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Princes and prophets: democracy and the defamation of power
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Chapter 5 Free expression, democracy and the defamation of power

Introduction

The previous chapters examined bans on *lèse-majesté*, the defamation of foreign heads, and blasphemy. From a supranational perspective, *lèse-majesté* bans and law against the defamation of foreign heads are considered illegitimate by both the European Court of Human Rights and other international human rights bodies, such as the Human Rights Committee. As for blasphemy bans, the picture is somewhat different. The European Court of Human Rights has decided that in a democracy blasphemy bans may be compatible with the right to free expression under article 10 of the Convention. In contrast, at the level of the United Nations, various bodies and officials have declared blasphemy bans incompatible with free expression. Given that free expression is essential for a democracy, this chapter discusses the legitimacy of *lèse-majesté* bans, bans on the defamation of foreign heads, and anti-blasphemy laws, by examining such provisions in light of democratic free expression theory.

1. Democracy, public discourse, and free expression

Although many notions of exist of what a 'democracy' exactly is, the core of the concept is largely undisputed, namely that it is a form of government of 'many' instead of 'a few', in which political power ultimately resides in the citizens. Free expression is intrinsically linked to such a form of government, as acknowledged by many courts as well as theorists.[752] For

[752] Although free expression has been defended on other grounds as well, such as the arguments from 'truth-seeking' and 'personal development'. On the truth-seeking argument, exchanges in the 'marketplace of ideas' will lead to truth and an increase in knowledge. The discovery of truth is frustrated, and important information

example, the United Nations Human Rights Committee observed that 'the right to freedom of expression is of paramount importance in any democratic society.'[753] The European Court for Human Rights has determined that 'freedom of expression (…) constitutes one of the essential foundations of a democratic society (…)'[754] while in a similar sense, the US Supreme Court noted that 'speech concerning public affairs [is] the essence of self-government.'[755]

In a democracy, free expression is connected to two important elements: an informed public, and legitimacy. On the first account, free expression provides for the access to information necessary to maintain an informed public debate. The 'informing function' of free expression maintains that freedom of expression is essential for, although it does not guarantee, an informed electorate.[756] On the second account, freedom of expression provides *legitimacy*

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might remain undisclosed, in case the free marketplace is disrupted by restrictions on expression. The theory 'assumes that a process of robust debate, if uninhibited by governmental interference, will lead to the discovery of truth, or at least the best perspectives or solutions for societal problems,' according to S. Ingber, 'The Marketplace of Ideas: A Legitimizing Myth,' *Duke Law Journal*, 1984, p. 3, 6. The theory can be understood as relating to scientific knowledge as well as to political wisdom. In the latter version, 'the quality of the public exchange of ideas promoted by the marketplace advances the quality of democratic government' (S. Ingber, 'The Marketplace of Ideas: A Legitimizing Myth,' *Duke Law Journal*, 1984, p. 4). On the self-fulfillment theory, free expression is considered essential for personal development. In short, the argument holds that 'the development and exercise of a range of distinctively human capacities, such as thinking, feeling, communicating, imagining, culture building, and so on, would be practically impossible, if not inconceivable, without freedom of expression given the expressive nature of the human capacities in question' (A. Brown, *Hate Speech Law: A Philosophical Examination*, Routledge 2015, p. 122); see also. K. Greenawalt, 'Free speech justifications', *Columbia Law Review*, 1989, p. 144 ('For the speaker, communication is a crucial way to relate to others; it is also an indispensable outlet for emotional feelings and a vital aspect of the development of one's personality and ideas'). Censorship, on this view, 'negates what is distinctly human about the speaker' (E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 105).

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

[754] European Court of Human Rights, 8 July 1986, 9815/82, par. 42 (*Lingens v. Austria*).

[755] *Garrison v. Louisiana*, 379 U.S. 64 (1964).

[756] A. Bhagwat & J. Weinstein, 'Freedom of Expression and Democracy', in: A. Stone & F. Schauer (eds.), *The Oxford Handbook of Freedom of Speech*, Oxford: Oxford University Press 2021, p. 90-91.

to the legal order. Legitimacy 'refers to the conditions that entitle a political entity to govern, and in particular, to use coercion to enforce its laws.'[757]

One way by which democracies achieve legitimacy of the legal order is voting. However, although voting is a necessary condition for a state to be democratic, it is an insufficient one.[758] Heinze states that 'Many would maintain that it is not speaking but voting that distinguishes democracy from other forms of government. Voting, however, is nothing but a formalized procedure for speaking.'[759] 'Voting', Heinze continues, 'remains derivative of something more foundational, something constitutive of it. It derives from, as a formalized procedure for, expression, within public discourse.'[760] Thus, the distinctive feature of democracy lies in the ability to participate in public discourse. According to legal theorist Ronald Dworkin:

> 'Fair democracy requires (…) that each citizen have not just a vote but a voice: a majority decision is not fair unless everyone has had a fair opportunity to express his or her attitudes or opinions or fears or tastes or presuppositions or prejudices or ideals, not just in the hope of influencing others (though that hope is crucially important), but also just to confirm his or her standing as a responsible agent in, rather than a passive victim of, collective action. The majority has no right to impose its

[757] A. Bhagwat & J. Weinstein, 'Freedom of Expression and Democracy', in: A. Stone & F. Schauer (eds.), *The Oxford Handbook of Freedom of Speech*, Oxford: Oxford University Press 2021, p. 92.

[758] 'Governments', Post points out, 'do not become democratic merely because they hold elections in which majorities govern.' See R. Post, 'Religion and Freedom of Speech: Portraits of Muhammad', in: S. Mancini & M. Rosenfeld (eds.), *Constitutional Secularism in an Age of Religious Revival*, Oxford: Oxford University Press 2014, p. 328.

[759] E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 46.

[760] E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 47. Also: R. Post, 'Legitimacy and Hate Speech', *Constitutional Commentary*, 2017, p. 654: 'A major reason why modern democracies protect freedom of speech is to endow persons with the sense that their government might be responsive to them. The sense of responsiveness produced by freedom of speech is more ubiquitous and more continuous than that produced by voting.'

> will on someone who is forbidden to raise a voice in protest or argument or objection before the decision is taken.'[761]

Prior to Dworkin, Austrian political philosopher Friedrich Hayek underscored the importance of free expression in a democratic political order. For Hayek, 'democracy is, above all, a process of forming opinion.'[762] Hayek states that:

> 'The conception that government should be guided by majority opinion makes sense only if that opinion is independent of government. The ideal of democracy rests on the belief that the view which will direct government emerges from an independent and spontaneous process. It requires, therefore, the existence of a large sphere independent of majority control in which the opinions of the individuals are formed. There is widespread consensus that for this reason the case for democracy and the case for freedom of speech and discussion are inseparable.'[763]

That independent large sphere crucial for the formation of opinions is commonly understood as 'public discourse.' Barendt succinctly describes this as 'speech concerning the organization and culture of society.'[764] Borrowing from Barendt, Ekeli understands public discourse as 'speech or other expressive conduct that is relevant to both intrapersonal and interpersonal deliberation on issues concerning the organization and culture of society or matters of public concern This will include religious or ideological views and ideas that are relevant to public discourse or political deliberation – for example, advocacy of holy war or Jihad.'[765]

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[761] R. Dworkin, 'Foreword,' in: I. Hare & J. Weinstein (eds.), *Extreme Speech and Democracy,* Oxford: Oxford University Press 2009, p. vii.

[762] F.A. Hayek, *The Constitution of Liberty*, Chicago/London: University of Chicago Press 2011 (1960), p 174.

[763] F.A. Hayek, *The Constitution of Liberty*, Chicago/London: University of Chicago Press 2011 (1960), p. 175.

[764] E. Barendt, *Freedom of Speech*, Oxford: Oxford University Press 2005, p. 189.

[765] K.S. Ekeli, 'Democratic legitimacy, political speech and viewpoint neutrality, *Philosophy and Social Criticism*, 2020, p. 725. For Heinze, public discourse 'is identifiable as being *of a type*, such that the message could plausibly be directed towards a sizeable audience, even if the actual audience in a given situation is small;

Public discourse can thus be distinguished from other, more private contexts such as the workplace or face-to-face interactions. Public discourse provides for a 'running discussion between majority and minority'[766] in which citizens may persuade each other or their political representatives of a particular viewpoint. Participation, or at least the ability to participate in public discourse enables people to 'self-govern' and to identify, albeit not necessarily to agree, with the laws by which they must live. In this context, Post speaks of 'the authorship of decisions', not the 'making of decisions' that is crucial in order for a state to be democratic.[767] According to Post, the reason to protect freedom of expression is

> 'to allow persons of widely varying views to experience as legitimate a government that may nevertheless act in ways that are inconsistent with their own ideas. What maintains descriptive legitimacy in such circumstances is the continuous hope that government actions might be swayed by changes in a public opinion to which persons are given full and open access. If persons are prevented from expressing their own views – however much others might find those views outrageous and intolerable – then they are less likely to experience their government as legitimate.'[768]

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and *of a type* such that its content might extend to some sector of the population, taking account, of course, that what may specifically "interest" any random listener is never wholly predictable.' See E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 27.

[766] H. Kelsen, *General Theory of Law and State*, Cambridge: Harvard University Press 1949, p. 287.

[767] R. Post, 'Religion and Freedom of Speech: Portraits of Muhammad', in: S. Mancini & M. Rosenfeld (eds.), *Constitutional Secularism in an Age of Religious Revival*, Oxford: Oxford University Press 2014, p. 329. See also R. Post, 'Religion and Freedom of Speech: Portraits of Muhammad', in: S. Mancini & M. Rosenfeld (eds.), *Constitutional Secularism in an Age of Religious Revival*, Oxford: Oxford University Press 2014, p. 328: 'Democracy is distinct from majoritarianism because democracy is a normative idea that refers to the substantive political values of self-government, whereas majoritarianism is a descriptive term that refers to a particular decision-making procedure.'

[768] R. Post, 'Legitimacy and Hate Speech', *Constitutional Commentary*, 2017, p. 656-657. See, similarly, the US Supreme Court in *Terminiello v. City of Chicago*, 337 U.S. 1 (1949): 'it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected.

For legal theorist Heinze, free expression within public discourse is not 'merely' an important individual *right*, but it is constitutive of democracy: 'Within a democracy, public discourse is the constitution *of* the constitution.'[769] On that view, '[v]iewpoint-selective penalties imposed upon expression within public discourse (…) serve only to de-democratize the state, even if they do in some circumstances, like other de-democratizing measures, serve a security interest.'[770] Limiting expression in public discourse chips away at democratic legitimacy. As Post puts it: 'censorship of public discourse must be understood as excluding those affected from access to the medium of collective self-determination.'[771]

Given that public discourse if of crucial importance to a democracy, no exact standard exists as to the extent to which public discourse must remain free from government interference to maintain democratic legitimacy. The limits of public discourse vary considerably from country to country, and even from democracy to democracy. To what extent, then, are bans on *lèse-majesté*, the defamation of a foreign head of state, and blasphemy legitimate?

2. State security

State security is of principal importance to democracies, or, for that matter, to any state. Hence, bans restricting certain viewpoints may serve a security interest that overrides democratic

The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.'

[769] E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 6.

[770] E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 6.

[771] R. Post, 'Managing Deliberation: The Quandary of Democratic Dialogue,' *Ethics*, 1993, p. 660. See also A. Bhagwat & J. Weinstein, 'Freedom of Expression and Democracy', in: A. Stone & F. Schauer (eds.), *The Oxford Handbook of Freedom of Speech*, Oxford: Oxford University Press 2021, p. 91: 'any regulation that selectively interferes with the expression of particular ideas or perspectives infringes the fundamental precept of equal political participation.'

principles of public discourse. The bans on *lèse-majesté* and the defamation of foreign heads of state were enacted in the Netherlands during a politically and socially volatile period of the nineteenth century.

The Dutch government submitted that insults directed at foreign sovereigns could damage the relations of the Netherlands with other countries. During the interbellum between the two World Wars, the ban on defaming foreign heads of state was applied with an eye on avoiding provocative expression that may incur the wrath of foreign states.

The *lèse-majesté* ban was enacted from an *internal* security perspective. In the midst of severe tensions in the Southern and Northern parts of the United Kingdom of the Netherlands over state finances, religion, education, and the national language, the government found it appropriate to prohibit insults directed at the King or the royal dynasty, as it felt that freedom of the press was abused 'to breed resentment, discontent, hatred of religion, partisanship, and rebellion.'.

Although such rationales serve the security interests of a state, they do not serve a democratic process Yet, given the foundational role of state security, security interests may override democratic principles of free expression. Whether this is the case arguably depends on socio-political circumstances. Heinze has introduced the concept of what he calls 'longstanding, stable, prosperous democracies' (LSPDs). An LSPD is founded 'not just on democratic rules, but on a democratic culture.'[772] In an LSPD, 'a large portion of the population has been educated over time with attitudes of social and political pluralism.'[773] Moreover, an LSPD is 'able to police itself, according to independently (e.g., judicially) reviewable criteria' and 'sufficiently wealthy to assure adequate measures against violence and discrimination, as

[772] E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 72.

[773] E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 72.

well as means of combating intolerance and protecting vulnerable individuals.'[774] Within this relatively new type of democracy,[775] provocative expression is very different from that within volatile societies or in significantly unstable times, where states may justly fear various types of profound societal disintegration such as secession or war. On this view, in relatively stable states, where there are no substantive reasons to fear such disintegration, bans on the expression of political views in public discourse then not only undermine democracy but can neither be justified by an overriding state security rationale.

3. Public order

Another rationale of bans on public expression concerns the local protection of public order within a state (vis-à-vis the protection of the state's integrity *as such*). Although they are not mutually exclusive, in these instances it is not the security of the state as such that is in question, but rather intercommunal strife. For example, the Dutch blasphemy ban of 1932 was enacted with the protection of the public order in mind, and the link between blasphemy and the prevention of intercommunal conflict is also visible in cases that came before the European Court of Human Rights. The European Court found that domestic courts could determine that prohibiting the presentation of religious objects of veneration in an 'abusive', 'unwarranted and offensive', or 'gratuitously offensive' manner could be justified to 'prevent disorder by safeguarding religious peace.'[776]

More generally, this rationale regards the link between an utterance and (social) unrest as a result of that utterance. This concerns one of the typical, classic restrictions on free

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[774] E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 73.

[775] 'Tracing back no further than the 1960s', see E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 70.

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

expression. As observed by German jurist Max Weber, states are characterized by their claim on the use of physical force within their territory.[777] Hence, states must take measures to preserve public order. By extension, states are entitled to curb expression that undermines or threatens to undermine that monopoly, that is to say, expression that is closely linked to disorder. An old but still useful example is that of English philosopher John Stuart Mill, who famously proclaimed in *On Liberty* that:

> '(…) even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.'[778]

Laws prohibiting expressions that directly cause disorder are rarely controversial. Even the democracy most protective of expression in public discourse, the United States, proscribes expression that is 'directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'[779]

Crucially though, the legitimacy of bans on public order grounds hinges on matters of proximity, causation, and intent. In a case regarding a violation of a breach of peace ordinance,

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[777] M. Weber, 'Politics as a Vocation', in: *From Max Weber: Essays in Sociology* (translated, edited, and introduced by H.H. Gerth & C. Wright Mills), New York: Oxford University Press 1946, p. 77-78. Although exceptions do exist, such as such as the legitimate use of private defensive force in certain contexts.

[778] J.S. Mill, *On Liberty*, London: Longman, Greens and co 1865 (1859), p. 32.

[779] *Brandenburg v. Ohio*, 395 U.S. 444 (1969). See for a detailed overview of the evolution of the 'clear and present danger' test, L. Alexander, 'Incitement and Freedom of Speech', in: D. Kretzmer & F. Kershman Hazan, (eds.), *Freedom of Speech and Incitement Against Democracy*, The Hague: Kluwer Law International 2000, p. 101-118.

where the defendant 'vigorously, if not viciously, criticized various political and racial groups whose activities he denounced as inimical to the nation's welfare', the US Supreme Court observed that:

> '[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute (…) is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.'[780]

Although the US Supreme Court's consideration is made within, and only applies to the American context, the Court does raise a compelling point for free expression in general. Given that public discourse often concerns topics people care deeply about, whether it be on abortion rights, climate change, same-sex marriage, immigration, or on Kings, presidents, or prophets, expression within public discourse may be experienced as provocative and challenging. There is no question that such expression may anger, upset, irritate, or annoy.

However, a risk associated with 'breach of peace' or 'public order' rationales is that they may invalidate speech on speculative harms done to the public order, unlikely to materialize. As Post puts it: '[E]very legal system suppresses speech that causes evil consequences. But there is always an important preliminary question about how tightly the causal connection between speech and its possible effects must be drawn before speech can constitutionally be sanctioned.'[781]

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[780] *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

[781] R. Post, 'Hate Speech', in: I. Hare & J. Weinstein (eds.), *Extreme Speech and Democracy*, Oxford: Oxford University Press 2009, p. 134.

This can be illustrated by a Dutch case of an activist who was convicted on the basis of article 131 of the Dutch Criminal Code, which is placed in the section 'Crimes against the public order.' In short, article 131 prohibits inciting others to commit a criminal offence or an act of violence against the public authorities. In 2014, the Amsterdam Court of Appeal convicted a defendant under article 131 who had published a 'modern pamphlet' on her website.[782] The impugned statements were: 'It's time for a new generation to stand up and to take the torch over from Rara';[783] 'Where is the Dutch revolt? Who joins me in storming and plundering the offices of the IND, dousing their archives and computers in gasoline and destroying them by fire?'[784] For these statements, the defendant was given a suspended sentence of two months' imprisonment with an operational period of one year.[785]

The Amsterdam Court of Appeal found that the statement 'Where is the Dutch revolt? Who joins me in storming and plundering the offices of the IND, dousing their archives and computers in gasoline and destroying them by fire?' *directly* incited others to commit criminal offences and thus violated article 131. The court found that the other statement, 'It's time for a new generation to stand up and to take the torch over from Rara', did not directly incite, but that 'the content and context' of the pamphlet it was part of had an inciting tenor, which made that that statement also violated the law.[786] According to the court, the defendant 'had not just sympathized with the fate of asylum seekers and persons staying illegally in the Netherlands,

[782] Amsterdam Court of Appeal, 28 May 2014, ECLI:NL:GHAMS:2014:1945.

[783] 'Rara' is the abbreviation of *Revolutionaire Anti-Racistische Actie*, a 1980s/1990s political activist group that had violence, including arson, as one of its tactics.

[784] 'IND' is the *Immigratie- en Naturalisatiedienst* (in English: Immigration and Naturalisation Service), the government agency that 'assesses all applications from foreign nationals who want to live in the Netherlands or want to become Dutch citizens.'

[785] The defendant violated the terms of the operational period by committing another crime, which triggered the suspended sentence of two months' imprisonment.

[786] Amsterdam Court of Appeal, 28 May 2014, ECLI:NL:GHAMS:2014:1945.

but she incited, and called for arson and vandalism, acts that may have grave and even disruptive consequences.'[787]

Lax causal connections between expression and harm, where it is highly questionable whether there ever was a moment that it was even somewhat likely the 'incitement' would materialize, undermine democratic public discourse. As Heinze observes with regard to bans against 'incitement':

> 'The state retains power to punish people for harms that might, on a wholly speculative chain of causation, result from expressing ideas. To be sure, the criminal law rightly punishes acts of criminal solicitation or conspiracy, where material acts towards the commission of a crime can be identified. Crimes of "incitement" do the opposite. They furnish the state with a dragnet device for sweeping up undesirables without having to show even a highly remote probability of harm actually resulting from the public expression of ideas.'[788]

Something similar is present in the way the European Court of Human Rights (and consequently, national courts) handles blasphemy cases, where the Court links blasphemy to the prevention of disorder. Take for example the case of *E.S. v. Austria*, in which the applicant was convicted by the Austrian authorities for statements that criticized the prophet of Islam Muhammad.[789] During seminars on the topic of Islam, E.S claimed that Muhammad's legacy had a negative impact on modern Austrian society. She wondered whether the relationship of the prophet Muhammad with Aisha ('a 56-year-old and a six-year-old') could be called anything else but 'paedophilia', and stated that:

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[787] Amsterdam Court of Appeal, 28 May 2014, ECLI:NL:GHAMS:2014:1945.

[788] E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 214.

[789] See also European Court of Human Rights, 20 September 1994, 13470/87, par. 56 (*Otto-Preminger-Institut v. Austria*), in which the Court reasoned that the Austrian authorities 'acted to ensure religious peace (…) and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner.'

> 'One of the biggest problems we are facing today is that Muhammad is seen as the ideal man, the perfect human, the perfect Muslim. That means that the highest commandment for a male Muslim is to imitate Muhammad, to live his life. This does not happen according to our social standards and laws. Because he was a warlord, he had many women, to put it like this, and liked to do it with children. And according to our standards he was not a perfect human. We have huge problems with that today, that Muslims get into conflict with democracy and our value system.'[790]

The Austrian Regional Court convicted E.S. and considered that 'because of the public nature of the seminars (…) it was conceivable that at least some of the participants might have been disturbed by the statements.'[791] The European Court of Human Rights upheld E.S.'s conviction, and submitted that the Austrian authorities had 'carefully balanced [E.S.'s] right to freedom of expression with the rights of others to have their religious feelings protected and to have religious peace preserved in Austrian society.'[792] The European Court accepted the Austrian courts' assessment that E.S.'s statements were 'an abusive attack on the Prophet of Islam' which were 'capable of stirring up prejudice and putting religious peace at risk' and 'contained elements of incitement to religious intolerance.'[793]

The Regional Court's consideration that 'it was conceivable that at least some of the participants might have been disturbed by the statements' not very persuasive as it is typical for any expression on matters of public concern, such as immigration or the role of religious symbols in society, that *some might* be *disturbed* by the opinions of others. Although, as acknowledged, a reasonable public order exception to expression in public discourse is legitimate, the Austrian courts failed to substantiate the claim that E.S.'s statements could put

[790] European Court of Human Rights, 25 October 2018, 38450/12, par. 13 (*E.S. v. Austria*).
[791] European Court of Human Rights, 25 October 2018, 38450/12, par. 14 (*E.S. v. Austria*).
[792] European Court of Human Rights, 25 October 2018, 38450/12, par. 57 (*E.S. v. Austria*).
[793] European Court of Human Rights, 25 October 2018, 38450/12, par. 57 (*E.S. v. Austria*).

religious peace (a vague concept in itself) at risk. Although being capable of causing genuine offence, E.S.'s statements were rather moderate in tone and lacked any call to action. Commenting on this case, Temperman observes that

> '(…) it is one thing to plead "disorder" or "religious peace" exceptions *in abstracto*, it is quite another to fulfil the concomitant burden and standard of proof. Naturally, whenever a state invokes such a ground it should offer something in the way of a substantiation, at least as to the likelihood of such peace being imminently under threat should it not intervene and restrict the speech act concerned – in the alternative, pleading "disorder" or "peace" exceptions is rather tendentious. (…) Big words like threats to the peace are easily presented, but not even hints can be traced in the facts of the case as presented by the parties that the "peaceful co-existence of religious and non-religious groups and individuals" (to quote the words the Strasbourg Court uses to express the direness of the situation) was at stake in this case.'[794]

There was no real risk posed to public order that could justify the banning of E.S.'s opinions on religion and immigration from public discourse. There is not much more than vague speculation that certain harms might occur as a result of her expression. Such a lax causal connection between an expression and a possible harm undermines the formation of public opinion.

4. Tolerance and the right not to be insulted in religious feelings

In addition to a reliance on weak public order arguments, the European Court of Human Rights makes use of the concept of 'tolerance' in deciding blasphemy cases. The Court holds that:

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[794] J. Temperman, 'Blasphemy and the European Court of Human Rights: A Small Step Forward, a Giant Leap Back', in: P. Czech et al. (eds.), *European Yearbook on Human Rights 2019*, Intersentia 2019, p. 233-235.

> 'The respect for the religious feelings of believers as guaranteed in Article 9 (art. 9) can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society.'[795]

The Court adopts a notion of tolerance that undermines the exchange of ideas. Post, in a critique on the Court's understanding of tolerance, states that 'Democracy demands that we refrain from acting toward each other in ways that are inconsistent with the social order. We must not riot or murder in defense of our beliefs. We must allow others peacefully to practice their beliefs.'[796] However, democracy 'does not require toleration in the sense that persons must abandon their independent evaluation of the beliefs and ideas of others. Democracies encompass groups that dislike and even detest each other, sometimes on religious grounds. To the extent that democracy suppresses my expressions of disapproval or condemnation for the actions of groups that I dislike, it excludes me from the formation of public opinion.'[797]

Similarly, in commenting on *E.S. v. Austria*, Temperman observes that

> 'In fact, the suppression of these statements on Islam can be deemed rather intolerant in its own right, that is, intolerant of persons with critical thoughts on religion. E.S. is certainly entitled to these thoughts and to the extent that she publicly wishes to express those same opinions, restrictions should be imposed only when the rights of others are truly threatened.'[798]

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[795] European Court of Human Rights, 20 September 1994, 13470/87, par. 47 (*Otto-Preminger-Institut v. Austria*); European Court of Human Rights, 25 October 2018, 38450/12, par. 53 (*E.S. v. Austria*).

[796] R. Post, 'Religion and Freedom of Speech: Portraits of Muhammad,' in: S. Mancini & M. Rosenfeld (eds.), *Constitutional Secularism in an Age of Religious Revival*, Oxford: Oxford University Press 2014, p. 336.

[797] R. Post, 'Religion and Freedom of Speech: Portraits of Muhammad,' in: S. Mancini & M. Rosenfeld (eds.), *Constitutional Secularism in an Age of Religious Revival*, Oxford: Oxford University Press 2014, p. 336.

[798] J. Temperman, 'Blasphemy and the European Court of Human Rights: A Small Step Forward, a Giant Leap Back', in: P. Czech et al. (eds.), *European Yearbook on Human Rights 2019*, Intersentia 2019, p. 235.

The Court interprets tolerance as a value that limits expression that others deem inappropriate or disrespectful. Thus, tolerance is used as an argument to limit expression: a tolerant person would not express himself in an offensive way. However, there are competing understandings of what tolerance entails. Political philosopher Peter Nicholson comments on toleration as follows: 'All that toleration requires is, negatively, that we permit the free expression of ideas we disapprove of and, positively, that we agree to the moral value of there being free expression of ideas we disapprove of.'[799] Tolerance is not the same as indifference One who is indifferent does not tolerate.[800] The tolerant actor experiences a *negative* state of mind as a result of an expression: he or she disapproves, is offended, shocked, or disturbed.[801] Crucially, tolerance is characterized by 'putting up with what you oppose'[802] as a principle.[803] Thus, tolerance on this

[799] P.P. Nicholson, 'Toleration as a moral ideal,' in: J. Horton & S. Mendus (eds.), *Aspects of Toleration: Philosophical Studies*, London/New York: Methuen & Co. 1985, p. 170. Voltaire is an historical figure often referred to in this context – 'I disapprove of what you say, but I will defend to the death your right to say it.' This phrase is often misattributed to French Enlightenment philosopher Voltaire but coined by his biographer S.G. Tallentyre when summarizing both Voltaire's thoughts in his *Traité sur la tolérance* as his attitude towards freedom of expression in general. In a letter that appeared in *The New York Times Book Review* on the 1st of September 1935 Tallentyre writes that the quote 'I disapprove of what you say, but I will defend to the death your right to say it' should be seen as 'a description of Voltaire's attitude to Helvetius's book "On the Mind" – and more widely, to the freedom of expression in general. I do not think, and I did not intend to imply, that Voltaire used these words verbatim, and should be surprised if they are found in any of his works. They are rather a paraphrase of Voltaire's words in the Essay on Tolerance– "Think for yourselves and let others enjoy the privilege to do so, too.'

[800] See for example B. Leiter, *Why Tolerate Religion?*, Princeton/Oxford: Princeton University Press 2013, p. 8. See also J. Habermas, 'Intolerance and discrimination', *International Journal of Constitutional Law*, 2003, p. 3: 'We do not need to be tolerant if we are indifferent toward other beliefs and attitudes or even if we appreciate otherness.'

[801] As philosopher Andrew Jason Cohen observes, 'one does not tolerate what one promotes.' A.J. Cohen, 'What Toleration Is,' *Ethics*, 2004, p. 73.

[802] C. McKinnon, *Toleration: A Critical Introduction*, Oxford: Routledge 2006, p. 3.

[803] See A.J. Cohen, 'What Toleration Is,' *Ethics*, 2004, p. 73: 'We must value our noninterference for it to count as toleration; the noninterference must be properly principled. (…) It is obvious, but worth pointing out, that for

view entails that we put up, not interfere, with expressions that are offend, shock, or disturb. Tolerance is thus also marked by self-restraint.[804]

Applying this to the Court's dealing with blasphemy, tolerance could just as plausibly work in the opposite direction of the way the Court uses it for banning offensive statements.

5. Demarcation and the subjectivity of offence

The Court draws a distinction between *protected* offensive expression, and *unprotected* expression that constitutes 'an abusive attack'[805] on a religious symbol, or expression that presents 'objects of religious worship in a provocative way capable of hurting the feelings of the followers of that religion,'[806], or 'expression that is, in regard to objects of veneration, gratuitously offensive to others and profane.'[807] Although not uncommon in anti-blasphemy laws,[808] an objective distinction between mere offence and gratuitous offence is hard to make.

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a case of noninterference to be principled, it must also be intentional – one does not act on one's principles by accident.'

[804] I. Creppell, 'Toleration, Politics and the Role of Mutuality,' in: M.S. Williams & J. Waldron (eds.), *Toleration and its Limits*, New York: New York University Press 2008, p. 316.

[805] European Court of Human Rights, 20 September 1994, 13470/87, par. 56 (*Otto-Preminger-Institut v. Austria*); European Court of Human Rights, 13 September 2005, 42571/98, par. 29 (*İ.A. v. Turkey*); European Court of Human Rights, 25 October 2018, 38450/12, par. 57 (*E.S. v. Austria*).

[806] European Court of Human Rights, 25 October 2018, 38450/12, par. 53 (*E.S. v. Austria*). See also the Vienna Court of Appeal in this case: 'Harsh criticism of churches or religious societies and religious traditions and practices was lawful. However, the permissible limits were exceeded where criticism ended and insults or mockery of a religious belief or person of worship began.'

[807] European Court of Human Rights, 25 October 2018, 38450/12, par. 43 (*E.S. v. Austria*).

[808] For example, the Dutch law against 'scornful blasphemy' was only directed at 'a scorning, abusive, or reviling manner' anti-religious expression. Also the English blasphemy law acknowledged this distinction, as it determined that 'Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible, or the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The

Writing on hate speech, a category of expression bearing similarities to blasphemy,[809] Post argues that

> 'All legal attempts to suppress hatred, whether of racial groups or of the King, must face a profound conceptual difficulty. They must distinguish hatred from ordinary dislike or disagreement. Even those who believe that hatred should be punished because it is 'extreme' would readily concede that disagreement, even disagreement that stems from dislike, ought to be protected because it is the lifeblood of politics (…) How can we distinguish critique that is too extreme, that ought to be condemned as hatred, from mere disagreement? The problem arises just as much in the context of contemporary hate speech regulation as it does in the context of seditious libel. Is speech attacking Islamic fundamentalism for its homophobia and suppression of women hate speech or critique? Is it hate speech or critique to attack the Catholic Church for its pedophiliac priests or for its position on abortion?'[810]

Looking at the circumstances of the cases in which the European Court upheld convictions over 'abusive' or 'gratuitously offensive' anti-religious expression, it is apparent that most of the criticism of religion is presented in rather moderate ways, with no calls to action or appeals to extreme emotions.

This brings us to the issue of subjectivity of offense. The Court espouses a subjective interpretation of offence. Take for example *Otto-Preminger-Institut v. Austria*, in which 'The Austrian courts, ordering the seizure and subsequently the forfeiture of the film, held it to be an abusive attack on the Roman Catholic religion *according to the conception of the Tyrolean*

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test to be applied is as to the manner in which the doctrines are advocated and not to the substance of the doctrines themselves.'

[809] See E. Heinze, 'Wild-West Cowboys versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech', in: I. Hare & J. Weinstein (eds.), *Extreme Speech and Democracy*, Oxford: Oxford University Press 2010, p. 187.

[810] R. Post, 'Hate Speech', in: I. Hare & J. Weinstein (red.) *Extreme Speech and Democracy*, Oxford: Oxford University Press 2009, p. 125.

public' (emphasis added).[811] Similarly, in *E.S. v. Austria*, the Austrian Regional Court argued regarding E.S.'s statements that: '*Muslims would find the impugned statements wrong and offensive*, even if Muhammad had married a six-year-old and had intercourse with her when she had been nine' (emphasis added).[812] By doing so, the boundaries of public discourse are subjectively drawn by the sensibilities of each respective group.[813]

An alternative path, one that would be more favourable to the legitimacy provided by public discourse, would be to suspend the protection of groups' sensibilities in public discourse. A good illustration of this is the American case of *Cantwell v. Connecticut*. In this case Jehovah's Witnesses were arrested, and initially convicted for a breach of the peace. The Jehovah's Witnesses proselytized in a neighbourhood in New Haven Connecticut that was densely populated by Roman Catholics.[814] Going from house to house, the Jehovah's Witnesses were 'equipped with a bag containing books and pamphlets on religious subjects, a portable phonograph, and a set of records, each of which, when played, introduced, and was a description of, one of the books.'[815] They asked people for permission to play one of the records, and in case permission was granted, 'asked the person to buy the book described, and, upon refusal, he solicited such contribution towards the publication of the pamphlets as the

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

[812] European Court of Human Rights, 25 October 2018, 38450/12, par. 17 (*E.S. v. Austria*).

[813] See also R. Post, 'Religion and Freedom of Speech: Portraits of Muhammad,' in: S. Mancini & M. Rosenfeld (eds.), *Constitutional Secularism in an Age of Religious Revival*, Oxford: Oxford University Press 2014, p. 338: 'What any given religious group finds offensive is a matter of contingent history. Before the European religious wars of the seventeenth century, Catholics found deeply offensive the mere existence of Protestants in their community, and vice versa. It would seem that the law cannot transparently apply the beliefs of religious groups without becoming entangled in endless and insoluble contradictions.'

[814] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[815] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

listener was willing to make. If a contribution was received, a pamphlet was delivered upon condition that it would be read.'[816]

A phonograph record, describing a book entitled 'Enemies,' included an attack on the Catholic religion.'[817] The US Supreme Court noted that

> 'the record played by Cantwell embodies a general attack on all organized religious systems as instruments of Satan and injurious to man; it then singles out the Roman Catholic Church for strictures couched in terms which naturally would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows. The hearers were, in fact, highly offended. One of them said he felt like hitting Cantwell, and the other that he was tempted to throw Cantwell off the street.'[818]

Ultimately, the US Supreme Court reversed the conviction, arguing that it 'was violative of constitutional guarantees of religious liberty and freedom of speech.' The Court devoted a substantial a passage to a discussion of the place of free expression in a pluralist society:

> 'In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy. The essential characteristic of these liberties is, that under their shield many types of life, character, opinion

[816] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).
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[818] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

> and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds.'[819]

By deciding so, the US Supreme Court gave way for a formally inclusive public discourse. 'Because we are a country of many creeds, it is exceedingly important that no single creed can hold the nation hostage to its sensitivities. What might be blasphemous to Catholics might be truth to Jehovah's Witnesses', Post observes.[820] 'We interpret our First Amendment', Post writes, 'to create a public space that is controlled by neither Catholics nor Jehovah's Witnesses, nor indeed by any group, so that every individual can participate in public discussion.'[821] Given that in a plural society a plurality of conceptions exist of what is pious, blasphemous, dangerous, moral, or immoral, viewpoint-neutrality, where the state in terms of legal sanctions remains neutral towards citizens' expression on matters of public concern,[822] enhances the democratic function of public discourse.

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[819] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[820] 'Free Speech in the Age of YouTube; Barack Obama couldn't censor that anti-Islam film – even if he wanted to', 17 September 2012, https://foreignpolicy.com/2012/09/17/free-speech-in-the-age-of-youtube/.

[821] 'Free Speech in the Age of YouTube; Barack Obama couldn't censor that anti-Islam film – even if he wanted to', 17 September 2012, https://foreignpolicy.com/2012/09/17/free-speech-in-the-age-of-youtube/.

[822] 'The *doctrine of viewpoint neutrality* requires that *all* persons have a right to express, hear and consider *any* viewpoint, idea or doctrine within public discourse. This means that liberal democracies should impose no criminal or civil penalties upon the expression of political opinions or ideas. The doctrine of viewpoint neutrality (…) requires that citizens in a liberal democracy should have a right to participate in public discourse as speakers and listeners free from state imposed viewpoint-based restrictions.' See K.S. Ekeli, 'Democratic legitimacy, political speech and viewpoint neutrality, *Philosophy and Social Criticism*, 2020, p. 725. Contrary to viewpoint neutrality, 'Viewpoint discriminatory regulations (…) are ones based on "the specific motivating ideology or the opinion or perspective of the speaker,"' according to J. Weinstein, 'An Overview of American Free Speech Doctrine and its Application to Extreme Speech', in: I. Hare & J. Weinstein (eds.), *Extreme Speech and Democracy*, Oxford: Oxford University Press 2009, p. 82.

Conclusion

This chapter has discussed the defamation of heads of state and religious symbols in light of democratic free expression theory. Democracy and expression are closely linked, as public discourse is essential for the legitimacy of a democratic order. The ability to participate in matters regarding the direction and culture of society allows people to identify with laws they must live by, even if they may disagree with them. Conversely, prohibiting expression in public discourse based on a certain viewpoint undermines that formation of public opinion. That being said, there may be grounds that justify doing so. One of these is a lack of state security, a prerequisite for any state, which can override democratic principles of public discourse. In particularly volatile times, bans on expressing certain viewpoints may be justified as they protect state security. For example, the Dutch bans on *lèse-majesté* and the defamation of foreign heads of state were enacted during a highly volatile period of the nineteenth century, in order to maintain social cohesion or cordial relations with other nations. Although arguably appropriate at the time, once socio-political circumstances change, so does the legitimacy of such bans. Another common restriction on public expression is that of the protection of the public order, a premier objective of states. On this view, the state can legitimately restrict expression that causes disorder. However, an important caveat concerns the likelihood of the public order being disrupted as a result of an utterance. The formation of public opinion is undermined if the state bans expression based on not much than more vague speculation that certain harms might occur as a result of her expression. This is visible in the way the European Court of Human Rights interprets freedom of expression in cases of blasphemy. The Courts easily accepts the national authorities' claims that the public order might be disturbed by expression on religion that is offensive to a part of the population.