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The Netherlands

Princes and prophets: democracy and the defamation of power
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Citation

Herrenberg, T. (2022, June 1). *Princes and prophets: democracy and the defamation of power*. Retrieved from <https://hdl.handle.net/1887/3304748>

Version: Publisher's Version

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Downloaded from: <https://hdl.handle.net/1887/3304748>

Note: To cite this publication please use the final published version (if applicable).

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

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,

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 experts³³ 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.

