Carolina Press 1993, p. 4.

[471] L.W. Levy, *Blasphemy: Verbal Offenses Against the Sacred, from Moses to Salman Rushdie*, Chapel Hill & London: The University of North Carolina Press 1993, p. 31.

> 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 honored Demeter, the earth godess. Impersonating the high priest, Alcibiades had revealed and mocked the secret rites.'[472]

Alcibiades was sentenced to death in absentia but went to Sparta before the sentence could be delivered. Another Greek who made things difficult for himself was the sculptor Phidias, who 'as a way of signing his work' had carved figures of himself and Athenian statesman Pericles on the shield of Athena on the Athena Parthenos.[473] Phidias, who was thrown in jail, had conducted an act of impiety, for 'any profanation of the protecting gods of the state implicitly attacked the state itself, akin to treason.'[474]

Phidias case illustrates something that was characteristic of many blasphemy laws in the West: the close link between disrespecting religion[475] and disobedience to the state. The well-known case of *Taylor v. Rex* (1676) on the English blasphemy law is a classic illustration of this. The defendant Taylor was prosecuted for stating, amongst other things, that 'religion is a Cheat' and that 'Christ is a bastard.'[476] The judge in the case, Matthew Hale, stated that

[472] L.W. Levy, *Blasphemy: Verbal Offenses Against the Sacred, from Moses to Salman Rushdie*, Chapel Hill & London: The University of North Carolina Press 1993, p. 5.

[473] L.W. Levy, *Blasphemy: Verbal Offenses Against the Sacred, from Moses to Salman Rushdie*, Chapel Hill & London: The University of North Carolina Press 1993, p. 4.

[474] L.W. Levy, *Blasphemy: Verbal Offenses Against the Sacred, from Moses to Salman Rushdie*, Chapel Hill & London: The University of North Carolina Press 1993, p. 4.

[475] Or perhaps more accurately: the majority religion at the time being.

[476] Quoted in I. Hare, 'Blasphemy and Incitement to Religious Hatred: Free Speech Dogma and Doctrine', in: I. Hare & J. Weinstein (eds.), *Extreme Speech and Democracy*, Oxford: Oxford University Press 2010, p. 290-291.

> 'such kind of wicked blasphemous words were not only an offence to God and religion, but a crime against the laws, State and Government, and therefore punishable in this court. For, to say religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved, and that Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law.'[477]

In the nineteenth century, that close link between subversion and blasphemy deteriorated and the definition of blasphemy 'narrowed'[478] or 'liberalized.'[479] A case in point stems from, again, the history of the English blasphemy law. In the 1883 case of *R. v. Ramsey and Foote*, a 'milestone in blasphemy prosecution' in England,[480] Justice Coleridge 'overturned the straightjacketed statute that had been created by Sir Matthew Hale in the 1670s'[481] and decided that 'even the fundamentals of religion may be attacked' as long as 'the decencies of controversy' are observed.[482] Coleridge distinguished between the matter and manner of an utterance.[483] As long as one is decent, timid, or inoffensive in style, one may question, or criticize religion. By doing so, the focus of the law's protection shifted from Christianity as such, to the protection of Christian believers.[484]

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[477] Quoted in: E. Visconsi, 'The Invention of Criminal Blasphemy: Rex v. Taylor (1676),' *Representations*, 2008, p. 31.

[478] I. Hare, 'The English Law of Blasphemy: The "Melancholy, Long, Withdrawing Roar"', in: P. Cliteur & T. Herrenberg (eds.), *The Fall and Rise of Blasphemy Law*, Leiden: Leiden University Press 2016, p. 58-60.

[479] D. Nash, *Blasphemy in the Christian World: A History*, Oxford: Oxford University Press 2007, p. 80.

[480] D. Nash, *Acts against God*, London: Reaktion Books 2020, p. 129.

[481] D. Nash, *Acts against God*, London: Reaktion Books 2020, p. 132.

[482] Full Report of the Trial of G.W. Foote and W.J. Ramsey, for Blasphemy, Before Lord Chief Justice Coleridge, London: Progressive Publishing Company 1883, p. 76.

[483] P. Jones, 'Blasphemy, Offensiveness and Law', *British Journal of Political Science*, 1980, p. 142. See also D. Nash, *Acts against God*, London: Reaktion Books 2020, p. 132: 'Coleridge lighted upon the concept of 'manner' and this would govern legal thinking in blasphemy cases for almost the entirety of the next century.'

[484] P. Jones, 'Blasphemy, Offensiveness and Law', *British Journal of Political Science*, 1980, p. 134.

Today, anti-blasphemy laws are still widespread.[485] This chapter examines international and national regulations of blasphemy and norms relating to anti-religious expression. For the national part, which this chapter starts off with, the Netherlands is used as case study. The chapter continues by discussing the development of the Dutch law against scornful blasphemy, introduced in 1932. The parliamentary debate on this ban will be discussed, as well as its reception in courts and its repeal in 2014. The work thereafter centers around a discussion of international and European regulations regarding the right to free expression and blasphemy.

A. National law

1. The Dutch law against 'scornful blasphemy'

The Dutch law against 'scornful blasphemy' (*smalende godslatering*) was adopted in 1932. The Dutch Criminal Code of 1886 lacked a general provision against blasphemy. In 1880, during a debate in Parliament about the Criminal Code, the minister of justice at the time, Anthony Ewoud Jan Modderman, submitted that 'God is able to preserve His own rights by Himself; no human laws are required for this purpose.'[486]

Yet, five decades later things had changed. A legislative proposal of 25 April 1931 entitled 'Amendment to the Criminal Code with provisions regarding certain utterances hurtful to religious feelings'[487] sought to add two provisions relating to the defamation of religion to the Criminal Code. Article 147 no. 1 was intended to criminalize 'he who verbally, in writing,

[485] See for example U.S. Commission on International Religious Freedom, *Violating Rights: Enforcing the World's Blasphemy Laws*, 2020.

[486] Parliamentary documents, House of Representatives, 1880-1881, 25 October 1880, 102.

[487] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 2 (*Aanvulling Wetboek van Strafrecht met voorzieningen betreffende bepaalde voor godsdienstige gevoelens krenkende uitingen*).

or in image, publicly expresses himself by scornful blasphemy in a manner offensive to religious feelings.' In addition, Article 429bis made it illegal for people to 'display, in a place visible from a public road, words or images that, as expressions of scornful blasphemy, are hurtful to religious feelings.'[488]

2. The proposal of the Dutch blasphemy law

> 'O, he is a great pleasure, that good god! He is an exceptionally useful thing! He leads the way in the march to war, he lends his lustre to the smear campaign against the Soviet Union, he is the patron of every Christian and unchristian exploiter, he symbolizes the stultification of the masses (…). God means imperial warfare, Christ means starvation and exploitation of the working masses, the 'Holy Spirit' means bloody suppression of the colonial peoples, the Holy Virgin Mother means stultifying the people in order to preserve all these blessings. For the working people, there is no Christmas. For them there is the song of the French revolution – A la lanterne!
>
> *Christ on the dunghill!*
> *The Holy Virgin in the stable!*
> *The Holy Fathers to the Devil!*
> *Long live the voice of the canon!*
>
> The canon of the proletarian revolution!'

These sentences are taken from an article entitled 'Away with Christmas!' (*Weg met het Kerstfeest!*) that appeared in the Dutch communist daily *De Tribune* on 24 December 1930. This newspaper article was one example of blasphemous material Minister of Justice Jan

[488] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 2. Article 147 no. 1 was placed within the section 'Crimes against public order' of the Dutch Criminal Code.

Donner 'grudgingly' gave in the short explanatory note accompanying his proposal for the introduction of the blasphemy law.[489] Donner, a Reformed Christian and eminent jurist who later in his career became president of the Dutch Supreme Court, cited two more examples that inspired him to draft the blasphemy law, both taken from the same communist newspaper, in Donner's words 'a Dutch daily of anti-religious orientation.'[490] The first example was a 'repulsive' cartoon entitled 'Plans for intervention are crafted in heaven and carried out on earth' (*Interventie-plannen worden in de hemel gesmeed, en op aarde uitgevoerd*) that appeared on 19 January 1931. The cartoon depicts a naked God in heaven wearing a hat with the words 'God himself' written on it. God is depicted as saying: 'I have discovered a new poison gas with which we can destroy Soviet-Russia entirely, my son.' A gas-masked Jesus is seen hanging on a crucifix, holding a large tank of 'Pacifism' in his hands. Referring to the tank, Jesus says: 'Before we start, let us first spread this powder across the earth.' The cartoon also pictures Petrus – also wearing a gas mask – holding a sign that reads: 'This year, God can only be contacted for war affairs.' The other example Donner briefly mentioned in his explanatory note was a cartoon that appeared on 4 April 1931, the day before Easter. This cartoon accompanied an article entitled 'Away with Easter!' (*Weg met het Paasch-feest!*). It pictures God blowing air at the sails of a heavily armed sailing boat on its way to the Soviet Union. The sailing boat is manned by people in top hats, suggesting that they belong to the upper class of society, who are also blowing air at the sails.[491]

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[489] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 3, p. 1 (footnote 1). Donner only cited the sentence 'Christ on the dunghill!' in his note. He did not want to cite the other 'far graver' blasphemous content from the newspaper article.

[490] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 3, p. 1 (footnote 1).

[491] The so-called *Centrale Vereeniging voor Openbare Leeszalen*, a government body responsible for the supervision of subsidised public libraries and public reading rooms, objected to the placement of editions of *De Tribune* at public libraries and reading rooms on the ground of 'moral harmfulness.' Subsequently, the communist daily was banned from those places. In defending this decision, the Dutch minister of Education, Arts, and Sciences, Jan Terpstra, pointed out that 'an honest, reasonable defence of atheism or communism'

In a rare insight Donner gave into his inner self, he revealed that the opinions expressed in *De Tribune* had deeply offended him and that it was 'a question of conscience' whether he could make use of his powers as a minister to act against this 'vomit from hell.'[492] He came to the conclusion that the state had a role to fulfil here.[493]

Although the minister was willing to 'admit to a certain degree' that abusive remarks about the divine were rare in Dutch society, they were nonetheless intolerable.[494] Donner sought to prevent the 'serious injury to the feelings of the great majority of the population.'[495] The Netherlands was a predominantly Christian nation at the time[496] and in 'a State in which God is acknowledged in multiple ways,' public expressions 'that directly scorn God (…) cannot be tolerated.' The minister felt that somebody who 'scornfully contests another's religion, arrogates that person's religious beliefs' and thus 'utters his hurtful opinion in the other person's sphere'[497] and that 'the public sphere must be kept pure from such forms of expression.'[498] Not criminalising scornful blasphemy would limit freedom in Donner's view:

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would not be banned from the public reading rooms, yet the problem with *De Tribune* was the 'disgusting manner' in which this daily had 'repeatedly scorned and offended the religious feelings of a large number of our people.' See Parliamentary documents, House of Representatives, 12 June 1931, p. 2754-2755.

[492] Parliamentary documents, House of Representatives, 31 May 1932, p. 2634.

[493] Parliamentary documents, House of Representatives, 31 May 1932, p. 2634.

[494] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 3, p. 1.

[495] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 3, p. 2. Although this seems to indicate that the blasphemy ban sought to cover only the insults to the feelings of Christian believers, Donner indicated during the parliamentary debate on the Bill that 'every concept of God present among our people is included in the norm.' See Parliamentary documents, Senate, 3 November 1932, p. 44.

[496] In 1930, roughly 80–90 per cent of the people were affiliated with a branch of Christianity. See R. van der Bie, 'Kerkelijkheid en kerkelijke diversiteit, 1889–2008,' in: *Religie aan het begin van de 21ste eeuw*, Den Haag/Heerlen: Centraal Bureau voor de Statistiek [central bureau of statistics] 2008, p. 14.

[497] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 3, p. 2. See also Parliamentary documents, House of Representatives, 1931-1932, no. 34, 1, p. 4.

[498] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 3, p. 2.

> 'Freedom of religion in the broad sense is a fruit of our historical development that we should be proud of. But in order to protect this freedom of thought as one of our highest national goods, action in this field is required. No good can continue to exist, whose abuse goes unpunished. When freedom of thought leads to debauchery, it will be, in the interest of freedom itself, forcefully opposed.'[499]

Moreover, Donner drew a connection between combatting scornful blasphemy and the protection of the public order.[500]

Expressions like those cartoons in *De Tribune*, in which 'a scorning, abusive, or reviling manner is chosen,'[501] were the target of the projected law. The proposal relied heavily on the distinction between substance and manner: 'Contesting Theism as such, no matter how fiercely, is not at issue; as long as, in terms of manner, a certain line is not crossed, the law remains idle,' Donner argued.[502]

Donner's separation of substance and manner echoes the famous distinction made by Lord Coleridge in *R. v. Ramsay and Foote* mentioned in the introduction. What the exact

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[499] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 3, p. 2. As Vleugel states, these considerations indicate that Donner saw the protection of religious feelings as a positive obligation for the state arising from religious freedom. See A. Vleugel, *Het juridisch begrip van godsdienst*, Deventer: Wolters Kluwer 2018, p. 215.

[500] The blasphemy ban was placed in the section of the Criminal Code that was concerned with crimes against the public order. See also J. Plooy, *Strafbare godslastering*, Amsterdam: Buijten & Schipperheijn 1986, p. 97; L.A. van Noorloos, *Strafbaarstelling van 'belediging van geloof' Een onderzoek naar mogelijke aanpassing van de uitingsdelicten in het Wetboek van Strafrecht, mede in het licht van internationale verdragsverplichtingen*, Den Haag: Boom Lemma uitgevers 2014, p. 108; A. Vleugel, *Het juridisch begrip van godsdienst*, Deventer: Wolters Kluwer 2018, p. 215, 218.

[501] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 3, p. 1.

[502] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 3, p. 1. 'Every form of expression that does not scorn or abuse God' was outside the scope of his legislative proposal. The same was the case for 'thoughtless utterances' and 'cursing.' Obviously, Donner was of the opinion that the boundaries had been crossed in the articles and cartoons that had appeared in *De Tribune*. See Parliamentary documents, House of Representatives, 1930-1931, no. 348, 3, p. 2.

influence of the English blasphemy law was on the drafting of the Dutch blasphemy ban is hard to say, yet it is clear that Donner was aware of the case, as he refers to it in a discussion of comparative law.[503]

3. Parliamentary reception

Despite the brevity of the legislative proposal and its accompanying explanatory note (together they comprised no more than two pages) it provoked a lively parliamentary reaction. A committee composed of members of the House of Representatives issued a preliminary report roughly two and a half months after the law was proposed. This inventory of the parliamentarians' attitudes revealed a number of objections to the criminalisation of scornful blasphemy.

One objection was an empirical one. Not all representatives were convinced, as claimed by Donner, of the systematic nature of the 'anti-religious propaganda,' nor was there consensus about the ability of society to counter the contested utterances without having to resort to the criminal law.[504]

A second type of objection raised the argument of equality. To outlaw 'scornful blasphemy' was problematic because, it was argued, blaspheming the tenets of other religious groups might not be much more than vindicating one's own religious principles.[505] It was suggested that the non-religious were often the target of abusive speech. The issue was raised whether the frequent defamation of socialist principles or saying that 'non-belief is a plague'

[503] Parliamentary documents, Senate, 1931-1932, no. 34; Eindverslag der Commissie van Rapporteurs, 6 October 1932, p. 4.

[504] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 4, p. 3.

[505] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 4, p. 3, 4.

should be punishable.[506] Several members of Parliament adduced that it was a sign of 'unbearable self-conceit' – after all, the proposer of the law was a Christian – to protect by law only the feelings of Christian believers while non-religious people could be freely exposed to grave vilification. These representatives were of the opinion that the blasphemy law contradicted the neutrality of the state and that all varieties of thought should be equally entitled to legal protection. Instead of legal suppression, these members viewed moral education as the appropriate response to the scorning of beliefs.[507]

The legal technicalities of the proposal gave ground for a third objection. 'Because of a wide diversity of opinions' that existed in the Netherlands on what exactly did and did not constitute 'blasphemy,' members of Parliament feared too much judicial subjectivity.[508] The law would either be inapplicable to concrete cases at all, or it would lead to inconvenient trials. The publicity surrounding those trials would only broadcast the blasphemous utterance, which would add insult to injury.[509] Moreover, there was a great consensus between both proponents and opponents about the Bill's ambiguity. The Bill did not clearly identify the subject the blasphemy law sought to protect. Was it *God*? Or was it the religious feelings of *people*? And what about mocking Jesus? The explanatory note mentioned that 'in a State in which God is acknowledged in multiple ways,' public expressions 'that directly scorn God (…) cannot be tolerated,' which seemed to imply the protection of God's image and reputation. Yet the minister also spoke of 'the severe insult to the feelings of the vast majority of our people' that had been done by utterances such as the blasphemous cartoons that had inspired him to draft the Bill. It was this ambiguity that raised much uncertainty about the aim and scope of the

[506] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 4, p. 3.

[507] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 4, p. 3.

[508] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 4, p. 3, 5.

[509] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 4, p. 3.

blasphemy law.[510] Some also argued that it was impossible to blaspheme God, because the notion of 'God,' whether spiritual or personal, was metaphysical and existed outside worldly society. Others argued that it would be impossible to establish an objective standard for 'blasphemy' and feared that scientific opinions could also be affected by the law.[511] The minister's argument that the blasphemer 'utters his hurtful opinion in the believer's sphere' was met with criticism from some members of Parliament; they considered it to be 'highly artificial.'[512]

Notwithstanding these objections, there were also strong voices in favour of the proposal. This appraisal was largely due to the connection between God, state power and morality. For example, it was proclaimed that

> 'In a State in which God is acknowledged, in which God is recognized also as the ultimate foundation of the Power of Government, (…) acts that this law seeks to punish violate public order, which Government has a duty to preserve. Public Blasphemy, insofar as it taunts or scorns God, breaches the moral order that, regarding our attitude towards the Highest Sovereign, ought to be maintained in a Christian nation. Prohibiting scornful blasphemy thus relates to the protection of the State's foundations, but also extends to preserving the moral order in a Christian society, to keeping debauchery within reasonable bounds, to halting the worst degeneration, to countering the deepest decline.'[513]

[510] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 4, p. 4.

[511] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 4, p. 5.

[512] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 4, p. 8.

[513] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 4, p. 6. Other representatives regarded 'the relation between Government and God, who is the source of its Power and the necessary foundation of law and moral order (…) as the legal basis for the proposal. This legal basis anchors in nature and reason, which oblige the State to protect and secure religion with the force of law. (…) This duty could justify in certain instances the State taking action against Blasphemy. In doing so, the State does not offer legal protection to God, but it fulfils a natural duty and enforces the foundation of its moral order.' See Parliamentary documents, House of Representatives, 1930-1931, no. 348, 4, 6.

4. Donner's response and further parliamentary debate

At the end of 1931 Donner replied to Parliament's observations in his 'Answering Note' (*Memorie van Antwoord*). He affirmed that, in his view, blasphemous utterances were indeed so systemically present in Dutch society that a law against them was justified.[514] As for the argument of equality, Donner 'firmly denied' that his law was discriminatory in that it favoured religion over non-belief. He made clear that his legislative proposal sought not to combat statements offensive to religious feelings *in general* but only those that were uttered in a manner that 'scorn the Person of God.'[515] Therefore, questions about the defamation of socialist principles or of non-belief were irrelevant to Donner, since the Bill did not seek to punish those who argued that 'religion is the opium of the people' or statements of a similar nature.[516] The very specific utterances Donner had in mind simply could not be compared with other types of expression: the utterances his law sought to ban were of a 'unique character.'[517] Donner also addressed the perceived 'ambiguity' of his proposal. While 'unable to hide his disappointment about this perception,' he stated that, as a matter of 'factual phenomenon,' the blasphemous utterances were 'scornful of God,' but that the legal basis of the proposal lay in 'the insult to religious feelings.'[518] As for the worries expressed by some parliamentarians that scientific views about God and religion could be affected by the blasphemy law, Donner made clear that not every statement dishonouring God fell within the scope of his law. Only those uttered in a

[514] Parliamentary documents, House of Representatives, 1931-1932, no. 34, 1, p. 1.

[515] Parliamentary documents, House of Representatives, 1931-1932, no. 34, 1, p. 3.

[516] Parliamentary documents, House of Representatives, 1931-1932, no. 34, 1, p. 1.

[517] Parliamentary documents, House of Representatives, 1931-1932, no. 34, p. 1. See also: Parliamentary documents, Senate, 1931-1932, no. 34, Eindverslag der Commissie van Rapporteurs, 6 October 1932, p. 2.

[518] Parliamentary documents, House of Representatives, 1931-1932, no. 34, 1, p. 2, 3.

'scorning manner' would be prohibited, and, as 'scientific opinions and accounts of honest convictions never take such form,' the fear that scientific opinions could be punishable was deemed unrealistic.[519] Moreover, he argued that defamation of 'the Person of Christ' was covered by his blasphemy law, since 'the Person of Christ is one of the Persons of the Holy Trinity.'[520]

The proposal for the blasphemy law was discussed over the next year in multiple sessions in both Houses of Parliament. As could be expected from the earlier responses, the Bill received both praise and criticism. Representative Visscher of the Anti-Revolutionary Party (*Anti-Revolutionaire Partij*) argued in favour: 'When Theism speaks so loud in our social conscience that it resounds in our laws in many ways, when thousands of people, however they may differ in philosophy of life, are moved by His Name, in whom we live and act, (…) then blaspheming that Name must be punishable.'[521] Others disagreed for a variety of reasons. The elusive nature of 'religion' and 'God' were reasons for Eerdmans of the Liberal State Party (*Vrijheidsbond*) to oppose the blasphemy law. 'The conception of God is different for a theist, for a deist, or for a pantheist,' he argued.[522] 'Religion is a personal conviction. One only ever accepts one's own religion as true. After all, if one did not recognise the truth of one's own religion or favoured a different religion, one would either wish to practise no religion at all or adopt that other religion. This means that the religious expression of one person is liable to constitute offence to another's religious feeling.'[523] This view was endorsed by Eerdmans' colleague, Henri Marchant of the Free-thinking Democratic League (*Vrijzinnig-Democratische*

[519] Parliamentary documents, House of Representatives, 1931-1932, no. 34, 1, p. 3.

[520] Parliamentary documents, House of Representatives, 1931-1932, no. 34, 1, p. 4. A scorning image of the Mother of God, 'although it would undoubtedly hurt religious feelings,' was not conceived to be covered by the proposal. See Parliamentary documents, House of Representatives, 1931-1932, no. 34, 1, p. 4.

[521] Parliamentary documents, House of Representatives, 26 May 1932, p. 2592.

[522] Parliamentary documents, House of Representatives, 26 May 1932, p. 2585.

[523] Parliamentary documents, House of Representatives, 26 May 1932, p. 2585.

Bond), who was also against the proposal: 'The orthodox has a different understanding of God from the non-orthodox. The Jew has a different understanding of God from the Christian. The conception of God is different for Catholics and Protestants.'[524] Furthermore, it was claimed that the blasphemy law would turn out to be counterproductive,[525] that it was incomprehensible – 'Is it desirable that our Criminal Code would allow God to be blasphemed, yet prohibit Him from being scornfully blasphemed – that it would create many problems of interpretation – 'What are 'religious feelings'? (…) Don't we already have enough vague concepts like 'compunctions,' 'conscientious objections,' and 'grave conscientious objections'?'[526] – and that it would be difficult to explain why some anti-religious speech would be illegal while other types would not be covered by the blasphemy law – for example, defaming the Mother of God or the mass.[527] It was even argued that the proposal should never have reached Parliament, since it created 'a maze of theological imaginations' that could not be satisfactorily discussed during parliamentary proceedings.[528]

As one might expect, fierce opposition also came from the Dutch Communist Party. Representative Wijnkoop, who frequently cited Lenin in his speeches, saw the blasphemy law primarily as a tool used by capitalists to blur the vision of the masses and to 'knock down the communist movement.'[529] The true reason why this law was proposed, according to Wijnkoop, was 'to combat the communist daily *De Tribune*, the instrument of international communism

[524] Parliamentary documents, House of Representatives, 27 May 1932, p. 2608.

[525] Parliamentary documents, House of Representatives, 26 May 1932, p. 2584, 2585. See also Parliamentary documents, House of Representatives, 27 May 1932, p. 2606. This was also underlined by the communist representative Mr. Wijnkoop, who argued that 'the consequence of this law will be that we will become better known by the working classes.' See Parliamentary documents, House of Representatives, 26 May 1932, p. 2603.

[526] Parliamentary documents, House of Representatives, 26 May 1932, p. 2586.

[527] Parliamentary documents, House of Representatives, 26 May 1932, p. 2589.

[528] Parliamentary documents, House of Representatives, 26 May 1932, p. 2584.

[529] Parliamentary documents, House of Representatives, 26 May 1932, p. 2597.

that represents its ideas.'[530] 'We fight against all those obscurities, against superstition, and against enslavement to the Supreme Being to use the masses and to suppress the workers and peasants; that is what needs to be eliminated. This is the reality. We do it because it is more sacred to us than all the other sanctities discussed by these gentlemen here.'[531] Perhaps somewhat surprising, the orthodox Reformed Protestant Party (*Staatkundig Gereformeerde Partij*) also objected to the blasphemy law. The problem for this party was that the scope of the proposed law was *too narrow*, since it sought to criminalise only *scornful* blasphemy instead of blasphemy as such.[532] 'The Lord must be honoured and idolatry must be fought against,' according to Zandt.[533] The blasphemy law as it was proposed was, in his eyes, 'a toleration of the idolatry of Rome.'[534]

Eventually, the proposed blasphemy law was adopted by both Houses of Parliament. The House of Representatives adopted the Bill by a small majority – 49 votes to 44[535]– while the Senate did so with 28 members voting for and 18 against it.[536] The blasphemy law entered into force on 1 December 1932. Donner described the adoption of his Bill as 'one of the greatest satisfactions' of his time as a minister of justice.[537]

[530] Parliamentary documents, House of Representatives, 26 May 1932, p. 2597.

[531] Parliamentary documents, House of Representatives, 26 May 1932, p. 2600.

[532] Parliamentary documents, House of Representatives, 27 May 1932, 2619. Also in: Parliamentary documents, House of Representatives, 1 June 1932, p. 2653.

[533] Parliamentary documents, House of Representatives, 31 May 1932, p. 2646.

[534] Parliamentary documents, House of Representatives, 31 May 1932, p. 2646.

[535] Parliamentary documents, House of Representatives, 1 June 1932, 2654. The House of Representatives had 100 seats at the time (currently 150 seats).

[536] Parliamentary documents, Senate, 3 November 1932, 49. The Senate had 50 seats at the time (currently 75 seats).

[537] See Parliamentary documents, House of Representatives, 31 May 1932, p. 2634.

5. The first trials based on the blasphemy law: a gap in the law appears

The first trial under the blasphemy law took place on 30 May 1933.[538] On that day, Hillenaar and Van den Heuvel, two members of the *Sociaal–Democratische Arbeiderspartij* political party stood trial before the Almelo District Court. They were accused of being involved in the distribution of about 1,500 copies of a manifesto that, according to the public prosecutor, fell within the scope of Article 147 no. 1 of the Criminal Code.[539] The manifesto called God, among other things, 'an ineffective object of propaganda (*een ondoelmatig propaganda–object*). The prosecutor requested that the court fine the accused the sum of 20 guilders.[540] However, the court's judgement of 13 June 1933 was in favour of the accused. The court acquitted Hillenaar because it could not be proven that he had distributed or had arranged for the distribution of the manifestos. While there was sufficient evidence that the other defendant, Van den Heuvel, had distributed the manifestos, he was 'discharged'[541] and was not sentenced. According to the court, the blasphemy law did not apply to the *mere spreading* of opinions. After all, article 147 no. 1 criminalised him who '*expresses* himself by scornful blasphemy in a manner offensive to religious feelings.' The court reasoned that 'where someone is not the author of a written work, it is necessary for that person to identify himself with the content of the work in some way, for

[538] *Smalende godslastering. Eerste vervolging volgens art. 147 W.v.S*. De Telegraaf 20 May 1933; *Eerste overtreding van het godslasteringswetje*, Algemeen Handelsblad 31 May 1933; *Eerste vervolging op grond van het Godslasteringswetje*, Het Volk, 31 May 1933.

[539] *Eerste vervolging op grond van het Godslasteringswetje*, Het Volk 31 May 1933; *Eerste overtreding van het godslasteringswetje*, Algemeen Handelsblad 31 May 1933.

[540] *Eerste vervolging op grond van het Godslasteringswetje*, Het Volk 31 May 1933.

[541] See for an explanation of this legal term and how it differs from 'acquittal' in Dutch criminal law: P.J.P. Tak, *The Dutch Criminal Justice System*, Nijmegen: Wolf Legal Publishers 2008, p. 102-103 ('The accused is to be acquitted when the essential facts charged are not proven by the evidence presented. A discharge of the accused takes place when the facts charged are proven, but do not constitute a criminal offence, or when the offender is not liable due to a justification or exculpation defence').

example by signature' in order to fall within the scope of Article 147 no. 1.[542] The court did not address whether or not the statements in the manifesto constituted 'scornful blasphemy.'[543]

On 15 June 1933, two days after the Almelo District Court's decision, the Rotterdam District Court decided a case in which the prosecutor had requested the court to sentence the defendant to one month in prison.[544] In this case a 34-year-old sailor had to appear in court for peddling a brochure entitled 'The Netherlands, God, and Orange' (*Nederland, God en Oranje*). The accused was caught on 3 December 1932, only two days after the blasphemy law had become effective.[545] The writer of the brochure, freethinker and public atheist Anton Levien Constandse, could not be held accountable since the brochure had been written before the blasphemy law had entered into force.[546] As Constandse recalled in an article he wrote in 1979, he had written the brochure 'with remarkable anger and vicious aggression.'[547] The passage that was the focus of the trial read:

> 'And how is God doing? At least 20 per cent of the Dutch people are no longer affiliated with a church, and 10 per cent at most attend church regularly. That is why they have decided to support the apparently weakened Old Lord by punishing anybody who speaks 'scornfully' of him! Our Christian ministers are so convinced of God's impotence (despite the millions in subsidies!) that

[542] *Smalende godslastering,* Algemeen Handelsblad 14 June 1933.

[543] *Beschuldigd van smalende godslastering. Vrijspraak en ontslag van rechtsvervolging*, De Telegraaf 14 June 1933.

[544] *Godslastering*, De Telegraaf 16 June 1933; *Een brochure met godslasterlijken inhoud. Tweede geval voor de rechtbank, thans te Rotterdam behandeld*, De Telegraaf 2 June 1933; *Tweede Godslasteringsproces*, Het Volk 1 June 1933.

[545] *Godslastering. Nog geen veroordeling*, Leeuwarder Courant 16 June 1933; *Een brochure met godslasterlijken inhoud. Tweede geval voor de rechtbank, thans te Rotterdam behandeld*, De Telegraaf 2 June 1933.

[546] *Een brochure met godslasterlijken inhoud. Tweede geval voor de rechtbank, thans te Rotterdam behandeld*, De Telegraaf 2 June 1933.

[547] A. Constandse, 'Een geval van godslastering', *De Gids*, 1979, p. 402.

> they rushed to his aid, hoping that the old Dutch God will, both civilly and militarily, be able to exert himself again! His religious enterprise, however, is failing hopelessly.'[548]

The sailor was discharged on the same grounds as in the first trial, namely that he had not expressed any blasphemous opinion; he had only distributed the brochure.[549]

These outcomes led to dissatisfaction in Parliament. In 1934, during the parliamentary process of discussing a Bill on various public order measures, representatives took the opportunity point at what they saw as 'a gap in the Blasphemy law.'[550] It was argued that 'Art. 147 does criminalize anyone who publicly expresses himself through scornful blasphemy in an offensive manner for religious feelings, but not the one who spreads otherwise offensive statements of this nature. Yet it is rational to criminalize this distribution as much as the statement itself.'[551] Secretary of Justice Van Schaik 'did not object'[552] to adding a dissemination offense to the blasphemy ban and proposed an amendment.[553] The new provision, article 147a, entered into force on 16 August 1934.[554]

6. Convictions for blasphemy

[548] A. Constandse, 'Een geval van godslastering', *De Gids*, 1979, p. 402; R. Baelde, *Studiën over Godsdienstdelicten*, The Hague: Martinus Nijhoff 1935, p. 228-229, also partially in *Godslastering. Nog geen veroordeling*, Leeuwarder Courant 16 June 1933.

[549] R. Baelde, *Studiën over Godsdienstdelicten*, The Hague: Martinus Nijhoff 1935, p. 229.

[550] Proceedings of the States General 1933-1934, 237, no. 4, p. 10.

[551] Proceedings of the States General 1933-1934, 237, no. 4, p. 10.

[552] Proceedings of the States General 1933-1934, 237, no. 5, p. 17.

[553] Proceedings of the States General 1933-1934, 237, no. 6, p. 19. The amendment was part of a set of legal measures entitled 'The law of 19 July 1934', see Bulletin of Acts and Decrees 1934, no. 40.

[554] See https://wetten.overheid.nl/BWBR0001854/2020-07-25/0/BoekTweede/TiteldeelV/Artikel147a/informatie#tab-wijzigingenoverzicht.

Notwithstanding the blasphemy ban's rocky start, people were in fact convicted under the ban. For example, a conviction took place on 15 June 1934 when a 'radical socialist' was fined 30 Dutch guilders. The socialist had during a public appearance made statements about religion that were largely 'beyond the reach of' Article 147 no 1. due to his 'tactful choice of words.'[555] Largely, but not completely, since he also stated that 'A God that created the tubercle bacillus is not a God, but a criminal.'[556] On 20 September 1934, a member of the National Socialist Movement was convicted in Rotterdam for displaying one of the cartoons that had inspired the Minister of Justice to draft the blasphemy law – the one about God saying he had discovered a new poison gas.[557] The accused, who was a devout Christian, had put the image, accompanied by a caption that read 'Such a thing is allowed in Holland!' (*Zooiets mag in Holland!*) behind a window because he had wanted to show how 'God and His Son are abused nowadays in politics.'[558] The judge convicted on the basis of Article 429bis of the Criminal Code and, taking the good intentions of the accused into consideration, fined him 5 guilders.[559] On 23 June 1963 a columnist for the magazine *Propria Cures* was convicted and fined for writing, amongst other things, that Jesus was a 'demagogue' and an 'amateur ombudsman.'[560]

However, the trial that turned out to be the major turning point in the history of the Dutch blasphemy law was the case against Dutch novelist Gerard Kornelis van het Reve, who later in his life became known as Gerard Reve.

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[555] R. Baelde, *Studiën over Godsdienstdelicten*, The Hague: Martinus Nijhoff 1935, p. 232.

[556] R. Baelde, *Studiën over Godsdienstdelicten*, The Hague: Martinus Nijhoff 1935, p. 234.

[557] *Godslasterende afbeelding voor het raam*, Het Vaderland 21 September 1934; *Godslastering. N.S.B.-er veroordeeld*, De Tijd 21 September 1934.

[558] *Godslasterende afbeelding voor het raam*, Het Vaderland 21 September 1934; *Godslastering. N.S.B.-er veroordeeld*, De Tijd 21 September 1934.

[559] *Godslasterende afbeelding voor het raam*, Het Vaderland 21 September 1934; *Godslastering. N.S.B.-er veroordeeld*, De Tijd 21 September 1934.

[560] Court of Amsterdam, 23 June 1965, ECLI:NL:RBAMS:1965:AB5727.

7. Sex, God, and a donkey: the trial of Gerard Kornelis van het Reve

In 1966 Van het Reve was brought before the court of Amsterdam for breach of Article 147 no. 1 of the Dutch Criminal Code. Van het Reve, in the Netherlands generally considered to be one of the greatest Dutch novelists of the post-Second World War era, faced charges over two pieces of writing that the public prosecutor considered to be scornful blasphemy.

The first piece was a letter Van het Reve had written to his bank, which was published in the Dutch magazine 'Dialogue'(*Dialoog*) in 1965.[561] This letter, entitled 'Letter to my Bank'(*Brief aan mijn Bank*) was in essence a request to his bank to transfer 400 Dutch guilders to him. In the letter, sent from the Spanish town of Algeciras, Van het Reve gave an account of some of his daily experiences in Spain, accompanied by a mixture of poetry, imagination and references to Jesus. In a part where Van het Reve wrote about his love for animals, the letter contained a passage that read:

> 'If God again surrenders himself in Living Dust, he shall return as a donkey, at most capable of formulating a few syllables, under-appreciated, maligned and beaten, but I shall understand Him and immediately go to bed with Him, but I shall tie bandages around His tiny hooves, so that I won't get too scratched if He flounders when he comes.'[562]

This letter prompted a priest and a reformed minister to write a joint letter to the magazine in which they complained about this passage. Although they praised Van het Reve's work in general, they found it incomprehensible that the editors of *Dialoog* had published the

[561] See J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 16.

[562] The entire passage was longer, yet the public prosecutor considered only this part to fall within the definition of 'scornful blasphemy.'

'blasphemous and repulsive' passage.[563] In response, Van het Reve explained that what he had written was simply *his* imagination of God:

> 'Everyone is entitled to their own conception of God, and, if they are so inclined, to the freedom to share it. I, for example, imagine our Saviour the way *I* see and experience Him (…). Many people wish to imagine Him with his hair way too long, parted in the middle and drenched in brilliantine, garbed in a white dress with an embroidered collar, and preferably without genitals, or, at least, without sexual activity (…). Yet, for me the Son of God had quite well-proportioned genitals, which he decisively refused to let rust away; I imagine Him as being bisexual, although with a predominant homosexual tendency, slightly neurotic, but without hatred towards any creature, because God is the Love that cannot exclude any creature from Himself. This is *my* image of God's Son. I do not want to force it upon anyone, but I am also unwilling to have another, no matter who, take it away from me.'[564]

Van het Reve also disparaged the accusation of 'blasphemy.' Pondering about the Second Coming, Van het Reve admitted that the 'chances of Him appearing as a Donkey, not to mention also wanting to have sex with me, are, of course, very small, but anything is possible with God. It seems blasphemous to me to exclude a priori any way in which God may incarnate and how he would behave.'[565] He subsequently wrote that

> 'The word "blasphemy", as used by many Christians in this country, has about the same meaning as, for example, the word 'provocation' has to communists. Just as communists employ the word 'provocation' for every political action or expression that goes against their system of terror, so do

[563] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 24-25.

[564] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 27.

[565] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 26.

> self-described Christians utilise the word 'blasphemy' for every conception of God that does not suit their system of terror or the one-way street of their so-called Christian tolerance.'[566]

Van het Reve's initial article in *Dialoog* (the letter to his bank) together with his subsequent response to the priest and the reformed minister inspired representative Van Dis, of the Reformed Political Party, to ask the government whether it intended to instigate criminal proceedings against Van het Reve. Van Dis considered Van het Reve's remarks to be 'of a blasphemous, immoral, and even Satanic nature, and thus extremely offensive to the religious feelings of many of our people.'[567]

The second piece of writing that got Van het Reve in trouble was a letter entitled 'Letter from The House named The Grass'(*Brief uit Het Huis, genaamd Het Gras*) that appeared in his novel 'Nearer to You' (*Nader tot U*) in 1966. In this particular passage, Van het Reve fantasised about kissing and having sex with God, who would appear to him as a 'one-year-old mouse grey donkey.'[568]

Van het Reve was prosecuted, and he stood trial before the district court of Amsterdam on 20 October 1966.[569] It was a highly anticipated, lengthy court day: theologians, writers and journalists watched Van het Reve explain his work,[570] and four expert witnesses were heard

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[566] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 26-27.

[567] Parliamentary documents, House of Representatives, Question of 22 February 1966.

[568] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve* Amsterdam: De Arbeiderspers 1968, p. 33.

[569] Van het Reve wanted the trial as well, since he wanted to clear himself of the accusations of blasphemy. See: J.J. Abspoel, *Studenten, moordenaars en ander volk. Kritische kanttekeningen van een officier van justitie,* Ede: L.J. Veen, 1979, p. 83; J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve,* Amsterdam: De Arbeiderspers 1968, p. 16, 34; *Merkwaardige rechtszitting over „godslastering.' f. 100,- boete geëist tegen Van het Reve*, De Waarheid 21 October 1966.

[570] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 31.

during the day: a reformed professor specialising in Christian ethics, a professor of the exegesis of the New Testament, a professor of literary studies, and a psychiatrist. During the trial Van het Reve defended his work largely along the lines of his response in the magazine *Dialoog*. When the judge asked him about his ideas, Van het Reve said that when he imagined God's incarnation, he did so 'in the shape of the most loveable creature that I know. That creature doesn't need to be a human being. It could be a lamb, but donkeys are even more endearing to me.' Every human being desires an intimate relationship with the deity, Reve claimed. And he added that for him this relationship had a sexual component to it.[571] Asked if he found the described acts perverse, Van het Reve said that there are 'many opinions about what is perverse and what is not; suppose the animal appreciated the act, would it be immoral in that case?'[572] Van het Reve also explained that for him sexuality is as holy as religion. The two are 'indissolubly linked to each other. A sexless God is unthinkable for me. That would be blasphemy to me.'[573]

The public prosecutor, Jan Jacobus Abspoel, did not hide his lack of enthusiasm for the blasphemy law under which he prosecuted Van het Reve. During the trial he revealed that as a secondary school student he had protested against the blasphemy law, and he called the law 'hideous.' But he also said that as a public prosecutor he had to enforce the law as it was-and that, in his opinion, it had been broken by Van het Reve.[574] This being the case, he requested the court to fine Van het Reve 100 Dutch guilders.

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[571] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 34.

[572] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 35.

[573] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 36.

[574] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 85. In his memoires Mr. Abspoel wrote that he had had always regarded the blasphemy

The Amsterdam District Court delivered its verdict on 3 November 1966. It turned out to be a decision that satisfied neither the prosecutor nor Van het Reve. The court discharged Van het Reve because, although it considered the passages to be blasphemous as they 'conflicted with the conception of God that is widely supported in Dutch society', they were not 'scornful.'[575] The court was not convinced that the passages were of a purely jeering nature, which the court considered necessary to convict Van het Reve of breach of Article 147 no. 1 of the Criminal Code.[576]

Both Van het Reve and the public prosecutor appealed the decision, the first because he wanted an acquittal, the second because he was after a conviction. Van het Reve had ditched his trial lawyer and defended himself during his appeal.[577] The appeal was not about new facts, but only about the existing facts' legal qualification.[578] In a brief decision, the Court of Appeal proclaimed that it could not be proven that Van het Reve's passages were scornfully blasphemous and acquitted him.[579] Whereas the court in first instance found the passages blasphemous yet not scornfully blasphemous, the appellate court was of the opinion that 'it has

law as a political instrument stemming from the 1930s. See Jan Jacobus Abspoel, *Studenten, moordenaars en ander volk. Kritische kanttekeningen van een officier van justitie*, Ede: L.J. Veen 1979, p. 81.

[575] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 93.

[576] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 93.

[577] On 29 September 1967 Van het Reve wrote in a personal letter to his publisher that he was terribly upset with his lawyer, calling him 'incompetent.' He was also angry at Van Oorschot for not (at least in part) paying his legal fees, which amounted to the rather large sum of 4.685 Dutch guilders. See G. Reve & G. Van Oorschot, *Briefwisseling 1951-1987*, Amsterdam: G.A. van Oorschot 2005, letter no. 388.

[578] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 114.

[579] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 153-154.

not been shown at all that the accused intended to insult or taunt God, or to express contempt for God in any way.'[580]

Finally, the Dutch Supreme Court, in its only decision on the blasphemy law,[581] declared the complaint against the appellate court's judgment inadmissible, thereby making Van het Reve's acquittal final. In its judgment the Supreme Court referred to a notable feature of the parliamentary debate of 31 May 1932. During this debate, Minister of Justice Donner had said that 'the term "scornful" clearly entails a subjective element, namely the intention of the scorner to bring down the, posited as existent, highest Supreme Being.'[582] The Supreme Court concluded from this that 'the term 'scornful' does not solely describe a certain manner of expression that is hurtful to religious feelings.' When applied to Van het Reve's case, the court was of the opinion that to violate the blasphemy law it was insufficient for an author to express himself in such a manner that others were bound to be hurt in their religious feelings.[583] After Van het Reve's trial the blasphemy law became basically obsolete or a 'dead letter,'[584] due to the high degree of intent that was required for a conviction.[585]

8. The end of the Dutch blasphemy law

[580] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 154.

[581] B.A.M. van Stokkom, H.J.B. Sackers and J.-P. Wils, *Godslastering, discriminerende uitingen wegens godsdienst en haatuitingen*, Den Haag: Boom Juridische uitgevers 2007, p. 103.

[582] Parliamentary documents, House of Representatives, 31 May 1932, p. 2632.

[583] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 173.

[584] See B.A.M. van Stokkom, H.J.B. Sackers and J.-P. Wils, *Godslastering, discriminerende uitingen wegens godsdienst en haatuitingen*, Den Haag: Boom Juridische uitgevers 2007, p. 106, 246.

[585] B.A.M. van Stokkom, H.J.B. Sackers and J.-P. Wils, *Godslastering, discriminerende uitingen wegens godsdienst en haatuitingen*, Den Haag: Boom Juridische uitgevers 2007, p. 106.

In the decades that followed, blasphemy vanished to the background,[586] only to be catapulted to the forefront after the murder of the 'blasphemer' Theo van Gogh. Van Gogh, a polemic writer, was murdered on 2 November 2004 by an extremist. The particular incident that inspired the killer a short movie entitled *Submission*, released in August 2004 and directed by Van Gogh, that showed naked bodies with verses from the Qur'an painted on them.

The murder of Van Gogh confused and shocked Dutch society. 'The attack on Theo van Gogh strikes at the heart of our national identity (…) [freedom of expression] was more or less our national pride, our World Trade Center, taken down by a terrorist,' representative Jozias van Aartsen observed during a parliamentary debate shortly after the attack.[587] A broad political and social discussion ensued after Van Gogh's death.[588]

Within this broader context the inert state of the Dutch blasphemy law regained attention. Secretary of Justice Piet Hein Donner, the grandson of the Secretary of Justice who had proposed the blasphemy law in the 1930s, expressed the intention to apply the blasphemy law more strictly.[589] Moreover, the Dutch Prime Minister, Jan Peter Balkenende, advocated moderation in the public debate. 'Everyone may choose his own words, but it is a good thing if we also take into account the 'recipient' of these words (…) Let us realise that our words can wound,' Balkenende said.[590]

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[586] No prosecutions for blasphemy took place after the Van het Reve's trial. See Parliamentary documents, House of Representatives, 2009-2010, no. 32203, 3, p. 4.

[587] Parliamentary documents, House of Representatives, 11 November 2004, no. 29854, p. 1282 (*Debat over de moord op de heer Th. van Gogh*).

[588] See on this debate P. Cliteur, 'Godslastering en zelfcensuur na de moord op Theo van Gogh,' in *Nederlands Juristenblad*, 2004, no. 45, p. 2328–2335.

[589] *Kabinet verdeeld over godslastering; Verdonk en Donner botsen over aanpak*, NRC Handelsblad 15 November 2004; *Ministers oneens over vervolgen godslastering*, de Volkskrant 15 November 2004. Donner later retracted his statements. See *Godslastering niet harder aangepakt; Donner neemt aankondiging terug*, NRC Handelsblad 16 November 2004.

[590] *Kabinet verdeeld over godslastering*, Trouw 15 November 2004.

However, in the following years blasphemy would be decriminalized. While a parliamentary motion that pressed the cabinet to 'reconsider' the blasphemy provisions was rejected a few weeks after Van Gogh's murder, a Bill that proposed the repeal of the blasphemy provisions was introduced in 2009[591] and eventually entered into force in 2014.[592] The representatives who drafted the proposal underlined the importance of diversity of opinion. The proposal relied heavily on the 'marketplace of ideas' argument: 'The collision of arguments and opinions deepens debate on important topics, such as philosophical issues and the formation of society.'[593] Second, the argument of equality was raised: 'Provisions that grant special protection to (specific) believers do not fit with the idea of equal treatment.'[594] Third, the representatives adduced that public and political debate provided enough opportunity to rebut abusive and insulting utterances.[595] Apart from the Christian parties, all parties in the House of Representatives favoured the Bill.[596] For example, Van der Staaij of the orthodox Reformed Protestant Party saw the repeal of the blasphemy law as a 'great loss' and 'the conscious release of a moral anchor point.'[597] Although he agreed that the provisions were 'dead' in strictly legal terms, Van der Staaij argued that they still had their contemporary value: 'Freedom is a great good, but don't use it to unnecessarily and intentionally hurt people in their deepest and dearest convictions.'[598] Following its adoption by the House of Representatives in

[591] Parliamentary documents, House of Representatives, 2009-2010, no. 32203, 2.

[592] See also J. Doomen & M. van Schaik, 'Blasfemie in de huidige context,' *Netherlands Journal of Legal Philosophy* 2015, p. 47-61.

[593] Parliamentary documents, House of Representatives, 2009-2010, no. 32203, 3, p. 1.

[594] Parliamentary documents, House of Representatives., 2009-2010, no. 32203, 3, p. 1.

[595] Parliamentary documents, House of Representatives, 2009-2010, no. 32203, 3, p. 2.

[596] See Parliamentary documents, House of Representatives, 16 April 2013 (*Stemmingen initiatiefvoorstel verbod op godslastering*).

[597] Parliamentary documents, House of Representatives, 20 March 2013, p. 37.

[598] Parliamentary documents, House of Representatives, 20 March 2013, p. 37.

April 2013, the Senate accepted the proposal by 49 votes to 21 in December 2013.[599] Ultimately, the Dutch blasphemy law (articles 147, 147a, and 429bis of the Criminal Code) was effectively repealed on 1 March 2014.[600]

9. The 'Schrijver motion' (2013)

On 3 December 2013, amidst the parliamentary debate on the Bill to repeal the blasphemy ban, the Dutch Senate adopted a motion in which the government was asked to examine 'whether a possible amendment of article 137 (c to h) of the Criminal Code could be useful to ensure that this article also provides sufficient protection for citizens against seriously felt insults of their religion and religious experience, without unnecessarily restricting the effect of freedom of expression.'[601] 'Article 137 c to h' is a series of articles in the Criminal Code that ban various types of derogatory or provocative expression, most notably group defamation (article 137c) and incitement to hatred (article 137d).

A study on this motion was conducted by the constitutional scholar Van Noorloos for the Ministry of Security and Justice's Research and Documentation Centre (*Wetenschappelijk Onderzoek- en Documentatiecentrum*).[602] The study examined the motion in the context of legislative history, case law, and international human rights law. First, it concluded that if the legislature deemed it opportune to protect citizens against seriously felt insults of their religion

[599] Parliamentary documents, Senate, 3 December 2013 (*Stemmingen in verband met het Voorstel van wet van de leden Schouw en De Wit tot wijziging van het Wetboek van Strafrecht in verband met het laten vervallen van het verbod op godslastering*).

[600] Bulletin of Acts and Decrees 2014, no. 39 (*Wet van 23 januari 2014 tot wijziging van het Wetboek van Strafrecht in verband met het laten vervallen van het verbod op godslastering*).

[601] Parliamentary documents, Senate, 2013-2014, no. 32203, E.

[602] L.A. van Noorloos, *Strafbaarstelling van 'belediging van geloof' Een onderzoek naar mogelijke aanpassing van de uitingsdelicten in het Wetboek van Strafrecht, mede in het licht van internationale verdragsverplichtingen*, Den Haag: Boom Lemma uitgevers 2014.

and religious experience, a change in the law would be necessary as such insults were not covered by the law.[603] The legal framework of Dutch defamation and incitement law would not allow for a subjective perception of insults as envisioned by the motion: the protection against *seriously felt insults* of religion and religious experience. Second, the study concluded that there are no positive obligations in international human rights law that *require* states to criminalize insults against religion or religious experience. Hence, by not adopting a provision against seriously felt insults of religion or religious experience, the Netherlands would not violate international (anti-discrimination) human rights law.[604] Third, the study examined whether criminalizing insults against religion or religious experience aligned with the right to free expression. While article 10 of the European Convention on Human Rights leaves some room for (but again, does not require) criminalizing such insults, the International Covenant on Civil and Political Rights does generally[605] not allow for anti-blasphemy laws. Hence, adopting a provision as mentioned in the motion would violate article 19 of the ICCPR.[606] Fourth, adopting a criminal provision that focuses on how people subjectively perceive a certain

[603] L.A. van Noorloos, *Strafbaarstelling van 'belediging van geloof' Een onderzoek naar mogelijke aanpassing van de uitingsdelicten in het Wetboek van Strafrecht, mede in het licht van internationale verdragsverplichtingen*, Den Haag: Boom Lemma uitgevers 2014, p. 117-119.

[604] L.A. van Noorloos, *Strafbaarstelling van 'belediging van geloof' Een onderzoek naar mogelijke aanpassing van de uitingsdelicten in het Wetboek van Strafrecht, mede in het licht van internationale verdragsverplichtingen*, Den Haag: Boom Lemma uitgevers 2014, p. 120.

[605] The exception is extreme statements about religion that to amount to propagating religious hatred that incites discrimination, hostility or violence against people. See L.A. van Noorloos, *Strafbaarstelling van 'belediging van geloof' Een onderzoek naar mogelijke aanpassing van de uitingsdelicten in het Wetboek van Strafrecht, mede in het licht van internationale verdragsverplichtingen*, Den Haag: Boom Lemma uitgevers 2014, p. 123-124. See also Human Rights Committee, General comment No. 34, UN Doc. CCPR/C/GC/34, 2011, par. 48 ('Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant').

[606] L.A. van Noorloos, *Strafbaarstelling van 'belediging van geloof' Een onderzoek naar mogelijke aanpassing van de uitingsdelicten in het Wetboek van Strafrecht, mede in het licht van internationale verdragsverplichtingen*, Den Haag: Boom Lemma uitgevers 2014, p. 125.

statement would likely violate the principle of legal certainty, it would be difficult to enforce, and is ill-suited to the *ultimum remedium* character of criminal law.[607]

The government responded to the study by way of a letter from the Secretary of Security and Justice. The letter stated that:

> 'The cabinet is committed to a society in which citizens are free to experience and propagate their faith. In this context it is important that they also feel protected against incitement to hatred or discrimination on the basis of their religion or beliefs. The research that has been carried out shows that on the one hand the criminal law offers sufficient protection against discriminatory statements about people because of their religion, while on the other hand, by extending that protection, the freedom of expression could possibly be jeopardized. In that light, the government does not consider it necessary to amend the criminal law.'[608]

Ultimately, the Dutch blasphemy ban was repealed in 2014 and there were no new restrictions on free expression adopted to replace the ban.

B. European and international human rights law

Notwithstanding that in many parts of the world (including a number of Western countries) blasphemy laws are still very much part of the legal system,[609] international law is critical of

[607] L.A. van Noorloos, *Strafbaarstelling van 'belediging van geloof' Een onderzoek naar mogelijke aanpassing van de uitingsdelicten in het Wetboek van Strafrecht, mede in het licht van internationale verdragsverplichtingen*, Den Haag: Boom Lemma uitgevers 2014, p. 126.

[608] Parliamentary documents, Senate, 2013-2014, 32203, F, p. 2 (*Brief inzake uitvoering van motie van lid Schrijver c.s. over de bescherming van godsdienstige gevoelens (32 203, E) - Voorstel van Wet van de leden Schouw en De Wit tot wijziging van het Wetboek van Strafrecht in verband met het laten vervallen van het verbod op godslastering*).

[609] See for example, United States Commission on International Religious Freedom, *Respecting Rights? Measuring the World's Blasphemy Laws*, p. 1, 3. See

such laws that focus on the protection of religion instead of people who hold religious beliefs. Diverging from the international consensus, the European Court of Human Rights is more lenient towards anti-blasphemy laws, and has upheld convictions based on those laws. This Part discusses blasphemy from the perspective of the United Nations and the European Convention on Human Rights.

1. The European Convention on Human Rights

The European Court of Human Rights has over the years addressed a number of cases in which people were convicted by national courts for blasphemous expression. The cases presented here all concern cases of the defamation of religious symbols; they are *Otto Preminger* (1994), *Wingrove v. the United Kingdom* (1996), *İ.A. v. Turkey* (2005) *Tatlav v. Turkey* (2006) and, most recently, *E.S. v. Austria* (2018).

The case of *Otto-Preminger-Institut v. Austria* revolved around a showing of a blasphemous film. The *Otto-Preminger-Institut*, an association that aims to 'promote creativity, communication and entertainment through the audiovisual media',[610] had announced a number of public showings of the film *Das Liebeskonzil* ('Council in Heaven').[611] This film contained scenes deemed derogatory of religious symbols, including scenes depicting God as 'an apparently senile old man prostrating himself before the Devil with whom he

https://www.uscirf.gov/sites/default/files/Blasphemy%20Laws%20Report.pdf; and, generally, J. Temperman & A. Koltay (eds.), *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre*, Cambridge: Cambridge University Press 2017; P. Marshall & N. Shea, *Silenced: How Apostasy and Blasphemy Codes are Choking Freedom Worldwide*, Oxford: Oxford University Press 2011.

[610] European Court of Human Rights, 20 September 1994, 13470/87, par. 9 (*Otto-Preminger-Institut v. Austria*).

[611] European Court of Human Rights, 20 September 1994, 13470/87, par. 10 (*Otto-Preminger-Institut v. Austria*).

exchanges a deep kiss and calling the Devil his friend' and Jesus Christ 'as a low grade mental defective.' God, the Virgin Mary and Christ are also 'shown in the film applauding the Devil.'[612]

The public prosecutor instituted criminal proceedings against the association on the basis of section 188 of the Penal Code, which prohibits 'disparaging religious doctrines.'[613] This provisions reads:

> 'Whoever, in circumstances where his behaviour is likely to arouse justified indignation, disparages or insults a person who, or an object which, is an object of veneration of a church or religious community established within the country, or a dogma, a lawful custom or a lawful institution of such a church or religious community, shall be liable to a prison sentence of up to six months or a fine of up to 360 daily rates.'[614]

After the film had been shown at a private gathering, the public prosecutor made an application for its seizure.[615] This application was granted by the Innsbruck Regional Court the same day. Furthermore, a regional court had ordered the forfeiture of the film.[616]

[612] European Court of Human Rights, 20 September 1994, 13470/87, par. 22 (*Otto-Preminger-Institut v. Austria*).

[613] European Court of Human Rights, 20 September 1994, 13470/87, par. 11 (*Otto-Preminger-Institut v. Austria*).

[614] Cited in: European Court of Human Rights, 20 September 1994, 13470/87, par. 25 (*Otto-Preminger-Institut v. Austria*).

[615] European Court of Human Rights, 20 September 1994, 13470/87, par. 12 (*Otto-Preminger-Institut v. Austria*).

[616] European Court of Human Rights, 20 September 1994, 13470/87, par. 16 (*Otto-Preminger-Institut v. Austria*).

Before the European Commission on Human Rights, the *Otto-Preminger Institut* claimed that the seizure and forfeiture of the film violated it's free expression rights under article 10 of the European Convention.[617]

According to the Court, the interference was prescribed by law,[618] and the legitimate aim protected by the interference was the 'protection of the rights of others.'[619] The Court observed that

> 'Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, 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. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them (…) The respect for the religious feelings of believers as guaranteed in Article 9 (art. 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, which must also be a feature of democratic society.'[620]

Moreover, the Court argued that

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[617] European Court of Human Rights, 20 September 1994, 13470/87, par. 31, 32, 42, 51 (*Otto-Preminger-Institut v. Austria*).

[618] European Court of Human Rights, 20 September 1994, 13470/87, par. 44-45 (*Otto-Preminger-Institut v. Austria*).

[619] European Court of Human Rights, 20 September 1994, 13470/87, par. 48 (*Otto-Preminger-Institut v. Austria*).

[620] European Court of Human Rights, 20 September 1994, 13470/87, par. 47 (*Otto-Preminger-Institut v. Austria*).

> ‘as is borne out by the wording itself of Article 10 (2) whoever exercises the rights and freedoms enshrined in the first paragraph of that Article (…) undertakes “duties and responsibilities”. Amongst them – in the context of religious opinions and beliefs – may legitimately be included 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. This being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration, provided always that any “formality”, “condition”, “restriction” or “penalty” imposed be proportionate to the legitimate aim pursued.’[621]

The Court observed that in cases of anti-religious it is impossible to ‘arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression’ expression as there is no ‘uniform conception of the significance of religion in society.’[622] Hence, the Court leaves a ‘certain margin of appreciation’ for national authorities to determine the need and scope for an interference. That margin of appreciation however is not unlimited but goes ‘hand in hand with Convention supervision, the scope of which will vary according to the circumstances. In cases such as the present one, where there has been an interference with the exercise of the freedoms guaranteed in paragraph 1 of Article 10 (…), the supervision must be strict because of the importance of the freedoms in question.’[623]

[621] European Court of Human Rights, 20 September 1994, 13470/87, par. 49 (*Otto-Preminger-Institut v. Austria*).

[622] European Court of Human Rights, 20 September 1994, 13470/87, par. 50 (*Otto-Preminger-Institut v. Austria*).

[623] European Court of Human Rights, 20 September 1994, 13470/87, par. 50 (*Otto-Preminger-Institut v. Austria*).

The Court proceeded to a balancing of, on the one hand the right 'to impart to the public controversial views and, by implication, the right of interested persons to take cognisance of such views' and on the other hand the right to proper respect for people's freedom of thought, conscience and religion.[624]

In balancing these two, the Court came to the conclusion that 'the content of the film cannot be said to be incapable of grounding the conclusions arrived at by the Austrian courts', who saw the film as an 'abusive attack on the Roman Catholic religion according to the conception of the Tyrolean public.'[625] The Court found that the Austrian authorities 'acted to ensure religious peace (…) and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner.'[626] And, given that, the national authorities are better placed to assess the need for an intervention, the Court found no error in seizing and forfeiting the film. [627] Hence, the Court found no violation of article 10 of the Convention.

Two years after *Otto-Preminger-Institut v. Austria*, another blasphemy case was decided by the Court, namely that of *Wingrove v. the United Kingdom*. In short, this case concerned a blasphemous video depicting a nun, intending to represent St Teresa, acting erotically towards Jesus Christ.[628] The video was submitted by Wingrove to the British Board

[624] European Court of Human Rights, 20 September 1994, 13470/87, par. 55 (*Otto-Preminger-Institut v. Austria*).

[625] European Court of Human Rights, 20 September 1994, 13470/87, par. 56 (*Otto-Preminger-Institut v. Austria*).

[626] European Court of Human Rights, 20 September 1994, 13470/87, par. 56 (*Otto-Preminger-Institut v. Austria*).

[627] European Court of Human Rights, 20 September 1994, 13470/87, par. 56 (*Otto-Preminger-Institut v. Austria*).

[628] European Court of Human Rights, 25 November 1996, 17419/90, par. 9 (*Wingrove v. the United Kingdom*).

of Film Classification to be supplied to the general public.[629] This submission was required as under the Video Recordings Act 1984 it was an offence 'for a person to supply or offer to supply a video work in respect of which no classification certificate has been issued.'[630]

However, the British Board of Film Classification rejected the application. At the time, the United Kingdom had an blasphemy law, that read:

> 'Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible, or the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which the doctrines are advocated and not to the substance of the doctrines themselves.'[631]

Given the 'mingling of religious ecstasy and sexual passion' and the fact that, in the words of the Board, 'the wounded body of the crucified Christ is presented solely as the focus of, and at certain moments a participant in, the erotic desire of St Teresa' the Board held that 'a reasonable jury properly directed would find that the work infringes the criminal law of blasphemy.'[632]

Wingrove appealed this decision to the Video Appeals Committee,[633] which rejected the appeal. The (majority of the) appeals committee 'considered the over-all tone and spirit of

[629] European Court of Human Rights, 25 November 1996, 17419/90, par. 11-12 (*Wingrove v. the United Kingdom*).

[630] European Court of Human Rights, 25 November 1996, 17419/90, par. 23 (*Wingrove v. the United Kingdom*).

[631] Cited in European Court of Human Rights, 25 November 1996, 17419/90, par. 27 (*Wingrove v. the United Kingdom*). The European Court adopted this from *Whitehouse v. Gay News Ltd and Lemon* [1979] Appeal Cases 617 at 665.

[632] European Court of Human Rights, 25 November 1996, 17419/90, par. 13 (*Wingrove v. the United Kingdom*).

[633] European Court of Human Rights, 25 November 1996, 17419/90, par. 17 (*Wingrove v. the United Kingdom*).

the video to be indecent' and had little doubt that the depictions of the nun and Jesus Christ 'would outrage the feelings of Christians, who would reasonably look upon it as being contemptuous of the divinity of Christ.'[634]

Wingrove took the matter up to the European Court on Human Rights[635] complaining that the refusal of a classification certificate for his video was in breach of his freedom of expression.[636]

The British government and Wingrove agreed that refusal to license the video amounted to an interference of Wingrove's freedom of expression.[637]

To determine the compatibility of this interference with article 10, the Court scrutinized the decision to not grant a certification for the video under its three part test. First, the Court examined whether the interference was prescribed by law. To meet this criterion, laws must be accessible and foreseeable. On this point, Wingrove complained about the blasphemy law's vagueness. He argued that 'the law of blasphemy was so uncertain that it was inordinately difficult to establish in advance whether in the eyes of a jury a particular publication would constitute an offence,'[638] and that 'it was practically impossible to know what predictions an administrative body – the British Board of Film Classification – would make as to the outcome of a hypothetical prosecution.'[639] The British government disagreed. It reasoned that it '[is] a feature common to most laws and legal systems that tribunals may reach different conclusions even when applying the same law to the same facts.'[640] The European Court sided with the

[634] European Court of Human Rights, 25 November 1996, 17419/90, par. 19 (*Wingrove v. the United Kingdom*).

[635] Via the European Commission of Human Rights, see European Court of Human Rights, 25 November 1996, 17419/90, par. 32-33 (*Wingrove v. the United Kingdom*).

[636] European Court of Human Rights, 25 November 1996, 17419/90, par. 32 (*Wingrove v. the United Kingdom*).

[637] European Court of Human Rights, 25 November 1996, 17419/90, par. 36 (*Wingrove v. the United Kingdom*).

[638] European Court of Human Rights, 25 November 1996, 17419/90, par. 37 (*Wingrove v. the United Kingdom*).

[639] European Court of Human Rights, 25 November 1996, 17419/90, par. 37 (*Wingrove v. the United Kingdom*).

[640] European Court of Human Rights, 25 November 1996, 17419/90, par. 38 (*Wingrove v. the United Kingdom*).

government. In determining that the interference was in fact prescribed by law,[641] the Court '[recognized] that the offence of blasphemy cannot by its very nature lend itself to precise legal definition. National authorities must therefore be afforded a degree of flexibility in assessing whether the facts of a particular case fall within the accepted definition of the offence.'[642] Moreover, the Court found that 'the applicant could reasonably have foreseen with appropriate legal advice that the film, particularly those scenes involving the crucified figure of Christ, could fall within the scope of the offence of blasphemy.'[643]

The next step under the three part test was to examine whether the interference pursued one of the legitimate aim's mentioned in article 10 paragraph 2 .[644] The Court noted

> 'that, as stated by the Board, the aim of the interference was to protect against the treatment of a religious subject in such a manner "as to be calculated (that is, bound, not intended) to outrage those who have an understanding of, sympathy towards and support for the Christian story and ethic, because of the contemptuous, reviling, insulting, scurrilous or ludicrous tone, style and spirit in which the subject is presented (…)".'[645]

According to the Court, 'this is an aim which undoubtedly corresponds to that of the protection of "the rights of others" within the meaning of paragraph 2 of Article 10. It is also fully consonant with the aim of the protections afforded by Article 9 to religious freedom.'[646]

Third, the Court examined whether the inference was 'necessary in a democratic society.' The Court observed that 'the refusal to grant Visions of Ecstasy a distribution

[641] European Court of Human Rights, 25 November 1996, 17419/90, par. 44 (*Wingrove v. the United Kingdom*).
[642] European Court of Human Rights, 25 November 1996, 17419/90, par. 42 (*Wingrove v. the United Kingdom*).
[643] European Court of Human Rights, 25 November 1996, 17419/90, par. 43 (*Wingrove v. the United Kingdom*).
[644] European Court of Human Rights, 25 November 1996, 17419/90, par. 48, 51 (*Wingrove v. the United Kingdom*).
[645] European Court of Human Rights, 25 November 1996, 17419/90, par. 48 (*Wingrove v. the United Kingdom*).
[646] European Court of Human Rights, 25 November 1996, 17419/90, par. 48 (*Wingrove v. the United Kingdom*).

certificate was intended to protect "the rights of others", and more specifically to provide protection against seriously offensive attacks on matters regarded as sacred by Christians.[647] Commenting on the English law of blasphemy, the Court found that it

> 'does not prohibit the expression, in any form, of views hostile to the Christian religion. Nor can it be said that opinions which are offensive to Christians necessarily fall within its ambit. As the English courts have indicated, it is the manner in which views are advocated rather than the views themselves which the law seeks to control. The extent of insult to religious feelings must be significant, as is clear from the use by the courts of the adjectives "contemptuous", "reviling", "scurrilous", "ludicrous" to depict material of a sufficient degree of offensiveness. The high degree of profanation that must be attained constitutes, in itself, a safeguard against arbitrariness. It is against this background that the asserted justification under Article 10 paragraph 2 in the decisions of the national authorities must be considered.'[648]

The Court continued by stating that

> 'Bearing in mind the safeguard of the high threshold of profanation embodied in the definition of the offence of blasphemy under English law as well as the State's margin of appreciation in this area (…), the reasons given to justify the measures taken can be considered as both relevant and sufficient for the purposes of Article 10 paragraph 2. Furthermore, having viewed the film for itself, the Court is satisfied that the decisions by the national authorities cannot be said to be arbitrary or excessive.'[649]

[647] European Court of Human Rights, 25 November 1996, 17419/90, par. 57 (*Wingrove v. the United Kingdom*).
[648] European Court of Human Rights, 25 November 1996, 17419/90, par. 60 (*Wingrove v. the United Kingdom*).
[649] European Court of Human Rights, 25 November 1996, 17419/90, par. 61 (*Wingrove v. the United Kingdom*).

All things considered, the Court found that article 10 of the Convention was not violated by the national authorities.[650]

The case of *İ.A. v. Turkey* concerned the proprietor and managing director of a publishing house which published a novel entitled *Yasak Tümceler* (The forbidden phrases),[651] a book that 'conveyed the author's views on philosophical and theological issues in a novelistic style' of which two thousand copies were printed in a single run.[652] For the publication of this book, the Istanbul public prosecutor charged the managing director under a statute that bans blasphemy against God, the Religion, the Prophet and the Holy Book.[653] The statute in question determines that 'it shall be an offence punishable by six months to one year's imprisonment and a fine of 5,000 to 25,000 Turkish liras to blaspheme against God, one of the religions, one of the prophets, one of the sects or one of the holy books (…) or to vilify or insult another on account of his religious beliefs or fulfilment of religious duties.'[654]

The applicant was convicted by the Court of First Instance and sentenced to two years' imprisonment and a fine. The court commuted the prison sentence to a fine, so that the applicant was ultimately only ordered to pay a small fine.[655] The court cited one particular passage from the book that violated the law:

> '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

[650] European Court of Human Rights, 25 November 1996, 17419/90, par. 65 (*Wingrove v. the United Kingdom*).
[651] European Court of Human Rights, 13 September 2005, 42571/98, par. 5 (*İ.A. v. Turkey*).
[652] European Court of Human Rights, 13 September 2005, 42571/98, par. 5 (*İ.A. v. Turkey*).
[653] European Court of Human Rights, 13 September 2005, 42571/98, par. 6 (*İ.A. v. Turkey*).
[654] European Court of Human Rights, 13 September 2005, 42571/98, par. 17 (*İ.A. v. Turkey*).
[655] European Court of Human Rights, 13 September 2005, 42571/98, par. 13 (*İ.A. v. Turkey*).

> sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual relations with a dead person or a live animal.'[656]

The Court of Cassation upheld the judgment by the lower court,[657] and the case ultimately made its way to the European Court of Human Rights. This Court found that the conviction of the applicant interfered with his right to free expression, that it was prescribed by law, and that it pursued a legitimate aim, namely preventing disorder and protecting morals and the rights of others. This was disputed by neither party.[658]

The dispute was solely about whether the interference was 'necessary in a democratic society.'[659] While the Court observed that 'Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism' and that 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',[660] it also held that '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.'[661]

The Court was of the opinion that 'believers [within Turkish society] 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

[656] European Court of Human Rights, 13 September 2005, 42571/98, par. 13 (*İ.A. v. Turkey*).
[657] European Court of Human Rights, 13 September 2005, 42571/98, par. 15 (*İ.A. v. Turkey*).
[658] European Court of Human Rights, 13 September 2005, 42571/98, par. 22 (*İ.A. v. Turkey*).
[659] European Court of Human Rights, 13 September 2005, 42571/98, par. 22 (*İ.A. v. Turkey*).
[660] European Court of Human Rights, 13 September 2005, 42571/98, par. 28 (*İ.A. v. Turkey*).
[661] European Court of Human Rights, 13 September 2005, 42571/98, par. 29 (*İ.A. v. Turkey*).

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".'[662]

Hence, the Court considered that 'the measure taken in respect of the statements in issue was intended to provide protection against offensive attacks on matters regarded as sacred by Muslims. In that respect it finds that the measure may reasonably be held to have met a "pressing social need".'[663] Ultimately, the Court established no violation of article 10.[664]

A blasphemy case with a different outcome was that of *Tatlav v. Turkey*. The applicant in this case, Tatlav, was a journalist and author of a five-volume work entitled *İslamiyet Gerçeği* (The Reality of Islam), of which the first edition was entitled *Kur'an ve Din* (The Koran and Religion). The fifth edition of the volume appeared in 1996 and contained a 'historical study and a critical commentary on the Koran.'[665]

In 1997, a public prosecutor charged Tatlav on the grounds of article 175 paragraph 2 of the Turkish Criminal Code,[666] which makes it a crime 'to blaspheme against God, one of the religions, one of the prophets, one of the sects or one of the holy books (…) or to vilify or insult another on account of his religious beliefs or fulfilment of religious duties (…).'[667] The impugned passages of the book read:

> '(…) Islam is an ideology that lacks so much self-confidence that this is revealed in the cruelty of its sanctions. (…) it (…) conditions [children] from an early age, with stories of heaven and hell. (…) he will no longer need stories from God from that age (…) the policy of Islam towards the child too, is made only of barbaric violence (…)

[662] European Court of Human Rights, 13 September 2005, 42571/98, par. 29 (*İ.A. v. Turkey*).
[663] European Court of Human Rights, 13 September 2005, 42571/98, par. 30 (*İ.A. v. Turkey*).
[664] European Court of Human Rights, 13 September 2005, 42571/98, par. 32 (*İ.A. v. Turkey*).
[665] European Court of Human Rights, 2 August 2006, 50692/99, par. 9 (*Aydin Tatlav v. Turkey*).
[666] European Court of Human Rights, 2 August 2006, 50692/99, par. 12 (*Aydin Tatlav v. Turkey*).
[667] European Court of Human Rights, 2 August 2006, 50692/99, par. 18 (*Aydin Tatlav v. Turkey*).

> religions show their lack of self-confidence, by their tendency to suppress free thought, and in particular any analysis and criticism of them.
>
> (…) all these truths concretize the fact that God does not exist, that it is the consciousness of the illiterate who created him (…) this God who mixes with everything, including question of knowing how many blows of sticks will be inflicted on adultery, what part of the thief's body will be amputated, and even the fringe of poor Ebu Leheb (…)
>
> With this typical psychic structure, similar to that of his predecessors, Mohamed, who takes his dreams for realities, presents himself with these absolutely insane verses, in front of the people who ask him to prove his prophecy (…). The founder of Islam sometimes adopts a tolerant attitude, sometimes orders jihad. From violence, it makes its fundamental policy. Allah's paradise promises men a true parasitic life of an aristocrat (…)
>
> (…) because they will see that the Koran is made only of comments filled with boring repetitions, devoid of any depth, more primitive than most of the older books, written by men (…) on commerce, relations between men and women, slavery, sanctions (…) ".'[668]

Although Tatlav asserted before the Turkish criminal court that his book should be read as 'a scientific treatise on religions and prophets', that he made a 'clear distinction between the belief held by people, and running a state in the name of a religion' in the preface, and that he criticised religious policy instead of religion,[669] he was sentenced to 12 months' imprisonment and a fine of 840,000 Turkish Lira. The prison sentence was ultimately converted into a fine of 2,640,000 Turkish Lira.[670] The court summarized the content of the book by stating that 'the book maintains that Allah does not exist, that it would have been created to fool the illiterate people, that Islam would be a primitive religion, which would deceive the population with

[668] European Court of Human Rights, 2 August 2006, 50692/99, par. 12 (*Aydin Tatlav v. Turkey*).

[669] European Court of Human Rights, 2 August 2006, 50692/99, par. 13 (*Aydin Tatlav v. Turkey*).

[670] European Court of Human Rights, 2 August 2006, 50692/99, par. 14 (*Aydin Tatlav v. Turkey*).

stories of paradise and hell, and which would sanctify exploitation, slavery included.'[671] The ruling was upheld by the Turkish Court of Cassation.[672]

Tatlav made an appeal to the European Court of Human Rights, arguing his right under article 10 of the Convention had been violated.[673] The Turkish government submitted, by referring to the *Otto Preminger* case, that the interference was proportional to the legitimate aims of the protection of morals and the rights of others and fell within the state's margin of appreciation.[674]

The European Court focused its analysis on the question whether the interference was 'necessary in a democratic society.'[675] The Court balanced 'the contradictory interests relating to the exercise of the two fundamental freedoms: on the one hand, the right, for the applicant, to communicate to the public his ideas on the legal doctrine religious, and, on the other hand, the right of other persons to respect for their freedom of thought, conscience and religion.'[676]

The weighing of these interests resulted in this case in favour of free expression. The Court observed that the passages cited in the judgment [by the Turkish court] contained sharp criticism,[677] as Tatlav argued in his book that 'the effect of religion is to legitimize social injustices by passing them off as "the will of God".' The Court considered this a non-believer's viewpoint in a socio-political context. The Court was of the opinion that the impugned statements did not contain 'an insulting tone aimed directly at the person of believers' nor 'an insulting attack on sacred symbols' even if Muslims 'could certainly feel offended by this

[671] European Court of Human Rights, 2 August 2006, 50692/99, par. 14 (*Aydin Tatlav v. Turkey*).
[672] European Court of Human Rights, 2 August 2006, 50692/99, par. 16 (*Aydin Tatlav v. Turkey*).
[673] European Court of Human Rights, 2 August 2006, 50692/99, par. 19 (*Aydin Tatlav v. Turkey*).
[674] European Court of Human Rights, 2 August 2006, 50692/99, par. 20 (*Aydin Tatlav v. Turkey*).
[675] European Court of Human Rights, 2 August 2006, 50692/99, par. 21 (*Aydin Tatlav v. Turkey*).
[676] European Court of Human Rights, 2 August 2006, 50692/99, par. 26 (*Aydin Tatlav v. Turkey*).
[677] European Court of Human Rights, 2 August 2006, 50692/99, par. 28 (*Aydin Tatlav v. Turkey*).

somewhat caustic commentary on their religion.'[678] In this regard, the case differed from that *İ.A. v. Turkey*, according to the Court.[679] As with regard to the imposed punishment, the Court observed that a criminal conviction, with the risk of a custodial sentence, could have a chilling effect on authors and publishers, who may be 'dissuaded from publishing opinions which are not conformist about religion.' Such a penalty may 'obstruct the safeguard of pluralism which is essential for the healthy development of a democratic society.'[680] Given that there was no pressing social need for the interference of Tatlav's right to free expression, the Court established a violation of article 10 of the Convention.[681]

The final blasphemy case discussed in this section is that of the 2018 case of *E.S. v. Austria*. In this case the applicant, E.S.,[682] held seminars at the right-wing Freedom Party Education Institute to 'educate' people about the Islam. The seminars were open to members of the Freedom Party and invited guests, and were advertised on the Freedom Party's website.[683] An undercover journalist was present during two of the seminars. On behalf of this journalist's journal, a preliminary investigation was instituted against E.S. regarding anti-Islam statements she had made during the seminars.[684]

Charges were brought against E.S, and the Austrian Regional Criminal Court found E.S. guilty of 'publicly disparaging an object of veneration of a domestic church or religious

[678] European Court of Human Rights, 2 August 2006, 50692/99, par. 28 (*Aydin Tatlav v. Turkey*).

[679] European Court of Human Rights, 2 August 2006, 50692/99, par. 28 (*Aydin Tatlav v. Turkey*). The Court also observed that the book was published for the first time in 1992, and that it wasn't until 1996 that a prosecution was instigated. See European Court of Human Rights, 2 August 2006, 50692/99, par. 29 (*Aydin Tatlav v. Turkey*).

[680] European Court of Human Rights, 2 August 2006, 50692/99, par. 30 (*Aydin Tatlav v. Turkey*).

[681] European Court of Human Rights, 2 August 2006, 50692/99, par. 31 (*Aydin Tatlav v. Turkey*).

[682] Identified as Elisabeth Sabaditsch-Wolff, author of *The Truth is No Defense Hardcover*, Nashville/London: New English Review Press 2019.

[683] European Court of Human Rights, 25 October 2018, 38450/12, par. 7 (*E.S. v. Austria*).

[684] European Court of Human Rights, 25 October 2018, 38450/12, par. 8-9 (*E.S. v. Austria*).

society – namely Muhammad, the Prophet of Islam – in a manner capable of arousing justified indignation.'[685] The court based its decision on article 188 of the Austrian Criminal Code.[686]

E.S. was convicted and ordered to pay a fine of 480 euros over statements indicating that the prophet Muhammad had pedophilic tendencies due to the alleged consumption of his marriage when his wife Aisha was nine years' old.[687] In the view of E.S., Muhammad's legacy is problematic in modern Austrian society, as she had stated during the seminars that:

> 'One of the biggest problems we are facing today is that Muhammad is seen as the ideal man, the perfect human, the perfect Muslim. That means that the highest commandment for a male Muslim is to imitate Muhammad, to live his life. This does not happen according to our social standards and laws. Because he was a warlord, he had many women, to put it like this, and liked to do it with children. And according to our standards he was not a perfect human. We have huge problems with that today, that Muslims get into conflict with democracy and our value system.'[688]

Moreover, E.S. quoted a part of a phone conversation she had with her sister, in which E.S. told her sister: 'A 56-year-old and a six-year-old? What do you call that? Give me an example? What do we call it, if it is not paedophilia?'[689]

The Regional Court found that 'by making the statements the applicant had suggested that Muhammad was not a worthy subject of worship.'[690] And although the Regional Court did

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[685] European Court of Human Rights, 25 October 2018, 38450/12, par. 12 (*E.S. v. Austria*).

[686] 'Whoever, in circumstances where his or her behaviour is likely to arouse justified indignation, publicly disparages or insults a person who, or an object which, is an object of veneration of a church or religious community established within the country, or a dogma, a lawful custom or a lawful institution of such a church or religious community, shall be liable to up to six months' imprisonment or a day-fine for a period of up to 360 days.' Cited in European Court of Human Rights, 25 October 2018, 38450/12, par. 24 (*E.S. v. Austria*).

[687] European Court of Human Rights, 25 October 2018, 38450/12, par. 13-14 (*E.S. v. Austria*).

[688] European Court of Human Rights, 25 October 2018, 38450/12, par. 13 (*E.S. v. Austria*).

[689] European Court of Human Rights, 25 October 2018, 38450/12, par. 13 (*E.S. v. Austria*).

[690] European Court of Human Rights, 25 October 2018, 38450/12, par. 14 (*E.S. v. Austria*).

not establish that E.S. had intended to decry all Muslims or that she suggested that all Muslims were pedophiles, it did find that her statements were 'capable of causing indignation' since 'pedophilia was behaviour which was ostracised by society and outlawed.'[691]

The Regional Court was of the opinion

> 'that the applicant had intended to wrongfully accuse Muhammad of having paedophilic tendencies. Even though criticising child marriages was justifiable, she had accused a subject of religious worship of having a primary sexual interest in children's bodies, which she had deduced from his marriage with a child, disregarding the point that the marriage had continued until the Prophet's death, when Aisha had already turned eighteen and had therefore passed the age of puberty. In addition, the court found that because of the public nature of the seminars, which had not been limited to members of the Freedom Party, it was conceivable that at least some of the participants might have been disturbed by the statements.'[692]

The Regional Court submitted that the exercise of free expression under article 10 was 'subject to duties and responsibilities, such as refraining from making statements which hurt others without reason and therefore did not contribute to a debate of public interest.'[693] The court balanced the rights under articles 9 and 10 of the Convention and argued that E.S. 'had not intended to approach the topic in an objective manner, but had directly aimed to degrade Muhammad' and that her derogatory statements exceeded the limits of free expression.[694] The Regional Court stated that 'child marriages were not the same as pedophilia, and were not only a phenomenon of Islam, but also used to be widespread among the European ruling dynasties.'[695] 'Presenting objects of religious worship in a provocative way capable of hurting

[691] European Court of Human Rights, 25 October 2018, 38450/12, par. 14 (*E.S. v. Austria*).

[692] European Court of Human Rights, 25 October 2018, 38450/12, par. 14 (*E.S. v. Austria*).

[693] European Court of Human Rights, 25 October 2018, 38450/12, par. 15 (*E.S. v. Austria*).

[694] European Court of Human Rights, 25 October 2018, 38450/12, par. 15 (*E.S. v. Austria*).

[695] European Court of Human Rights, 25 October 2018, 38450/12, par. 15 (*E.S. v. Austria*).

the feelings of the followers of that religion could be conceived as a malicious violation of the spirit of tolerance, which was one of the bases of a democratic society', according to the court. Ultimately, the Regional Court concluded that E.S.'s criminal conviction was necessary in a democratic society to protect religious peace in Austria.[696]

The Vienna Court of Appeal confirmed the findings of the lower court.[697] This court found E.S.'s statements not 'merely provocative' but intended as 'an abusive attack on the Prophet of Islam,' since 'Muslims would find the impugned statements wrong and offensive, even if Muhammad had married a six-year-old and had intercourse with her when she had been nine.'[698] 'Even if', the court stated, E.S. 'had had the right to criticise others' attempts to imitate Muhammad, her statements showed her intention to unnecessarily disparage and deride Muslims.'[699] In the view of the court, 'harsh criticism of churches or religious societies and religious traditions and practices was lawful. However, the permissible limits were exceeded where criticism ended and insults or mockery of a religious belief or person of worship began.'[700] Hence, the interference of E.S.'s right to free expression was justified.

As a final step before the domestic authorities, E.S. lodged a request for a renewal of the proceeding with the Austrian Supreme Court, which was dismissed.[701] The Supreme Court found that E.S. 'had not aimed to contribute to a serious debate about Islam or the phenomenon of child marriage' but that she 'had made her allegation primarily in order to defame Muhammad.'[702]

[696] European Court of Human Rights, 25 October 2018, 38450/12, par. 15 (*E.S. v. Austria*).
[697] European Court of Human Rights, 25 October 2018, 38450/12, par. 17 (*E.S. v. Austria*).
[698] European Court of Human Rights, 25 October 2018, 38450/12, par. 17 (*E.S. v. Austria*).
[699] European Court of Human Rights, 25 October 2018, 38450/12, par. 18 (*E.S. v. Austria*).
[700] European Court of Human Rights, 25 October 2018, 38450/12, par. 18 (*E.S. v. Austria*).
[701] European Court of Human Rights, 25 October 2018, 38450/12, par. 21 (*E.S. v. Austria*).
[702] European Court of Human Rights, 25 October 2018, 38450/12, par. 22 (*E.S. v. Austria*).

Subsequently, E.S. filed a complaint with the European Court. The Court found that the interference with the applicant's right to freedom of expression was 'prescribed by law',[703] as the conviction was based on article 188 of the Austrian Criminal Code, and that it met the legitimate aims of 'preventing disorder by safeguarding religious peace, as well as protecting religious feelings, which corresponds to protecting the rights of others within the meaning of Article 10 (2) of the Convention.'[704]

Following this, the Court examined whether the conviction of the applicant was 'necessary in a democratic society.' First, the Court reiterated its general principles on free expression, namely that article 10 also applies to expression that offends, shocks, or disturbs; that believers must tolerate and accept the denial by others of their religious beliefs and the propagation by others of doctrines hostile to their faith; that the exercise of free expression carries responsibilities that include 'a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane'; that states have a relatively large margin of appreciation in regulating expression disparaging to religious convictions; and that states have a positive obligation under article 9 to ensure 'the peaceful co-existence of all religions and those not belonging to a religious group by ensuring mutual tolerance.'[705]

After outlining the general principles, the Court turned to an examination of the case at hand. First, the Court noted that the Austrian authorities had a wide margin of appreciation to evaluate the interference with free expression, as they were better placed to evaluate which statements were likely to disturb the religious peace in their country.[706]

Next, the Court observed that

[703] European Court of Human Rights, 25 October 2018, 38450/12, par. 40 (*E.S. v. Austria*).

[704] European Court of Human Rights, 25 October 2018, 38450/12, par. 41 (*E.S. v. Austria*).

[705] European Court of Human Rights, 25 October 2018, 38450/12, par. 42-49 (*E.S. v. Austria*).

[706] European Court of Human Rights, 25 October 2018, 38450/12, par. 50 (*E.S. v. Austria*).

> 'Article 188 of the Criminal Code does not in fact incriminate all behaviour that is likely to hurt religious feelings or amounts to blasphemy, but additionally requires that the circumstances of such behaviour were capable of arousing justified indignation, and thus aims at the protection of religious peace and tolerance. The Court notes that the domestic courts explained extensively why they considered that the applicant's statements had been capable of arousing justified indignation, on the grounds that they had not been made in an objective manner aimed at contributing to a debate of public interest, but could only be understood as having been aimed at demonstrating that Muhammad was not a worthy subject of worship.' [707]

The Court agreed with the assessment of the domestic courts.[708] Moreover, the Court agreed with the domestic courts that E.S.'s 'must have been aware' that her statement 'What do we call it, if it is not paedophilia?' was 'partly based on untrue facts and liable to arouse (justified) indignation in others.'[709] In this context, the Court reiterated that national states are obliged to ensure 'the peaceful co-existence of religious and non-religious groups and individuals under their jurisdiction by ensuring an atmosphere of mutual tolerance,' and it endorsed the Austrian Regional Court's statement that 'presenting objects of religious worship in a provocative way capable of hurting the feelings of the followers of that religion could be conceived as a malicious violation of the spirit of tolerance, which was one of the bases of a democratic society.'[710]

Lastly, the Court agreed with the Austrian courts 'that the impugned statements can be classified as value judgments not having a sufficient factual basis' as E.S. 'had subjectively labelled Muhammad with a general sexual preference for paedophilia and had failed to

[707] European Court of Human Rights, 25 October 2018, 38450/12, par. 52 (*E.S. v. Austria*).

[708] European Court of Human Rights, 25 October 2018, 38450/12, par. 52 (*E.S. v. Austria*).

[709] European Court of Human Rights, 25 October 2018, 38450/12, par. 53 (*E.S. v. Austria*).

[710] European Court of Human Rights, 25 October 2018, 38450/12, par. 53 (*E.S. v. Austria*).

neutrally inform her audience of the historical background, which consequently had not allowed for a serious debate on that issue.'[711]

Taking into consideration the amount of the fine E.S. was ordered to pay (480 Euros), which it found not disproportionate,[712] the European Court of Human Rights concluded that the Austrian authorities had 'carefully balanced her right to freedom of expression with the rights of others to have their religious feelings protected and to have religious peace preserved in Austrian society.' [713] The Court accepted the view of the Austrian courts that E.S.'s statements went 'beyond the permissible limits of an objective debate,' that they constituted 'an abusive attack on the Prophet of Islam, (…) capable of stirring up prejudice and putting religious peace at risk' and that they 'contained elements of incitement to religious intolerance.'[714] Ultimately, the Court found the reasons put forward by the Austrian courts for the interference 'relevant and sufficient' and submitted that the interference corresponded 'to a pressing social need and was proportionate to the legitimate aim pursued.'[715] Hence, the Court established no violation of article 10.[716]

2. The International Covenant on Civil and Political Rights

The Human Rights Committee is straightforward when it comes to the legitimacy of blasphemy laws under the International Covenant on Civil and Political Rights. In its guideline for interpreting article 19 of the ICCPR, the Human Rights Committee observed, without much

[711] European Court of Human Rights, 25 October 2018, 38450/12, par. 54 (*E.S. v. Austria*).
[712] European Court of Human Rights, 25 October 2018, 38450/12, par. 56 (*E.S. v. Austria*).
[713] European Court of Human Rights, 25 October 2018, 38450/12, par. 57 (*E.S. v. Austria*).
[714] European Court of Human Rights, 25 October 2018, 38450/12, par. 57 (*E.S. v. Austria*).
[715] European Court of Human Rights, 25 October 2018, 38450/12, par. 57 (*E.S. v. Austria*).
[716] European Court of Human Rights, 25 October 2018, 38450/12, par. 58 (*E.S. v. Austria*).

elaboration,[717] that 'Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant.'[718]

Notwithstanding this clear-cut approach to blasphemy laws, different opinions on blasphemy bans have been expressed before various United Nations bodies over the last decades. From 1999 to 2011, resolutions were proposed and adopted at the United Nations about 'defamation of religion.'[719] The driving force behind these resolutions was the Organization of Islamic Cooperation (OIC). With 57 members, the OIC is the second-largest intergovernmental organization in the world. Established in 1969, the organization aims to function as the 'collective voice of the Muslim world.'[720] This organization is responsible for drafting the Cairo Declaration on Human Rights in Islam (CDHRI, 1990). The CDHRI entails a 'general guidance for Member States in the field of human rights.'[721] From the outset this document is different from other human rights documents, mainly because of the role religion plays. International human rights documents typically protect the freedom of individuals in matters of (religious) belief, yet they do not subject the human rights to a particular religion as

[717] See, critically, N. Cox, 'Justifying blasphemy laws: freedom of expression, public morals, and international human rights law', *Journal of Law and Religion*, 2020, p. 37: 'The absence of reasoning in paragraph 48 is particularly stark given that there are multiple blasphemy laws in existence today, some of which—those for example in various Muslim-majority states—are regarded as important and necessary. It is simply not the case, in other words, that there is any genuine international consensus on this point.'

[718] Human Rights Committee, General comment No. 34, UN Doc. CCPR/C/GC/34, 2011, par. 48. For a critique of the compatibility of this standpoint with the text of the ICCPR, see N. Cox, 'Justifying blasphemy laws: freedom of expression, public morals, and international human rights law', *Journal of Law and Religion*, 2020, p. 33-60. Article 20 paragraph 2 provides that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'

[719] See, generally, L. Langer, *Religious Offence and Human Rights: The Implications of Defamation of Religions*, Cambridge: Cambridge University Press 2014.

[720] http://www.oic-oci.org/oicv2/page/?p_id=52&p_ref=26&lan=en.

[721] Preamble, Cairo Declaration on Human Rights in Islam.

such.[722] The CDHRI is different in this regard. In it, fundamental rights and universal freedoms in Islam are seen as 'binding divine commandments', human beings as God's subjects, and it states that 'All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah.'

The CDHRI also allows religion to determine the scope of the human rights stipulated in it. Article 24 reads: 'All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah', while article 25 states: 'The Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration.' And specifically regarding the right to freedom of expression, article 22 (a) of the Declaration states that: 'Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah.' Provision (c) of article 22 stipulates that 'Information (…) may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith.'

Activities of the OIC at the United Nations on the matter of free speech have been described by the United States Commission on International Religious Freedom as seeking 'to establish what would be in effect a global blasphemy law.'[723] These activities commenced in 1999, when Pakistan, on behalf of the OIC, proposed to the United Nations Commission on Human Rights (the predecessor of the Human Rights Council) a draft resolution entitled 'Defamation of Islam.'[724] In this draft resolution, the Commission on Human Rights 'expresses

[722] Cf. C.W. Howland, 'The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter', *Columbia Journal of Transnational Law*, 1997, p. 329-330.

[723] United States Commission on International Religious Freedom, Annual Report 2013, p. 304.

[724] United Nations Commission on Human Rights, UN Doc. E/CN.4/1999/L.40. The Commission on Human Rights was, and the Human Rights Council (established in 2006) is, a political body, not to be confused with the

its concern at the use of print, audio-visual or electronic media or any other means to spread intolerance against Islam'[725] and 'expresses its appreciation of the efforts of many countries and societies to combat ignorance of and intolerance towards Islam.'[726] This draft attracted criticism from non-Muslim-majority countries for its exclusive focus on Islam. For example, the Japanese delegation 'would have liked the draft resolution to be worded in more general terms'[727], while the German delegation said that 'although it understood some of the concerns which had led the sponsors of [the draft resolution] to submit that text, it was of the opinion that the draft resolution's overall design was not balanced, since it referred exclusively to the negative stereotyping of Islam (…).'[728] Amendments designed to 'broaden the issue and deal equally with all religions' were proposed by Germany on behalf of other Western countries.[729] These amendments proposed, inter alia, to change the title of the resolution from 'defamation of Islam' to 'stereotyping of religions'[730] and to replace the phrase 'alarmed at the negative stereotyping of Islam and the tendency to associate human rights violations and terrorism with Islam' with 'deeply concerned at the negative stereotyping of some religions, including many minority religions.'[731] These proposed amendments were much to Pakistan's dismay, for 'the problem faced by Islam was of a very special nature and its manifestations took many forms.'[732] The amendments 'would defeat the purpose of the text, which was to bring a problem relating

Human Rights Committee of the United Nations, which consists of independent human rights experts tasked with monitoring the implementation of the ICCPR.

[725] United Nations Commission on Human Rights, UN Doc. E/CN.4/1999/L.40, p. 2.

[726] United Nations Commission on Human Rights, UN Doc. E/CN.4/1999/L.40, p. 2.

[727] United Nations Commission on Human Rights, UN Doc. E/CN.4/1999/SR.61, p. 3.

[728] United Nations Commission on Human Rights, UN Doc. E/CN.4/1999/SR.61, p. 2.

[729] United Nations Commission on Human Rights, UN Doc. E/CN.4/1999/SR.61, p. 2.

[730] United Nations Commission on Human Rights, UN Doc. E/CN.4/1999/L.90, p. 1.

[731] United Nations Commission on Human Rights, UN Doc. E/CN.4/1999/L.90, p. 1.

[732] United Nations Commission on Human Rights, UN Doc. E/CN.4/1999/SR.61, p. 3.

specifically to that religion to the attention of the international community.'[733] Subsequently, 'the States which had submitted the draft resolution could therefore not agree to the proposed amendments and (…) appealed to Germany and the other co-sponsors of the amendments to withdraw them.'[734] Eventually, Pakistan introduced a revised draft which was adopted under the title 'Defamation of religions.'[735] Although this final resolution was, as the title suggests, as it was formulated in more general terms, the only religion that is explicitly mentioned in it is Islam. This resolution was followed by many OIC-sponsored resolutions expressing the same intention to dampen the defamation of belief systems in general and Islam in particular. Those resolutions were proposed to and adopted by the Commission on Human Rights, the Human Rights Council as well as the main body of the United Nations, the General Assembly.[736] Members of the United States Commission on International Religious Freedom have argued that these defamation of religions resolutions are 'in essence (…) an attempt to export the repressive blasphemy laws found in some OIC countries to the international level'[737] and that 'implementing the OIC's approach would violate provisions of the Universal Declaration of Human Rights and various human rights treaties that protect, with only narrow exceptions, every individual's right to receive and impart information and speak out.'[738]

Support for these resolutions gradually deteriorated, which resulted in a break in the trend when the resolution 16/18 on 'Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons

[733] United Nations Commission on Human Rights, UN Doc. E/CN.4/1999/SR.61, p. 3.

[734] United Nations Commission on Human Rights, UN Doc. E/CN.4/1999/SR.61, p. 3.

[735] United Nations Commission on Human Rights, UN Doc. E/CN.4/RES/1999/82. See also, Commission on Human Rights, Report on the 55th Session (22 March – 30 April 1999), p. 308-309.

[736] For an overview, see http://www.strasbourgconsortium.org/index.php?blurb_id=778.

[737] L.A. Leo, F.D. Gaer & E.K. Cassidy, 'Protecting Religions From 'Defamation': A Threat To Universal Human Rights Standards,' *Harvard Journal of Law & Public Policy*, 2011, p. 772.

[738] L.A. Leo, F.D. Gaer & E.K. Cassidy, 'Protecting Religions From 'Defamation': A Threat To Universal Human Rights Standards,' *Harvard Journal of Law & Public Policy*, 2011, p. 772.

based on religion or belief' was adopted in March 2011.[739] International human rights organization Human Rights First welcomed the resolution as 'a huge achievement because for the first time in many years it focuses on the protection of individuals rather than religions.'[740]

Later resolutions proceeded on this path of focusing on individuals instead of belief systems, lacking any reference to the 'defamation of religion' or demanding 'full respect of religion.'[741]

Although the wording of resolution 16/18 and subsequent resolutions is different from the previous resolutions on combating the defamation of religion, it appears that the main sponsor of these types of resolutions, the OIC, regards this shift as insignificant. Pakistani ambassador Zamir Akram, head of the OIC mission at the time resolution 16/18 was passed by the Human Rights Council, said: 'I want to state categorically that this resolution does not replace the OIC's earlier resolutions on combating defamation of religions which were adopted by the Human Rights Council and continue to remain valid.'[742] His colleague from Saudi Arabia, Ahmed Suleiman Ibrahim Alaquil, stated: 'This text is not replacing the other, existing text which also criminalizes attack on religion. This text still remains valid.'[743] In their study of Pakistan's blasphemy law, legal scholars Javaid Rehman and Stephanie Berry '[identify], notwithstanding [the] apparent departure from explicit references to "defamation of religions"

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[739] For the background of this resolution, see M. Limon, N. Ghanea & H. Power, 'Freedom of Expression and Religions, the United Nations and the '16/ 18 Process'", in: J. Temperman & A. Koltay (eds.), *Blasphemy and Freedom of Expression Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre*, Cambridge: Cambridge University Press 2017, p. 645-680.

[740] 'UN rights body ditches religious "defamation" idea', 24 March 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/03/24/AR2011032403901.html.

[741] See for example, Human Rights Council, UN Doc. A/HRC/19/L.7; General Assembly, UN Doc. A/RES/68/169.

[742] 'U.N. Religious 'Defamation' Resolution is Not Dead, Says Islamic Bloc', 30 March 2011, http://cnsnews.com/news/article/un-religious-defamation-resolution-not-dead-says-islamic-bloc.

[743] 'U.N. Religious 'Defamation' Resolution is Not Dead, Says Islamic Bloc', 30 March 2011, http://cnsnews.com/news/article/un-religious-defamation-resolution-not-dead-says-islamic-bloc.

in the UN, a continuing trend on the part of the OIC and its members towards the banning and criminalization of all forms of "defamation of religions" and protecting and promoting analogous domestic anti-blasphemy laws.'[744]

The concept of defamation of religion as well as blasphemy bans in general have been criticized by various United Nations bodies and officials.[745] In 2009, amidst the discussion on the concept of defamation of religion, a joint statement was released by the Special rapporteurs on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, on freedom of religion or belief, and the promotion and protection of the right to freedom of opinion and expression. In it, they stated that 'the difficulties in providing an objective definition of the term "defamation of religions" at the international level make the whole concept open to abuse.'[746] Moreover, the Special rapporteurs stated that:

[744] J. Rehman & S.E. Berry, 'Is "Defamation of Religions" passé? The United Nations, Organisation of Islamic Cooperation, and Islamic State Practices: Lessons from Pakistan', *The George Washington International Law Review*, 2012, p. 433.

[745] The concept has also drawn criticism from academia. For example, legal scholar Jeroen Termperman commented on the notion of 'defamation of religions' as follows: 'the (…) counter-defamation discourse introduces new grounds for limiting human rights, notably with respect to the right to freedom of expression – limitations that are not recognized by international law. It is largely intrinsic to religious belief to deem all contradicting, unorthodox, or otherwise deviant religious doctrine and religious manifestations as, if not "heretical," then at least erroneous, misguided, or misdirected.' For Temperman, 'the counter-defamation approach is unacceptable because it seeks to shift the emphasis from the protection of the rights of individuals to the protection of religions per se.' See J. Temperman, 'Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech', *BYU Law Review*, 2011, p. 730.

[746] 'Freedom of expression and incitement to racial or religious hatred', OHCHR side event during the Durban Review Conference, Geneva, 22 April 2009, Joint statement by Mr. Githu Muigai, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Ms. Asma Jahangir, Special Rapporteur on freedom of religion or belief; and Mr. Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, p. 2, https://www2.ohchr.org/english/issues/racism/rapporteur/docs/Joint_Statement_SRs.pdf.

> 'At the national level, domestic blasphemy laws can prove counter-productive, since this could result in the de facto censure of all inter-religious and intra-religious criticism. Many of these laws afford different levels of protection to different religions and have often proved to be applied in a discriminatory manner. There are numerous examples of persecution of religious minorities or dissenters, but also of atheists and non-theists, as a result of legislation on religious offences or overzealous application of laws that are fairly neutral.'[747]

More recently, the current Special Rapporteur on freedom of religion or belief, Ahmed Shaheed, has observed that 'Many States have adopted [anti-blasphemy laws] to promote and strengthen "social harmony" and "public order" between and across various communities. By and large, those efforts are effectively measures meant to protect majority religious sentiments or State-imposed religious or belief orthodoxies.'[748] According to the Special Rapporteur,

> 'Anti-blasphemy laws often give States licence to determine which conversations on religion are admissible and which ones are too controversial to be voiced. The Special Rapporteur notes that when governments restrict freedom of expression on the grounds of "insult to religion", any peaceful expression of political or religious views is subject to potential prohibition. In practice, those laws can be used for the suppression of any dissenting view in violation of international human rights standards protecting freedom of opinion and expression and freedom of religion or belief. Legislation on religious offences is thus often used to facilitate the persecution of members of religious minority groups, dissenters, atheists and non-theists. In many States, individuals whose beliefs constitute dissent from religious doctrine or beliefs held by the State have been subjected to

[747] 'Freedom of expression and incitement to racial or religious hatred', OHCHR side event during the Durban Review Conference, Geneva, 22 April 2009, Joint statement by Mr. Githu Muigai, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Ms. Asma Jahangir, Special Rapporteur on freedom of religion or belief; and Mr. Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, p. 2, https://www2.ohchr.org/english/issues/racism/rapporteur/docs/Joint_Statement_SRs.pdf.

[748] Interim report of the Special Rapporteur on freedom of religion or belief, UN. Doc. A/72/365, 2017, par. 27.

> criminal sanctions, including life imprisonment or capital punishment, under the auspices of "fighting religious intolerance" or "upholding social harmony".'[749]

Shaheed's predecessor, Heiner Bielefeldt, has stated that 'States should repeal blasphemy laws, which typically have a stifling effect on open dialogue and public discourse, often particularly affecting persons belonging to religious minorities'[750] and that

> 'in the human rights framework, respect always relates to human beings, (…). In the face of widespread misunderstandings, it cannot be emphasized enough that freedom of religion or belief does not provide respect to religions as such; instead it empowers human beings in the broad field of religion and belief. The idea of protecting the honour of religions themselves would clearly be at variance with the human rights approach.'[751]

Conclusion

This chapter examined legal aspects of the regulation of blasphemy: expression that ridicules, defames, or denies religious symbols such as prophets, Gods, or sacred texts. This speech crime, still outlawed in various countries in both the developed as well as the developing world, has a long history. Initially, blasphemy was closely related to undermining the state and disobedience to its laws. Challenging or defaming religion was akin to an attack on worldly power. As the legitimizing function of religion for the state eroded, so did the scope of anti-

[749] Interim report of the Special Rapporteur on freedom of religion or belief, UN. Doc. A/72/365, 2017, par. 28-29.

[750] Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, 2013, UN Doc. A/HRC/25/58, par. 70(e).

[751] Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, 2013, UN Doc. A/HRC/25/58, par. 33. See also L.A. Leo, F.D. Gaer & E.K. Cassidy, 'Protecting Religions From 'Defamation': A Threat To Universal Human Rights Standards,' *Harvard Journal of Law & Public Policy*, 2011, p. 770.

blasphemy laws. The determining factor became the manner in which anti-religious expression was uttered. Examples are the English blasphemy and the Dutch blasphemy bans, the latter of which has been examined in this chapter.

The Dutch ban on 'scornful blasphemy' of 1932 prohibited blasphemy uttered in a scorning or abusive manner. Although early cases on the basis of this law did result in convictions, for example for stating that 'A God that created the tubercle bacillus is not a God, but a criminal', the force of the law was greatly diminished in the 1960s as a result of the trial against novelist Van het Reve. Ultimately, the anti-blasphemy law was repealed in 2014. The government examined whether the ban should be replaced by a new criminal provision that offered protection against seriously felt insults of their religion and religious experience.' The government ultimately decided not to do so over concerns about the subjectivity, compatibility with international law, and legal certainty of such a provision.

The repeal of this ban fits with the current framework of the United Nations' International Covenant on Civil and Political Rights. Although there has been debate in the early 2000s at various UN fora concerning the so-called 'defamation of religion resolutions', which free speech advocates feared would restrict anti-religious expression, the Human Rights Committee has stated in 2011 that 'prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible' the ICCPR. Other UN officials and bodies have voiced similar critical statements on anti-blasphemy laws.

The European Court of Human Rights takes a different, less straightforward approach. This Court has upheld convictions by domestic authorities for blasphemous utterances. Although a very broad blasphemy ban which prohibits all criticism of a religion or the denial of religious beliefs, would violate article 10 of the European Convention on Human Rights, the Court has upheld convictions based on moderate blasphemy bans as compatible with the protection of free expression offered by the Convention. Granting a relatively wide margin of

appreciation to national authorities to determine the appropriateness of an interference, and taking into account the proportionality of the imposed punishment, expression that presents objects of religious worship in ‘a provocative way capable of hurting the feelings of the followers of that religion’ may fall outside of the protection offered by article 10 of the Convention.

Chapter 5 Free expression, democracy and the defamation of power

Introduction

The previous chapters examined bans on *lèse-majesté*, the defamation of foreign heads, and blasphemy. From a supranational perspective, *lèse-majesté* bans and law against the defamation of foreign heads are considered illegitimate by both the European Court of Human Rights and other international human rights bodies, such as the Human Rights Committee. As for blasphemy bans, the picture is somewhat different. The European Court of Human Rights has decided that in a democracy blasphemy bans may be compatible with the right to free expression under article 10 of the Convention. In contrast, at the level of the United Nations, various bodies and officials have declared blasphemy bans incompatible with free expression. Given that free expression is essential for a democracy, this chapter discusses the legitimacy of *lèse-majesté* bans, bans on the defamation of foreign heads, and anti-blasphemy laws, by examining such provisions in light of democratic free expression theory.

1. Democracy, public discourse, and free expression

Although many notions of exist of what a 'democracy' exactly is, the core of the concept is largely undisputed, namely that it is a form of government of 'many' instead of 'a few', in which political power ultimately resides in the citizens. Free expression is intrinsically linked to such a form of government, as acknowledged by many courts as well as theorists.[752] For

[752] Although free expression has been defended on other grounds as well, such as the arguments from 'truth-seeking' and 'personal development'. On the truth-seeking argument, exchanges in the 'marketplace of ideas' will lead to truth and an increase in knowledge. The discovery of truth is frustrated, and important information

example, the United Nations Human Rights Committee observed that 'the right to freedom of expression is of paramount importance in any democratic society.'[753] The European Court for Human Rights has determined that 'freedom of expression (…) constitutes one of the essential foundations of a democratic society (…)'[754] while in a similar sense, the US Supreme Court noted that 'speech concerning public affairs [is] the essence of self-government.'[755]

In a democracy, free expression is connected to two important elements: an informed public, and legitimacy. On the first account, free expression provides for the access to information necessary to maintain an informed public debate. The 'informing function' of free expression maintains that freedom of expression is essential for, although it does not guarantee, an informed electorate.[756] On the second account, freedom of expression provides *legitimacy*

might remain undisclosed, in case the free marketplace is disrupted by restrictions on expression. The theory 'assumes that a process of robust debate, if uninhibited by governmental interference, will lead to the discovery of truth, or at least the best perspectives or solutions for societal problems,' according to S. Ingber, 'The Marketplace of Ideas: A Legitimizing Myth,' *Duke Law Journal*, 1984, p. 3, 6. The theory can be understood as relating to scientific knowledge as well as to political wisdom. In the latter version, 'the quality of the public exchange of ideas promoted by the marketplace advances the quality of democratic government' (S. Ingber, 'The Marketplace of Ideas: A Legitimizing Myth,' *Duke Law Journal*, 1984, p. 4). On the self-fulfillment theory, free expression is considered essential for personal development. In short, the argument holds that 'the development and exercise of a range of distinctively human capacities, such as thinking, feeling, communicating, imagining, culture building, and so on, would be practically impossible, if not inconceivable, without freedom of expression given the expressive nature of the human capacities in question' (A. Brown, *Hate Speech Law: A Philosophical Examination*, Routledge 2015, p. 122); see also. K. Greenawalt, 'Free speech justifications', *Columbia Law Review*, 1989, p. 144 ('For the speaker, communication is a crucial way to relate to others; it is also an indispensable outlet for emotional feelings and a vital aspect of the development of one's personality and ideas'). Censorship, on this view, 'negates what is distinctly human about the speaker' (E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 105).

[753] Human Rights Committee, *Tae Hoon Park v. Republic of Korea*, CCPR/C/64/D/628/1995, par. 10.3; Human Rights Committee, *Rafael Marques de Morais v. Angola*, CCPR/C/83/D/1128/2002, par. 6.8.

[754] European Court of Human Rights, 8 July 1986, 9815/82, par. 42 (*Lingens v. Austria*).

[755] *Garrison v. Louisiana*, 379 U.S. 64 (1964).

[756] A. Bhagwat & J. Weinstein, 'Freedom of Expression and Democracy', in: A. Stone & F. Schauer (eds.), *The Oxford Handbook of Freedom of Speech*, Oxford: Oxford University Press 2021, p. 90-91.

to the legal order. Legitimacy 'refers to the conditions that entitle a political entity to govern, and in particular, to use coercion to enforce its laws.'[757]

One way by which democracies achieve legitimacy of the legal order is voting. However, although voting is a necessary condition for a state to be democratic, it is an insufficient one.[758] Heinze states that 'Many would maintain that it is not speaking but voting that distinguishes democracy from other forms of government. Voting, however, is nothing but a formalized procedure for speaking.'[759] 'Voting', Heinze continues, 'remains derivative of something more foundational, something constitutive of it. It derives from, as a formalized procedure for, expression, within public discourse.'[760] Thus, the distinctive feature of democracy lies in the ability to participate in public discourse. According to legal theorist Ronald Dworkin:

> 'Fair democracy requires (…) that each citizen have not just a vote but a voice: a majority decision is not fair unless everyone has had a fair opportunity to express his or her attitudes or opinions or fears or tastes or presuppositions or prejudices or ideals, not just in the hope of influencing others (though that hope is crucially important), but also just to confirm his or her standing as a responsible agent in, rather than a passive victim of, collective action. The majority has no right to impose its

[757] A. Bhagwat & J. Weinstein, 'Freedom of Expression and Democracy', in: A. Stone & F. Schauer (eds.), *The Oxford Handbook of Freedom of Speech*, Oxford: Oxford University Press 2021, p. 92.

[758] 'Governments', Post points out, 'do not become democratic merely because they hold elections in which majorities govern.' See R. Post, 'Religion and Freedom of Speech: Portraits of Muhammad', in: S. Mancini & M. Rosenfeld (eds.), *Constitutional Secularism in an Age of Religious Revival*, Oxford: Oxford University Press 2014, p. 328.

[759] E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 46.

[760] E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 47. Also: R. Post, 'Legitimacy and Hate Speech', *Constitutional Commentary*, 2017, p. 654: 'A major reason why modern democracies protect freedom of speech is to endow persons with the sense that their government might be responsive to them. The sense of responsiveness produced by freedom of speech is more ubiquitous and more continuous than that produced by voting.'

> will on someone who is forbidden to raise a voice in protest or argument or objection before the decision is taken.'[761]

Prior to Dworkin, Austrian political philosopher Friedrich Hayek underscored the importance of free expression in a democratic political order. For Hayek, 'democracy is, above all, a process of forming opinion.'[762] Hayek states that:

> 'The conception that government should be guided by majority opinion makes sense only if that opinion is independent of government. The ideal of democracy rests on the belief that the view which will direct government emerges from an independent and spontaneous process. It requires, therefore, the existence of a large sphere independent of majority control in which the opinions of the individuals are formed. There is widespread consensus that for this reason the case for democracy and the case for freedom of speech and discussion are inseparable.'[763]

That independent large sphere crucial for the formation of opinions is commonly understood as 'public discourse.' Barendt succinctly describes this as 'speech concerning the organization and culture of society.'[764] Borrowing from Barendt, Ekeli understands public discourse as 'speech or other expressive conduct that is relevant to both intrapersonal and interpersonal deliberation on issues concerning the organization and culture of society or matters of public concern This will include religious or ideological views and ideas that are relevant to public discourse or political deliberation – for example, advocacy of holy war or Jihad.'[765]

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[761] R. Dworkin, 'Foreword,' in: I. Hare & J. Weinstein (eds.), *Extreme Speech and Democracy*, Oxford: Oxford University Press 2009, p. vii.

[762] F.A. Hayek, *The Constitution of Liberty*, Chicago/London: University of Chicago Press 2011 (1960), p 174.

[763] F.A. Hayek, *The Constitution of Liberty*, Chicago/London: University of Chicago Press 2011 (1960), p. 175.

[764] E. Barendt, *Freedom of Speech*, Oxford: Oxford University Press 2005, p. 189.

[765] K.S. Ekeli, 'Democratic legitimacy, political speech and viewpoint neutrality, *Philosophy and Social Criticism*, 2020, p. 725. For Heinze, public discourse 'is identifiable as being *of a type*, such that the message could plausibly be directed towards a sizeable audience, even if the actual audience in a given situation is small;

Public discourse can thus be distinguished from other, more private contexts such as the workplace or face-to-face interactions. Public discourse provides for a 'running discussion between majority and minority'[766] in which citizens may persuade each other or their political representatives of a particular viewpoint. Participation, or at least the ability to participate in public discourse enables people to 'self-govern' and to identify, albeit not necessarily to agree, with the laws by which they must live. In this context, Post speaks of 'the authorship of decisions', not the 'making of decisions' that is crucial in order for a state to be democratic.[767] According to Post, the reason to protect freedom of expression is

> 'to allow persons of widely varying views to experience as legitimate a government that may nevertheless act in ways that are inconsistent with their own ideas. What maintains descriptive legitimacy in such circumstances is the continuous hope that government actions might be swayed by changes in a public opinion to which persons are given full and open access. If persons are prevented from expressing their own views – however much others might find those views outrageous and intolerable – then they are less likely to experience their government as legitimate.'[768]

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and *of a type* such that its content might extend to some sector of the population, taking account, of course, that what may specifically "interest" any random listener is never wholly predictable.' See E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 27.

[766] H. Kelsen, *General Theory of Law and State*, Cambridge: Harvard University Press 1949, p. 287.

[767] R. Post, 'Religion and Freedom of Speech: Portraits of Muhammad', in: S. Mancini & M. Rosenfeld (eds.), *Constitutional Secularism in an Age of Religious Revival*, Oxford: Oxford University Press 2014, p. 329. See also R. Post, 'Religion and Freedom of Speech: Portraits of Muhammad', in: S. Mancini & M. Rosenfeld (eds.), *Constitutional Secularism in an Age of Religious Revival*, Oxford: Oxford University Press 2014, p. 328: 'Democracy is distinct from majoritarianism because democracy is a normative idea that refers to the substantive political values of self-government, whereas majoritarianism is a descriptive term that refers to a particular decision-making procedure.'

[768] R. Post, 'Legitimacy and Hate Speech', *Constitutional Commentary*, 2017, p. 656-657. See, similarly, the US Supreme Court in *Terminiello v. City of Chicago*, 337 U.S. 1 (1949): 'it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected.

For legal theorist Heinze, free expression within public discourse is not 'merely' an important individual *right*, but it is constitutive of democracy: 'Within a democracy, public discourse is the constitution *of* the constitution.'[769] On that view, '[v]iewpoint-selective penalties imposed upon expression within public discourse (…) serve only to de-democratize the state, even if they do in some circumstances, like other de-democratizing measures, serve a security interest.'[770] Limiting expression in public discourse chips away at democratic legitimacy. As Post puts it: 'censorship of public discourse must be understood as excluding those affected from access to the medium of collective self-determination.'[771]

Given that public discourse if of crucial importance to a democracy, no exact standard exists as to the extent to which public discourse must remain free from government interference to maintain democratic legitimacy. The limits of public discourse vary considerably from country to country, and even from democracy to democracy. To what extent, then, are bans on *lèse-majesté*, the defamation of a foreign head of state, and blasphemy legitimate?

2. State security

State security is of principal importance to democracies, or, for that matter, to any state. Hence, bans restricting certain viewpoints may serve a security interest that overrides democratic

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The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.'

[769] E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 6.

[770] E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 6.

[771] R. Post, 'Managing Deliberation: The Quandary of Democratic Dialogue,' *Ethics*, 1993, p. 660. See also A. Bhagwat & J. Weinstein, 'Freedom of Expression and Democracy', in: A. Stone & F. Schauer (eds.), *The Oxford Handbook of Freedom of Speech*, Oxford: Oxford University Press 2021, p. 91: 'any regulation that selectively interferes with the expression of particular ideas or perspectives infringes the fundamental precept of equal political participation.'

principles of public discourse. The bans on *lèse-majesté* and the defamation of foreign heads of state were enacted in the Netherlands during a politically and socially volatile period of the nineteenth century.

The Dutch government submitted that insults directed at foreign sovereigns could damage the relations of the Netherlands with other countries. During the interbellum between the two World Wars, the ban on defaming foreign heads of state was applied with an eye on avoiding provocative expression that may incur the wrath of foreign states.

The *lèse-majesté* ban was enacted from an *internal* security perspective. In the midst of severe tensions in the Southern and Northern parts of the United Kingdom of the Netherlands over state finances, religion, education, and the national language, the government found it appropriate to prohibit insults directed at the King or the royal dynasty, as it felt that freedom of the press was abused 'to breed resentment, discontent, hatred of religion, partisanship, and rebellion.'.

Although such rationales serve the security interests of a state, they do not serve a democratic process Yet, given the foundational role of state security, security interests may override democratic principles of free expression. Whether this is the case arguably depends on socio-political circumstances. Heinze has introduced the concept of what he calls 'longstanding, stable, prosperous democracies' (LSPDs). An LSPD is founded 'not just on democratic rules, but on a democratic culture.'[772] In an LSPD, 'a large portion of the population has been educated over time with attitudes of social and political pluralism.'[773] Moreover, an LSPD is 'able to police itself, according to independently (e.g., judicially) reviewable criteria' and 'sufficiently wealthy to assure adequate measures against violence and discrimination, as

[772] E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 72.

[773] E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 72.

well as means of combating intolerance and protecting vulnerable individuals.'[774] Within this relatively new type of democracy,[775] provocative expression is very different from that within volatile societies or in significantly unstable times, where states may justly fear various types of profound societal disintegration such as secession or war. On this view, in relatively stable states, where there are no substantive reasons to fear such disintegration, bans on the expression of political views in public discourse then not only undermine democracy but can neither be justified by an overriding state security rationale.

3. Public order

Another rationale of bans on public expression concerns the local protection of public order within a state (vis-à-vis the protection of the state's integrity *as such*). Although they are not mutually exclusive, in these instances it is not the security of the state as such that is in question, but rather intercommunal strife. For example, the Dutch blasphemy ban of 1932 was enacted with the protection of the public order in mind, and the link between blasphemy and the prevention of intercommunal conflict is also visible in cases that came before the European Court of Human Rights. The European Court found that domestic courts could determine that prohibiting the presentation of religious objects of veneration in an 'abusive', 'unwarranted and offensive', or 'gratuitously offensive' manner could be justified to 'prevent disorder by safeguarding religious peace.'[776]

More generally, this rationale regards the link between an utterance and (social) unrest as a result of that utterance. This concerns one of the typical, classic restrictions on free

[774] E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 73.

[775] 'Tracing back no further than the 1960s', see E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 70.

[776] European Court of Human Rights, 25 October 2018, 38450/12, par. 41 (*E.S. v. Austria*).

expression. As observed by German jurist Max Weber, states are characterized by their claim on the use of physical force within their territory.[777] Hence, states must take measures to preserve public order. By extension, states are entitled to curb expression that undermines or threatens to undermine that monopoly, that is to say, expression that is closely linked to disorder. An old but still useful example is that of English philosopher John Stuart Mill, who famously proclaimed in *On Liberty* that:

> '(…) even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.'[778]

Laws prohibiting expressions that directly cause disorder are rarely controversial. Even the democracy most protective of expression in public discourse, the United States, proscribes expression that is 'directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'[779]

Crucially though, the legitimacy of bans on public order grounds hinges on matters of proximity, causation, and intent. In a case regarding a violation of a breach of peace ordinance,

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[777] M. Weber, 'Politics as a Vocation', in: *From Max Weber: Essays in Sociology* (translated, edited, and introduced by H.H. Gerth & C. Wright Mills), New York: Oxford University Press 1946, p. 77-78. Although exceptions do exist, such as such as the legitimate use of private defensive force in certain contexts.

[778] J.S. Mill, *On Liberty*, London: Longman, Greens and co 1865 (1859), p. 32.

[779] *Brandenburg v. Ohio*, 395 U.S. 444 (1969). See for a detailed overview of the evolution of the 'clear and present danger' test, L. Alexander, 'Incitement and Freedom of Speech', in: D. Kretzmer & F. Kershman Hazan, (eds.), *Freedom of Speech and Incitement Against Democracy*, The Hague: Kluwer Law International 2000, p. 101-118.

where the defendant 'vigorously, if not viciously, criticized various political and racial groups whose activities he denounced as inimical to the nation's welfare', the US Supreme Court observed that:

> '[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute (…) is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.'[780]

Although the US Supreme Court's consideration is made within, and only applies to the American context, the Court does raise a compelling point for free expression in general. Given that public discourse often concerns topics people care deeply about, whether it be on abortion rights, climate change, same-sex marriage, immigration, or on Kings, presidents, or prophets, expression within public discourse may be experienced as provocative and challenging. There is no question that such expression may anger, upset, irritate, or annoy.

However, a risk associated with 'breach of peace' or 'public order' rationales is that they may invalidate speech on speculative harms done to the public order, unlikely to materialize. As Post puts it: '[E]very legal system suppresses speech that causes evil consequences. But there is always an important preliminary question about how tightly the causal connection between speech and its possible effects must be drawn before speech can constitutionally be sanctioned.'[781]

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[780] *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

[781] R. Post, 'Hate Speech', in: I. Hare & J. Weinstein (eds.), *Extreme Speech and Democracy*, Oxford: Oxford University Press 2009, p. 134.

This can be illustrated by a Dutch case of an activist who was convicted on the basis of article 131 of the Dutch Criminal Code, which is placed in the section 'Crimes against the public order.' In short, article 131 prohibits inciting others to commit a criminal offence or an act of violence against the public authorities. In 2014, the Amsterdam Court of Appeal convicted a defendant under article 131 who had published a 'modern pamphlet' on her website.[782] The impugned statements were: 'It's time for a new generation to stand up and to take the torch over from Rara';[783] 'Where is the Dutch revolt? Who joins me in storming and plundering the offices of the IND, dousing their archives and computers in gasoline and destroying them by fire?'[784] For these statements, the defendant was given a suspended sentence of two months' imprisonment with an operational period of one year.[785]

The Amsterdam Court of Appeal found that the statement 'Where is the Dutch revolt? Who joins me in storming and plundering the offices of the IND, dousing their archives and computers in gasoline and destroying them by fire?' *directly* incited others to commit criminal offences and thus violated article 131. The court found that the other statement, 'It's time for a new generation to stand up and to take the torch over from Rara', did not directly incite, but that 'the content and context' of the pamphlet it was part of had an inciting tenor, which made that that statement also violated the law.[786] According to the court, the defendant 'had not just sympathized with the fate of asylum seekers and persons staying illegally in the Netherlands,

[782] Amsterdam Court of Appeal, 28 May 2014, ECLI:NL:GHAMS:2014:1945.

[783] 'Rara' is the abbreviation of *Revolutionaire Anti-Racistische Actie*, a 1980s/1990s political activist group that had violence, including arson, as one of its tactics.

[784] 'IND' is the *Immigratie- en Naturalisatiedienst* (in English: Immigration and Naturalisation Service), the government agency that 'assesses all applications from foreign nationals who want to live in the Netherlands or want to become Dutch citizens.'

[785] The defendant violated the terms of the operational period by committing another crime, which triggered the suspended sentence of two months' imprisonment.

[786] Amsterdam Court of Appeal, 28 May 2014, ECLI:NL:GHAMS:2014:1945.

but she incited, and called for arson and vandalism, acts that may have grave and even disruptive consequences.'[787]

Lax causal connections between expression and harm, where it is highly questionable whether there ever was a moment that it was even somewhat likely the 'incitement' would materialize, undermine democratic public discourse. As Heinze observes with regard to bans against 'incitement':

> 'The state retains power to punish people for harms that might, on a wholly speculative chain of causation, result from expressing ideas. To be sure, the criminal law rightly punishes acts of criminal solicitation or conspiracy, where material acts towards the commission of a crime can be identified. Crimes of "incitement" do the opposite. They furnish the state with a dragnet device for sweeping up undesirables without having to show even a highly remote probability of harm actually resulting from the public expression of ideas.'[788]

Something similar is present in the way the European Court of Human Rights (and consequently, national courts) handles blasphemy cases, where the Court links blasphemy to the prevention of disorder. Take for example the case of *E.S. v. Austria*, in which the applicant was convicted by the Austrian authorities for statements that criticized the prophet of Islam Muhammad.[789] During seminars on the topic of Islam, E.S claimed that Muhammad's legacy had a negative impact on modern Austrian society. She wondered whether the relationship of the prophet Muhammad with Aisha ('a 56-year-old and a six-year-old') could be called anything else but 'paedophilia', and stated that:

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[787] Amsterdam Court of Appeal, 28 May 2014, ECLI:NL:GHAMS:2014:1945.

[788] E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 214.

[789] See also European Court of Human Rights, 20 September 1994, 13470/87, par. 56 (*Otto-Preminger-Institut v. Austria*), in which the Court reasoned that the Austrian authorities 'acted to ensure religious peace (…) and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner.'

> 'One of the biggest problems we are facing today is that Muhammad is seen as the ideal man, the perfect human, the perfect Muslim. That means that the highest commandment for a male Muslim is to imitate Muhammad, to live his life. This does not happen according to our social standards and laws. Because he was a warlord, he had many women, to put it like this, and liked to do it with children. And according to our standards he was not a perfect human. We have huge problems with that today, that Muslims get into conflict with democracy and our value system.'[790]

The Austrian Regional Court convicted E.S. and considered that 'because of the public nature of the seminars (…) it was conceivable that at least some of the participants might have been disturbed by the statements.'[791] The European Court of Human Rights upheld E.S.'s conviction, and submitted that the Austrian authorities had 'carefully balanced [E.S.'s] right to freedom of expression with the rights of others to have their religious feelings protected and to have religious peace preserved in Austrian society.'[792] The European Court accepted the Austrian courts' assessment that E.S.'s statements were 'an abusive attack on the Prophet of Islam' which were 'capable of stirring up prejudice and putting religious peace at risk' and 'contained elements of incitement to religious intolerance.'[793]

The Regional Court's consideration that 'it was conceivable that at least some of the participants might have been disturbed by the statements' not very persuasive as it is typical for any expression on matters of public concern, such as immigration or the role of religious symbols in society, that *some might* be *disturbed* by the opinions of others. Although, as acknowledged, a reasonable public order exception to expression in public discourse is legitimate, the Austrian courts failed to substantiate the claim that E.S.'s statements could put

[790] European Court of Human Rights, 25 October 2018, 38450/12, par. 13 (*E.S. v. Austria*).

[791] European Court of Human Rights, 25 October 2018, 38450/12, par. 14 (*E.S. v. Austria*).

[792] European Court of Human Rights, 25 October 2018, 38450/12, par. 57 (*E.S. v. Austria*).

[793] European Court of Human Rights, 25 October 2018, 38450/12, par. 57 (*E.S. v. Austria*).

religious peace (a vague concept in itself) at risk. Although being capable of causing genuine offence, E.S.'s statements were rather moderate in tone and lacked any call to action. Commenting on this case, Temperman observes that

> '(…) it is one thing to plead "disorder" or "religious peace" exceptions *in abstracto*, it is quite another to fulfil the concomitant burden and standard of proof. Naturally, whenever a state invokes such a ground it should offer something in the way of a substantiation, at least as to the likelihood of such peace being imminently under threat should it not intervene and restrict the speech act concerned – in the alternative, pleading "disorder" or "peace" exceptions is rather tendentious. (…) Big words like threats to the peace are easily presented, but not even hints can be traced in the facts of the case as presented by the parties that the "peaceful co-existence of religious and non-religious groups and individuals" (to quote the words the Strasbourg Court uses to express the direness of the situation) was at stake in this case.'[794]

There was no real risk posed to public order that could justify the banning of E.S.'s opinions on religion and immigration from public discourse. There is not much more than vague speculation that certain harms might occur as a result of her expression. Such a lax causal connection between an expression and a possible harm undermines the formation of public opinion.

4. Tolerance and the right not to be insulted in religious feelings

In addition to a reliance on weak public order arguments, the European Court of Human Rights makes use of the concept of 'tolerance' in deciding blasphemy cases. The Court holds that:

[794] J. Temperman, 'Blasphemy and the European Court of Human Rights: A Small Step Forward, a Giant Leap Back', in: P. Czech et al. (eds.), *European Yearbook on Human Rights 2019*, Intersentia 2019, p. 233-235.

> 'The respect for the religious feelings of believers as guaranteed in Article 9 (art. 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, which must also be a feature of democratic society.'[795]

The Court adopts a notion of tolerance that undermines the exchange of ideas. Post, in a critique on the Court's understanding of tolerance, states that 'Democracy demands that we refrain from acting toward each other in ways that are inconsistent with the social order. We must not riot or murder in defense of our beliefs. We must allow others peacefully to practice their beliefs.'[796] However, democracy 'does not require toleration in the sense that persons must abandon their independent evaluation of the beliefs and ideas of others. Democracies encompass groups that dislike and even detest each other, sometimes on religious grounds. To the extent that democracy suppresses my expressions of disapproval or condemnation for the actions of groups that I dislike, it excludes me from the formation of public opinion.'[797]

Similarly, in commenting on *E.S. v. Austria*, Temperman observes that

> 'In fact, the suppression of these statements on Islam can be deemed rather intolerant in its own right, that is, intolerant of persons with critical thoughts on religion. E.S. is certainly entitled to these thoughts and to the extent that she publicly wishes to express those same opinions, restrictions should be imposed only when the rights of others are truly threatened.'[798]

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[795] European Court of Human Rights, 20 September 1994, 13470/87, par. 47 (*Otto-Preminger-Institut v. Austria*); European Court of Human Rights, 25 October 2018, 38450/12, par. 53 (*E.S. v. Austria*).

[796] R. Post, 'Religion and Freedom of Speech: Portraits of Muhammad,' in: S. Mancini & M. Rosenfeld (eds.), *Constitutional Secularism in an Age of Religious Revival*, Oxford: Oxford University Press 2014, p. 336.

[797] R. Post, 'Religion and Freedom of Speech: Portraits of Muhammad,' in: S. Mancini & M. Rosenfeld (eds.), *Constitutional Secularism in an Age of Religious Revival*, Oxford: Oxford University Press 2014, p. 336.

[798] J. Temperman, 'Blasphemy and the European Court of Human Rights: A Small Step Forward, a Giant Leap Back', in: P. Czech et al. (eds.), *European Yearbook on Human Rights 2019*, Intersentia 2019, p. 235.

The Court interprets tolerance as a value that limits expression that others deem inappropriate or disrespectful. Thus, tolerance is used as an argument to limit expression: a tolerant person would not express himself in an offensive way. However, there are competing understandings of what tolerance entails. Political philosopher Peter Nicholson comments on toleration as follows: 'All that toleration requires is, negatively, that we permit the free expression of ideas we disapprove of and, positively, that we agree to the moral value of there being free expression of ideas we disapprove of.'[799] Tolerance is not the same as indifference One who is indifferent does not tolerate.[800] The tolerant actor experiences a *negative* state of mind as a result of an expression: he or she disapproves, is offended, shocked, or disturbed.[801] Crucially, tolerance is characterized by 'putting up with what you oppose'[802] as a principle.[803] Thus, tolerance on this

[799] P.P. Nicholson, 'Toleration as a moral ideal,' in: J. Horton & S. Mendus (eds.), *Aspects of Toleration: Philosophical Studies*, London/New York: Methuen & Co. 1985, p. 170. Voltaire is an historical figure often referred to in this context – 'I disapprove of what you say, but I will defend to the death your right to say it.' This phrase is often misattributed to French Enlightenment philosopher Voltaire but coined by his biographer S.G. Tallentyre when summarizing both Voltaire's thoughts in his *Traité sur la tolérance* as his attitude towards freedom of expression in general. In a letter that appeared in *The New York Times Book Review* on the 1st of September 1935 Tallentyre writes that the quote 'I disapprove of what you say, but I will defend to the death your right to say it' should be seen as 'a description of Voltaire's attitude to Helvetius's book "On the Mind" – and more widely, to the freedom of expression in general. I do not think, and I did not intend to imply, that Voltaire used these words verbatim, and should be surprised if they are found in any of his works. They are rather a paraphrase of Voltaire's words in the Essay on Tolerance– "Think for yourselves and let others enjoy the privilege to do so, too.'

[800] See for example B. Leiter, *Why Tolerate Religion?*, Princeton/Oxford: Princeton University Press 2013, p. 8. See also J. Habermas, 'Intolerance and discrimination', *International Journal of Constitutional Law*, 2003, p. 3: 'We do not need to be tolerant if we are indifferent toward other beliefs and attitudes or even if we appreciate otherness.'

[801] As philosopher Andrew Jason Cohen observes, 'one does not tolerate what one promotes.' A.J. Cohen, 'What Toleration Is,' *Ethics*, 2004, p. 73.

[802] C. McKinnon, *Toleration: A Critical Introduction*, Oxford: Routledge 2006, p. 3.

[803] See A.J. Cohen, 'What Toleration Is,' *Ethics*, 2004, p. 73: 'We must value our noninterference for it to count as toleration; the noninterference must be properly principled. (…) It is obvious, but worth pointing out, that for

view entails that we put up, not interfere, with expressions that are offend, shock, or disturb. Tolerance is thus also marked by self-restraint.[804]

Applying this to the Court's dealing with blasphemy, tolerance could just as plausibly work in the opposite direction of the way the Court uses it for banning offensive statements.

5. Demarcation and the subjectivity of offence

The Court draws a distinction between *protected* offensive expression, and *unprotected* expression that constitutes 'an abusive attack'[805] on a religious symbol, or expression that presents 'objects of religious worship in a provocative way capable of hurting the feelings of the followers of that religion,'[806], or 'expression that is, in regard to objects of veneration, gratuitously offensive to others and profane.'[807] Although not uncommon in anti-blasphemy laws,[808] an objective distinction between mere offence and gratuitous offence is hard to make.

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a case of noninterference to be principled, it must also be intentional – one does not act on one's principles by accident.'

[804] I. Creppell, 'Toleration, Politics and the Role of Mutuality,' in: M.S. Williams & J. Waldron (eds.), *Toleration and its Limits*, New York: New York University Press 2008, p. 316.

[805] European Court of Human Rights, 20 September 1994, 13470/87, par. 56 (*Otto-Preminger-Institut v. Austria*); European Court of Human Rights, 13 September 2005, 42571/98, par. 29 (*İ.A. v. Turkey*); European Court of Human Rights, 25 October 2018, 38450/12, par. 57 (*E.S. v. Austria*).

[806] European Court of Human Rights, 25 October 2018, 38450/12, par. 53 (*E.S. v. Austria*). See also the Vienna Court of Appeal in this case: 'Harsh criticism of churches or religious societies and religious traditions and practices was lawful. However, the permissible limits were exceeded where criticism ended and insults or mockery of a religious belief or person of worship began.'

[807] European Court of Human Rights, 25 October 2018, 38450/12, par. 43 (*E.S. v. Austria*).

[808] For example, the Dutch law against 'scornful blasphemy' was only directed at 'a scorning, abusive, or reviling manner' anti-religious expression. Also the English blasphemy law acknowledged this distinction, as it determined that 'Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible, or the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The

Writing on hate speech, a category of expression bearing similarities to blasphemy,[809] Post argues that

> 'All legal attempts to suppress hatred, whether of racial groups or of the King, must face a profound conceptual difficulty. They must distinguish hatred from ordinary dislike or disagreement. Even those who believe that hatred should be punished because it is 'extreme' would readily concede that disagreement, even disagreement that stems from dislike, ought to be protected because it is the lifeblood of politics (…) How can we distinguish critique that is too extreme, that ought to be condemned as hatred, from mere disagreement? The problem arises just as much in the context of contemporary hate speech regulation as it does in the context of seditious libel. Is speech attacking Islamic fundamentalism for its homophobia and suppression of women hate speech or critique? Is it hate speech or critique to attack the Catholic Church for its pedophiliac priests or for its position on abortion?'[810]

Looking at the circumstances of the cases in which the European Court upheld convictions over 'abusive' or 'gratuitously offensive' anti-religious expression, it is apparent that most of the criticism of religion is presented in rather moderate ways, with no calls to action or appeals to extreme emotions.

This brings us to the issue of subjectivity of offense. The Court espouses a subjective interpretation of offence. Take for example *Otto-Preminger-Institut v. Austria*, in which 'The Austrian courts, ordering the seizure and subsequently the forfeiture of the film, held it to be an abusive attack on the Roman Catholic religion *according to the conception of the Tyrolean*

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test to be applied is as to the manner in which the doctrines are advocated and not to the substance of the doctrines themselves.'

[809] See E. Heinze, 'Wild-West Cowboys versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech', in: I. Hare & J. Weinstein (eds.), *Extreme Speech and Democracy*, Oxford: Oxford University Press 2010, p. 187.

[810] R. Post, 'Hate Speech', in: I. Hare & J. Weinstein (red.) *Extreme Speech and Democracy*, Oxford: Oxford University Press 2009, p. 125.

public' (emphasis added).[811] Similarly, in *E.S. v. Austria*, the Austrian Regional Court argued regarding E.S.'s statements that: '*Muslims would find the impugned statements wrong and offensive*, even if Muhammad had married a six-year-old and had intercourse with her when she had been nine' (emphasis added).[812] By doing so, the boundaries of public discourse are subjectively drawn by the sensibilities of each respective group.[813]

An alternative path, one that would be more favourable to the legitimacy provided by public discourse, would be to suspend the protection of groups' sensibilities in public discourse. A good illustration of this is the American case of *Cantwell v. Connecticut*. In this case Jehovah's Witnesses were arrested, and initially convicted for a breach of the peace. The Jehovah's Witnesses proselytized in a neighbourhood in New Haven Connecticut that was densely populated by Roman Catholics.[814] Going from house to house, the Jehovah's Witnesses were 'equipped with a bag containing books and pamphlets on religious subjects, a portable phonograph, and a set of records, each of which, when played, introduced, and was a description of, one of the books.'[815] They asked people for permission to play one of the records, and in case permission was granted, 'asked the person to buy the book described, and, upon refusal, he solicited such contribution towards the publication of the pamphlets as the

[811] European Court of Human Rights, 20 September 1994, 13470/87, par. 56 (*Otto-Preminger-Institut v. Austria*).

[812] European Court of Human Rights, 25 October 2018, 38450/12, par. 17 (*E.S. v. Austria*).

[813] See also R. Post, 'Religion and Freedom of Speech: Portraits of Muhammad,' in: S. Mancini & M. Rosenfeld (eds.), *Constitutional Secularism in an Age of Religious Revival*, Oxford: Oxford University Press 2014, p. 338: 'What any given religious group finds offensive is a matter of contingent history. Before the European religious wars of the seventeenth century, Catholics found deeply offensive the mere existence of Protestants in their community, and vice versa. It would seem that the law cannot transparently apply the beliefs of religious groups without becoming entangled in endless and insoluble contradictions.'

[814] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[815] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

listener was willing to make. If a contribution was received, a pamphlet was delivered upon condition that it would be read.'[816]

A phonograph record, describing a book entitled 'Enemies,' included an attack on the Catholic religion.'[817] The US Supreme Court noted that

> 'the record played by Cantwell embodies a general attack on all organized religious systems as instruments of Satan and injurious to man; it then singles out the Roman Catholic Church for strictures couched in terms which naturally would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows. The hearers were, in fact, highly offended. One of them said he felt like hitting Cantwell, and the other that he was tempted to throw Cantwell off the street.'[818]

Ultimately, the US Supreme Court reversed the conviction, arguing that it 'was violative of constitutional guarantees of religious liberty and freedom of speech.' The Court devoted a substantial a passage to a discussion of the place of free expression in a pluralist society:

> 'In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy. The essential characteristic of these liberties is, that under their shield many types of life, character, opinion

[816] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[817] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[818] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds.'[819]

By deciding so, the US Supreme Court gave way for a formally inclusive public discourse. 'Because we are a country of many creeds, it is exceedingly important that no single creed can hold the nation hostage to its sensitivities. What might be blasphemous to Catholics might be truth to Jehovah's Witnesses', Post observes.[820] 'We interpret our First Amendment', Post writes, 'to create a public space that is controlled by neither Catholics nor Jehovah's Witnesses, nor indeed by any group, so that every individual can participate in public discussion.'[821] Given that in a plural society a plurality of conceptions exist of what is pious, blasphemous, dangerous, moral, or immoral, viewpoint-neutrality, where the state in terms of legal sanctions remains neutral towards citizens' expression on matters of public concern,[822] enhances the democratic function of public discourse.

[819] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[820] 'Free Speech in the Age of YouTube; Barack Obama couldn't censor that anti-Islam film – even if he wanted to', 17 September 2012, https://foreignpolicy.com/2012/09/17/free-speech-in-the-age-of-youtube/.

[821] 'Free Speech in the Age of YouTube; Barack Obama couldn't censor that anti-Islam film – even if he wanted to', 17 September 2012, https://foreignpolicy.com/2012/09/17/free-speech-in-the-age-of-youtube/.

[822] 'The *doctrine of viewpoint neutrality* requires that *all* persons have a right to express, hear and consider *any* viewpoint, idea or doctrine within public discourse. This means that liberal democracies should impose no criminal or civil penalties upon the expression of political opinions or ideas. The doctrine of viewpoint neutrality (…) requires that citizens in a liberal democracy should have a right to participate in public discourse as speakers and listeners free from state imposed viewpoint-based restrictions.' See K.S. Ekeli, 'Democratic legitimacy, political speech and viewpoint neutrality, *Philosophy and Social Criticism*, 2020, p. 725. Contrary to viewpoint neutrality, 'Viewpoint discriminatory regulations (…) are ones based on "the specific motivating ideology or the opinion or perspective of the speaker,"' according to J. Weinstein, 'An Overview of American Free Speech Doctrine and its Application to Extreme Speech', in: I. Hare & J. Weinstein (eds.), *Extreme Speech and Democracy*, Oxford: Oxford University Press 2009, p. 82.

Conclusion

This chapter has discussed the defamation of heads of state and religious symbols in light of democratic free expression theory. Democracy and expression are closely linked, as public discourse is essential for the legitimacy of a democratic order. The ability to participate in matters regarding the direction and culture of society allows people to identify with laws they must live by, even if they may disagree with them. Conversely, prohibiting expression in public discourse based on a certain viewpoint undermines that formation of public opinion. That being said, there may be grounds that justify doing so. One of these is a lack of state security, a prerequisite for any state, which can override democratic principles of public discourse. In particularly volatile times, bans on expressing certain viewpoints may be justified as they protect state security. For example, the Dutch bans on *lèse-majesté* and the defamation of foreign heads of state were enacted during a highly volatile period of the nineteenth century, in order to maintain social cohesion or cordial relations with other nations. Although arguably appropriate at the time, once socio-political circumstances change, so does the legitimacy of such bans. Another common restriction on public expression is that of the protection of the public order, a premier objective of states. On this view, the state can legitimately restrict expression that causes disorder. However, an important caveat concerns the likelihood of the public order being disrupted as a result of an utterance. The formation of public opinion is undermined if the state bans expression based on not much than more vague speculation that certain harms might occur as a result of her expression. This is visible in the way the European Court of Human Rights interprets freedom of expression in cases of blasphemy. The Courts easily accepts the national authorities' claims that the public order might be disturbed by expression on religion that is offensive to a part of the population.

Chapter 6 Blasphemy and private power: Hate spin and the extra-judicial dimension of blasphemy

Introduction

This thesis has thus far focused on the legal dimension of the defamation of powerful entities, symbols, or institutions; discussing their legislative background, rationale, and (inter)national legal framework. However, of the three speech crimes examined (*lèse-majesté*, the defamation of foreign heads of state, and blasphemy), blasphemy is different in the sense that it has a noticeable private, informal, or 'extra-judicial' dimension. That is to say that over the last decades attempts have been made to curtail blasphemy by way of various types of intimidation. In these cases, instances of blasphemy were followed by unrest or intimidation. Perhaps the most well-known example of this is the *Rushdie affair*, concerning the novelist Salman Rushdie, who in 1989 was 'sentenced to death' by the Supreme Leader of Iran for his book *The Satanic Verses*.[823]

In *Silenced: How Apostasy and Blasphemy Codes are Choking Freedom Worldwide*, Paul Marshall and Nina Shea observe that '[e]xtrajudicial threats and attacks by vigilantes and

[823] Khomeini declared: 'I inform all zealous Muslims of the world that the author of the book entitled The Satanic Verses-which has been compiled, printed, and published in opposition to Islam, the Prophet, and the Qur'an-and all those involved in its publication who were aware of its content, are sentenced to death. I call on all zealous Muslims to execute them quickly, wherever they may be found, so that no one else will dare to insult the Muslim sanctities. God willing, whoever is killed on this path is a martyr.' Cited in: M.M. Slaughter, 'The Salman Rushdie Affair: Apostasy, Honor, and Freedom of Speech', *Virginia Law Review*, 1993, p. 159.

terrorists have (…) established a wider pattern of intimidation, silencing, and self-censorship, than have western legal processes.'[824]

This chapter discusses one case in which that 'extra-legal' dimension of blasphemy was visible, namely the video *Innocence of Muslims*, which was uploaded to YouTube in the Summer of 2012 and considered to be blasphemous by many Muslims. First, this chapter discusses the concept of 'hate spin'. Next, this chapter examines the circumstances surrounding *Innocence of Muslims* through the lens of this concept, and discusses political responses to the controversy.

1. Hate spin

'Hate spin' is a term coined by the scholar of media studies Cherian George. This concept is useful to understand the workings of cross-border episodes of blasphemy. George describes

[824] P. Marshall & N. Shea, *Silenced: How Apostasy and Blasphemy Codes are Choking Freedom Worldwide*, Oxford: Oxford University Press 2011, p. 286. See on self-censorship in this context also: P. Cliteur, T. Herrenberg & B. Rijpkema, 'The New Censorship – A Case Study of the Extrajudicial Restraints on Free Speech,' in: A. Ellian & G. Molier (eds.), *Freedom of Speech under Attack*, The Hague: Eleven International Publishing 2015, p. 291-318 and P. Cliteur, *Theoterrorism v. Freedom of Speech: From incident to precedent*, Amsterdam: Amsterdam University Press 2019. An example is the decision of Yale University Press to not publish the Danish cartoons in a book about the Danish cartoons. The press stated: 'We recognize that inclusion of the cartoons would complement the book's text with a convenient visual reference for the reader, who otherwise must consult the Internet to view the images. As an institution deeply committed to free expression, we were inclined to publish the cartoons and other images as proposed by the author.' However, realizing that '[r]epublication of the cartoons has repeatedly resulted in violent incidents', and after consulting with various experts, the press concluded that 'the republication of the cartoons by Yale University Press ran a serious risk of instigating violence' and declined to reprint the cartoons. See 'Publisher's statement', in: J. Klausen, *The Cartoons that Shook the World*, New Haven/London: Yale University Press 2009.

'hate spin' as 'manufactured vilification or indignation, used as a political strategy that exploits group identities to mobilize supporters and coerce opponents.'[825] George observes that

> 'major episodes of religious offense and offendedness are not the natural, product of human diversity, but rather performances orchestrated by political entrepreneurs in their quest for power. These opportunists selectively tease out citizens' genuine religious emotions and encourage expressions of the popular will, the better to mobilize them toward anti-democratic goals.'[826]

Episodes such as the *Rushdie affair* and the *Danish cartoon controversy* are less organic, George submits, than might appear at first sight. George points at the 'significant political context' of the Rushdie controversy:

> 'Iran at the time was emerging from its eight-year war with Iraq, one of the most debilitating conflicts of the twentieth century. Two months before the publication of Rushdie's book, Iran had accepted a ceasefire. The war had not ended gloriously. Iran lost not only millions of its citizens but also some of the prestige that its 1979 revolution had earned it among Muslim countries.'[827]

'In this light', George observes, 'Iran's response to Satanic Verses was less a Quranic imperative than a page from the classic political playbook: faced with a loss for answers, produce a common enemy, internal or external.'[828]

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[825] C. George, *Hate Spin: The Manufacture of Religious Offense and Its Threat to Democracy*, Cambridge: The MIT Press 2016, p. 4.

[826] C. George, *Hate Spin: The Manufacture of Religious Offense and Its Threat to Democracy*, Cambridge: The MIT Press 2016, p. 1.

[827] C. George, *Hate Spin: The Manufacture of Religious Offense and Its Threat to Democracy*, Cambridge: The MIT Press 2016, p. 60.

[828] C. George, *Hate Spin: The Manufacture of Religious Offense and Its Threat to Democracy*, Cambridge: The MIT Press 2016, p. 60.

Somewhat similar dynamics were at work in the so-called *Danish cartoons controversy* of 2005-2006.[829] This controversy revolved around twelve cartoons of the prophet Muhamad that appeared in the Danish newspaper *Jyllands-Posten*. The most controversial of these cartoons was drawn by Kurt Westergaard and depicted the prophet of Islam with a bomb in his turban.

The background of the publication of these images was that a publisher was unable to find an illustrator for a children's book on Muhammad.[830] Surprised and dismayed by this, Flemming Rose, cultural editor at *Jyllands-Posten*, invited members of the Danish cartoonists society to send in drawings of the prophet. Rose wrote them a letter stating:

> 'Dear cartoonist,
>
> We write to you following last week's debate about depiction of the Prophet Muhammad and freedom of speech resulting from the children's book by Kåre Bluitgen. It appears that several illustrators declined to depict Muhammad for fear of reprisal. *Jyllands-Posten* is on the side of freedom of speech. We would therefore like to invite you to draw Muhammad as you see him. (…).'[831]

Some months after the publication of the cartoons, protests commenced. Although peaceful at first, protests against these cartoons turned violent months after the cartoons were published.[832]

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[829] See F. Rose, *The Tyranny of Silence*, Washington D.C.: Cato Institute 2014; J. Klausen, *The Cartoons that Shook the World*, New Haven/London: Yale University Press 2009; C. George, *Hate Spin: The Manufacture of Religious Offense and Its Threat to Democracy*, Cambridge: The MIT Press 2016, p. 61-66.

[830] F. Rose, *The Tyranny of Silence*, Washington D.C.: Cato Institute 2014, p. 28-29.

[831] F. Rose, *The Tyranny of Silence*, Washington D.C.: Cato Institute 2014, p. 29-30.

[832] See J. Klausen, *The Cartoons that Shook the World*, New Haven/London: Yale University Press 2009, p. 83-113; C. George, *Hate Spin: The Manufacture of Religious Offense and Its Threat to Democracy*, Cambridge: The MIT Press 2016, p. 61-66. 'The controversy surrounding the Danish cartoons, published in September 2005, did not enter a violent phase for many months, until the 'influential satellite television channels Al-Jazeera and Al-Arabiya covered the story. It was then picked up in Friday sermons in Egypt, Saudi Arabia, and

‘At the heights of protests,’ George observes, ‘behind the semblance of spontaneous combustion, there is evidence of options being weighed and choices being made.’[833]

Similar to the *Rushdie affair*, political forces were at work in the controversy of the Danish cartoons. George observes that:

> ‘The cartoons had appeared in a landmark year for Egypt’s military-backed regime. Mubarak, in power since 1981, had been pressured to allow multicandidate presidential elections for the first time. His victory was a foregone conclusion—he was declared the victor with almost 89 percent of the vote in early September 2005—but the upcoming parliamentary elections in November–December were less predictable. The biggest threat came from candidates linked to the banned Muslim Brotherhood.’[834]

George cites an analyst who stated that the Egyptian state ‘needed opportunities to portray itself “almost as Islamic as the Islamist opposition.”’[835] An Asian diplomat quoted by George observed that ‘Mubarak sought to use the Danish cartoons to promote Egypt’s Islamic credentials, and neutralize Muslim Brotherhood’s ascendancy in general elections for parliament.’[836]

Similar patterns were present in the case of *Innocence of Muslims*, which will be the focus of the following sections.

Iraq.’ See C. George, *Hate Spin: The Manufacture of Religious Offense and Its Threat to Democracy*, Cambridge: The MIT Press 2016, p. 64.

[833] C. George, *Hate Spin: The Manufacture of Religious Offense and Its Threat to Democracy*, Cambridge: The MIT Press 2016, p. 64.

[834] C. George, *Hate Spin: The Manufacture of Religious Offense and Its Threat to Democracy*, Cambridge: The MIT Press 2016, p. 63.

[835] C. George, *Hate Spin: The Manufacture of Religious Offense and Its Threat to Democracy*, Cambridge: The MIT Press 2016, p. 63.

[836] C. George, *Hate Spin: The Manufacture of Religious Offense and Its Threat to Democracy*, Cambridge: The MIT Press 2016, p. 64.

2. What *Innocence of Muslims* was about

Innocence of Muslims is the title commonly attributed to a video, considered by many Muslims to be blasphemous, that was posted on video-sharing website YouTube in the summer of 2012. The video was produced by Mark Basseley Youssef (also known as Nakoula Basseley Nakoula), an Egyptian-born Coptic Christian living in America, and was posted on YouTube by his son.[837]

According to the filmmaker, he wanted his video to expose the 'hypocrisy of Islam.'[838] Youssef stated that 'Islam is a cancer' and that it is 'a political movie. The U.S. lost a lot of money and people in Iraq and Afghanistan, but we're fighting with ideas.'[839] In response to questions asked by *The New York Times,* Youssef made it clear that he did not regret the video and that 'he would go to great lengths to convey what he called 'the actual truth' about Muhammad.'[840] 'I thought, before I wrote this script', Youssef told the newspaper, 'that I should burn myself in a public square to let the American people and the people of the world know this message that I believe in.'[841] Youssef also 'reeled off "atrocities" by Muslims that went back many years and formed his views, focusing on shootings, a bombing and the torture of his fellow Copts.'[842]

Roughly speaking, the video consists of two parts. The first part pictures an angry mob of Muslims rioting in the streets of modern-day Egypt. In the opening scenes, Muslims plunder

[837] 'From Man Who Insulted Muhammad, No Regret', *The New York Times,* 26 November 2012.

[838] 'Director in hiding but unapologetic about his film', *The Times,* 13 September 2012.

[839] 'Director in hiding but unapologetic about his film', *The Times,* 13 September 2012.

[840] 'From Man Who Insulted Muhammad, No Regret', *The New York Times,* 26 November 2012.

[841] 'From Man Who Insulted Muhammad, No Regret', *The New York Times,* 26 November 2012.

[842] 'From Man Who Insulted Muhammad, No Regret', *The New York Times,* 26 November 2012.

what appears to be a pharmacy, burn houses and kill a woman wearing a crucifix. Security forces are depicted observing the mayhem but unwilling to intervene.

In the second part the video shifts to the past and focuses on the prophet Muhammad and a group of looters surrounding him. Scenes likely to be offensive to many Muslims are those in which Muhammad is talking to a donkey, womanizing, and advocating slavery. Moreover, he is called 'a murderous thug' and is in general pictured as a vicious warlord. Many, if not all of the references to the prophet Muhammad and the Islamic religion were, to the dismay of the actors, added in post-production by means of overdubbing.[843] In a statement to *CNN*, the actors said: 'We are shocked by the drastic rewrites of the script and lies that were told to all involved. We are deeply saddened by the tragedies that have occurred.'[844] An actress also said that 'the original script did not include a Prophet Muhammed character 'and that 'she and other actors complained that their lines had been changed.'[845]

Despite the fact that *Innocence of Muslims* sparked controversy in September 2012, versions of the video, entitled *The Real Life of Muhammad* and *Muhammad Movie Trailer*, had already been posted on YouTube early in July 2012.[846] Yet it did not attract serious attention until parts of the video, dubbed in Arabic, were picked up by Egyptian television station Al-Nas and broadcast on 8 September 2012.[847] A short while later the video reached hundreds of thousands of Egyptian viewers online.[848] The scenes that were broadcast by Al-Nas included

[843] 'Man Behind Anti-Islam Video Gets Prison Term', *The New York Times*, 8 November 2012.

[844] 'Staff and crew of film that ridiculed Muslims say they were 'grossly misled'', 13 September 2012, http://edition.cnn.com/2012/09/12/world/anti-islam-film/.

[845] 'Staff and crew of film that ridiculed Muslims say they were 'grossly misled'', 13 September 2012, http://edition.cnn.com/2012/09/12/world/anti-islam-film/.

[846] 'Key facts after fallout from film mocking Islam's prophet Muhammad', *Associated Press*, 14 September 2012; 'Man behind anti-Islam film arrested, detained in Calif.', *The Washington Post*, 28 September 2012; 'From Man Who Insulted Muhammad, No Regret', *The New York Times*, 26 November 2012.

[847] 'Foreign aid under fire on many fronts' *The Washington Post*, 2 October 2012.

[848] 'Foreign aid under fire on many fronts' *The Washington Post*, 2 October 2012.

images implying that the Qur'an was plagiarized from the New Testament and a scene that pictures Muhammad talking to a donkey.[849]

3. What followed the release of *Innocence of Muslims*

The broadcasts by Al-Nas triggered protests in Egypt's capital city of Cairo, which in turn set off a snowball effect in parts of the Islamic world. The events included a rampage on the US embassy in Tunisia;[850] violations of the territory of the U.S. embassy in Egypt;[851] a car bombing in Afghanistan as a reprisal for *Innocence of Muslims*, which killed 14 people, mostly foreign civilian workers;[852] violent demonstrations in Pakistan;[853] a clash between hundreds of demonstrators and local police near the US embassy in Jakarta, Indonesia;[854] roughly 500 people demonstrating outside the Swiss embassy in Tehran, Iran;[855] a protest outside the US embassy in Doha, Qatar, where demonstrators shouted anti-U.S. slogans and called for the US ambassador to Qatar to leave;[856] thousands of Muslims demonstrating against the video in

[849] 'Low-budget Muhammad film attempts to depict prophet as fraud', 12 September 2012, http://www.theguardian.com/world/2012/sep/12/low-budget-muhammad-film-prophet.

[850] 'Violence ups ante for Tunisia's new rulers', *The Washington Post*, 21 September 2012.

[851] 'Anger Over a Film Fuels Anti-American Attacks in Libya and Egypt', *The New York Times*, 12 September 2012.

[852] 'Suicide Bomber in Afghanistan Strikes Minibus, Killing Mostly Foreign Workers', *The New York Times*, 19 September 2012.

[853] 'Deadly Violence Erupts in Pakistan on a Day Reserved for Peaceful Protests', *The New York Times*, 22 September 2012; 'Nineteen killed in Pakistan day of protest after Obama broadcast fails to calm fury', *The Times*, 22 September 2012.

[854] 'Protests Turn Violent Around Asia', *Associated Press*, 17 September 2012.

[855] 'Protests at 'insulting' film spread across Muslim world', *The Times*, 14 September 2012. The Swiss embassy in Tehran represents the interests of the United States in Iran.

[856] 'Mideast Turmoil: Amid Chaos, Extremists Spur Violence – Inflamed by Anti-Islam Video, Marchers Target U.S. and Other Western Allies; Iran Calls for a 'United Response'', *The Wall Street Journal*, 15 September 2012.

India, burning US flags and calling U.S. President Barack Obama a terrorist;[857] 300 Muslims in Colombo, Sri Lanka, calling for the creators of *Innocence of Muslims* to be hanged;[858] and the killing of the United States ambassador to Libya, Christopher Stevens, and three of his fellow Americans, Sean Smith, Tyrone S. Woods, and Glen A. Doherty.[859] In a few Western parts of the world, including London, Paris and Jerusalem, people demonstrated against the film.[860]

4. *Innocence of Muslims*: Law and politics

As far as domestic law is concerned, the video was lawful. The current interpretation of the First Amendment to the US Constitution allows for blasphemy in public discourse, and the video fell short of 'incitement to violence.'[861] From an international law perspective, despite some politicians claiming the opposite,[862] the video also did not violate established free

[857] 'Mideast Turmoil: Amid Chaos, Extremists Spur Violence – Inflamed by Anti-Islam Video, Marchers Target U.S. and Other Western Allies; Iran Calls for a 'United Response'', *The Wall Street Journal*, 15 September 2012.

[858] 'International: Cartoon row: Film protests', *The Guardian*, 20 September 2012.

[859] 'In Libya, Chaos Was Followed by Organized Ambush, Official Says', *The New York Times*, 14 September 2012.

[860] 'Protest over anti-Islam film hits US embassy in London', *The Guardian*, 17 September 2012; 'Paris Prosecutors Open Inquiry Into Protest at U.S. Embassy', *The New York Times*, 18 September 2012; 'Rioters besiege British, German and US embassies in Khartoum', 15 September 2012, https://www.theguardian.com/world/2012/sep/14/rioters-besiege-western-embassies-khartoum.

[861] See 'That Anti-Muhammad Film: It's Totally Protected by the 1st Amendment', 13 September 2012, http://www.theatlantic.com/national/archive/2012/09/that-anti-muhammad-film-its-totally-protected-by-the-1st-amendment/262324/; 'Free Speech in the Age of YouTube; Barack Obama couldn't censor that anti-Islam film – even if he wanted to', 17 September 2012, http://www.foreignpolicy.com/articles/2012/09/17/free_speech_in_the_age_of_youube.

[862] See for example 'World Muslim group demands laws against 'Islamophobia'', *Reuters News*, 25 September 2012 (claiming the video was a 'flagrant incitement to violence').

expression norms. Although article 20(2) of the ICCPR does require the prohibition of 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence', the video did not amount to this.[863]

Besides a matter of law, the video, and more generally the right to defame religion, became subject of debate in international politics, with various pre-eminent politicians blaming the video for the turmoil. The United States Ambassador to the United Nations at the time Susan Rice stated: 'What sparked the recent violence was the airing on the Internet of a very hateful, very offensive video that has offended many people around the world.' She called the video 'the proximate cause' of the riots.'[864] By way of its spokesperson, the US White House claimed that the violent protests were 'in response to a video, a film, that we have judged to be reprehensible and disgusting.'[865] Secretary of State Hilary Clinton argued that the video 'has led to these protests in a number of countries.'[866]

At the United Nations level, then Secretary-General Ban Ki-moon stated that 'it is very disgraceful and shameful that (…) people are provoking the values and beliefs of other people. Many world leaders have issued strong statements – I was one of them – strongly condemning [this] kind of very senseless, disgraceful act. This must stop.'[867] 'At the same time', Ban Ki-moon continued, 'I am also speaking out loudly against those people who really fan the flames

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[863] See for a discussion E.M. Aswad, 'To Ban or Not to Ban Blasphemous Videos', *Georgetown Journal of International Law*, 2013 p.1313-1328 ('not banning the anti-Islam video was in line with the existing international human rights law regime', at p. 1316). For an analysis of Article 20(2) ICCPR, see J. Temperman, *Religious Hatred and International Law: The Prohibition of Incitement to Violence or Discrimination*, Cambridge: Cambridge University Press 2016.

[864] As quoted in 'The Video Did It', *The Wall Street Journal*, 17 September 2012; the interview on Fox News can be seen at http://www.youtube.com/watch?v=xk6s5FkObt0.

[865] As quoted in 'The Video Did It', *The Wall Street Journal*, 17 September 2012.

[866] See 'Hillary Clinton Condemns Anti-Islam Film', 13 September 2012, http://www.ibtimes.com/hillary-clinton-condemns-anti-islam-film-full-text-788950.

[867] 'Press Conference by Secretary-General Ban Ki-moon at United Nations Headquarters', 19 September 2012, http://www.un.org/press/en/2012/sgsm14518.doc.htm.

of this intolerance and hatred, using these kinds of opportunities. I again strongly urge calm and reason and tolerance and forgiveness. These are things which we have to do.'[868] When Ban Ki-moon was asked particularly about 'the argument of freedom of expression that has been raised', he called 'the inalienable right to freedom of expression' a 'very fundamental' right. However, that right 'should not be abused by individuals' and 'must be guaranteed when [it is] used for common justice, common purpose.' 'When some people use this freedom of expression to provoke or humiliate some others' values and beliefs, then this cannot be protected in such a way', the Secretary-General submitted.[869]

Representatives of the European Union, the Organisation of Islamic Cooperation, the Arab League and the Commission of the African Union issued a joint statement that stated 'While fully recognizing freedom of expression, we believe in the importance of respecting all prophets, regardless of which religion they belong to.'[870] The representatives '[reiterated their] strong commitment to take further measures and to work for an international consensus on (…) full respect of religion, including on the basis of UN Human Rights Council resolution 16/18.'[871]

The political responses largely fell into two categories. Responses in the first category are of an empirical nature, they concern whether the video was the cause of the turmoil that followed. The second category, although not entirely distinct from the first, regards the

[868] 'Press Conference by Secretary-General Ban Ki-moon at United Nations Headquarters', 19 September 2012, http://www.un.org/press/en/2012/sgsm14518.doc.htm.

[869] 'Press Conference by Secretary-General Ban Ki-moon at United Nations Headquarters', 19 September 2012, http://www.un.org/press/en/2012/sgsm14518.doc.htm.

[870] 'Joint statement on Peace and Tolerance by EU High Representative, OIC Secretary General, Arab League Secretary General, and AU Commissioner for Peace and Security', 20 September 2012, http://www.eu-un.europa.eu/articles/en/article_12602_en.htm.

[871] 'Joint statement on Peace and Tolerance by EU High Representative, OIC Secretary General, Arab League Secretary General, and AU Commissioner for Peace and Security', 20 September 2012, http://www.eu-un.europa.eu/articles/en/article_12602_en.htm.

importance of free expression, including expression that is derogatory of cherished religious symbols, in an interconnected world.

With regard to the first matter, the question of causation, it should be noted that there was a time-span of about two months between the publication of the video (July 2012)[872] and the eruption of riots (September 2012), after parts of the video were broadcast by Egyptian television station Al-Nas.[873] It was reported by multiple news outlets that various actors played a role in encouraging or instigating unrest. For example, *The Washington Post* reported that the Muslim Brotherhood in Egypt called for protests.[874] *The Wall Street Journal* featured an article which said that in Cairo, 'protesters rallied to the Embassy at the prompting of Islamist Facebook groups and hard-line Salafi preachers who frequently preach on Islamist satellite channels.'[875] *USA Today* reported that the spokesperson for the Egyptian Salafist Noor party, 'which holds about 25% of the seats in parliament, called on people to go to the Embassy. He also called on non-Islamist soccer hooligans, known as Ultras, to join the protest.'[876] Protests in Yemen 'came hours after a Muslim cleric, Abdul Majid al-Zindani, urged followers to emulate the protests in Libya and Egypt.'[877] In Tunisia, 'a hard-line Islamist instigated a violent rampage at the U.S. Embassy', according to the Tunisian authorities.[878] *The Daily Telegraph*

[872] 'From Man Who Insulted Muhammad, No Regret', *The New York Times*, 26 November 2012; 'World News: U.S. Missions Stormed in Libya, Egypt – Movie Critical of Prophet Muhammad Spurs Attack in Benghazi, Killing American; Protesters Breach Wall of Cairo Compound', *The Wall Street Journal*, 12 September 2012.

[873] 'Foreign aid under fire on many fronts' *The Washington Post*, 2 October 2012.

[874] 'More protests erupt in Muslim world', *The Washington Post*, 14 September 2012.

[875] 'World News: U.S. Missions Stormed in Libya, Egypt – Movie Critical of Prophet Muhammad Spurs Attack in Benghazi, Killing American; Protesters Breach Wall of Cairo Compound', *The Wall Street Journal*, 12 September 2012.

[876] 'Deadly embassy attacks were days in the making', 12 September 2012, http://usatoday30.usatoday.com/news/world/story/2012/09/12/deadly-embassy-attacks-were-days-in-the-making/57752828/1.

[877] 'Turmoil Over Contentious Video Spreads', *The New York Times*, 14 September 2012.

[878] 'Violence ups ante for Tunisia's new rulers', *The Washington Post*, 21 September 2012.

reported that Hassan Nasrallah, the leader of Hezbollah, 'denounced the film as an even greater insult to Islam than The Satanic Verses.'[879] 'Responding to his call for a demonstration of public anger in Lebanon, thousands of followers of the Shia militant group, which is funded and armed by Iran, massed in the slums of south Beirut. "The whole world needs to see your anger on your faces, in your fists and your shouts," Sheikh Nasrallah said.'[880] According to *The Washington Post*, the organized rally was 'also an attempt to show the party's strength'[881], and was aimed 'to show that the political alliance that many observers refer to as the 'axis of resistance' – Hezbollah, Syria and Iran – is still holding strong. Demonstrators carried pictures of Assad and Syrian flags in the crowd on Monday, and some carried Iranian flags, too.'[882] *The Washington Post* also reported that 'Hezbollah has called for demonstrations to continue and take place in other cities across Lebanon in coming days. Sunni leaders, not to be outdone by their Shiite counterparts, also announced more protests on Monday. The controversial Sunni sheikh Ahmad Assir, who is based in the city of Sidon, announced a demonstration for his followers later this week.'[883]

[879] 'Violent protests over US-made film spill into more Islamic nations', *The Daily Telegraph*, 18 September 2012.

[880] 'Violent protests over US-made film spill into more Islamic nations', *The Daily Telegraph*, 18 September 2012.

[881] 'Thousands in Beirut protest anti-Islam video in Hezbollah show of strength', 17 September 2012, http://www.washingtonpost.com/world/middle_east/thousands-in-beirut-protest-anti-islam-video-in-hezbollah-show-of-strength/2012/09/17/821b9188-00f5-11e2-b257-e1c2b3548a4a_story.html.

[882] 'Thousands in Beirut protest anti-Islam video in Hezbollah show of strength', 17 September 2012, http://www.washingtonpost.com/world/middle_east/thousands-in-beirut-protest-anti-islam-video-in-hezbollah-show-of-strength/2012/09/17/821b9188-00f5-11e2-b257-e1c2b3548a4a_story.html.

[883] 'Thousands in Beirut protest anti-Islam video in Hezbollah show of strength', 17 September 2012, http://www.washingtonpost.com/world/middle_east/thousands-in-beirut-protest-anti-islam-video-in-hezbollah-show-of-strength/2012/09/17/821b9188-00f5-11e2-b257-e1c2b3548a4a_story.html.

These reports indicate that rather than natural, the riots in response to the video were, at least in part, manufactured. Shortly after the protests erupted, *The New York Times* columnist Ross Douthat gave the following explanation:

> 'There is certainly unreason at work in the streets of Cairo and Benghazi, but something much more calculated is happening as well. The mobs don't exist because of an offensive movie, and an American ambassador isn't dead because what appears to be a group of Coptic Christians in California decided to use their meager talents to disparage the Prophet Muhammad. What we are witnessing, instead, is mostly an exercise in old-fashioned power politics, with a stone-dumb video as a pretext for violence that would have been unleashed on some other excuse. (…) Today's wave of violence (…) owes much more to a bloody-minded realpolitik than to the madness of crowds. (…) What we're watching unfold in the post-Arab Spring Mideast is the kind of struggle for power that frequently takes place in a revolution's wake: between secular and fundamentalist forces in Benghazi, between the Muslim Brotherhood and its more-Islamist-than-thou rivals in Cairo, with similar forces contending for mastery from Tunisia to Yemen to the Muslim diaspora in Europe.'[884]

Rather than being *the* cause, let alone the proximate cause, a more accurate picture would regard the video as *an early* link in a chain of events that ultimately led to the turmoil, while the time period of two months between the release of the video and the first riots suggest that other factors than the video were far more proximate.

Writing on the role of middlemen in protests over offensive expression, George states that 'If provocative symbols do not always and everywhere produce strong reactions, it must follow that some other intervening factor affects how people in a given time and place respond. This intervention comes in the form of middlemen who decide whether it is in their interests to

[884] 'It's Not About The Video', *The New York Times*, 16 September 2012.

transform a potential provocation into a full-blown protest.'[885] 'While a mix of anti-US sentiment and religious fervor helped ensure the video's value as an international injustice symbol,' George observes, 'detailed forensics reveal that those who did the most to push that narrative out were motivated primarily by domestic political interests.'[886] George calls *Innocence of Muslims* 'an archetypal cross-border case of hate spin'[887] that, barring its technological aspects, mostly 'followed the same pattern as Satanic Verses and the Jyllands-Posten cartoons.'[888]

That brings us to the second element of these political responses, namely that of the value of free expression. Elsewhere[889] I have criticized these statements for their incompatibility with international human rights norms and elusiveness (for example, Ban Ki-moon's requirements of 'common justice and purpose).' More generally, in my view these statements provide a weak endorsement of free expression.

In turn, my stance has attracted criticism. Robert Kahn writes that

> 'Some opponents of blasphemy laws make arguments and take positions that have little basis in social scientific and humanistic understandings of blasphemy and anti-blasphemy laws and, at the

[885] C. George, *Hate Spin: The Manufacture of Religious Offense and Its Threat to Democracy*, Cambridge: The MIT Press 2016, p. 19.

[886] C. George, *Hate Spin: The Manufacture of Religious Offense and Its Threat to Democracy*, Cambridge: The MIT Press 2016, p. 70.

[887] C. George, *Hate Spin: The Manufacture of Religious Offense and Its Threat to Democracy*, Cambridge: The MIT Press 2016, p. 57.

[888] C. George, *Hate Spin: The Manufacture of Religious Offense and Its Threat to Democracy*, Cambridge: The MIT Press 2016, p. 66.

[889] T. Herrenberg, 'Denouncing Divinity: Blasphemy, Human Rights, and the Struggle of Political Leaders to defend Freedom of Speech in the Case of Innocence of Muslims,' in: *Ancilla Iuris*, 2015.

same time, weaken the ability of human rights advocates to present compelling arguments to those individuals, communities and leaders who still support blasphemy laws.'[890]

Kahn identifies three 'counterproductive ways opponents of blasphemy bans present their case', namely 'a tendency to (1) treat religious identity as more malleable than other identities and use this as a reason to oppose blasphemy bans (2) take a 'zero tolerance' approach to blasphemy bans under which a restriction on blasphemy anywhere is a threat to freedom everywhere and (3) fall into a clash-of-civilizations trap, in which blasphemy bans become a flash point between a modern West and Islam (little different from struggles over the hijab and burqa).'[891]

My criticism falls in the second category. Kahn writes:

'A (…) zero-tolerance question involves what one is allowed to say about blasphemy laws while remaining a member of the international human rights community in good standing. Is it permissible for global leaders (for example, the Secretary General of the United Nations) to say things that might appear to offer legitimacy to supporters of blasphemy laws? Maybe not. Tom Herrenberg takes Secretary General Ban Ki-Moon to task for saying that the film *The Innocence of Muslims* is a humiliating abuse of freedom of speech, one that should not be legally protected. According to Herrenberg, the Secretary General's statement 'nurtures confusion' and provides a signal to demonstrators against the film that 'they [the demonstrators] might be right.' Later in the article, he takes Hillary Clinton to task for stating that the film was made to provoke rage. While Herrenberg accepts that politicians should be allowed to comment on controversial issues, he will not allow them to "deviate from principles enshrined in human rights law".

[890] R.A. Kahn, 'Rethinking Blasphemy and Anti- Blasphemy Laws', in: J. Temperman & A. Koltay (eds.), *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre*, Cambridge: Cambridge University Press 2017, p. 168.

[891] R.A. Kahn, 'Rethinking Blasphemy and Anti- Blasphemy Laws', in: J. Temperman & A. Koltay (eds.), *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre*, Cambridge: Cambridge University Press 2017, p. 168.

> But what about Secretary General Moon's freedom of speech? Perhaps Secretary General Ban Ki-Moon is naïve or has fallen under the thumb of the Organization of Islamic Cooperation. It is perfectly legitimate to fault the Secretary General for bad politics, but Herrenberg's language suggests that a human rights spokesperson is simply not allowed to say anything that suggests blasphemy might constitute real harm (in some situations) lest that statement render aid and comfort to those countries that make frequent use of anti-blasphemy laws. While there is a logic to this position, there is also a logic about the value of free and fair debate. If one of the harms of anti-blasphemy laws is that they prevent debates about religion, Herrenberg's position does the same for debates about international human rights law.'[892]

Kahn raises interesting points. Perhaps I was a bit too harsh on these politicians, as they tried to crisis manage the situation, trying to cool the heads by validating some of the protesters' grievances. Also, it could be that I was not sensitive enough to the broader political interests involved; interests that need to be protected and that might require a little apology for your standards. That broader political interests were at stake is evident. George, for example, in explaining the condemnations of the video by the US government,[893] notes that 'the United

[892] R.A. Kahn, 'Rethinking Blasphemy and Anti- Blasphemy Laws', in: J. Temperman & A. Koltay (eds.), *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre*, Cambridge: Cambridge University Press 2017, p. 174-175.

[893] The US government aired ads in Pakistani media, in which President Barack Obama and Secretary of State Hillary Clinton condemned the video, 'emphasizing that it was not produced or authorized by the United States government', see 'Obama administration airs ads in Pakistan, condemning anti-Islam film', 20 September 2012, https://www.politico.com/blogs/politico44/2012/09/obama-administration-airs-ads-in-pakistan-condemning-anti-islam-film-136174. A spokesperson for the US government said about the decision to air ads on Pakistani television: 'As you know, after the video came out, there was concern in lots of bodies politic, including Pakistan, as to whether this represented the views of the U.S. Government. So in order to ensure we reached the largest number of Pakistanis – some 90 million, as I understand it in this case with these spots – it was the judgment that this was the best way to do it.' See 'Obama administration airs ads in Pakistan, condemning anti-Islam film', 20 September 2012, https://www.politico.com/blogs/politico44/2012/09/obama-administration-airs-ads-in-pakistan-condemning-anti-islam-film-136174.

States relies heavily on the cooperation of Muslim countries for its military and counterterrorism operations and therefore cannot afford to alienate them.'[894]

These things aside, let me say, first, that my criticism was not intended to 'prevent debates about international human rights law.' I don't see how my language 'suggests that a human rights spokesperson is simply not allowed to say anything that suggests blasphemy might constitute real harm (in some situations).' Bearing in mind the considerations on causality mentioned earlier, it can hardly be argued that the video constituted the real harm (although, obviously, it caused harm to the religious feelings of many believers). Moreover, my intention was not to prevent debates about human rights law. Just as Kahn I am in favour of free and fair debate. Rather, I merely intended to draw attention to the in my view weak endorsement of a core democratic value, namely free expression.

Although I do subscribe to the notion that politics and law are separate domains governed by their own logic, I don't find it very persuasive to endorse the right to free expression and suggest the repeal of blasphemy bans in international human rights law on one hand, while on the other hand, issue political statements that contradict these norms. If freedom of expression is important and blasphemy bans are detrimental to that right, should that not only be stated by a matter of international law, but also actively and openly stated by high-level political leaders in real-life cases?

Conclusion

A noticeable aspect of blasphemy is its informal dimension. Over the last decades there have been various attempts to silence blasphemers not by the legal process, but informally, such as

[894] C. George, *Hate Spin: The Manufacture of Religious Offense and Its Threat to Democracy*, Cambridge: The MIT Press 2016, p. 67-68.

by way of intimidation. The *Rushdie affair* and *Danish cartoons controversy* being two well-known examples. This chapter discussed a more recent example of these types of episodes: the crude *Innocence of Muslims* video that was derogatory of the prophet Muhammad. This short video was followed by unrest in various parts of the world. Although some blamed the video as the cause of the turmoil, a closer examination reveals that it was primarily an instance of what the scholar of communication studies George calls 'hate spin', the 'manufactured vilification or indignation, used as a political strategy that exploits group identities to mobilize supporters and coerce opponents.' In their responses to the video, some high-level politicians, I argued, offered weak endorsements of the right to free expression, as they seemed to introduce new, stricter norms for protectable anti-religious expression.

Chapter 7 Conclusion

This thesis has discussed the background and regulation of three types of defamation of powerful entities, symbols, or institutions:

(1) *lèse-majesté*, the defamation of a *national head of state* (such as Kings, Queens, or Presidents);

(2) the defamation of *foreign heads of state*; and

(3) *blasphemy*, the defamation of *religion* or *religious symbols*.

These speech crimes were once very serious wrongs, closely associated with a serious threat to social stability. For example, the English law once held that 'expression against the King, cursing or wishing him ill' amounted to sedition.[895] The Dutch *lèse-majesté* law of 1830 criminalized violating 'the dignity, the authority, or the rights of the King or the Royal dynasty' and 'slandering, deriding, or defaming the person of the King.' This law, enacted amidst great political instability and social tensions, carried sentences of up to five years' imprisonment. This law and its successor, included in the Criminal Code of 1886, were rooted in notions of maintaining *internal* tranquility and unity; it was the interest of the *state*, as opposed to private interests of the King, that justified criminalizing expression defamatory of royal dignitaries. The elevated, special position of the King, Queen, and the Royal House justified a special protection against attacks on their reputation.

Bans on defaming *foreign heads* of state are typically adopted to cultivate *external* stability, to foster cordial relations with other nations. For example, the Dutch ban of 1816 prohibiting insults directed at foreign Sovereigns or Monarchs was intended to preserve friendly relations with other nations. Subsequent versions of this were also characterized by

[895] H.J. Stephen, *Stephen's Commentaries on the Laws of England*, 17th ed., 1922, p. 153.

the wish to maintain friendly relations with other nations. The Criminal Code of 1886 prohibited 'the intentional insult of a ruling sovereign or other head of a friendly state,' and to 'intentionally insult a representative of a foreign power, acting in his quality as representative.' Although the government did not mention the principle underlying these speech crimes, legal scholar Simons regarded 'friendly relations with other nations' as a 'primary requirement of our national interest.'[896] A court case of the 1930s, a highly turbulent decade, reflect this rationale. In a 1933 case about the defamation of *Reichspräsident* Paul von Hindenburg, the public prosecutor explained that insults directed at foreign heads of state should not take place 'in view of friendly relations between the states' and that 'diplomatic relations with a friendly state, such as Germany, may not be disrupted.' This was considered to be a 'requirement of self-preservation', because 'leaving insults unpunished could constitute a *casus belli*' in the view of the prosecutor.[897] The ban on insulting foreign heads state was thus perceived as an instrument to foster international relations and even to preclude incurring the wrath of foreign, mightier powers.

The third restriction, *blasphemy*, 'the willful use of derogatory language or actions that question the existence, nature, or power of sacred beings, items, or texts'[898] was once regarded as a profound moral and legal wrong as well. It has been associated with treason[899] and subversion. The English law of blasphemy as established in *Rex v. Taylor* (1676), prohibited 'to reproach the Christian religion' as it was 'to speak in subversion of the law.'[900] Hence,

[896] See D. Simons, *De vrijheid van drukpers in verband met het Wetboek van Strafrecht*, 's-Gravenhage 1883, p. 156.

[897] *L. de Visser staat terecht*, Algemeen Handelsblad 30 June 1933.

[898] As defined in D. Nash, *Acts against God*, London: Reaktion Books 2020, p. 12.

[899] For example, in Ancient Greece. See L.W. Levy, *Blasphemy: Verbal Offenses Against the Sacred, from Moses to Salman Rushdie*, Chapel Hill & London: The University of North Carolina Press 1993, p. 4.

[900] Quoted in: E. Visconsi, 'The Invention of Criminal Blasphemy: Rex v. Taylor (1676),' *Representations*, 2008, p. 31.

blasphemy was once regarded as a very serious threat to the stability of the state. From the late nineteenth century onwards, the regulation of anti-religious expression became more moderate, emphasizing an offensive *manner* of anti-religious expression, thus leaving more room for criticism of religion.[901] Religion could be criticized as long as 'the decencies of controversy' were observed. Hare speaks in this regard of a 'narrowing' of the offence of blasphemy, as 'the law appeared to tolerate the reasoned denial of the truth of Christianity.'[902] This notion was also reflected in the Dutch blasphemy ban of 1932, which criminalized blasphemy uttered in a 'reviling' or 'abusive' manner yet not criticism of religion as such.

Some European countries have repealed, or are in the process of repealing, their bans on *lèse-majesté*, the defamation of foreign heads of state, or blasphemy. *Lèse-majesté* was abolished in the Netherlands in 2020, while a Bill to end the Belgium *lèse-majesté* law is currently being considered.[903] Outside of Europe, *lèse-majesté* bans can still be found in various countries, including Spain, Cambodia, Thailand, Jordan, Kuwait, Bahrain, and Turkey.[904] France (2004),[905] Belgium (2005),[906] Germany (2018),[907] and the Netherlands (2020)[908] all abolished their bans on the defamation of foreign heads of state, while other European countries

[901] D. Nash, *Blasphemy in the Christian World: A History*, Oxford: Oxford University Press 2007, p. 80.

[902] I. Hare, 'The English Law of Blasphemy: The "Melancholy, Long, Withdrawing Roar"', in: P. Cliteur & T. Herrenberg (eds.), *The Fall and Rise of Blasphemy Law*, Leiden: Leiden University Press 2016, p. 58.

[903] Parliamentary documents, Belgian House of Representatives (*Belgische Kamer van volksvertegenwoordigers*), 3 March 2021, Doc. No. 55 1824/001.

[904] Overseas Security Advisory Council, *Lèse Majesté: Watching what you say (and type) abroad* (report), 2019, https://www.osac.gov/Content/Report/e48a9599-9258-483c-9cd4-169f9c8946f5.

[905] See Article 52 *Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité*.

[906] See J. Foakes, *The Position of Heads of State and Senior Officials in International Law*, Oxford: Oxford University Press 2014, p. 70 n. 161.

[907] See *Gesetz zur Reform der Straftaten gegen ausländische Staaten, Bundesgesetzblatt* (2017) no. 48; See also 'Lèse-Majesté in Germany – A Relic of a Long-Gone Era?', 23 February 2017, https://blogs.loc.gov/law/2017/02/lse-majest-in-germany-a-relic-of-a-long-gone-era/.

[908] Bulletin of Acts and Decrees (*Staatsblad*) 2019, no. 277.

still have such laws on their books.[909] These laws are also still found in numerous countries outside Europe.[910] As far as blasphemy laws are concerned, during 2014-2020, the Netherlands, Iceland, Norway, Malta, Denmark, Ireland, Canada, New Zealand, and Greece repealed their blasphemy laws while during this period these bans have been introduced or amended in Kazakhstan, Nepal, Oman, Mauritania, Morocco, and Brunei.[911]

From a supranational law perspective, the United Nations Human Rights Committee and the European Court of Human Rights have commented and decided on laws prohibiting the defamation of powerful entities, symbols, or institutions.

As for *lèse-majesté* laws and bans on the defamation of foreign heads of state, the European Court of Human Rights holds that laws providing for 'a special legal status on heads of State, shielding them from criticism solely on account of their function or status, irrespective of whether the criticism is warranted (…) amounts to conferring on foreign heads of State a special privilege that cannot be reconciled with modern practice and political conceptions'[912] and that 'providing increased protection by means of a special law on insults will not, as a rule, be in keeping with the spirit of the Convention.'[913] Hence, the European Court has established numerous violations of article 10 in cases where applicants were convicted on the basis of special defamation laws.[914] The United Nations Human Rights Committee, a body consisting

[909] See Organization for Security and Co-operation in Europe, *Defamation and Insult Laws in the OSCE Region: A Comparative Study*, 2017, p. 23..

[910] These include Afghanistan (article 243 Criminal Code), Botswana (article 60 Criminal Code), Cameroon (article 153 Criminal Code), Egypt (article 181 Criminal Code), Ethiopia (article 264 Criminal Code), Indonesia (article 144 Criminal Code), Iraq (article 227 Criminal Code), Israel (article 168 Criminal Code), Senegal (article 165 Criminal Code), South Korea (article 107 paragraph 2), and Thailand (article 133 Criminal Code).

[911] U.S. Commission on International Religious Freedom, *Violating Rights: Enforcing the World's Blasphemy Laws*, 2020,p. 7.

[912] European Court of Human Rights, 25 June 2002, 51279/99, par. 68-69 (*Colombani and others v. France*).

[913] European Court of Human Rights, 15 March 2011, 2034/07, par. 55 (*Otegi Mondragon v. Spain*).

[914] For example, European Court of Human Rights, 25 June 2002, 51279/99, par. 68-69 (*Colombani and others v. France*); European Court of Human Rights, 15 March 2011, 2034/07, par. 55 (*Otegi Mondragon v. Spain*);

of independent human rights experts and that monitors implementation of the ICCPR by the State parties, has 'expressed concern regarding laws on such matters as *lèse-majesté*, (…) defamation of the head of state and the protection of the honour of public officials'[915] and observed that 'laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned.'[916] The Human Rights Committee and United Nations officials have also commented on *lèse-majesté* bans in specific countries. For example, the Human Rights Committee observed that Thailand 'should review article 112 of the Criminal Code, on publicly offending the royal family, to bring it into line with article 19 of the Covenant'[917] while the former Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, 'called on the Thai authorities to stop using *lèse-majesté* provisions as a political tool to stifle critical speech (…).'[918] With regard to the now repealed Dutch *lèse-majesté* ban, Kaye 'expressed concern that the [*lèse-majesté*] provisions of the Dutch Criminal Code limit the right to freedom of expression in contradiction with article 19 of the International Covenant on Civil and Political Rights.'[919]

As for blasphemy, the picture is less straight-forward from a supranational law perspective. On one hand are bodies and officials that outright reject blasphemy laws. The Human Rights Committee unequivocally holds that 'Prohibitions of displays of lack of respect

European Court of Human Rights, 13 March 2018, 51168/15 and 51186/15, par. 6 (*Stern Taulats and Roura Capellera v. Spain*); European Court of Human Rights, 19 October 2021, 42048/19, par. 20 (*Vedat Şorli v. Turkey*).

[915] Human Rights Committee, General comment No. 34, UN Doc. CCPR/C/GC/34, 2011, par. 38.

[916] Human Rights Committee, General comment No. 34, UN Doc. CCPR/C/GC/34, 2011, par. 38.

[917] Human Rights Committee, 'Concluding observations on the second periodic report of Thailand', 25 April 2017, UN Doc. CCPR/C/THA/CO/2, par. 38.

[918] 'Thailand: UN rights expert concerned by the continued use of lèse-majesté', 7 February 2017,http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21149&LangID=E.

[919] D. Kaye, Letter of 14 October 2016, UN Doc., OLNLD2/2016, https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL_NLD_2016.pdf.

for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant.'[920] Heiner Bielefeldt, the former Special Rapporteur on freedom of religion or belief, has stated that 'States should repeal blasphemy laws, which typically have a stifling effect on open dialogue and public discourse, often particularly affecting persons belonging to religious minorities'[921] The Venice Commission, the Council of Europe's advisory body on constitutional matters, has stated that 'the offence of blasphemy should be abolished (…) and should not be reintroduced.'[922] On the other hand, the European Court of Human Rights does not regard blasphemy bans necessarily as incompatible with freedom of expression as guaranteed by article 10 of the European Convention on Human Rights. From its landmark case *Otto-Preminger-Institut v. Austria* onwards,[923] the Court has upheld convictions by national courts over blasphemous expression in multiple cases.[924] The Court has held that 'abusive attacks' on religious symbols 'capable of stirring up prejudice and putting religious peace at risk ', or the presentation of 'objects of religious worship in a provocative way capable of hurting the feelings of the followers of that religion' may fall outside of the protection offered by article 10 of the European Convention on Human Rights. Such a provocative way

[920] Human Rights Committee, General comment No. 34, UN Doc. CCPR/C/GC/34, 2011, par. 48. For a critique of the compatibility of this standpoint with the text of the ICCPR, see N. Cox, 'Justifying blasphemy laws: freedom of expression, public morals, and international human rights law', *Journal of Law and Religion*, 2020, p. 33-60. Article 20 paragraph 2 provides that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'

[921] Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, 2013, UN Doc. A/HRC/25/58, par. 70(e).

[922] Venice Commission, *Blasphemy, Insult and hatred: finding answers in a democratic society. Science and technique of democracy, No. 47*, Luxembourg: Council of Europe Publishing, 2008, p. 32.

[923] European Court of Human Rights, 20 September 1994, 13470/87 (*Otto-Preminger-Institut v. Austria*).

[924] For example, European Court of Human Rights, 13 September 2005, 42571/98 (*İ.A. v. Turkey*); European Court of Human Rights, 25 October 2018, 38450/12, (*E.S. v. Austria*).

of presentation 'could be conceived as a malicious violation of the spirit of tolerance' which is 'one of the bases of a democratic society', according to the Court.[925]

This thesis has also reflected on the question whether bans on expression that defames powerful entities, symbols, or institutions are legitimate in a democracy. Public discourse, expression 'concerning the organization and culture of society'[926] is constitutive of a democracy.[927] 'The ideal of democracy', according to political philosopher Hayek, 'rests on the belief that the view which will direct government emerges from an independent and spontaneous process. It requires, therefore, the existence of a large sphere independent of majority control in which the opinions of the individuals are formed.'[928] Public discourse provides for what has been called by Kelsen a 'running discussion between majority and minority',[929] where citizens may persuade each other or their political representatives of a particular viewpoint. Participation, or at least the ability to participate in public discourse enables people to 'self-govern' and to identify, albeit not necessarily to agree, with the laws by which they must live.

Viewpoint selective bans, based on 'the specific motivating ideology or the opinion or perspective of the speaker',[930] of which *lèse-majesté* , the defamation of foreign heads of state, and blasphemy are all examples, interfere with that legitimizing function of public discourse; as only *certain* viewpoints on religion or the government are accepted to 'compete' in public discourse while others are not. Laws that limit certain viewpoints in public discourse, for

[925] European Court of Human Rights, 25 October 2018, 38450/12, par .15 (*E.S. v. Austria*).

[926] E. Barendt, *Freedom of Speech*, Oxford: Oxford University Press 2005, p. 189.

[927] See E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 5, 8, 47-48.

[928] F.A. Hayek, *The Constitution of Liberty*, Chicago/London: University of Chicago Press 2011 (1960), p. 175.

[929] H. Kelsen, *General Theory of Law and State*, Cambridge: Harvard University Press 1949, p. 287.

[930] See J. Weinstein, 'An Overview of American Free Speech Doctrine and its Application to Extreme Speech', in: I. Hare & J. Weinstein (eds.), *Extreme Speech and Democracy*, Oxford: Oxford University Press 2009, p. 82.

example on the monarch, or on religion, undermine the legitimacy provided for by free expression.

That being said, although such laws cannot be justified on *democratic* principles, they may be legitimate on other grounds, such as on state security or public safety grounds. State security, which a prerequisite for a state, may entail limiting certain viewpoints as they pose a substantive risk of social disintegration if left unchecked. Whether this is the case arguably depends on socio-political circumstances such as the state's stability, existence or lack of a democratic culture, etcetera. The bans on *lèse-majesté* and the defamation of foreign heads of state were enacted in the Netherlands during highly volatile periods in the early nineteenth century. Although not on democratic grounds, such bans may be justified on overriding, security grounds when, in significantly unstable periods of time, socio-political circumstances require so.

Bans that limit certain viewpoints in public discourse on public order grounds are commonplace. However, the legitimacy of such bans depends on the causal connection between an utterance and the disruption of public order taking place. There must arguably be a genuine threat of the public order being disturbed by a certain expression to justifiably ban that expression. Looking at the European Court of Human Rights' case law on blasphemy, it is clear that the Court accepts a very loose connection between provocative expression on religion and any subsequent danger to the public order. Such a lax connection is hard to reconcile with a democratic free speech principle.

Lastly, this thesis has discussed some challenges to free expression posed by the informal dimension of blasphemy. Different from *lèse-majesté* and the defamation of foreign, blasphemy has an 'extra-judicial' or 'extra-legal' dimension. This is a development in the area of blasphemy that has been on the forefront since the last three decades. The *Rushdie affair*, the *Danish cartoons controversy*, and the *Charlie Hebdo affair* are notable examples of this.

This thesis has discussed one episode of this informal aspect of blasphemy, namely that of *Innocence of Muslims*. In ways resembling the *Rushdie affair* and the *Danish cartoons controversy,* incident was about a video containing content considered by many Muslims to be blasphemous, which was followed by unrest in various parts of the world.

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Summary

This thesis deals with three restrictions on freedom of expression, namely 1) *lèse-majesté* (the insult to the national head of state; the monarch in a monarchy, or the president in a republic), 2) the defamation of foreign heads of state, and 3) blasphemy (insulting religion or religious symbols). The three offenses have in common that they want to protect different types of power from insults. Such prohibitions are still topical. For example, a 2017 comparative study by the *Organization for Security and Co-operation in Europe* shows that more than ten European countries have laws that prohibit insulting foreign heads of state. A 2019 report from the *Overseas Security Advisory Council*, part of the US State Department, lists more than a dozen countries that ban insults against national heads of state. Finally, according to a 2020 report from the *United States Commission on International Religious Freedom*, 84 countries have some form of ban on blasphemy.

The three offenses are rooted in notions of social and political stability and order. Lèse-majesté¬ bans are aimed at preserving internal stability and unity, while the ban on insulting foreign heads of state serves external stability ("friendly relations"). Blasphemy has traditionally been linked to undermining state authority, later this offense was associated with disturbing public order.

Over time, these offenses have been 'liberalized' in many countries. Either the scope of the offenses has been shortened (which expressions are punishable?), the severity of the punishment has decreased, or they have been abolished. The latter in particular is relatively recent. *Lèse-majesté* has been abolished in the Netherlands in 2020. A law with the same aim is currently pending in Belgium. France (in 2004), Belgium (in 2005), Germany (in 2018), and the Netherlands (in 2020) have all recently lifted the ban on insulting foreign heads of state.

Countries that have abolished blasphemy in recent years include the Netherlands, Iceland, Norway, Malta, Denmark, Ireland, Canada, New Zealand, and Greece.

Laws that restrict freedom of expression by granting individuals special protection based on their social status are at odds with European and international human rights. The European Court of Human Rights has stated that providing increased protection by means of a special law on insults will not, as a rule, be in keeping with the spirit of the Convention. The Court has found numerous violations of Article 10 of the Convention in cases involving *lèse-majesté* and insulting foreign heads of state. The United Nations Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights, is also critical of such laws. The Committee has expressed 'concern' about *lèse-majesté* bans and laws against the defamation of heads of state.

With regard to blasphemy bans, the UN Human Rights Committee has determined that they are incompatible with the International Covenant on Civil and Political Rights. The Venice Commission, the committee that advises the Council of Europe on constitutional law issues, stated in 2008 that states should abolish the ban on blasphemy. However, the European Court of Human Rights takes a different line. This Court has upheld multiple convictions of blasphemy in recent decades, and does not find blasphemy prohibitions necessarily incompatible with Article 10 of the Convention.

Lastly, this thesis discussed some of the challenges to free speech posed by the punishment of blasphemers, or the threat thereof, by actors operating outside the law. Blasphemy has an 'extrajudicial' dimension. This is a blasphemy development that has been at the forefront of the past three decades. The *Rushdie affair*, the controversy over the Danish cartoons, and the *Charlie Hebdo affair* are examples of this. One event of this informal aspect of blasphemy has been discussed in this thesis, namely that of the profane *Innocence of Muslims* video.

Samenvatting (Dutch summary)

Dit proefschrift gaat over drie beperkingen op de vrijheid van meningsuiting, te weten 1) majesteitsschennis (*lèse-majesté,* de belediging van het nationale staatshoofd; de monarch in een monarchie, of de president in een republiek), 2) de belediging van buitenlandse staatshoofden, en 3) godslastering (het beledigen van religie of religieuze symbolen). De drie delicten hebben gemeen dat ze verschillende typen van macht willen beschermen tegen beledigingen. Zulke verbodsbepalingen zijn nog steeds actueel. Uit een vergelijkend onderzoek uit 2017 van de *Organisatie voor Veiligheid en Samenwerking in Europa* blijkt bijvoorbeeld dat meer dan tien Europese landen wetten hebben die de belediging van buitenlandse staatshoofden verbieden. Een rapport uit 2019 van de *Overseas Security Advisory Council*, onderdeel van het Amerikaanse ministerie van Buitenlandse Zaken, noemt meer dan een dozijn landen die beledigingen ten aanzien van nationale staatshoofden verbieden. Tot slot, volgens een rapport uit 2020 van de *United States Commission on International Religious Freedom* hebben 84 landen een bepaalde vorm van een verbod op godslastering.

De drie delicten wortelen in noties van maatschappelijke en politieke stabiliteit en orde. *Lèse-majesté*-verboden zijn gericht op het bewaren van *interne* stabiliteit en eenheid, terwijl met het verbod op de belediging van buitenlandse staatshoofden externe stabiliteit (‘vriendschappelijke relaties’) gediend is. Godslastering is van oudsher verbonden met het ondermijnen van het staatsgezag, later werd dit delict in verband gebracht met het verstoren van de publieke orde.

In de loop der tijd zijn deze delicten in veel landen ‘geliberaliseerd’. Ofwel is de reikwijdte van de delicten verkort (welke uitingen zijn strafbaar?), of de zwaarte van de straf is afgenomen, of ze zijn afgeschaft. Vooral dat laatste is relatief recent. *Lèse-majesté* is in Nederland in 2020 afgeschaft. In België is thans een wet aanhangig met hetzelfde doel.

Frankrijk (in 2004), België (in 2005), Duitsland (in 2018), en Nederland (in 2020) hebben recentelijk allemaal het verbod op het beledigen van buitenlandse staatshoofden afgeschaft. Landen die de afgelopen jaren godslastering hebben afgeschaft zijn Nederland, IJsland, Noorwegen, Malta, Denemarken, Ierland, Canada, Nieuw-Zeeland, en Griekenland.

Wetten die de vrijheid van meningsuiting beperken door personen een speciale bescherming te bieden op basis van hun sociale status staan op gespannen voet met Europese en internationale mensenrechten. Het Europees Hof voor de Rechten van de Mens acht het bieden van meer bescherming door middel van een speciale wet op beledigingen in de regel niet in overeenstemming met de geest van het Europees Verdrag voor de Rechten van de Mens. Het Hof heeft schendingen vastgesteld van artikel 10 van het Verdrag in zaken over *lèse-majesté* en de belediging van buitenlandse staatshoofden. Ook het Mensenrechtencomité van de Verenigde Naties, dat toeziet op naleving van het Internationaal Verdrag inzake burgerrechten en politieke rechten, is kritisch op dit soort wetten. Het Comité heeft zijn 'bezorgdheid' uitgesproken over wetten tegen majesteitschennis en het beledigen van staatshoofden.

Voor wat betreft godslastering heeft het VN-Mensenrechtencomité bepaald dat zij onverenigbaar zijn met het Internationaal verdrag inzake burgerrechten en politieke rechten. De Commissie van Venetië, de commissie die de Raad van Europa adviseert over staatsrechtelijke kwesties, stelde in 2008 dat staten het verbod op godslastering dienen af te schaffen. Het Europees Hof voor de Rechten van de Mens kiest echter een andere lijn. Dit Hof heeft de afgelopen decennia meerdere veroordelingen van godslasterlijke uitingen gehandhaafd, en acht blasfemieverboden niet per se onverenigbaar met artikel 10 van het Verdrag.

Ten slotte heeft dit proefschrift enkele uitdagingen voor de vrije meningsuiting besproken die worden veroorzaakt door de bestraffing van godslasteraars, of de dreiging

daarvan, door actoren die buiten de wet opereren. Godslastering heeft een ‘buitengerechtelijke’ of dimensie. Dit is een ontwikkeling op het gebied van godslastering die sinds de laatste drie decennia op de voorgrond staat. De ‘Rushdie-affaire’, de controverse over de Deense cartoons, en de ‘Charlie Hebdo-affaire’ zijn hiervan voorbeelden van. In dit proefschrift is één gebeurtenis van dit informele aspect van godslastering besproken, namelijk dat van de godslasterlijke video *Innocence of Muslims*.

Curriculum vitae

Tom Herrenberg was born on 15 October 1986 in Eindhoven, the Netherlands. He read law at Maastricht University (LLB, LLM) and Leiden University (LLM). Thereafter, he became a part-time lecturer at the Department of Jurisprudence at Leiden Law School of Leiden University. As of 2015 he held a post as a PhD candidate at that department, under the supervision of Prof. Paul Cliteur and Prof. B.R. Rijpkema. During this time he was also a visiting researcher (Academic Visitor) at the University of Oxford. He is currently an assistant professor at the Faculty of Law of the Open Universiteit in the Netherlands.