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Princes and prophets: democracy and the defamation of power

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Citation

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

Version: Publisher's Version

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

Chapter 7 Conclusion

This thesis has discussed the background and regulation of three types of defamation of powerful entities, symbols, or institutions:

- (1) *lèse-majesté*, the defamation of a *national head of state* (such as Kings, Queens, or Presidents);
- (2) the defamation of *foreign heads of state*; and
- (3) *blasphemy*, the defamation of *religion or religious symbols*.

These speech crimes were once very serious wrongs, closely associated with a serious threat to social stability. For example, the English law once held that ‘expression against the King, cursing or wishing him ill’ amounted to sedition.⁸⁹⁵ The Dutch *lèse-majesté* law of 1830 criminalized violating ‘the dignity, the authority, or the rights of the King or the Royal dynasty’ and ‘slandering, deriding, or defaming the person of the King.’ This law, enacted amidst great political instability and social tensions, carried sentences of up to five years’ imprisonment. This law and its successor, included in the Criminal Code of 1886, were rooted in notions of maintaining *internal* tranquility and unity; it was the interest of the *state*, as opposed to private interests of the King, that justified criminalizing expression defamatory of royal dignitaries. The elevated, special position of the King, Queen, and the Royal House justified a special protection against attacks on their reputation.

Bans on defaming *foreign heads* of state are typically adopted to cultivate *external* stability, to foster cordial relations with other nations. For example, the Dutch ban of 1816 prohibiting insults directed at foreign Sovereigns or Monarchs was intended to preserve friendly relations with other nations. Subsequent versions of this were also characterized by

⁸⁹⁵ H.J. Stephen, *Stephen’s Commentaries on the Laws of England*, 17th ed., 1922, p. 153.

the wish to maintain friendly relations with other nations. The Criminal Code of 1886 prohibited ‘the intentional insult of a ruling sovereign or other head of a friendly state,’ and to ‘intentionally insult a representative of a foreign power, acting in his quality as representative.’ Although the government did not mention the principle underlying these speech crimes, legal scholar Simons regarded ‘friendly relations with other nations’ as a ‘primary requirement of our national interest.’⁸⁹⁶ A court case of the 1930s, a highly turbulent decade, reflect this rationale. In a 1933 case about the defamation of *Reichspräsident* Paul von Hindenburg, the public prosecutor explained that insults directed at foreign heads of state should not take place ‘in view of friendly relations between the states’ and that ‘diplomatic relations with a friendly state, such as Germany, may not be disrupted.’ This was considered to be a ‘requirement of self-preservation’, because ‘leaving insults unpunished could constitute a *casus belli*’ in the view of the prosecutor.⁸⁹⁷ The ban on insulting foreign heads state was thus perceived as an instrument to foster international relations and even to preclude incurring the wrath of foreign, mightier powers.

The third restriction, *blasphemy*, ‘the willful use of derogatory language or actions that question the existence, nature, or power of sacred beings, items, or texts’⁸⁹⁸ was once regarded as a profound moral and legal wrong as well. It has been associated with treason⁸⁹⁹ and subversion. The English law of blasphemy as established in *Rex v. Taylor* (1676), prohibited ‘to reproach the Christian religion’ as it was ‘to speak in subversion of the law.’⁹⁰⁰ Hence,

⁸⁹⁶ See D. Simons, *De vrijheid van drukpers in verband met het Wetboek van Strafrecht*, 's-Gravenhage 1883, p. 156.

⁸⁹⁷ *L. de Visser staat terecht*, *Algemeen Handelsblad* 30 June 1933.

⁸⁹⁸ As defined in D. Nash, *Acts against God*, London: Reaktion Books 2020, p. 12.

⁸⁹⁹ For example, in Ancient Greece. See 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.

⁹⁰⁰ Quoted in: E. Visconsi, ‘The Invention of Criminal Blasphemy: *Rex v. Taylor* (1676),’ *Representations*, 2008, p. 31.

blasphemy was once regarded as a very serious threat to the stability of the state. From the late nineteenth century onwards, the regulation of anti-religious expression became more moderate, emphasizing an offensive *manner* of anti-religious expression, thus leaving more room for criticism of religion.⁹⁰¹ Religion could be criticized as long as ‘the decencies of controversy’ were observed. Hare speaks in this regard of a ‘narrowing’ of the offence of blasphemy, as ‘the law appeared to tolerate the reasoned denial of the truth of Christianity.’⁹⁰² This notion was also reflected in the Dutch blasphemy ban of 1932, which criminalized blasphemy uttered in a ‘reviling’ or ‘abusive’ manner yet not criticism of religion as such.

Some European countries have repealed, or are in the process of repealing, their bans on *lèse-majesté*, the defamation of foreign heads of state, or blasphemy. *Lèse-majesté* was abolished in the Netherlands in 2020, while a Bill to end the Belgium *lèse-majesté* law is currently being considered.⁹⁰³ Outside of Europe, *lèse-majesté* bans can still be found in various countries, including Spain, Cambodia, Thailand, Jordan, Kuwait, Bahrain, and Turkey.⁹⁰⁴ France (2004),⁹⁰⁵ Belgium (2005),⁹⁰⁶ Germany (2018),⁹⁰⁷ and the Netherlands (2020)⁹⁰⁸ all abolished their bans on the defamation of foreign heads of state, while other European countries

⁹⁰¹ D. Nash, *Blasphemy in the Christian World: A History*, Oxford: Oxford University Press 2007, p. 80.

⁹⁰² 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.

⁹⁰³ Parliamentary documents, Belgian House of Representatives (*Belgische Kamer van volksvertegenwoordigers*), 3 March 2021, Doc. No. 55 1824/001.

⁹⁰⁴ Overseas Security Advisory Council, *Lèse Majesté: Watching what you say (and type) abroad* (report), 2019, <https://www.osac.gov/Content/Report/e48a9599-9258-483c-9cd4-169f9c8946f5>.

⁹⁰⁵ See Article 52 *Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité*.

⁹⁰⁶ See J. Foakes, *The Position of Heads of State and Senior Officials in International Law*, Oxford: Oxford University Press 2014, p. 70 n. 161.

⁹⁰⁷ See *Gesetz zur Reform der Straftaten gegen ausländische Staaten*, *Bundesgesetzblatt* (2017) no. 48; See also ‘Lèse-Majesté in Germany – A Relic of a Long-Gone Era?’, 23 February 2017, <https://blogs.loc.gov/law/2017/02/lse-majest-in-germany-a-relic-of-a-long-gone-era/>.

⁹⁰⁸ Bulletin of Acts and Decrees (*Staatsblad*) 2019, no. 277.

still have such laws on their books.⁹⁰⁹ These laws are also still found in numerous countries outside Europe.⁹¹⁰ As far as blasphemy laws are concerned, during 2014-2020, the Netherlands, Iceland, Norway, Malta, Denmark, Ireland, Canada, New Zealand, and Greece repealed their blasphemy laws while during this period these bans have been introduced or amended in Kazakhstan, Nepal, Oman, Mauritania, Morocco, and Brunei.⁹¹¹

From a supranational law perspective, the United Nations Human Rights Committee and the European Court of Human Rights have commented and decided on laws prohibiting the defamation of powerful entities, symbols, or institutions.

As for *lèse-majesté* laws and bans on the defamation of foreign heads of state, the European Court of Human Rights holds that laws providing for ‘a special legal status on heads of State, shielding them from criticism solely on account of their function or status, irrespective of whether the criticism is warranted (...) amounts to conferring on foreign heads of State a special privilege that cannot be reconciled with modern practice and political conceptions’⁹¹² and that ‘providing increased protection by means of a special law on insults will not, as a rule, be in keeping with the spirit of the Convention.’⁹¹³ Hence, the European Court has established numerous violations of article 10 in cases where applicants were convicted on the basis of special defamation laws.⁹¹⁴ The United Nations Human Rights Committee, a body consisting

⁹⁰⁹ See Organization for Security and Co-operation in Europe, *Defamation and Insult Laws in the OSCE Region: A Comparative Study*, 2017, p. 23..

⁹¹⁰ These include Afghanistan (article 243 Criminal Code), Botswana (article 60 Criminal Code), Cameroon (article 153 Criminal Code), Egypt (article 181 Criminal Code), Ethiopia (article 264 Criminal Code), Indonesia (article 144 Criminal Code), Iraq (article 227 Criminal Code), Israel (article 168 Criminal Code), Senegal (article 165 Criminal Code), South Korea (article 107 paragraph 2), and Thailand (article 133 Criminal Code).

⁹¹¹ U.S. Commission on International Religious Freedom, *Violating Rights: Enforcing the World’s Blasphemy Laws*, 2020, p. 7.

⁹¹² European Court of Human Rights, 25 June 2002, 51279/99, par. 68-69 (*Colombani and others v. France*).

⁹¹³ European Court of Human Rights, 15 March 2011, 2034/07, par. 55 (*Otegi Mondragon v. Spain*).

⁹¹⁴ For example, European Court of Human Rights, 25 June 2002, 51279/99, par. 68-69 (*Colombani and others v. France*); European Court of Human Rights, 15 March 2011, 2034/07, par. 55 (*Otegi Mondragon v. Spain*);

of independent human rights experts and that monitors implementation of the ICCPR by the State parties, has ‘expressed concern regarding laws on such matters as *lèse-majesté*, (...) defamation of the head of state and the protection of the honour of public officials’⁹¹⁵ and observed that ‘laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned.’⁹¹⁶ The Human Rights Committee and United Nations officials have also commented on *lèse-majesté* bans in specific countries. For example, the Human Rights Committee observed that Thailand ‘should review article 112 of the Criminal Code, on publicly offending the royal family, to bring it into line with article 19 of the Covenant’⁹¹⁷ while the former Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, ‘called on the Thai authorities to stop using *lèse-majesté* provisions as a political tool to stifle critical speech (...).’⁹¹⁸ With regard to the now repealed Dutch *lèse-majesté* ban, Kaye ‘expressed concern that the [*lèse-majesté*] provisions of the Dutch Criminal Code limit the right to freedom of expression in contradiction with article 19 of the International Covenant on Civil and Political Rights.’⁹¹⁹

As for blasphemy, the picture is less straight-forward from a supranational law perspective. On one hand are bodies and officials that outright reject blasphemy laws. The Human Rights Committee unequivocally holds that ‘Prohibitions of displays of lack of respect

European Court of Human Rights, 13 March 2018, 51168/15 and 51186/15, par. 6 (*Stern Taulats and Roura Capellera v. Spain*); European Court of Human Rights, 19 October 2021, 42048/19, par. 20 (*Vedat Şorli v. Turkey*).

⁹¹⁵ Human Rights Committee, General comment No. 34, UN Doc. CCPR/C/GC/34, 2011, par. 38.

⁹¹⁶ Human Rights Committee, General comment No. 34, UN Doc. CCPR/C/GC/34, 2011, par. 38.

⁹¹⁷ Human Rights Committee, ‘Concluding observations on the second periodic report of Thailand’, 25 April 2017, UN Doc. CCPR/C/THA/CO/2, par. 38.

⁹¹⁸ ‘Thailand: UN rights expert concerned by the continued use of *lèse-majesté*’, 7 February 2017, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21149&LangID=E>.

⁹¹⁹ D. Kaye, Letter of 14 October 2016, UN Doc., OLNLD2/2016, https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL_NLD_2016.pdf.

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.’⁹²⁰ Heiner Bielefeldt, the former Special Rapporteur on freedom of religion or belief, 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’⁹²¹ The Venice Commission, the Council of Europe’s advisory body on constitutional matters, has stated that ‘the offence of blasphemy should be abolished (...) and should not be reintroduced.’⁹²² On the other hand, the European Court of Human Rights does not regard blasphemy bans necessarily as incompatible with freedom of expression as guaranteed by article 10 of the European Convention on Human Rights. From its landmark case *Otto-Preminger-Institut v. Austria* onwards,⁹²³ the Court has upheld convictions by national courts over blasphemous expression in multiple cases.⁹²⁴ The Court has held that ‘abusive attacks’ on religious symbols ‘capable of stirring up prejudice and putting religious peace at risk’, or the presentation of ‘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 European Convention on Human Rights. Such a provocative way

⁹²⁰ 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.’

⁹²¹ Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, 2013, UN Doc. A/HRC/25/58, par. 70(e).

⁹²² Venice Commission, *Blasphemy, Insult and hatred: finding answers in a democratic society. Science and technique of democracy*, No. 47, Luxembourg: Council of Europe Publishing, 2008, p. 32.

⁹²³ European Court of Human Rights, 20 September 1994, 13470/87 (*Otto-Preminger-Institut v. Austria*).

⁹²⁴ For example, European Court of Human Rights, 13 September 2005, 42571/98 (*İ.A. v. Turkey*); European Court of Human Rights, 25 October 2018, 38450/12, (*E.S. v. Austria*).

of presentation ‘could be conceived as a malicious violation of the spirit of tolerance’ which is ‘one of the bases of a democratic society’, according to the Court.⁹²⁵

This thesis has also reflected on the question whether bans on expression that defames powerful entities, symbols, or institutions are legitimate in a democracy. Public discourse, expression ‘concerning the organization and culture of society’⁹²⁶ is constitutive of a democracy.⁹²⁷ ‘The ideal of democracy’, according to political philosopher Hayek, ‘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.’⁹²⁸ Public discourse provides for what has been called by Kelsen a ‘running discussion between majority and minority’,⁹²⁹ where 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.

Viewpoint selective bans, based on ‘the specific motivating ideology or the opinion or perspective of the speaker’,⁹³⁰ of which *lèse-majesté*, the defamation of foreign heads of state, and blasphemy are all examples, interfere with that legitimizing function of public discourse; as only *certain* viewpoints on religion or the government are accepted to ‘compete’ in public discourse while others are not. Laws that limit certain viewpoints in public discourse, for

⁹²⁵ European Court of Human Rights, 25 October 2018, 38450/12, par .15 (*E.S. v. Austria*).

⁹²⁶ E. Barendt, *Freedom of Speech*, Oxford: Oxford University Press 2005, p. 189.

⁹²⁷ See E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford: Oxford University Press 2016, p. 5, 8, 47-48.

⁹²⁸ F.A. Hayek, *The Constitution of Liberty*, Chicago/London: University of Chicago Press 2011 (1960), p. 175.

⁹²⁹ H. Kelsen, *General Theory of Law and State*, Cambridge: Harvard University Press 1949, p. 287.

⁹³⁰ See 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.

example on the monarch, or on religion, undermine the legitimacy provided for by free expression.

That being said, although such laws cannot be justified on *democratic* principles, they may be legitimate on other grounds, such as on state security or public safety grounds. State security, which a prerequisite for a state, may entail limiting certain viewpoints as they pose a substantive risk of social disintegration if left unchecked. Whether this is the case arguably depends on socio-political circumstances such as the state's stability, existence or lack of a democratic culture, etcetera. The bans on *lèse-majesté* and the defamation of foreign heads of state were enacted in the Netherlands during highly volatile periods in the early nineteenth century. Although not on democratic grounds, such bans may be justified on overriding, security grounds when, in significantly unstable periods of time, socio-political circumstances require so.

Bans that limit certain viewpoints in public discourse on public order grounds are commonplace. However, the legitimacy of such bans depends on the causal connection between an utterance and the disruption of public order taking place. There must arguably be a genuine threat of the public order being disturbed by a certain expression to justifiably ban that expression. Looking at the European Court of Human Rights' case law on blasphemy, it is clear that the Court accepts a very loose connection between provocative expression on religion and any subsequent danger to the public order. Such a lax connection is hard to reconcile with a democratic free speech principle.

Lastly, this thesis has discussed some challenges to free expression posed by the informal dimension of blasphemy. Different from *lèse-majesté* and the defamation of foreign, blasphemy has an 'extra-judicial' or 'extra-legal' dimension. This is a development in the area of blasphemy that has been on the forefront since the last three decades. The *Rushdie affair*, the *Danish cartoons controversy*, and the *Charlie Hebdo affair* are notable examples of this.

This thesis has discussed one episode of this informal aspect of blasphemy, namely that of *Innocence of Muslims*. In ways resembling the *Rushdie affair* and the *Danish cartoons controversy*, incident was about a video containing content considered by many Muslims to be blasphemous, which was followed by unrest in various parts of the world.