Princes and prophets: democracy and the defamation of power

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Chapter 4 Blasphemy

Introduction

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

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

> 'In 415 B.C., when Athenians were preparing an expeditionary force against Sparta, the city awoke one morning to an appalling discovery: nearly every statue celebrating Hermes, son of Zeus, the king of gods and men, had been desecrated during the night. Impiety on so vast a scale seemed the work of a conspiracy. The event was taken as a bad omen for the expedition and for the survival of Athenian democracy. Informers, responding to offers of rewards, implicated Alcibiades, and further

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

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

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

> investigation uncovered a second crime of impiety. If the first was comparable to smashing statues of the Madonna in all the religious shrines in a Catholic town during the Middle Ages, the second was comparable to a Black Mass. One night when the spirits had been high and the flagons low, according to informers, Alcibiades had led a blasphemous parody of the sacred Eleusinian Mysteries, which honored Demeter, the earth godess. Impersonating the high priest, Alcibiades had revealed and mocked the secret rites.'[472]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. National law

1. The Dutch law against 'scornful blasphemy'

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

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

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

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

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

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

2. The proposal of the Dutch blasphemy law

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

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

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

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

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

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

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

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

Although the minister was willing to 'admit to a certain degree' that abusive remarks about the divine were rare in Dutch society, they were nonetheless intolerable.[494] Donner sought to prevent the 'serious injury to the feelings of the great majority of the population.'[495] The Netherlands was a predominantly Christian nation at the time[496] and in 'a State in which God is acknowledged in multiple ways,' public expressions 'that directly scorn God (…) cannot be tolerated.' The minister felt that somebody who 'scornfully contests another's religion, arrogates that person's religious beliefs' and thus 'utters his hurtful opinion in the other person's sphere'[497] and that 'the public sphere must be kept pure from such forms of expression.'[498] Not criminalising scornful blasphemy would limit freedom in Donner's view:

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would not be banned from the public reading rooms, yet the problem with *De Tribune* was the 'disgusting manner' in which this daily had 'repeatedly scorned and offended the religious feelings of a large number of our people.' See Parliamentary documents, House of Representatives, 12 June 1931, p. 2754-2755.

[492] Parliamentary documents, House of Representatives, 31 May 1932, p. 2634.

[493] Parliamentary documents, House of Representatives, 31 May 1932, p. 2634.

[494] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 3, p. 1.

[495] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 3, p. 2. Although this seems to indicate that the blasphemy ban sought to cover only the insults to the feelings of Christian believers, Donner indicated during the parliamentary debate on the Bill that 'every concept of God present among our people is included in the norm.' See Parliamentary documents, Senate, 3 November 1932, p. 44.

[496] In 1930, roughly 80–90 per cent of the people were affiliated with a branch of Christianity. See R. van der Bie, 'Kerkelijkheid en kerkelijke diversiteit, 1889–2008,' in: *Religie aan het begin van de 21ste eeuw*, Den Haag/Heerlen: Centraal Bureau voor de Statistiek [central bureau of statistics] 2008, p. 14.

[497] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 3, p. 2. See also Parliamentary documents, House of Representatives, 1931-1932, no. 34, 1, p. 4.

[498] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 3, p. 2.

> 'Freedom of religion in the broad sense is a fruit of our historical development that we should be proud of. But in order to protect this freedom of thought as one of our highest national goods, action in this field is required. No good can continue to exist, whose abuse goes unpunished. When freedom of thought leads to debauchery, it will be, in the interest of freedom itself, forcefully opposed.'[499]

Moreover, Donner drew a connection between combatting scornful blasphemy and the protection of the public order.[500]

Expressions like those cartoons in *De Tribune*, in which 'a scorning, abusive, or reviling manner is chosen,'[501] were the target of the projected law. The proposal relied heavily on the distinction between substance and manner: 'Contesting Theism as such, no matter how fiercely, is not at issue; as long as, in terms of manner, a certain line is not crossed, the law remains idle,' Donner argued.[502]

Donner's separation of substance and manner echoes the famous distinction made by Lord Coleridge in *R. v. Ramsay and Foote* mentioned in the introduction. What the exact

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[499] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 3, p. 2. As Vleugel states, these considerations indicate that Donner saw the protection of religious feelings as a positive obligation for the state arising from religious freedom. See A. Vleugel, *Het juridisch begrip van godsdienst*, Deventer: Wolters Kluwer 2018, p. 215.

[500] The blasphemy ban was placed in the section of the Criminal Code that was concerned with crimes against the public order. See also J. Plooy, *Strafbare godslastering*, Amsterdam: Buijten & Schipperheijn 1986, p. 97; L.A. van Noorloos, *Strafbaarstelling van 'belediging van geloof' Een onderzoek naar mogelijke aanpassing van de uitingsdelicten in het Wetboek van Strafrecht, mede in het licht van internationale verdragsverplichtingen*, Den Haag: Boom Lemma uitgevers 2014, p. 108; A. Vleugel, *Het juridisch begrip van godsdienst*, Deventer: Wolters Kluwer 2018, p. 215, 218.

[501] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 3, p. 1.

[502] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 3, p. 1. 'Every form of expression that does not scorn or abuse God' was outside the scope of his legislative proposal. The same was the case for 'thoughtless utterances' and 'cursing.' Obviously, Donner was of the opinion that the boundaries had been crossed in the articles and cartoons that had appeared in *De Tribune*. See Parliamentary documents, House of Representatives, 1930-1931, no. 348, 3, p. 2.

influence of the English blasphemy law was on the drafting of the Dutch blasphemy ban is hard to say, yet it is clear that Donner was aware of the case, as he refers to it in a discussion of comparative law.[503]

3. Parliamentary reception

Despite the brevity of the legislative proposal and its accompanying explanatory note (together they comprised no more than two pages) it provoked a lively parliamentary reaction. A committee composed of members of the House of Representatives issued a preliminary report roughly two and a half months after the law was proposed. This inventory of the parliamentarians' attitudes revealed a number of objections to the criminalisation of scornful blasphemy.

One objection was an empirical one. Not all representatives were convinced, as claimed by Donner, of the systematic nature of the 'anti-religious propaganda,' nor was there consensus about the ability of society to counter the contested utterances without having to resort to the criminal law.[504]

A second type of objection raised the argument of equality. To outlaw 'scornful blasphemy' was problematic because, it was argued, blaspheming the tenets of other religious groups might not be much more than vindicating one's own religious principles.[505] It was suggested that the non-religious were often the target of abusive speech. The issue was raised whether the frequent defamation of socialist principles or saying that 'non-belief is a plague'

[503] Parliamentary documents, Senate, 1931-1932, no. 34; Eindverslag der Commissie van Rapporteurs, 6 October 1932, p. 4.

[504] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 4, p. 3.

[505] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 4, p. 3, 4.

should be punishable.[506] Several members of Parliament adduced that it was a sign of 'unbearable self-conceit' – after all, the proposer of the law was a Christian – to protect by law only the feelings of Christian believers while non-religious people could be freely exposed to grave vilification. These representatives were of the opinion that the blasphemy law contradicted the neutrality of the state and that all varieties of thought should be equally entitled to legal protection. Instead of legal suppression, these members viewed moral education as the appropriate response to the scorning of beliefs.[507]

The legal technicalities of the proposal gave ground for a third objection. 'Because of a wide diversity of opinions' that existed in the Netherlands on what exactly did and did not constitute 'blasphemy,' members of Parliament feared too much judicial subjectivity.[508] The law would either be inapplicable to concrete cases at all, or it would lead to inconvenient trials. The publicity surrounding those trials would only broadcast the blasphemous utterance, which would add insult to injury.[509] Moreover, there was a great consensus between both proponents and opponents about the Bill's ambiguity. The Bill did not clearly identify the subject the blasphemy law sought to protect. Was it *God*? Or was it the religious feelings of *people*? And what about mocking Jesus? The explanatory note mentioned that 'in a State in which God is acknowledged in multiple ways,' public expressions 'that directly scorn God (…) cannot be tolerated,' which seemed to imply the protection of God's image and reputation. Yet the minister also spoke of 'the severe insult to the feelings of the vast majority of our people' that had been done by utterances such as the blasphemous cartoons that had inspired him to draft the Bill. It was this ambiguity that raised much uncertainty about the aim and scope of the

[506] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 4, p. 3.

[507] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 4, p. 3.

[508] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 4, p. 3, 5.

[509] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 4, p. 3.

blasphemy law.[510] Some also argued that it was impossible to blaspheme God, because the notion of 'God,' whether spiritual or personal, was metaphysical and existed outside worldly society. Others argued that it would be impossible to establish an objective standard for 'blasphemy' and feared that scientific opinions could also be affected by the law.[511] The minister's argument that the blasphemer 'utters his hurtful opinion in the believer's sphere' was met with criticism from some members of Parliament; they considered it to be 'highly artificial.'[512]

Notwithstanding these objections, there were also strong voices in favour of the proposal. This appraisal was largely due to the connection between God, state power and morality. For example, it was proclaimed that

> 'In a State in which God is acknowledged, in which God is recognized also as the ultimate foundation of the Power of Government, (…) acts that this law seeks to punish violate public order, which Government has a duty to preserve. Public Blasphemy, insofar as it taunts or scorns God, breaches the moral order that, regarding our attitude towards the Highest Sovereign, ought to be maintained in a Christian nation. Prohibiting scornful blasphemy thus relates to the protection of the State's foundations, but also extends to preserving the moral order in a Christian society, to keeping debauchery within reasonable bounds, to halting the worst degeneration, to countering the deepest decline.'[513]

[510] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 4, p. 4.

[511] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 4, p. 5.

[512] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 4, p. 8.

[513] Parliamentary documents, House of Representatives, 1930-1931, no. 348, 4, p. 6. Other representatives regarded 'the relation between Government and God, who is the source of its Power and the necessary foundation of law and moral order (…) as the legal basis for the proposal. This legal basis anchors in nature and reason, which oblige the State to protect and secure religion with the force of law. (…) This duty could justify in certain instances the State taking action against Blasphemy. In doing so, the State does not offer legal protection to God, but it fulfils a natural duty and enforces the foundation of its moral order.' See Parliamentary documents, House of Representatives, 1930-1931, no. 348, 4, 6.

4. Donner's response and further parliamentary debate

At the end of 1931 Donner replied to Parliament's observations in his 'Answering Note' (*Memorie van Antwoord*). He affirmed that, in his view, blasphemous utterances were indeed so systemically present in Dutch society that a law against them was justified.[514] As for the argument of equality, Donner 'firmly denied' that his law was discriminatory in that it favoured religion over non-belief. He made clear that his legislative proposal sought not to combat statements offensive to religious feelings *in general* but only those that were uttered in a manner that 'scorn the Person of God.'[515] Therefore, questions about the defamation of socialist principles or of non-belief were irrelevant to Donner, since the Bill did not seek to punish those who argued that 'religion is the opium of the people' or statements of a similar nature.[516] The very specific utterances Donner had in mind simply could not be compared with other types of expression: the utterances his law sought to ban were of a 'unique character.'[517] Donner also addressed the perceived 'ambiguity' of his proposal. While 'unable to hide his disappointment about this perception,' he stated that, as a matter of 'factual phenomenon,' the blasphemous utterances were 'scornful of God,' but that the legal basis of the proposal lay in 'the insult to religious feelings.'[518] As for the worries expressed by some parliamentarians that scientific views about God and religion could be affected by the blasphemy law, Donner made clear that not every statement dishonouring God fell within the scope of his law. Only those uttered in a

[514] Parliamentary documents, House of Representatives, 1931-1932, no. 34, 1, p. 1.

[515] Parliamentary documents, House of Representatives, 1931-1932, no. 34, 1, p. 3.

[516] Parliamentary documents, House of Representatives, 1931-1932, no. 34, 1, p. 1.

[517] Parliamentary documents, House of Representatives, 1931-1932, no. 34, p. 1. See also: Parliamentary documents, Senate, 1931-1932, no. 34, Eindverslag der Commissie van Rapporteurs, 6 October 1932, p. 2.

[518] Parliamentary documents, House of Representatives, 1931-1932, no. 34, 1, p. 2, 3.

'scorning manner' would be prohibited, and, as 'scientific opinions and accounts of honest convictions never take such form,' the fear that scientific opinions could be punishable was deemed unrealistic.[519] Moreover, he argued that defamation of 'the Person of Christ' was covered by his blasphemy law, since 'the Person of Christ is one of the Persons of the Holy Trinity.'[520]

The proposal for the blasphemy law was discussed over the next year in multiple sessions in both Houses of Parliament. As could be expected from the earlier responses, the Bill received both praise and criticism. Representative Visscher of the Anti-Revolutionary Party (*Anti-Revolutionaire Partij*) argued in favour: 'When Theism speaks so loud in our social conscience that it resounds in our laws in many ways, when thousands of people, however they may differ in philosophy of life, are moved by His Name, in whom we live and act, (…) then blaspheming that Name must be punishable.'[521] Others disagreed for a variety of reasons. The elusive nature of 'religion' and 'God' were reasons for Eerdmans of the Liberal State Party (*Vrijheidsbond*) to oppose the blasphemy law. 'The conception of God is different for a theist, for a deist, or for a pantheist,' he argued.[522] 'Religion is a personal conviction. One only ever accepts one's own religion as true. After all, if one did not recognise the truth of one's own religion or favoured a different religion, one would either wish to practise no religion at all or adopt that other religion. This means that the religious expression of one person is liable to constitute offence to another's religious feeling.'[523] This view was endorsed by Eerdmans' colleague, Henri Marchant of the Free-thinking Democratic League (*Vrijzinnig-Democratische*

[519] Parliamentary documents, House of Representatives, 1931-1932, no. 34, 1, p. 3.

[520] Parliamentary documents, House of Representatives, 1931-1932, no. 34, 1, p. 4. A scorning image of the Mother of God, 'although it would undoubtedly hurt religious feelings,' was not conceived to be covered by the proposal. See Parliamentary documents, House of Representatives, 1931-1932, no. 34, 1, p. 4.

[521] Parliamentary documents, House of Representatives, 26 May 1932, p. 2592.

[522] Parliamentary documents, House of Representatives, 26 May 1932, p. 2585.

[523] Parliamentary documents, House of Representatives, 26 May 1932, p. 2585.

Bond), who was also against the proposal: 'The orthodox has a different understanding of God from the non-orthodox. The Jew has a different understanding of God from the Christian. The conception of God is different for Catholics and Protestants.'[524] Furthermore, it was claimed that the blasphemy law would turn out to be counterproductive,[525] that it was incomprehensible – 'Is it desirable that our Criminal Code would allow God to be blasphemed, yet prohibit Him from being scornfully blasphemed – that it would create many problems of interpretation – 'What are 'religious feelings'? (…) Don't we already have enough vague concepts like 'compunctions,' 'conscientious objections,' and 'grave conscientious objections'?'[526] – and that it would be difficult to explain why some anti-religious speech would be illegal while other types would not be covered by the blasphemy law – for example, defaming the Mother of God or the mass.[527] It was even argued that the proposal should never have reached Parliament, since it created 'a maze of theological imaginations' that could not be satisfactorily discussed during parliamentary proceedings.[528]

As one might expect, fierce opposition also came from the Dutch Communist Party. Representative Wijnkoop, who frequently cited Lenin in his speeches, saw the blasphemy law primarily as a tool used by capitalists to blur the vision of the masses and to 'knock down the communist movement.'[529] The true reason why this law was proposed, according to Wijnkoop, was 'to combat the communist daily *De Tribune*, the instrument of international communism

[524] Parliamentary documents, House of Representatives, 27 May 1932, p. 2608.

[525] Parliamentary documents, House of Representatives, 26 May 1932, p. 2584, 2585. See also Parliamentary documents, House of Representatives, 27 May 1932, p. 2606. This was also underlined by the communist representative Mr. Wijnkoop, who argued that 'the consequence of this law will be that we will become better known by the working classes.' See Parliamentary documents, House of Representatives, 26 May 1932, p. 2603.

[526] Parliamentary documents, House of Representatives, 26 May 1932, p. 2586.

[527] Parliamentary documents, House of Representatives, 26 May 1932, p. 2589.

[528] Parliamentary documents, House of Representatives, 26 May 1932, p. 2584.

[529] Parliamentary documents, House of Representatives, 26 May 1932, p. 2597.

that represents its ideas.'[530] 'We fight against all those obscurities, against superstition, and against enslavement to the Supreme Being to use the masses and to suppress the workers and peasants; that is what needs to be eliminated. This is the reality. We do it because it is more sacred to us than all the other sanctities discussed by these gentlemen here.'[531] Perhaps somewhat surprising, the orthodox Reformed Protestant Party (*Staatkundig Gereformeerde Partij*) also objected to the blasphemy law. The problem for this party was that the scope of the proposed law was *too narrow*, since it sought to criminalise only *scornful* blasphemy instead of blasphemy as such.[532] 'The Lord must be honoured and idolatry must be fought against,' according to Zandt.[533] The blasphemy law as it was proposed was, in his eyes, 'a toleration of the idolatry of Rome.'[534]

Eventually, the proposed blasphemy law was adopted by both Houses of Parliament. The House of Representatives adopted the Bill by a small majority – 49 votes to 44[535]– while the Senate did so with 28 members voting for and 18 against it.[536] The blasphemy law entered into force on 1 December 1932. Donner described the adoption of his Bill as 'one of the greatest satisfactions' of his time as a minister of justice.[537]

[530] Parliamentary documents, House of Representatives, 26 May 1932, p. 2597.

[531] Parliamentary documents, House of Representatives, 26 May 1932, p. 2600.

[532] Parliamentary documents, House of Representatives, 27 May 1932, 2619. Also in: Parliamentary documents, House of Representatives, 1 June 1932, p. 2653.

[533] Parliamentary documents, House of Representatives, 31 May 1932, p. 2646.

[534] Parliamentary documents, House of Representatives, 31 May 1932, p. 2646.

[535] Parliamentary documents, House of Representatives, 1 June 1932, 2654. The House of Representatives had 100 seats at the time (currently 150 seats).

[536] Parliamentary documents, Senate, 3 November 1932, 49. The Senate had 50 seats at the time (currently 75 seats).

[537] See Parliamentary documents, House of Representatives, 31 May 1932, p. 2634.

5. The first trials based on the blasphemy law: a gap in the law appears

The first trial under the blasphemy law took place on 30 May 1933.[538] On that day, Hillenaar and Van den Heuvel, two members of the *Sociaal–Democratische Arbeiderspartij* political party stood trial before the Almelo District Court. They were accused of being involved in the distribution of about 1,500 copies of a manifesto that, according to the public prosecutor, fell within the scope of Article 147 no. 1 of the Criminal Code.[539] The manifesto called God, among other things, 'an ineffective object of propaganda (*een ondoelmatig propaganda–object*). The prosecutor requested that the court fine the accused the sum of 20 guilders.[540] However, the court's judgement of 13 June 1933 was in favour of the accused. The court acquitted Hillenaar because it could not be proven that he had distributed or had arranged for the distribution of the manifestos. While there was sufficient evidence that the other defendant, Van den Heuvel, had distributed the manifestos, he was 'discharged'[541] and was not sentenced. According to the court, the blasphemy law did not apply to the *mere spreading* of opinions. After all, article 147 no. 1 criminalised him who '*expresses* himself by scornful blasphemy in a manner offensive to religious feelings.' The court reasoned that 'where someone is not the author of a written work, it is necessary for that person to identify himself with the content of the work in some way, for

[538] *Smalende godslastering. Eerste vervolging volgens art. 147 W.v.S*. De Telegraaf 20 May 1933; *Eerste overtreding van het godslasteringswetje*, Algemeen Handelsblad 31 May 1933; *Eerste vervolging op grond van het Godslasteringswetje*, Het Volk, 31 May 1933.

[539] *Eerste vervolging op grond van het Godslasteringswetje*, Het Volk 31 May 1933; *Eerste overtreding van het godslasteringswetje*, Algemeen Handelsblad 31 May 1933.

[540] *Eerste vervolging op grond van het Godslasteringswetje*, Het Volk 31 May 1933.

[541] See for an explanation of this legal term and how it differs from 'acquittal' in Dutch criminal law: P.J.P. Tak, *The Dutch Criminal Justice System*, Nijmegen: Wolf Legal Publishers 2008, p. 102-103 ('The accused is to be acquitted when the essential facts charged are not proven by the evidence presented. A discharge of the accused takes place when the facts charged are proven, but do not constitute a criminal offence, or when the offender is not liable due to a justification or exculpation defence').

example by signature' in order to fall within the scope of Article 147 no. 1.[542] The court did not address whether or not the statements in the manifesto constituted 'scornful blasphemy.'[543]

On 15 June 1933, two days after the Almelo District Court's decision, the Rotterdam District Court decided a case in which the prosecutor had requested the court to sentence the defendant to one month in prison.[544] In this case a 34-year-old sailor had to appear in court for peddling a brochure entitled 'The Netherlands, God, and Orange' (*Nederland, God en Oranje*). The accused was caught on 3 December 1932, only two days after the blasphemy law had become effective.[545] The writer of the brochure, freethinker and public atheist Anton Levien Constandse, could not be held accountable since the brochure had been written before the blasphemy law had entered into force.[546] As Constandse recalled in an article he wrote in 1979, he had written the brochure 'with remarkable anger and vicious aggression.'[547] The passage that was the focus of the trial read:

> 'And how is God doing? At least 20 per cent of the Dutch people are no longer affiliated with a church, and 10 per cent at most attend church regularly. That is why they have decided to support the apparently weakened Old Lord by punishing anybody who speaks 'scornfully' of him! Our Christian ministers are so convinced of God's impotence (despite the millions in subsidies!) that

[542] *Smalende godslastering,* Algemeen Handelsblad 14 June 1933.

[543] *Beschuldigd van smalende godslastering. Vrijspraak en ontslag van rechtsvervolging*, De Telegraaf 14 June 1933.

[544] *Godslastering*, De Telegraaf 16 June 1933; *Een brochure met godslasterlijken inhoud. Tweede geval voor de rechtbank, thans te Rotterdam behandeld*, De Telegraaf 2 June 1933; *Tweede Godslasteringsproces*, Het Volk 1 June 1933.

[545] *Godslastering. Nog geen veroordeling*, Leeuwarder Courant 16 June 1933; *Een brochure met godslasterlijken inhoud. Tweede geval voor de rechtbank, thans te Rotterdam behandeld*, De Telegraaf 2 June 1933.

[546] *Een brochure met godslasterlijken inhoud. Tweede geval voor de rechtbank, thans te Rotterdam behandeld*, De Telegraaf 2 June 1933.

[547] A. Constandse, 'Een geval van godslastering', *De Gids*, 1979, p. 402.

> they rushed to his aid, hoping that the old Dutch God will, both civilly and militarily, be able to exert himself again! His religious enterprise, however, is failing hopelessly.'[548]

The sailor was discharged on the same grounds as in the first trial, namely that he had not expressed any blasphemous opinion; he had only distributed the brochure.[549]

These outcomes led to dissatisfaction in Parliament. In 1934, during the parliamentary process of discussing a Bill on various public order measures, representatives took the opportunity point at what they saw as 'a gap in the Blasphemy law.'[550] It was argued that 'Art. 147 does criminalize anyone who publicly expresses himself through scornful blasphemy in an offensive manner for religious feelings, but not the one who spreads otherwise offensive statements of this nature. Yet it is rational to criminalize this distribution as much as the statement itself.'[551] Secretary of Justice Van Schaik 'did not object'[552] to adding a dissemination offense to the blasphemy ban and proposed an amendment.[553] The new provision, article 147a, entered into force on 16 August 1934.[554]

6. Convictions for blasphemy

[548] A. Constandse, 'Een geval van godslastering', *De Gids*, 1979, p. 402; R. Baelde, *Studiën over Godsdienstdelicten*, The Hague: Martinus Nijhoff 1935, p. 228-229, also partially in *Godslastering. Nog geen veroordeling*, Leeuwarder Courant 16 June 1933.

[549] R. Baelde, *Studiën over Godsdienstdelicten*, The Hague: Martinus Nijhoff 1935, p. 229.

[550] Proceedings of the States General 1933-1934, 237, no. 4, p. 10.

[551] Proceedings of the States General 1933-1934, 237, no. 4, p. 10.

[552] Proceedings of the States General 1933-1934, 237, no. 5, p. 17.

[553] Proceedings of the States General 1933-1934, 237, no. 6, p. 19. The amendment was part of a set of legal measures entitled 'The law of 19 July 1934', see Bulletin of Acts and Decrees 1934, no. 40.

[554] See https://wetten.overheid.nl/BWBR0001854/2020-07-25/0/BoekTweede/TiteldeelV/Artikel147a/informatie#tab-wijzigingenoverzicht.

Notwithstanding the blasphemy ban's rocky start, people were in fact convicted under the ban. For example, a conviction took place on 15 June 1934 when a 'radical socialist' was fined 30 Dutch guilders. The socialist had during a public appearance made statements about religion that were largely 'beyond the reach of' Article 147 no 1. due to his 'tactful choice of words.'[555] Largely, but not completely, since he also stated that 'A God that created the tubercle bacillus is not a God, but a criminal.'[556] On 20 September 1934, a member of the National Socialist Movement was convicted in Rotterdam for displaying one of the cartoons that had inspired the Minister of Justice to draft the blasphemy law – the one about God saying he had discovered a new poison gas.[557] The accused, who was a devout Christian, had put the image, accompanied by a caption that read 'Such a thing is allowed in Holland!' (*Zooiets mag in Holland!*) behind a window because he had wanted to show how 'God and His Son are abused nowadays in politics.'[558] The judge convicted on the basis of Article 429bis of the Criminal Code and, taking the good intentions of the accused into consideration, fined him 5 guilders.[559] On 23 June 1963 a columnist for the magazine *Propria Cures* was convicted and fined for writing, amongst other things, that Jesus was a 'demagogue' and an 'amateur ombudsman.'[560]

However, the trial that turned out to be the major turning point in the history of the Dutch blasphemy law was the case against Dutch novelist Gerard Kornelis van het Reve, who later in his life became known as Gerard Reve.

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[555] R. Baelde, *Studiën over Godsdienstdelicten*, The Hague: Martinus Nijhoff 1935, p. 232.

[556] R. Baelde, *Studiën over Godsdienstdelicten*, The Hague: Martinus Nijhoff 1935, p. 234.

[557] *Godslasterende afbeelding voor het raam*, Het Vaderland 21 September 1934; *Godslastering. N.S.B.-er veroordeeld*, De Tijd 21 September 1934.

[558] *Godslasterende afbeelding voor het raam*, Het Vaderland 21 September 1934; *Godslastering. N.S.B.-er veroordeeld*, De Tijd 21 September 1934.

[559] *Godslasterende afbeelding voor het raam*, Het Vaderland 21 September 1934; *Godslastering. N.S.B.-er veroordeeld*, De Tijd 21 September 1934.

[560] Court of Amsterdam, 23 June 1965, ECLI:NL:RBAMS:1965:AB5727.

7. Sex, God, and a donkey: the trial of Gerard Kornelis van het Reve

In 1966 Van het Reve was brought before the court of Amsterdam for breach of Article 147 no. 1 of the Dutch Criminal Code. Van het Reve, in the Netherlands generally considered to be one of the greatest Dutch novelists of the post-Second World War era, faced charges over two pieces of writing that the public prosecutor considered to be scornful blasphemy.

The first piece was a letter Van het Reve had written to his bank, which was published in the Dutch magazine 'Dialogue'(*Dialoog*) in 1965.[561] This letter, entitled 'Letter to my Bank'(*Brief aan mijn Bank*) was in essence a request to his bank to transfer 400 Dutch guilders to him. In the letter, sent from the Spanish town of Algeciras, Van het Reve gave an account of some of his daily experiences in Spain, accompanied by a mixture of poetry, imagination and references to Jesus. In a part where Van het Reve wrote about his love for animals, the letter contained a passage that read:

> 'If God again surrenders himself in Living Dust, he shall return as a donkey, at most capable of formulating a few syllables, under-appreciated, maligned and beaten, but I shall understand Him and immediately go to bed with Him, but I shall tie bandages around His tiny hooves, so that I won't get too scratched if He flounders when he comes.'[562]

This letter prompted a priest and a reformed minister to write a joint letter to the magazine in which they complained about this passage. Although they praised Van het Reve's work in general, they found it incomprehensible that the editors of *Dialoog* had published the

[561] See J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 16.

[562] The entire passage was longer, yet the public prosecutor considered only this part to fall within the definition of 'scornful blasphemy.'

'blasphemous and repulsive' passage.[563] In response, Van het Reve explained that what he had written was simply *his* imagination of God:

> 'Everyone is entitled to their own conception of God, and, if they are so inclined, to the freedom to share it. I, for example, imagine our Saviour the way *I* see and experience Him (…). Many people wish to imagine Him with his hair way too long, parted in the middle and drenched in brilliantine, garbed in a white dress with an embroidered collar, and preferably without genitals, or, at least, without sexual activity (…). Yet, for me the Son of God had quite well-proportioned genitals, which he decisively refused to let rust away; I imagine Him as being bisexual, although with a predominant homosexual tendency, slightly neurotic, but without hatred towards any creature, because God is the Love that cannot exclude any creature from Himself. This is *my* image of God's Son. I do not want to force it upon anyone, but I am also unwilling to have another, no matter who, take it away from me.'[564]

Van het Reve also disparaged the accusation of 'blasphemy.' Pondering about the Second Coming, Van het Reve admitted that the 'chances of Him appearing as a Donkey, not to mention also wanting to have sex with me, are, of course, very small, but anything is possible with God. It seems blasphemous to me to exclude a priori any way in which God may incarnate and how he would behave.'[565] He subsequently wrote that

> 'The word "blasphemy", as used by many Christians in this country, has about the same meaning as, for example, the word 'provocation' has to communists. Just as communists employ the word 'provocation' for every political action or expression that goes against their system of terror, so do

[563] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 24-25.

[564] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 27.

[565] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 26.

> self-described Christians utilise the word 'blasphemy' for every conception of God that does not suit their system of terror or the one-way street of their so-called Christian tolerance.'[566]

Van het Reve's initial article in *Dialoog* (the letter to his bank) together with his subsequent response to the priest and the reformed minister inspired representative Van Dis, of the Reformed Political Party, to ask the government whether it intended to instigate criminal proceedings against Van het Reve. Van Dis considered Van het Reve's remarks to be 'of a blasphemous, immoral, and even Satanic nature, and thus extremely offensive to the religious feelings of many of our people.'[567]

The second piece of writing that got Van het Reve in trouble was a letter entitled 'Letter from The House named The Grass'(*Brief uit Het Huis, genaamd Het Gras*) that appeared in his novel 'Nearer to You' (*Nader tot U*) in 1966. In this particular passage, Van het Reve fantasised about kissing and having sex with God, who would appear to him as a 'one-year-old mouse grey donkey.'[568]

Van het Reve was prosecuted, and he stood trial before the district court of Amsterdam on 20 October 1966.[569] It was a highly anticipated, lengthy court day: theologians, writers and journalists watched Van het Reve explain his work,[570] and four expert witnesses were heard

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[566] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 26-27.

[567] Parliamentary documents, House of Representatives, Question of 22 February 1966.

[568] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve* Amsterdam: De Arbeiderspers 1968, p. 33.

[569] Van het Reve wanted the trial as well, since he wanted to clear himself of the accusations of blasphemy. See: J.J. Abspoel, *Studenten, moordenaars en ander volk. Kritische kanttekeningen van een officier van justitie,* Ede: L.J. Veen, 1979, p. 83; J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve,* Amsterdam: De Arbeiderspers 1968, p. 16, 34; *Merkwaardige rechtszitting over „godslastering.' f. 100,- boete geëist tegen Van het Reve*, De Waarheid 21 October 1966.

[570] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 31.

during the day: a reformed professor specialising in Christian ethics, a professor of the exegesis of the New Testament, a professor of literary studies, and a psychiatrist. During the trial Van het Reve defended his work largely along the lines of his response in the magazine *Dialoog*. When the judge asked him about his ideas, Van het Reve said that when he imagined God's incarnation, he did so 'in the shape of the most loveable creature that I know. That creature doesn't need to be a human being. It could be a lamb, but donkeys are even more endearing to me.' Every human being desires an intimate relationship with the deity, Reve claimed. And he added that for him this relationship had a sexual component to it.[571] Asked if he found the described acts perverse, Van het Reve said that there are 'many opinions about what is perverse and what is not; suppose the animal appreciated the act, would it be immoral in that case?'[572] Van het Reve also explained that for him sexuality is as holy as religion. The two are 'indissolubly linked to each other. A sexless God is unthinkable for me. That would be blasphemy to me.'[573]

The public prosecutor, Jan Jacobus Abspoel, did not hide his lack of enthusiasm for the blasphemy law under which he prosecuted Van het Reve. During the trial he revealed that as a secondary school student he had protested against the blasphemy law, and he called the law 'hideous.' But he also said that as a public prosecutor he had to enforce the law as it was-and that, in his opinion, it had been broken by Van het Reve.[574] This being the case, he requested the court to fine Van het Reve 100 Dutch guilders.

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[571] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 34.

[572] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 35.

[573] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 36.

[574] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 85. In his memoires Mr. Abspoel wrote that he had had always regarded the blasphemy

The Amsterdam District Court delivered its verdict on 3 November 1966. It turned out to be a decision that satisfied neither the prosecutor nor Van het Reve. The court discharged Van het Reve because, although it considered the passages to be blasphemous as they 'conflicted with the conception of God that is widely supported in Dutch society', they were not 'scornful.'[575] The court was not convinced that the passages were of a purely jeering nature, which the court considered necessary to convict Van het Reve of breach of Article 147 no. 1 of the Criminal Code.[576]

Both Van het Reve and the public prosecutor appealed the decision, the first because he wanted an acquittal, the second because he was after a conviction. Van het Reve had ditched his trial lawyer and defended himself during his appeal.[577] The appeal was not about new facts, but only about the existing facts' legal qualification.[578] In a brief decision, the Court of Appeal proclaimed that it could not be proven that Van het Reve's passages were scornfully blasphemous and acquitted him.[579] Whereas the court in first instance found the passages blasphemous yet not scornfully blasphemous, the appellate court was of the opinion that 'it has

law as a political instrument stemming from the 1930s. See Jan Jacobus Abspoel, *Studenten, moordenaars en ander volk. Kritische kanttekeningen van een officier van justitie*, Ede: L.J. Veen 1979, p. 81.

[575] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 93.

[576] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 93.

[577] On 29 September 1967 Van het Reve wrote in a personal letter to his publisher that he was terribly upset with his lawyer, calling him 'incompetent.' He was also angry at Van Oorschot for not (at least in part) paying his legal fees, which amounted to the rather large sum of 4.685 Dutch guilders. See G. Reve & G. Van Oorschot, *Briefwisseling 1951-1987*, Amsterdam: G.A. van Oorschot 2005, letter no. 388.

[578] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 114.

[579] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 153-154.

not been shown at all that the accused intended to insult or taunt God, or to express contempt for God in any way.'[580]

Finally, the Dutch Supreme Court, in its only decision on the blasphemy law,[581] declared the complaint against the appellate court's judgment inadmissible, thereby making Van het Reve's acquittal final. In its judgment the Supreme Court referred to a notable feature of the parliamentary debate of 31 May 1932. During this debate, Minister of Justice Donner had said that 'the term "scornful" clearly entails a subjective element, namely the intention of the scorner to bring down the, posited as existent, highest Supreme Being.'[582] The Supreme Court concluded from this that 'the term 'scornful' does not solely describe a certain manner of expression that is hurtful to religious feelings.' When applied to Van het Reve's case, the court was of the opinion that to violate the blasphemy law it was insufficient for an author to express himself in such a manner that others were bound to be hurt in their religious feelings.[583] After Van het Reve's trial the blasphemy law became basically obsolete or a 'dead letter,'[584] due to the high degree of intent that was required for a conviction.[585]

8. The end of the Dutch blasphemy law

[580] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 154.

[581] B.A.M. van Stokkom, H.J.B. Sackers and J.-P. Wils, *Godslastering, discriminerende uitingen wegens godsdienst en haatuitingen*, Den Haag: Boom Juridische uitgevers 2007, p. 103.

[582] Parliamentary documents, House of Representatives, 31 May 1932, p. 2632.

[583] J. Fekkes, *De God van je tante. Ofwel het Ezel-proces van Gerard Kornelis van het Reve*, Amsterdam: De Arbeiderspers 1968, p. 173.

[584] See B.A.M. van Stokkom, H.J.B. Sackers and J.-P. Wils, *Godslastering, discriminerende uitingen wegens godsdienst en haatuitingen*, Den Haag: Boom Juridische uitgevers 2007, p. 106, 246.

[585] B.A.M. van Stokkom, H.J.B. Sackers and J.-P. Wils, *Godslastering, discriminerende uitingen wegens godsdienst en haatuitingen*, Den Haag: Boom Juridische uitgevers 2007, p. 106.

In the decades that followed, blasphemy vanished to the background,[586] only to be catapulted to the forefront after the murder of the 'blasphemer' Theo van Gogh. Van Gogh, a polemic writer, was murdered on 2 November 2004 by an extremist. The particular incident that inspired the killer a short movie entitled *Submission*, released in August 2004 and directed by Van Gogh, that showed naked bodies with verses from the Qur'an painted on them.

The murder of Van Gogh confused and shocked Dutch society. 'The attack on Theo van Gogh strikes at the heart of our national identity (…) [freedom of expression] was more or less our national pride, our World Trade Center, taken down by a terrorist,' representative Jozias van Aartsen observed during a parliamentary debate shortly after the attack.[587] A broad political and social discussion ensued after Van Gogh's death.[588]

Within this broader context the inert state of the Dutch blasphemy law regained attention. Secretary of Justice Piet Hein Donner, the grandson of the Secretary of Justice who had proposed the blasphemy law in the 1930s, expressed the intention to apply the blasphemy law more strictly.[589] Moreover, the Dutch Prime Minister, Jan Peter Balkenende, advocated moderation in the public debate. 'Everyone may choose his own words, but it is a good thing if we also take into account the 'recipient' of these words (…) Let us realise that our words can wound,' Balkenende said.[590]

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[586] No prosecutions for blasphemy took place after the Van het Reve's trial. See Parliamentary documents, House of Representatives, 2009-2010, no. 32203, 3, p. 4.

[587] Parliamentary documents, House of Representatives, 11 November 2004, no. 29854, p. 1282 (*Debat over de moord op de heer Th. van Gogh*).

[588] See on this debate P. Cliteur, 'Godslastering en zelfcensuur na de moord op Theo van Gogh,' in *Nederlands Juristenblad*, 2004, no. 45, p. 2328–2335.

[589] *Kabinet verdeeld over godslastering; Verdonk en Donner botsen over aanpak*, NRC Handelsblad 15 November 2004; *Ministers oneens over vervolgen godslastering*, de Volkskrant 15 November 2004. Donner later retracted his statements. See *Godslastering niet harder aangepakt; Donner neemt aankondiging terug*, NRC Handelsblad 16 November 2004.

[590] *Kabinet verdeeld over godslastering*, Trouw 15 November 2004.

However, in the following years blasphemy would be decriminalized. While a parliamentary motion that pressed the cabinet to 'reconsider' the blasphemy provisions was rejected a few weeks after Van Gogh's murder, a Bill that proposed the repeal of the blasphemy provisions was introduced in 2009[591] and eventually entered into force in 2014.[592] The representatives who drafted the proposal underlined the importance of diversity of opinion. The proposal relied heavily on the 'marketplace of ideas' argument: 'The collision of arguments and opinions deepens debate on important topics, such as philosophical issues and the formation of society.'[593] Second, the argument of equality was raised: 'Provisions that grant special protection to (specific) believers do not fit with the idea of equal treatment.'[594] Third, the representatives adduced that public and political debate provided enough opportunity to rebut abusive and insulting utterances.[595] Apart from the Christian parties, all parties in the House of Representatives favoured the Bill.[596] For example, Van der Staaij of the orthodox Reformed Protestant Party saw the repeal of the blasphemy law as a 'great loss' and 'the conscious release of a moral anchor point.'[597] Although he agreed that the provisions were 'dead' in strictly legal terms, Van der Staaij argued that they still had their contemporary value: 'Freedom is a great good, but don't use it to unnecessarily and intentionally hurt people in their deepest and dearest convictions.'[598] Following its adoption by the House of Representatives in

[591] Parliamentary documents, House of Representatives, 2009-2010, no. 32203, 2.

[592] See also J. Doomen & M. van Schaik, 'Blasfemie in de huidige context,' *Netherlands Journal of Legal Philosophy* 2015, p. 47-61.

[593] Parliamentary documents, House of Representatives, 2009-2010, no. 32203, 3, p. 1.

[594] Parliamentary documents, House of Representatives., 2009-2010, no. 32203, 3, p. 1.

[595] Parliamentary documents, House of Representatives, 2009-2010, no. 32203, 3, p. 2.

[596] See Parliamentary documents, House of Representatives, 16 April 2013 (*Stemmingen initiatiefvoorstel verbod op godslastering*).

[597] Parliamentary documents, House of Representatives, 20 March 2013, p. 37.

[598] Parliamentary documents, House of Representatives, 20 March 2013, p. 37.

April 2013, the Senate accepted the proposal by 49 votes to 21 in December 2013.[599] Ultimately, the Dutch blasphemy law (articles 147, 147a, and 429bis of the Criminal Code) was effectively repealed on 1 March 2014.[600]

9. The 'Schrijver motion' (2013)

On 3 December 2013, amidst the parliamentary debate on the Bill to repeal the blasphemy ban, the Dutch Senate adopted a motion in which the government was asked to examine 'whether a possible amendment of article 137 (c to h) of the Criminal Code could be useful to ensure that this article also provides sufficient protection for citizens against seriously felt insults of their religion and religious experience, without unnecessarily restricting the effect of freedom of expression.'[601] 'Article 137 c to h' is a series of articles in the Criminal Code that ban various types of derogatory or provocative expression, most notably group defamation (article 137c) and incitement to hatred (article 137d).

A study on this motion was conducted by the constitutional scholar Van Noorloos for the Ministry of Security and Justice's Research and Documentation Centre (*Wetenschappelijk Onderzoek- en Documentatiecentrum*).[602] The study examined the motion in the context of legislative history, case law, and international human rights law. First, it concluded that if the legislature deemed it opportune to protect citizens against seriously felt insults of their religion

[599] Parliamentary documents, Senate, 3 December 2013 (*Stemmingen in verband met het Voorstel van wet van de leden Schouw en De Wit tot wijziging van het Wetboek van Strafrecht in verband met het laten vervallen van het verbod op godslastering*).

[600] Bulletin of Acts and Decrees 2014, no. 39 (*Wet van 23 januari 2014 tot wijziging van het Wetboek van Strafrecht in verband met het laten vervallen van het verbod op godslastering*).

[601] Parliamentary documents, Senate, 2013-2014, no. 32203, E.

[602] L.A. van Noorloos, *Strafbaarstelling van 'belediging van geloof' Een onderzoek naar mogelijke aanpassing van de uitingsdelicten in het Wetboek van Strafrecht, mede in het licht van internationale verdragsverplichtingen*, Den Haag: Boom Lemma uitgevers 2014.

and religious experience, a change in the law would be necessary as such insults were not covered by the law.[603] The legal framework of Dutch defamation and incitement law would not allow for a subjective perception of insults as envisioned by the motion: the protection against *seriously felt insults* of religion and religious experience. Second, the study concluded that there are no positive obligations in international human rights law that *require* states to criminalize insults against religion or religious experience. Hence, by not adopting a provision against seriously felt insults of religion or religious experience, the Netherlands would not violate international (anti-discrimination) human rights law.[604] Third, the study examined whether criminalizing insults against religion or religious experience aligned with the right to free expression. While article 10 of the European Convention on Human Rights leaves some room for (but again, does not require) criminalizing such insults, the International Covenant on Civil and Political Rights does generally[605] not allow for anti-blasphemy laws. Hence, adopting a provision as mentioned in the motion would violate article 19 of the ICCPR.[606] Fourth, adopting a criminal provision that focuses on how people subjectively perceive a certain

[603] L.A. van Noorloos, *Strafbaarstelling van 'belediging van geloof' Een onderzoek naar mogelijke aanpassing van de uitingsdelicten in het Wetboek van Strafrecht, mede in het licht van internationale verdragsverplichtingen*, Den Haag: Boom Lemma uitgevers 2014, p. 117-119.

[604] L.A. van Noorloos, *Strafbaarstelling van 'belediging van geloof' Een onderzoek naar mogelijke aanpassing van de uitingsdelicten in het Wetboek van Strafrecht, mede in het licht van internationale verdragsverplichtingen*, Den Haag: Boom Lemma uitgevers 2014, p. 120.

[605] The exception is extreme statements about religion that to amount to propagating religious hatred that incites discrimination, hostility or violence against people. See L.A. van Noorloos, *Strafbaarstelling van 'belediging van geloof' Een onderzoek naar mogelijke aanpassing van de uitingsdelicten in het Wetboek van Strafrecht, mede in het licht van internationale verdragsverplichtingen*, Den Haag: Boom Lemma uitgevers 2014, p. 123-124. See also Human Rights Committee, General comment No. 34, UN Doc. CCPR/C/GC/34, 2011, par. 48 ('Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant').

[606] L.A. van Noorloos, *Strafbaarstelling van 'belediging van geloof' Een onderzoek naar mogelijke aanpassing van de uitingsdelicten in het Wetboek van Strafrecht, mede in het licht van internationale verdragsverplichtingen*, Den Haag: Boom Lemma uitgevers 2014, p. 125.

statement would likely violate the principle of legal certainty, it would be difficult to enforce, and is ill-suited to the *ultimum remedium* character of criminal law.[607]

The government responded to the study by way of a letter from the Secretary of Security and Justice. The letter stated that:

> 'The cabinet is committed to a society in which citizens are free to experience and propagate their faith. In this context it is important that they also feel protected against incitement to hatred or discrimination on the basis of their religion or beliefs. The research that has been carried out shows that on the one hand the criminal law offers sufficient protection against discriminatory statements about people because of their religion, while on the other hand, by extending that protection, the freedom of expression could possibly be jeopardized. In that light, the government does not consider it necessary to amend the criminal law.'[608]

Ultimately, the Dutch blasphemy ban was repealed in 2014 and there were no new restrictions on free expression adopted to replace the ban.

B. European and international human rights law

Notwithstanding that in many parts of the world (including a number of Western countries) blasphemy laws are still very much part of the legal system,[609] international law is critical of

[607] L.A. van Noorloos, *Strafbaarstelling van 'belediging van geloof' Een onderzoek naar mogelijke aanpassing van de uitingsdelicten in het Wetboek van Strafrecht, mede in het licht van internationale verdragsverplichtingen*, Den Haag: Boom Lemma uitgevers 2014, p. 126.

[608] Parliamentary documents, Senate, 2013-2014, 32203, F, p. 2 (*Brief inzake uitvoering van motie van lid Schrijver c.s. over de bescherming van godsdienstige gevoelens (32 203, E) - Voorstel van Wet van de leden Schouw en De Wit tot wijziging van het Wetboek van Strafrecht in verband met het laten vervallen van het verbod op godslastering*).

[609] See for example, United States Commission on International Religious Freedom, *Respecting Rights? Measuring the World's Blasphemy Laws*, p. 1, 3. See

such laws that focus on the protection of religion instead of people who hold religious beliefs. Diverging from the international consensus, the European Court of Human Rights is more lenient towards anti-blasphemy laws, and has upheld convictions based on those laws. This Part discusses blasphemy from the perspective of the United Nations and the European Convention on Human Rights.

1. The European Convention on Human Rights

The European Court of Human Rights has over the years addressed a number of cases in which people were convicted by national courts for blasphemous expression. The cases presented here all concern cases of the defamation of religious symbols; they are *Otto Preminger* (1994), *Wingrove v. the United Kingdom* (1996), *İ.A. v. Turkey* (2005) *Tatlav v. Turkey* (2006) and, most recently, *E.S. v. Austria* (2018).

The case of *Otto-Preminger-Institut v. Austria* revolved around a showing of a blasphemous film. The *Otto-Preminger-Institut*, an association that aims to 'promote creativity, communication and entertainment through the audiovisual media',[610] had announced a number of public showings of the film *Das Liebeskonzil* ('Council in Heaven').[611] This film contained scenes deemed derogatory of religious symbols, including scenes depicting God as 'an apparently senile old man prostrating himself before the Devil with whom he

https://www.uscirf.gov/sites/default/files/Blasphemy%20Laws%20Report.pdf; and, generally, J. Temperman & A. Koltay (eds.), *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre*, Cambridge: Cambridge University Press 2017; P. Marshall & N. Shea, *Silenced: How Apostasy and Blasphemy Codes are Choking Freedom Worldwide*, Oxford: Oxford University Press 2011.

[610] European Court of Human Rights, 20 September 1994, 13470/87, par. 9 (*Otto-Preminger-Institut v. Austria*).

[611] European Court of Human Rights, 20 September 1994, 13470/87, par. 10 (*Otto-Preminger-Institut v. Austria*).

exchanges a deep kiss and calling the Devil his friend' and Jesus Christ 'as a low grade mental defective.' God, the Virgin Mary and Christ are also 'shown in the film applauding the Devil.'[612]

The public prosecutor instituted criminal proceedings against the association on the basis of section 188 of the Penal Code, which prohibits 'disparaging religious doctrines.'[613] This provisions reads:

> 'Whoever, in circumstances where his behaviour is likely to arouse justified indignation, disparages or insults a person who, or an object which, is an object of veneration of a church or religious community established within the country, or a dogma, a lawful custom or a lawful institution of such a church or religious community, shall be liable to a prison sentence of up to six months or a fine of up to 360 daily rates.'[614]

After the film had been shown at a private gathering, the public prosecutor made an application for its seizure.[615] This application was granted by the Innsbruck Regional Court the same day. Furthermore, a regional court had ordered the forfeiture of the film.[616]

[612] European Court of Human Rights, 20 September 1994, 13470/87, par. 22 (*Otto-Preminger-Institut v. Austria*).

[613] European Court of Human Rights, 20 September 1994, 13470/87, par. 11 (*Otto-Preminger-Institut v. Austria*).

[614] Cited in: European Court of Human Rights, 20 September 1994, 13470/87, par. 25 (*Otto-Preminger-Institut v. Austria*).

[615] European Court of Human Rights, 20 September 1994, 13470/87, par. 12 (*Otto-Preminger-Institut v. Austria*).

[616] European Court of Human Rights, 20 September 1994, 13470/87, par. 16 (*Otto-Preminger-Institut v. Austria*).

Before the European Commission on Human Rights, the *Otto-Preminger Institut* claimed that the seizure and forfeiture of the film violated it's free expression rights under article 10 of the European Convention.[617]

According to the Court, the interference was prescribed by law,[618] and the legitimate aim protected by the interference was the 'protection of the rights of others.'[619] The Court observed that

> 'Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them (…) The respect for the religious feelings of believers as guaranteed in Article 9 (art. 9) can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society.'[620]

Moreover, the Court argued that

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[617] European Court of Human Rights, 20 September 1994, 13470/87, par. 31, 32, 42, 51 (*Otto-Preminger-Institut v. Austria*).

[618] European Court of Human Rights, 20 September 1994, 13470/87, par. 44-45 (*Otto-Preminger-Institut v. Austria*).

[619] European Court of Human Rights, 20 September 1994, 13470/87, par. 48 (*Otto-Preminger-Institut v. Austria*).

[620] European Court of Human Rights, 20 September 1994, 13470/87, par. 47 (*Otto-Preminger-Institut v. Austria*).

> ‘as is borne out by the wording itself of Article 10 (2) whoever exercises the rights and freedoms enshrined in the first paragraph of that Article (…) undertakes “duties and responsibilities”. Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs. This being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration, provided always that any “formality”, “condition”, “restriction” or “penalty” imposed be proportionate to the legitimate aim pursued.’[621]

The Court observed that in cases of anti-religious it is impossible to ‘arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression’ expression as there is no ‘uniform conception of the significance of religion in society.’[622] Hence, the Court leaves a ‘certain margin of appreciation’ for national authorities to determine the need and scope for an interference. That margin of appreciation however is not unlimited but goes ‘hand in hand with Convention supervision, the scope of which will vary according to the circumstances. In cases such as the present one, where there has been an interference with the exercise of the freedoms guaranteed in paragraph 1 of Article 10 (…), the supervision must be strict because of the importance of the freedoms in question.’[623]

[621] European Court of Human Rights, 20 September 1994, 13470/87, par. 49 (*Otto-Preminger-Institut v. Austria*).

[622] European Court of Human Rights, 20 September 1994, 13470/87, par. 50 (*Otto-Preminger-Institut v. Austria*).

[623] European Court of Human Rights, 20 September 1994, 13470/87, par. 50 (*Otto-Preminger-Institut v. Austria*).

The Court proceeded to a balancing of, on the one hand the right 'to impart to the public controversial views and, by implication, the right of interested persons to take cognisance of such views' and on the other hand the right to proper respect for people's freedom of thought, conscience and religion.[624]

In balancing these two, the Court came to the conclusion that 'the content of the film cannot be said to be incapable of grounding the conclusions arrived at by the Austrian courts', who saw the film as an 'abusive attack on the Roman Catholic religion according to the conception of the Tyrolean public.'[625] The Court found that the Austrian authorities 'acted to ensure religious peace (…) and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner.'[626] And, given that, the national authorities are better placed to assess the need for an intervention, the Court found no error in seizing and forfeiting the film. [627] Hence, the Court found no violation of article 10 of the Convention.

Two years after *Otto-Preminger-Institut v. Austria*, another blasphemy case was decided by the Court, namely that of *Wingrove v. the United Kingdom*. In short, this case concerned a blasphemous video depicting a nun, intending to represent St Teresa, acting erotically towards Jesus Christ.[628] The video was submitted by Wingrove to the British Board

[624] European Court of Human Rights, 20 September 1994, 13470/87, par. 55 (*Otto-Preminger-Institut v. Austria*).

[625] European Court of Human Rights, 20 September 1994, 13470/87, par. 56 (*Otto-Preminger-Institut v. Austria*).

[626] European Court of Human Rights, 20 September 1994, 13470/87, par. 56 (*Otto-Preminger-Institut v. Austria*).

[627] European Court of Human Rights, 20 September 1994, 13470/87, par. 56 (*Otto-Preminger-Institut v. Austria*).

[628] European Court of Human Rights, 25 November 1996, 17419/90, par. 9 (*Wingrove v. the United Kingdom*).

of Film Classification to be supplied to the general public.[629] This submission was required as under the Video Recordings Act 1984 it was an offence 'for a person to supply or offer to supply a video work in respect of which no classification certificate has been issued.'[630]

However, the British Board of Film Classification rejected the application. At the time, the United Kingdom had an blasphemy law, that read:

> 'Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible, or the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which the doctrines are advocated and not to the substance of the doctrines themselves.'[631]

Given the 'mingling of religious ecstasy and sexual passion' and the fact that, in the words of the Board, 'the wounded body of the crucified Christ is presented solely as the focus of, and at certain moments a participant in, the erotic desire of St Teresa' the Board held that 'a reasonable jury properly directed would find that the work infringes the criminal law of blasphemy.'[632]

Wingrove appealed this decision to the Video Appeals Committee,[633] which rejected the appeal. The (majority of the) appeals committee 'considered the over-all tone and spirit of

[629] European Court of Human Rights, 25 November 1996, 17419/90, par. 11-12 (*Wingrove v. the United Kingdom*).

[630] European Court of Human Rights, 25 November 1996, 17419/90, par. 23 (*Wingrove v. the United Kingdom*).

[631] Cited in European Court of Human Rights, 25 November 1996, 17419/90, par. 27 (*Wingrove v. the United Kingdom*). The European Court adopted this from *Whitehouse v. Gay News Ltd and Lemon* [1979] Appeal Cases 617 at 665.

[632] European Court of Human Rights, 25 November 1996, 17419/90, par. 13 (*Wingrove v. the United Kingdom*).

[633] European Court of Human Rights, 25 November 1996, 17419/90, par. 17 (*Wingrove v. the United Kingdom*).

the video to be indecent' and had little doubt that the depictions of the nun and Jesus Christ 'would outrage the feelings of Christians, who would reasonably look upon it as being contemptuous of the divinity of Christ.'[634]

Wingrove took the matter up to the European Court on Human Rights[635] complaining that the refusal of a classification certificate for his video was in breach of his freedom of expression.[636]

The British government and Wingrove agreed that refusal to license the video amounted to an interference of Wingrove's freedom of expression.[637]

To determine the compatibility of this interference with article 10, the Court scrutinized the decision to not grant a certification for the video under its three part test. First, the Court examined whether the interference was prescribed by law. To meet this criterion, laws must be accessible and foreseeable. On this point, Wingrove complained about the blasphemy law's vagueness. He argued that 'the law of blasphemy was so uncertain that it was inordinately difficult to establish in advance whether in the eyes of a jury a particular publication would constitute an offence,'[638] and that 'it was practically impossible to know what predictions an administrative body – the British Board of Film Classification – would make as to the outcome of a hypothetical prosecution.'[639] The British government disagreed. It reasoned that it '[is] a feature common to most laws and legal systems that tribunals may reach different conclusions even when applying the same law to the same facts.'[640] The European Court sided with the

[634] European Court of Human Rights, 25 November 1996, 17419/90, par. 19 (*Wingrove v. the United Kingdom*).

[635] Via the European Commission of Human Rights, see European Court of Human Rights, 25 November 1996, 17419/90, par. 32-33 (*Wingrove v. the United Kingdom*).

[636] European Court of Human Rights, 25 November 1996, 17419/90, par. 32 (*Wingrove v. the United Kingdom*).

[637] European Court of Human Rights, 25 November 1996, 17419/90, par. 36 (*Wingrove v. the United Kingdom*).

[638] European Court of Human Rights, 25 November 1996, 17419/90, par. 37 (*Wingrove v. the United Kingdom*).

[639] European Court of Human Rights, 25 November 1996, 17419/90, par. 37 (*Wingrove v. the United Kingdom*).

[640] European Court of Human Rights, 25 November 1996, 17419/90, par. 38 (*Wingrove v. the United Kingdom*).

government. In determining that the interference was in fact prescribed by law,[641] the Court '[recognized] that the offence of blasphemy cannot by its very nature lend itself to precise legal definition. National authorities must therefore be afforded a degree of flexibility in assessing whether the facts of a particular case fall within the accepted definition of the offence.'[642] Moreover, the Court found that 'the applicant could reasonably have foreseen with appropriate legal advice that the film, particularly those scenes involving the crucified figure of Christ, could fall within the scope of the offence of blasphemy.'[643]

The next step under the three part test was to examine whether the interference pursued one of the legitimate aim's mentioned in article 10 paragraph 2 .[644] The Court noted

> 'that, as stated by the Board, the aim of the interference was to protect against the treatment of a religious subject in such a manner "as to be calculated (that is, bound, not intended) to outrage those who have an understanding of, sympathy towards and support for the Christian story and ethic, because of the contemptuous, reviling, insulting, scurrilous or ludicrous tone, style and spirit in which the subject is presented (…)".'[645]

According to the Court, 'this is an aim which undoubtedly corresponds to that of the protection of "the rights of others" within the meaning of paragraph 2 of Article 10. It is also fully consonant with the aim of the protections afforded by Article 9 to religious freedom.'[646]

Third, the Court examined whether the inference was 'necessary in a democratic society.' The Court observed that 'the refusal to grant Visions of Ecstasy a distribution

[641] European Court of Human Rights, 25 November 1996, 17419/90, par. 44 (*Wingrove v. the United Kingdom*).
[642] European Court of Human Rights, 25 November 1996, 17419/90, par. 42 (*Wingrove v. the United Kingdom*).
[643] European Court of Human Rights, 25 November 1996, 17419/90, par. 43 (*Wingrove v. the United Kingdom*).
[644] European Court of Human Rights, 25 November 1996, 17419/90, par. 48, 51 (*Wingrove v. the United Kingdom*).
[645] European Court of Human Rights, 25 November 1996, 17419/90, par. 48 (*Wingrove v. the United Kingdom*).
[646] European Court of Human Rights, 25 November 1996, 17419/90, par. 48 (*Wingrove v. the United Kingdom*).

certificate was intended to protect "the rights of others", and more specifically to provide protection against seriously offensive attacks on matters regarded as sacred by Christians.[647] Commenting on the English law of blasphemy, the Court found that it

> 'does not prohibit the expression, in any form, of views hostile to the Christian religion. Nor can it be said that opinions which are offensive to Christians necessarily fall within its ambit. As the English courts have indicated, it is the manner in which views are advocated rather than the views themselves which the law seeks to control. The extent of insult to religious feelings must be significant, as is clear from the use by the courts of the adjectives "contemptuous", "reviling", "scurrilous", "ludicrous" to depict material of a sufficient degree of offensiveness. The high degree of profanation that must be attained constitutes, in itself, a safeguard against arbitrariness. It is against this background that the asserted justification under Article 10 paragraph 2 in the decisions of the national authorities must be considered.'[648]

The Court continued by stating that

> 'Bearing in mind the safeguard of the high threshold of profanation embodied in the definition of the offence of blasphemy under English law as well as the State's margin of appreciation in this area (…), the reasons given to justify the measures taken can be considered as both relevant and sufficient for the purposes of Article 10 paragraph 2. Furthermore, having viewed the film for itself, the Court is satisfied that the decisions by the national authorities cannot be said to be arbitrary or excessive.'[649]

[647] European Court of Human Rights, 25 November 1996, 17419/90, par. 57 (*Wingrove v. the United Kingdom*).
[648] European Court of Human Rights, 25 November 1996, 17419/90, par. 60 (*Wingrove v. the United Kingdom*).
[649] European Court of Human Rights, 25 November 1996, 17419/90, par. 61 (*Wingrove v. the United Kingdom*).

All things considered, the Court found that article 10 of the Convention was not violated by the national authorities.[650]

The case of *İ.A. v. Turkey* concerned the proprietor and managing director of a publishing house which published a novel entitled *Yasak Tümceler* (The forbidden phrases),[651] a book that 'conveyed the author's views on philosophical and theological issues in a novelistic style' of which two thousand copies were printed in a single run.[652] For the publication of this book, the Istanbul public prosecutor charged the managing director under a statute that bans blasphemy against God, the Religion, the Prophet and the Holy Book.[653] The statute in question determines that 'it shall be an offence punishable by six months to one year's imprisonment and a fine of 5,000 to 25,000 Turkish liras to blaspheme against God, one of the religions, one of the prophets, one of the sects or one of the holy books (…) or to vilify or insult another on account of his religious beliefs or fulfilment of religious duties.'[654]

The applicant was convicted by the Court of First Instance and sentenced to two years' imprisonment and a fine. The court commuted the prison sentence to a fine, so that the applicant was ultimately only ordered to pay a small fine.[655] The court cited one particular passage from the book that violated the law:

> 'Look at the triangle of fear, inequality and inconsistency in the Koran; it reminds me of an earthworm. God says that all the words are those of his messenger. Some of these words, moreover, were inspired in a surge of exultation, in Aisha's arms. (…) God's messenger broke his fast through

[650] European Court of Human Rights, 25 November 1996, 17419/90, par. 65 (*Wingrove v. the United Kingdom*).
[651] European Court of Human Rights, 13 September 2005, 42571/98, par. 5 (*İ.A. v. Turkey*).
[652] European Court of Human Rights, 13 September 2005, 42571/98, par. 5 (*İ.A. v. Turkey*).
[653] European Court of Human Rights, 13 September 2005, 42571/98, par. 6 (*İ.A. v. Turkey*).
[654] European Court of Human Rights, 13 September 2005, 42571/98, par. 17 (*İ.A. v. Turkey*).
[655] European Court of Human Rights, 13 September 2005, 42571/98, par. 13 (*İ.A. v. Turkey*).

> sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual relations with a dead person or a live animal.'[656]

The Court of Cassation upheld the judgment by the lower court,[657] and the case ultimately made its way to the European Court of Human Rights. This Court found that the conviction of the applicant interfered with his right to free expression, that it was prescribed by law, and that it pursued a legitimate aim, namely preventing disorder and protecting morals and the rights of others. This was disputed by neither party.[658]

The dispute was solely about whether the interference was 'necessary in a democratic society.'[659] While the Court observed that 'Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism' and that they 'must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith',[660] it also held that 'the present case concerns not only comments that offend or shock, or a "provocative" opinion, but also an abusive attack on the Prophet of Islam.'[661]

The Court was of the opinion that 'believers [within Turkish society] may legitimately feel themselves to be the object of unwarranted and offensive attacks through the following passages: "Some of these words were, moreover, inspired in a surge of exultation, in Aisha's

[656] European Court of Human Rights, 13 September 2005, 42571/98, par. 13 (*İ.A. v. Turkey*).
[657] European Court of Human Rights, 13 September 2005, 42571/98, par. 15 (*İ.A. v. Turkey*).
[658] European Court of Human Rights, 13 September 2005, 42571/98, par. 22 (*İ.A. v. Turkey*).
[659] European Court of Human Rights, 13 September 2005, 42571/98, par. 22 (*İ.A. v. Turkey*).
[660] European Court of Human Rights, 13 September 2005, 42571/98, par. 28 (*İ.A. v. Turkey*).
[661] European Court of Human Rights, 13 September 2005, 42571/98, par. 29 (*İ.A. v. Turkey*).

arms. (…) God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual intercourse with a dead person or a live animal".'[662]

Hence, the Court considered that 'the measure taken in respect of the statements in issue was intended to provide protection against offensive attacks on matters regarded as sacred by Muslims. In that respect it finds that the measure may reasonably be held to have met a "pressing social need".'[663] Ultimately, the Court established no violation of article 10.[664]

A blasphemy case with a different outcome was that of *Tatlav v. Turkey*. The applicant in this case, Tatlav, was a journalist and author of a five-volume work entitled *İslamiyet Gerçeği* (The Reality of Islam), of which the first edition was entitled *Kur'an ve Din* (The Koran and Religion). The fifth edition of the volume appeared in 1996 and contained a 'historical study and a critical commentary on the Koran.'[665]

In 1997, a public prosecutor charged Tatlav on the grounds of article 175 paragraph 2 of the Turkish Criminal Code,[666] which makes it a crime 'to blaspheme against God, one of the religions, one of the prophets, one of the sects or one of the holy books (…) or to vilify or insult another on account of his religious beliefs or fulfilment of religious duties (…).'[667] The impugned passages of the book read:

> '(…) Islam is an ideology that lacks so much self-confidence that this is revealed in the cruelty of its sanctions. (…) it (…) conditions [children] from an early age, with stories of heaven and hell. (…) he will no longer need stories from God from that age (…) the policy of Islam towards the child too, is made only of barbaric violence (…)

[662] European Court of Human Rights, 13 September 2005, 42571/98, par. 29 (*İ.A. v. Turkey*).
[663] European Court of Human Rights, 13 September 2005, 42571/98, par. 30 (*İ.A. v. Turkey*).
[664] European Court of Human Rights, 13 September 2005, 42571/98, par. 32 (*İ.A. v. Turkey*).
[665] European Court of Human Rights, 2 August 2006, 50692/99, par. 9 (*Aydin Tatlav v. Turkey*).
[666] European Court of Human Rights, 2 August 2006, 50692/99, par. 12 (*Aydin Tatlav v. Turkey*).
[667] European Court of Human Rights, 2 August 2006, 50692/99, par. 18 (*Aydin Tatlav v. Turkey*).

> religions show their lack of self-confidence, by their tendency to suppress free thought, and in particular any analysis and criticism of them.
>
> (…) all these truths concretize the fact that God does not exist, that it is the consciousness of the illiterate who created him (…) this God who mixes with everything, including question of knowing how many blows of sticks will be inflicted on adultery, what part of the thief's body will be amputated, and even the fringe of poor Ebu Leheb (…)
>
> With this typical psychic structure, similar to that of his predecessors, Mohamed, who takes his dreams for realities, presents himself with these absolutely insane verses, in front of the people who ask him to prove his prophecy (…). The founder of Islam sometimes adopts a tolerant attitude, sometimes orders jihad. From violence, it makes its fundamental policy. Allah's paradise promises men a true parasitic life of an aristocrat (…)
>
> (…) because they will see that the Koran is made only of comments filled with boring repetitions, devoid of any depth, more primitive than most of the older books, written by men (…) on commerce, relations between men and women, slavery, sanctions (…) ".'[668]

Although Tatlav asserted before the Turkish criminal court that his book should be read as 'a scientific treatise on religions and prophets', that he made a 'clear distinction between the belief held by people, and running a state in the name of a religion' in the preface, and that he criticised religious policy instead of religion,[669] he was sentenced to 12 months' imprisonment and a fine of 840,000 Turkish Lira. The prison sentence was ultimately converted into a fine of 2,640,000 Turkish Lira.[670] The court summarized the content of the book by stating that 'the book maintains that Allah does not exist, that it would have been created to fool the illiterate people, that Islam would be a primitive religion, which would deceive the population with

[668] European Court of Human Rights, 2 August 2006, 50692/99, par. 12 (*Aydin Tatlav v. Turkey*).

[669] European Court of Human Rights, 2 August 2006, 50692/99, par. 13 (*Aydin Tatlav v. Turkey*).

[670] European Court of Human Rights, 2 August 2006, 50692/99, par. 14 (*Aydin Tatlav v. Turkey*).

stories of paradise and hell, and which would sanctify exploitation, slavery included.'[671] The ruling was upheld by the Turkish Court of Cassation.[672]

Tatlav made an appeal to the European Court of Human Rights, arguing his right under article 10 of the Convention had been violated.[673] The Turkish government submitted, by referring to the *Otto Preminger* case, that the interference was proportional to the legitimate aims of the protection of morals and the rights of others and fell within the state's margin of appreciation.[674]

The European Court focused its analysis on the question whether the interference was 'necessary in a democratic society.'[675] The Court balanced 'the contradictory interests relating to the exercise of the two fundamental freedoms: on the one hand, the right, for the applicant, to communicate to the public his ideas on the legal doctrine religious, and, on the other hand, the right of other persons to respect for their freedom of thought, conscience and religion.'[676]

The weighing of these interests resulted in this case in favour of free expression. The Court observed that the passages cited in the judgment [by the Turkish court] contained sharp criticism,[677] as Tatlav argued in his book that 'the effect of religion is to legitimize social injustices by passing them off as "the will of God".' The Court considered this a non-believer's viewpoint in a socio-political context. The Court was of the opinion that the impugned statements did not contain 'an insulting tone aimed directly at the person of believers' nor 'an insulting attack on sacred symbols' even if Muslims 'could certainly feel offended by this

[671] European Court of Human Rights, 2 August 2006, 50692/99, par. 14 (*Aydin Tatlav v. Turkey*).
[672] European Court of Human Rights, 2 August 2006, 50692/99, par. 16 (*Aydin Tatlav v. Turkey*).
[673] European Court of Human Rights, 2 August 2006, 50692/99, par. 19 (*Aydin Tatlav v. Turkey*).
[674] European Court of Human Rights, 2 August 2006, 50692/99, par. 20 (*Aydin Tatlav v. Turkey*).
[675] European Court of Human Rights, 2 August 2006, 50692/99, par. 21 (*Aydin Tatlav v. Turkey*).
[676] European Court of Human Rights, 2 August 2006, 50692/99, par. 26 (*Aydin Tatlav v. Turkey*).
[677] European Court of Human Rights, 2 August 2006, 50692/99, par. 28 (*Aydin Tatlav v. Turkey*).

somewhat caustic commentary on their religion.'[678] In this regard, the case differed from that *İ.A. v. Turkey*, according to the Court.[679] As with regard to the imposed punishment, the Court observed that a criminal conviction, with the risk of a custodial sentence, could have a chilling effect on authors and publishers, who may be 'dissuaded from publishing opinions which are not conformist about religion.' Such a penalty may 'obstruct the safeguard of pluralism which is essential for the healthy development of a democratic society.'[680] Given that there was no pressing social need for the interference of Tatlav's right to free expression, the Court established a violation of article 10 of the Convention.[681]

The final blasphemy case discussed in this section is that of the 2018 case of *E.S. v. Austria*. In this case the applicant, E.S.,[682] held seminars at the right-wing Freedom Party Education Institute to 'educate' people about the Islam. The seminars were open to members of the Freedom Party and invited guests, and were advertised on the Freedom Party's website.[683] An undercover journalist was present during two of the seminars. On behalf of this journalist's journal, a preliminary investigation was instituted against E.S. regarding anti-Islam statements she had made during the seminars.[684]

Charges were brought against E.S, and the Austrian Regional Criminal Court found E.S. guilty of 'publicly disparaging an object of veneration of a domestic church or religious

[678] European Court of Human Rights, 2 August 2006, 50692/99, par. 28 (*Aydin Tatlav v. Turkey*).

[679] European Court of Human Rights, 2 August 2006, 50692/99, par. 28 (*Aydin Tatlav v. Turkey*). The Court also observed that the book was published for the first time in 1992, and that it wasn't until 1996 that a prosecution was instigated. See European Court of Human Rights, 2 August 2006, 50692/99, par. 29 (*Aydin Tatlav v. Turkey*).

[680] European Court of Human Rights, 2 August 2006, 50692/99, par. 30 (*Aydin Tatlav v. Turkey*).

[681] European Court of Human Rights, 2 August 2006, 50692/99, par. 31 (*Aydin Tatlav v. Turkey*).

[682] Identified as Elisabeth Sabaditsch-Wolff, author of *The Truth is No Defense Hardcover*, Nashville/London: New English Review Press 2019.

[683] European Court of Human Rights, 25 October 2018, 38450/12, par. 7 (*E.S. v. Austria*).

[684] European Court of Human Rights, 25 October 2018, 38450/12, par. 8-9 (*E.S. v. Austria*).

society – namely Muhammad, the Prophet of Islam – in a manner capable of arousing justified indignation.'[685] The court based its decision on article 188 of the Austrian Criminal Code.[686]

E.S. was convicted and ordered to pay a fine of 480 euros over statements indicating that the prophet Muhammad had pedophilic tendencies due to the alleged consumption of his marriage when his wife Aisha was nine years' old.[687] In the view of E.S., Muhammad's legacy is problematic in modern Austrian society, as she had stated during the seminars that:

> 'One of the biggest problems we are facing today is that Muhammad is seen as the ideal man, the perfect human, the perfect Muslim. That means that the highest commandment for a male Muslim is to imitate Muhammad, to live his life. This does not happen according to our social standards and laws. Because he was a warlord, he had many women, to put it like this, and liked to do it with children. And according to our standards he was not a perfect human. We have huge problems with that today, that Muslims get into conflict with democracy and our value system.'[688]

Moreover, E.S. quoted a part of a phone conversation she had with her sister, in which E.S. told her sister: 'A 56-year-old and a six-year-old? What do you call that? Give me an example? What do we call it, if it is not paedophilia?'[689]

The Regional Court found that 'by making the statements the applicant had suggested that Muhammad was not a worthy subject of worship.'[690] And although the Regional Court did

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[685] European Court of Human Rights, 25 October 2018, 38450/12, par. 12 (*E.S. v. Austria*).

[686] 'Whoever, in circumstances where his or her behaviour is likely to arouse justified indignation, publicly disparages or insults a person who, or an object which, is an object of veneration of a church or religious community established within the country, or a dogma, a lawful custom or a lawful institution of such a church or religious community, shall be liable to up to six months' imprisonment or a day-fine for a period of up to 360 days.' Cited in European Court of Human Rights, 25 October 2018, 38450/12, par. 24 (*E.S. v. Austria*).

[687] European Court of Human Rights, 25 October 2018, 38450/12, par. 13-14 (*E.S. v. Austria*).

[688] European Court of Human Rights, 25 October 2018, 38450/12, par. 13 (*E.S. v. Austria*).

[689] European Court of Human Rights, 25 October 2018, 38450/12, par. 13 (*E.S. v. Austria*).

[690] European Court of Human Rights, 25 October 2018, 38450/12, par. 14 (*E.S. v. Austria*).

not establish that E.S. had intended to decry all Muslims or that she suggested that all Muslims were pedophiles, it did find that her statements were 'capable of causing indignation' since 'pedophilia was behaviour which was ostracised by society and outlawed.'[691]

The Regional Court was of the opinion

> 'that the applicant had intended to wrongfully accuse Muhammad of having paedophilic tendencies. Even though criticising child marriages was justifiable, she had accused a subject of religious worship of having a primary sexual interest in children's bodies, which she had deduced from his marriage with a child, disregarding the point that the marriage had continued until the Prophet's death, when Aisha had already turned eighteen and had therefore passed the age of puberty. In addition, the court found that because of the public nature of the seminars, which had not been limited to members of the Freedom Party, it was conceivable that at least some of the participants might have been disturbed by the statements.'[692]

The Regional Court submitted that the exercise of free expression under article 10 was 'subject to duties and responsibilities, such as refraining from making statements which hurt others without reason and therefore did not contribute to a debate of public interest.'[693] The court balanced the rights under articles 9 and 10 of the Convention and argued that E.S. 'had not intended to approach the topic in an objective manner, but had directly aimed to degrade Muhammad' and that her derogatory statements exceeded the limits of free expression.[694] The Regional Court stated that 'child marriages were not the same as pedophilia, and were not only a phenomenon of Islam, but also used to be widespread among the European ruling dynasties.'[695] 'Presenting objects of religious worship in a provocative way capable of hurting

[691] European Court of Human Rights, 25 October 2018, 38450/12, par. 14 (*E.S. v. Austria*).

[692] European Court of Human Rights, 25 October 2018, 38450/12, par. 14 (*E.S. v. Austria*).

[693] European Court of Human Rights, 25 October 2018, 38450/12, par. 15 (*E.S. v. Austria*).

[694] European Court of Human Rights, 25 October 2018, 38450/12, par. 15 (*E.S. v. Austria*).

[695] European Court of Human Rights, 25 October 2018, 38450/12, par. 15 (*E.S. v. Austria*).

the feelings of the followers of that religion could be conceived as a malicious violation of the spirit of tolerance, which was one of the bases of a democratic society', according to the court. Ultimately, the Regional Court concluded that E.S.'s criminal conviction was necessary in a democratic society to protect religious peace in Austria.[696]

The Vienna Court of Appeal confirmed the findings of the lower court.[697] This court found E.S.'s statements not 'merely provocative' but intended as 'an abusive attack on the Prophet of Islam,' since 'Muslims would find the impugned statements wrong and offensive, even if Muhammad had married a six-year-old and had intercourse with her when she had been nine.'[698] 'Even if', the court stated, E.S. 'had had the right to criticise others' attempts to imitate Muhammad, her statements showed her intention to unnecessarily disparage and deride Muslims.'[699] In the view of the court, 'harsh criticism of churches or religious societies and religious traditions and practices was lawful. However, the permissible limits were exceeded where criticism ended and insults or mockery of a religious belief or person of worship began.'[700] Hence, the interference of E.S.'s right to free expression was justified.

As a final step before the domestic authorities, E.S. lodged a request for a renewal of the proceeding with the Austrian Supreme Court, which was dismissed.[701] The Supreme Court found that E.S. 'had not aimed to contribute to a serious debate about Islam or the phenomenon of child marriage' but that she 'had made her allegation primarily in order to defame Muhammad.'[702]

[696] European Court of Human Rights, 25 October 2018, 38450/12, par. 15 (*E.S. v. Austria*).
[697] European Court of Human Rights, 25 October 2018, 38450/12, par. 17 (*E.S. v. Austria*).
[698] European Court of Human Rights, 25 October 2018, 38450/12, par. 17 (*E.S. v. Austria*).
[699] European Court of Human Rights, 25 October 2018, 38450/12, par. 18 (*E.S. v. Austria*).
[700] European Court of Human Rights, 25 October 2018, 38450/12, par. 18 (*E.S. v. Austria*).
[701] European Court of Human Rights, 25 October 2018, 38450/12, par. 21 (*E.S. v. Austria*).
[702] European Court of Human Rights, 25 October 2018, 38450/12, par. 22 (*E.S. v. Austria*).

Subsequently, E.S. filed a complaint with the European Court. The Court found that the interference with the applicant's right to freedom of expression was 'prescribed by law',[703] as the conviction was based on article 188 of the Austrian Criminal Code, and that it met the legitimate aims of 'preventing disorder by safeguarding religious peace, as well as protecting religious feelings, which corresponds to protecting the rights of others within the meaning of Article 10 (2) of the Convention.'[704]

Following this, the Court examined whether the conviction of the applicant was 'necessary in a democratic society.' First, the Court reiterated its general principles on free expression, namely that article 10 also applies to expression that offends, shocks, or disturbs; that believers must tolerate and accept the denial by others of their religious beliefs and the propagation by others of doctrines hostile to their faith; that the exercise of free expression carries responsibilities that include 'a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane'; that states have a relatively large margin of appreciation in regulating expression disparaging to religious convictions; and that states have a positive obligation under article 9 to ensure 'the peaceful co-existence of all religions and those not belonging to a religious group by ensuring mutual tolerance.'[705]

After outlining the general principles, the Court turned to an examination of the case at hand. First, the Court noted that the Austrian authorities had a wide margin of appreciation to evaluate the interference with free expression, as they were better placed to evaluate which statements were likely to disturb the religious peace in their country.[706]

Next, the Court observed that

[703] European Court of Human Rights, 25 October 2018, 38450/12, par. 40 (*E.S. v. Austria*).

[704] European Court of Human Rights, 25 October 2018, 38450/12, par. 41 (*E.S. v. Austria*).

[705] European Court of Human Rights, 25 October 2018, 38450/12, par. 42-49 (*E.S. v. Austria*).

[706] European Court of Human Rights, 25 October 2018, 38450/12, par. 50 (*E.S. v. Austria*).

> 'Article 188 of the Criminal Code does not in fact incriminate all behaviour that is likely to hurt religious feelings or amounts to blasphemy, but additionally requires that the circumstances of such behaviour were capable of arousing justified indignation, and thus aims at the protection of religious peace and tolerance. The Court notes that the domestic courts explained extensively why they considered that the applicant's statements had been capable of arousing justified indignation, on the grounds that they had not been made in an objective manner aimed at contributing to a debate of public interest, but could only be understood as having been aimed at demonstrating that Muhammad was not a worthy subject of worship.' [707]

The Court agreed with the assessment of the domestic courts.[708] Moreover, the Court agreed with the domestic courts that E.S.'s 'must have been aware' that her statement 'What do we call it, if it is not paedophilia?' was 'partly based on untrue facts and liable to arouse (justified) indignation in others.'[709] In this context, the Court reiterated that national states are obliged to ensure 'the peaceful co-existence of religious and non-religious groups and individuals under their jurisdiction by ensuring an atmosphere of mutual tolerance,' and it endorsed the Austrian Regional Court's statement that 'presenting objects of religious worship in a provocative way capable of hurting the feelings of the followers of that religion could be conceived as a malicious violation of the spirit of tolerance, which was one of the bases of a democratic society.'[710]

Lastly, the Court agreed with the Austrian courts 'that the impugned statements can be classified as value judgments not having a sufficient factual basis' as E.S. 'had subjectively labelled Muhammad with a general sexual preference for paedophilia and had failed to

[707] European Court of Human Rights, 25 October 2018, 38450/12, par. 52 (*E.S. v. Austria*).

[708] European Court of Human Rights, 25 October 2018, 38450/12, par. 52 (*E.S. v. Austria*).

[709] European Court of Human Rights, 25 October 2018, 38450/12, par. 53 (*E.S. v. Austria*).

[710] European Court of Human Rights, 25 October 2018, 38450/12, par. 53 (*E.S. v. Austria*).

neutrally inform her audience of the historical background, which consequently had not allowed for a serious debate on that issue.'[711]

Taking into consideration the amount of the fine E.S. was ordered to pay (480 Euros), which it found not disproportionate,[712] the European Court of Human Rights concluded that the Austrian authorities had 'carefully balanced her right to freedom of expression with the rights of others to have their religious feelings protected and to have religious peace preserved in Austrian society.' [713] The Court accepted the view of the Austrian courts that E.S.'s statements went 'beyond the permissible limits of an objective debate,' that they constituted 'an abusive attack on the Prophet of Islam, (…) capable of stirring up prejudice and putting religious peace at risk' and that they 'contained elements of incitement to religious intolerance.'[714] Ultimately, the Court found the reasons put forward by the Austrian courts for the interference 'relevant and sufficient' and submitted that the interference corresponded 'to a pressing social need and was proportionate to the legitimate aim pursued.'[715] Hence, the Court established no violation of article 10.[716]

2. The International Covenant on Civil and Political Rights

The Human Rights Committee is straightforward when it comes to the legitimacy of blasphemy laws under the International Covenant on Civil and Political Rights. In its guideline for interpreting article 19 of the ICCPR, the Human Rights Committee observed, without much

[711] European Court of Human Rights, 25 October 2018, 38450/12, par. 54 (*E.S. v. Austria*).
[712] European Court of Human Rights, 25 October 2018, 38450/12, par. 56 (*E.S. v. Austria*).
[713] European Court of Human Rights, 25 October 2018, 38450/12, par. 57 (*E.S. v. Austria*).
[714] European Court of Human Rights, 25 October 2018, 38450/12, par. 57 (*E.S. v. Austria*).
[715] European Court of Human Rights, 25 October 2018, 38450/12, par. 57 (*E.S. v. Austria*).
[716] European Court of Human Rights, 25 October 2018, 38450/12, par. 58 (*E.S. v. Austria*).

elaboration,[717] that 'Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant.'[718]

Notwithstanding this clear-cut approach to blasphemy laws, different opinions on blasphemy bans have been expressed before various United Nations bodies over the last decades. From 1999 to 2011, resolutions were proposed and adopted at the United Nations about 'defamation of religion.'[719] The driving force behind these resolutions was the Organization of Islamic Cooperation (OIC). With 57 members, the OIC is the second-largest intergovernmental organization in the world. Established in 1969, the organization aims to function as the 'collective voice of the Muslim world.'[720] This organization is responsible for drafting the Cairo Declaration on Human Rights in Islam (CDHRI, 1990). The CDHRI entails a 'general guidance for Member States in the field of human rights.'[721] From the outset this document is different from other human rights documents, mainly because of the role religion plays. International human rights documents typically protect the freedom of individuals in matters of (religious) belief, yet they do not subject the human rights to a particular religion as

[717] See, critically, N. Cox, 'Justifying blasphemy laws: freedom of expression, public morals, and international human rights law', *Journal of Law and Religion*, 2020, p. 37: 'The absence of reasoning in paragraph 48 is particularly stark given that there are multiple blasphemy laws in existence today, some of which—those for example in various Muslim-majority states—are regarded as important and necessary. It is simply not the case, in other words, that there is any genuine international consensus on this point.'

[718] Human Rights Committee, General comment No. 34, UN Doc. CCPR/C/GC/34, 2011, par. 48. For a critique of the compatibility of this standpoint with the text of the ICCPR, see N. Cox, 'Justifying blasphemy laws: freedom of expression, public morals, and international human rights law', *Journal of Law and Religion*, 2020, p. 33-60. Article 20 paragraph 2 provides that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'

[719] See, generally, L. Langer, *Religious Offence and Human Rights: The Implications of Defamation of Religions*, Cambridge: Cambridge University Press 2014.

[720] http://www.oic-oci.org/oicv2/page/?p_id=52&p_ref=26&lan=en.

[721] Preamble, Cairo Declaration on Human Rights in Islam.

such.[722] The CDHRI is different in this regard. In it, fundamental rights and universal freedoms in Islam are seen as 'binding divine commandments', human beings as God's subjects, and it states that 'All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah.'

The CDHRI also allows religion to determine the scope of the human rights stipulated in it. Article 24 reads: 'All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah', while article 25 states: 'The Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration.' And specifically regarding the right to freedom of expression, article 22 (a) of the Declaration states that: 'Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah.' Provision (c) of article 22 stipulates that 'Information (…) may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith.'

Activities of the OIC at the United Nations on the matter of free speech have been described by the United States Commission on International Religious Freedom as seeking 'to establish what would be in effect a global blasphemy law.'[723] These activities commenced in 1999, when Pakistan, on behalf of the OIC, proposed to the United Nations Commission on Human Rights (the predecessor of the Human Rights Council) a draft resolution entitled 'Defamation of Islam.'[724] In this draft resolution, the Commission on Human Rights 'expresses

[722] Cf. C.W. Howland, 'The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter', *Columbia Journal of Transnational Law*, 1997, p. 329-330.

[723] United States Commission on International Religious Freedom, Annual Report 2013, p. 304.

[724] United Nations Commission on Human Rights, UN Doc. E/CN.4/1999/L.40. The Commission on Human Rights was, and the Human Rights Council (established in 2006) is, a political body, not to be confused with the

its concern at the use of print, audio-visual or electronic media or any other means to spread intolerance against Islam'[725] and 'expresses its appreciation of the efforts of many countries and societies to combat ignorance of and intolerance towards Islam.'[726] This draft attracted criticism from non-Muslim-majority countries for its exclusive focus on Islam. For example, the Japanese delegation 'would have liked the draft resolution to be worded in more general terms'[727], while the German delegation said that 'although it understood some of the concerns which had led the sponsors of [the draft resolution] to submit that text, it was of the opinion that the draft resolution's overall design was not balanced, since it referred exclusively to the negative stereotyping of Islam (…).'[728] Amendments designed to 'broaden the issue and deal equally with all religions' were proposed by Germany on behalf of other Western countries.[729] These amendments proposed, inter alia, to change the title of the resolution from 'defamation of Islam' to 'stereotyping of religions'[730] and to replace the phrase 'alarmed at the negative stereotyping of Islam and the tendency to associate human rights violations and terrorism with Islam' with 'deeply concerned at the negative stereotyping of some religions, including many minority religions.'[731] These proposed amendments were much to Pakistan's dismay, for 'the problem faced by Islam was of a very special nature and its manifestations took many forms.'[732] The amendments 'would defeat the purpose of the text, which was to bring a problem relating

Human Rights Committee of the United Nations, which consists of independent human rights experts tasked with monitoring the implementation of the ICCPR.

[725] United Nations Commission on Human Rights, UN Doc. E/CN.4/1999/L.40, p. 2.

[726] United Nations Commission on Human Rights, UN Doc. E/CN.4/1999/L.40, p. 2.

[727] United Nations Commission on Human Rights, UN Doc. E/CN.4/1999/SR.61, p. 3.

[728] United Nations Commission on Human Rights, UN Doc. E/CN.4/1999/SR.61, p. 2.

[729] United Nations Commission on Human Rights, UN Doc. E/CN.4/1999/SR.61, p. 2.

[730] United Nations Commission on Human Rights, UN Doc. E/CN.4/1999/L.90, p. 1.

[731] United Nations Commission on Human Rights, UN Doc. E/CN.4/1999/L.90, p. 1.

[732] United Nations Commission on Human Rights, UN Doc. E/CN.4/1999/SR.61, p. 3.

specifically to that religion to the attention of the international community.'[733] Subsequently, 'the States which had submitted the draft resolution could therefore not agree to the proposed amendments and (…) appealed to Germany and the other co-sponsors of the amendments to withdraw them.'[734] Eventually, Pakistan introduced a revised draft which was adopted under the title 'Defamation of religions.'[735] Although this final resolution was, as the title suggests, as it was formulated in more general terms, the only religion that is explicitly mentioned in it is Islam. This resolution was followed by many OIC-sponsored resolutions expressing the same intention to dampen the defamation of belief systems in general and Islam in particular. Those resolutions were proposed to and adopted by the Commission on Human Rights, the Human Rights Council as well as the main body of the United Nations, the General Assembly.[736] Members of the United States Commission on International Religious Freedom have argued that these defamation of religions resolutions are 'in essence (…) an attempt to export the repressive blasphemy laws found in some OIC countries to the international level'[737] and that 'implementing the OIC's approach would violate provisions of the Universal Declaration of Human Rights and various human rights treaties that protect, with only narrow exceptions, every individual's right to receive and impart information and speak out.'[738]

Support for these resolutions gradually deteriorated, which resulted in a break in the trend when the resolution 16/18 on 'Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons

[733] United Nations Commission on Human Rights, UN Doc. E/CN.4/1999/SR.61, p. 3.

[734] United Nations Commission on Human Rights, UN Doc. E/CN.4/1999/SR.61, p. 3.

[735] United Nations Commission on Human Rights, UN Doc. E/CN.4/RES/1999/82. See also, Commission on Human Rights, Report on the 55th Session (22 March – 30 April 1999), p. 308-309.

[736] For an overview, see http://www.strasbourgconsortium.org/index.php?blurb_id=778.

[737] L.A. Leo, F.D. Gaer & E.K. Cassidy, 'Protecting Religions From 'Defamation': A Threat To Universal Human Rights Standards,' *Harvard Journal of Law & Public Policy*, 2011, p. 772.

[738] L.A. Leo, F.D. Gaer & E.K. Cassidy, 'Protecting Religions From 'Defamation': A Threat To Universal Human Rights Standards,' *Harvard Journal of Law & Public Policy*, 2011, p. 772.

based on religion or belief' was adopted in March 2011.[739] International human rights organization Human Rights First welcomed the resolution as 'a huge achievement because for the first time in many years it focuses on the protection of individuals rather than religions.'[740]

Later resolutions proceeded on this path of focusing on individuals instead of belief systems, lacking any reference to the 'defamation of religion' or demanding 'full respect of religion.'[741]

Although the wording of resolution 16/18 and subsequent resolutions is different from the previous resolutions on combating the defamation of religion, it appears that the main sponsor of these types of resolutions, the OIC, regards this shift as insignificant. Pakistani ambassador Zamir Akram, head of the OIC mission at the time resolution 16/18 was passed by the Human Rights Council, said: 'I want to state categorically that this resolution does not replace the OIC's earlier resolutions on combating defamation of religions which were adopted by the Human Rights Council and continue to remain valid.'[742] His colleague from Saudi Arabia, Ahmed Suleiman Ibrahim Alaquil, stated: 'This text is not replacing the other, existing text which also criminalizes attack on religion. This text still remains valid.'[743] In their study of Pakistan's blasphemy law, legal scholars Javaid Rehman and Stephanie Berry '[identify], notwithstanding [the] apparent departure from explicit references to "defamation of religions"

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[739] For the background of this resolution, see M. Limon, N. Ghanea & H. Power, 'Freedom of Expression and Religions, the United Nations and the '16/ 18 Process'", in: J. Temperman & A. Koltay (eds.), *Blasphemy and Freedom of Expression Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre*, Cambridge: Cambridge University Press 2017, p. 645-680.

[740] 'UN rights body ditches religious "defamation" idea', 24 March 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/03/24/AR2011032403901.html.

[741] See for example, Human Rights Council, UN Doc. A/HRC/19/L.7; General Assembly, UN Doc. A/RES/68/169.

[742] 'U.N. Religious 'Defamation' Resolution is Not Dead, Says Islamic Bloc', 30 March 2011, http://cnsnews.com/news/article/un-religious-defamation-resolution-not-dead-says-islamic-bloc.

[743] 'U.N. Religious 'Defamation' Resolution is Not Dead, Says Islamic Bloc', 30 March 2011, http://cnsnews.com/news/article/un-religious-defamation-resolution-not-dead-says-islamic-bloc.

in the UN, a continuing trend on the part of the OIC and its members towards the banning and criminalization of all forms of "defamation of religions" and protecting and promoting analogous domestic anti-blasphemy laws.'[744]

The concept of defamation of religion as well as blasphemy bans in general have been criticized by various United Nations bodies and officials.[745] In 2009, amidst the discussion on the concept of defamation of religion, a joint statement was released by the Special rapporteurs on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, on freedom of religion or belief, and the promotion and protection of the right to freedom of opinion and expression. In it, they stated that 'the difficulties in providing an objective definition of the term "defamation of religions" at the international level make the whole concept open to abuse.'[746] Moreover, the Special rapporteurs stated that:

[744] J. Rehman & S.E. Berry, 'Is "Defamation of Religions" passé? The United Nations, Organisation of Islamic Cooperation, and Islamic State Practices: Lessons from Pakistan', *The George Washington International Law Review*, 2012, p. 433.

[745] The concept has also drawn criticism from academia. For example, legal scholar Jeroen Termperman commented on the notion of 'defamation of religions' as follows: 'the (…) counter-defamation discourse introduces new grounds for limiting human rights, notably with respect to the right to freedom of expression – limitations that are not recognized by international law. It is largely intrinsic to religious belief to deem all contradicting, unorthodox, or otherwise deviant religious doctrine and religious manifestations as, if not "heretical," then at least erroneous, misguided, or misdirected.' For Temperman, 'the counter-defamation approach is unacceptable because it seeks to shift the emphasis from the protection of the rights of individuals to the protection of religions per se.' See J. Temperman, 'Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech', *BYU Law Review*, 2011, p. 730.

[746] 'Freedom of expression and incitement to racial or religious hatred', OHCHR side event during the Durban Review Conference, Geneva, 22 April 2009, Joint statement by Mr. Githu Muigai, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Ms. Asma Jahangir, Special Rapporteur on freedom of religion or belief; and Mr. Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, p. 2, https://www2.ohchr.org/english/issues/racism/rapporteur/docs/Joint_Statement_SRs.pdf.

> 'At the national level, domestic blasphemy laws can prove counter-productive, since this could result in the de facto censure of all inter-religious and intra-religious criticism. Many of these laws afford different levels of protection to different religions and have often proved to be applied in a discriminatory manner. There are numerous examples of persecution of religious minorities or dissenters, but also of atheists and non-theists, as a result of legislation on religious offences or overzealous application of laws that are fairly neutral.'[747]

More recently, the current Special Rapporteur on freedom of religion or belief, Ahmed Shaheed, has observed that 'Many States have adopted [anti-blasphemy laws] to promote and strengthen "social harmony" and "public order" between and across various communities. By and large, those efforts are effectively measures meant to protect majority religious sentiments or State-imposed religious or belief orthodoxies.'[748] According to the Special Rapporteur,

> 'Anti-blasphemy laws often give States licence to determine which conversations on religion are admissible and which ones are too controversial to be voiced. The Special Rapporteur notes that when governments restrict freedom of expression on the grounds of "insult to religion", any peaceful expression of political or religious views is subject to potential prohibition. In practice, those laws can be used for the suppression of any dissenting view in violation of international human rights standards protecting freedom of opinion and expression and freedom of religion or belief. Legislation on religious offences is thus often used to facilitate the persecution of members of religious minority groups, dissenters, atheists and non-theists. In many States, individuals whose beliefs constitute dissent from religious doctrine or beliefs held by the State have been subjected to

[747] 'Freedom of expression and incitement to racial or religious hatred', OHCHR side event during the Durban Review Conference, Geneva, 22 April 2009, Joint statement by Mr. Githu Muigai, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Ms. Asma Jahangir, Special Rapporteur on freedom of religion or belief; and Mr. Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, p. 2, https://www2.ohchr.org/english/issues/racism/rapporteur/docs/Joint_Statement_SRs.pdf.

[748] Interim report of the Special Rapporteur on freedom of religion or belief, UN. Doc. A/72/365, 2017, par. 27.

> criminal sanctions, including life imprisonment or capital punishment, under the auspices of "fighting religious intolerance" or "upholding social harmony".'[749]

Shaheed's predecessor, Heiner Bielefeldt, has stated that 'States should repeal blasphemy laws, which typically have a stifling effect on open dialogue and public discourse, often particularly affecting persons belonging to religious minorities'[750] and that

> 'in the human rights framework, respect always relates to human beings, (…). In the face of widespread misunderstandings, it cannot be emphasized enough that freedom of religion or belief does not provide respect to religions as such; instead it empowers human beings in the broad field of religion and belief. The idea of protecting the honour of religions themselves would clearly be at variance with the human rights approach.'[751]

Conclusion

This chapter examined legal aspects of the regulation of blasphemy: expression that ridicules, defames, or denies religious symbols such as prophets, Gods, or sacred texts. This speech crime, still outlawed in various countries in both the developed as well as the developing world, has a long history. Initially, blasphemy was closely related to undermining the state and disobedience to its laws. Challenging or defaming religion was akin to an attack on worldly power. As the legitimizing function of religion for the state eroded, so did the scope of anti-

[749] Interim report of the Special Rapporteur on freedom of religion or belief, UN. Doc. A/72/365, 2017, par. 28-29.

[750] Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, 2013, UN Doc. A/HRC/25/58, par. 70(e).

[751] Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, 2013, UN Doc. A/HRC/25/58, par. 33. See also L.A. Leo, F.D. Gaer & E.K. Cassidy, 'Protecting Religions From 'Defamation': A Threat To Universal Human Rights Standards,' *Harvard Journal of Law & Public Policy*, 2011, p. 770.

blasphemy laws. The determining factor became the manner in which anti-religious expression was uttered. Examples are the English blasphemy and the Dutch blasphemy bans, the latter of which has been examined in this chapter.

The Dutch ban on 'scornful blasphemy' of 1932 prohibited blasphemy uttered in a scorning or abusive manner. Although early cases on the basis of this law did result in convictions, for example for stating that 'A God that created the tubercle bacillus is not a God, but a criminal', the force of the law was greatly diminished in the 1960s as a result of the trial against novelist Van het Reve. Ultimately, the anti-blasphemy law was repealed in 2014. The government examined whether the ban should be replaced by a new criminal provision that offered protection against seriously felt insults of their religion and religious experience.' The government ultimately decided not to do so over concerns about the subjectivity, compatibility with international law, and legal certainty of such a provision.

The repeal of this ban fits with the current framework of the United Nations' International Covenant on Civil and Political Rights. Although there has been debate in the early 2000s at various UN fora concerning the so-called 'defamation of religion resolutions', which free speech advocates feared would restrict anti-religious expression, the Human Rights Committee has stated in 2011 that 'prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible' the ICCPR. Other UN officials and bodies have voiced similar critical statements on anti-blasphemy laws.

The European Court of Human Rights takes a different, less straightforward approach. This Court has upheld convictions by domestic authorities for blasphemous utterances. Although a very broad blasphemy ban which prohibits all criticism of a religion or the denial of religious beliefs, would violate article 10 of the European Convention on Human Rights, the Court has upheld convictions based on moderate blasphemy bans as compatible with the protection of free expression offered by the Convention. Granting a relatively wide margin of

appreciation to national authorities to determine the appropriateness of an interference, and taking into account the proportionality of the imposed punishment, expression that presents objects of religious worship in ‘a provocative way capable of hurting the feelings of the followers of that religion’ may fall outside of the protection offered by article 10 of the Convention.