Princes and prophets: democracy and the defamation of power

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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.