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## **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*;<sup>1</sup>
- (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.<sup>2</sup> 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,<sup>3</sup> while these laws are also found in numerous countries outside Europe.<sup>4</sup> Moreover, a 2020 report by the United States Commission on International Religious Freedom listed 84 countries that maintain some sort of *blasphemy* ban.<sup>5</sup>

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<sup>1</sup> 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.

<sup>2</sup> 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 Some countries mentioned in the report, such as Belgium and the Netherlands, have repealed, or are in the process of repealing their *lèse-majesté* ban.

<sup>3</sup> 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>.

<sup>4</sup> 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).

<sup>5</sup> U.S. Commission on International Religious Freedom, *Violating Rights: Enforcing the World’s Blasphemy Laws*, 2020, p. 7, <https://www.uscifr.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.<sup>6</sup> In 2018, Spanish rapper Valtonyc was sentenced to three and a half years' imprisonment for charges including *lèse-majesté*.<sup>7</sup> 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 decriminalized 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.

<sup>6</sup> 'Germany reviewing Turkey demand for charges over 'bestiality' satire,' *Agence France Presse*, 11 April 2016.

<sup>7</sup> '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.<sup>8</sup> 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, or 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.<sup>9</sup>

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

<sup>9</sup> 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.

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