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Blasphemy, defamation of religion, religious hate speech

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Introduction

Both at the national level and at the international level, law-makers have been racking their brains over the conundrum of how to optimize both the right to freedom of expression and the right to freedom of religion or belief. Sometimes rightly – but often wrongly – the right to freedom of expression and the right to freedom of religion or belief are portrayed as colliding rights. And where fundamental rights potentially clash, dilemmas are posed: should one right prevail over another? How can we optimize both rights? Should we somehow balance these rights?

At the national level, blasphemy laws, religious hate speech laws, and memory laws all offer a priori answers to the question which right or interest prevails. These laws have in common that they provide state authorities with the means to take measures at the expense of free speech. The state may seek to justify such laws and policies by reference to the religious rights or at least ‘religious sensitivities’ of others (e.g. blasphemy laws). Or they may perhaps refer to the need to protect certain religious dogmas – e.g. the finality of the Prophet-hood of Muhammad – per se (e.g. certain of the most stringent religious defamation laws). Or the state may seek to justify interferences by referring to the need to protect religious adherents against discrimination, hostility or violence (e.g. hate speech or incitement laws). Still other states may find certain content per se undesirable, such as the denial of established historical atrocities (e.g. memory laws, or ‘denial laws’, or other laws against negationism or revisionism, most commonly in relation to the Holocaust).

International law accepts and rejects some of these domestic approaches to dealing with negative speech about religion or religious believers. In this chapter, we will discuss the main areas of tension, dilemmas and challenges states are facing in the area of what can best be generally referred to as ‘extreme speech’ about religion or religious believers. Also, we will assess some of the recent contributions from international law and international human rights monitoring bodies on these controversial matters.
Blasphemy

Many states in the world at some point in time had blasphemy as a criminal offence on the statutes.\(^1\) And in many parts of the world, states still do (Marshall and Shea 2011). Pew Forum (2012) has counted 32 states, i.e. 16 per cent out of a total of 198 countries studied, with anti-blasphemy laws. Laws that penalize blasphemy are particularly common in the Middle East, Asia and North Africa. They are virtually non-existent in the Americas; in the United States specifically prosecutions over blasphemy are of course bound to be unconstitutional.\(^2\) In Sub-Saharan Africa only two states can be found with blasphemy laws (Nigeria and Somalia).

Europe is sending out confusing signals, making it harder to discern clear trends. That is, if one compares contemporary Europe with Europe from pre-modern times, blasphemy laws have certainly fallen from grace. Still, no less than eight countries, i.e. 18 per cent (which in fact equates with the Asia-Pacific region), maintain their blasphemy laws till today (Pew Forum 2012). This concerns: Denmark, Germany, Greece, Ireland, Italy, Malta, Netherlands and Poland.\(^3\) In many, if not all, European countries the tenability of such laws has been challenged, yet confusingly, these debates lead to rather different legislative, prosecutorial and judicial approaches.

First, some European states which still have blasphemy as an offence on their criminal books have not prosecuted alleged perpetrators for many decades. For instance, in the Netherlands the final conviction for ‘gratuitous blasphemy’ was in 1965; moreover, the person involved was acquitted by the Dutch Supreme Court some three years later.\(^4\) In Denmark, too, there have been few post–World War II prosecutions and no successful blasphemy conviction since the 1930s.

In other words, blasphemy is more or less a dead letter there. Yet, apparently not quite so dead that the offence can be easily abolished altogether. The final Dutch blasphemy case mentioned just now revolved around Dutch author Gerard Reve, who wrote about having sex with God incarnated as a donkey – clearly this decision (acquittal on appeal) was the final blow to the legal ban. Yet some political (Christian) factions valued retaining the *de jure* ban for symbolic reasons and resisted its complete abolition. More liberal political factions have several times proposed the complete abolition of the offence; several times without success,\(^5\) and only very recently.

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1. Or as a religious law or common law offence. For an historical and comparative overview, see Temperman 2008.
2. Under the robust free speech protection guaranteed by the First Amendment to the US Constitution. For a landmark US Supreme Court decision, see *Joseph Burstyn, Inc. v. Wilson*, 343 US 495 (1952). However, it should be noted that at state level some of the US states still have blasphemy laws in place, though their enforcement is made unviable by US Supreme Court rulings. See e.g. Sec. 36 of Ch. 272 of the General Laws of Massachusetts.
3. Note that on 3 December 2013, the Dutch Senate accepted the proposal to delete blasphemy from the Dutch Criminal Code.
5. In 2009, a majority in the Dutch Parliament expressed itself in favour of striking blasphemy from the Dutch criminal code. See, e.g., *NRC* 2009. Initially, the plan was to replace the blasphemy offence with a hate speech offence. Ultimately, however, both offences were retained by the Dutch Penal code. See Art. 147 and Art. 147a (on blasphemy and religious defamation), Art. 137c (on group defamation) and Art. 137d (incitement to hatred) of the Dutch Penal Code. The last few coalitions have been dependent on the support by some of the smaller Christian political parties: not proceeding with the abolishment of the offence has been part of the leverage.
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(December 2013) successfully. Similarly, in Denmark, while higher threshold religious hate speech prohibitions do lead to prosecutions and convictions, attempts to annul the virtually dead blasphemy prohibition have thus far stranded.

In Western liberal democracies, Christian political factions are typically interested in retaining the offence purely as a symbolic offence, while they may also be hoping for a prosecutorial and judicial U-turn (more rigorous prosecutions) in the future. At any event, as long as the offence is on the statutes, some ‘chilling effect’ cannot be denied outright – this is presumably precisely what these parties are interested in.

A fairly recent case of blasphemy being struck of the statutes occurred in England and Wales. In those parts of the United Kingdom blasphemy and blasphemous libel were indeed fully abolished as common law offences in May 2008. Some months earlier, on 5 March 2008, the House of Lords had voted in favour of the amendment to the Criminal Justice Bill as proposed by the government. A House of Lords’ Select Committee on Religious Offences had already paved the way towards the annulment of the blasphemy offence as it considered the legal concept to be obsolete and contrary to fundamental human rights norms, notably the right to freedom of expression. In its stead a prohibition of incitement to racial and religious hatred was introduced, as that was deemed to be more in line with requirements from human rights law. Accordingly, here you can clearly discern a trend characterized by moving away from protecting religious doctrines and churches per se (the English blasphemy laws exclusively protected the Anglican Church of England as the upheaval surrounding Salman Rushdie’s *Satanic Verses* reiterated), to protection of groups of people belonging to a religion or belief. Similarly, the Netherlands had adopted religious hate speech legislation some years prior to the recent abolishment of the blasphemy offence– accordingly, one can see how these developments tend to go hand in hand in Western liberal democracies.

That said, in certain European countries blasphemy laws are no dead letter but very much alive. Greece would be a case in point, while Ireland recently in fact updated its laws on blasphemy. The latter was all the more remarkable since domestic momentum was building up to abolish the offence. The Irish Law Reform Commission had deemed the Irish blasphemy offence untenable. This Commission was ‘of the view that there is no place for the offense of blasphemous libel in a society which respects freedom of speech’ and consequently advised – to no avail – its abolishment.

Whereas blasphemy laws have been abolished in many countries out of concern with freedom of expression, freedom of religion concerns raised by blasphemy laws are not to be trivialized.

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6 The annulment of the prohibition was proposed by liberal party D66 and socialist party SP.
7 As per Article 79 of the Criminal Justice and Immigration Act 2008 (c. 4). The annulment entered into effect on 8 July 2008.
9 As per the Racial and Religious Hatred Act 2006 (c. 1).
11 In fact, initially the plan was to do this simultaneously (see note 5).
12 Articles 198, 199, and 201 of the Greek Penal Code deal with different forms of religious defamation and blasphemy. There have been quite a number of prosecutions in the last few years, from the Gerhard Haderer case in 2005, to the most recent ‘Facebook case’. See Christian Science Monitor (2012).
The treatment of Ahmadis in Pakistan, who were constitutionally stigmatized as apostates (‘non-Muslims’) in 1974, is a good example.\(^{15}\) ‘Ahmadis’ is used as a collective name for two minority communities that consider themselves Muslims: the Ahmadiyya Muslim Community and the Lahore Ahmadiyya Movement for the Propagation of Islam. Ahmadis are followers of Mirzā Ghulām Ahmad Qādiyānī (1835–1908). Many core Islamic beliefs and rituals are shared by Ahmadis; however, certain aspects of Ahmadiyya beliefs are considered controversial if not heretical by mainstream Sunni and Shia Muslims. These doctrinal issues concern predominantly differing takes on the life and role of Jesus, the Prophet-hood of Muhammad and the status of the religious founder and reformer, Ahmad. The Ahmadiyya Muslim Community renders prophet status to Ahmad and in so doing questions the finality of the Prophet-hood of Muhammad, something which ‘orthodox Muslims’ consider contrary to true Islamic doctrine, particularly the Quranic words ‘Muhammad is . . . the Seal of the Prophets’.\(^{16}\)

Ostensibly so as to protect ‘pure Islam’, Penal Code revisions paved the way towards what might be called an official anti-Ahmadi campaign. One of the provisions of these anti-Ahmadi laws reads: ‘Any person of the Quadiani group or the Lahori group (who call themselves “Ahmadis” or by any other name), who, directly or indirectly, poses himself as Muslim, or calls, or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations, or in any manner whatsoever outrages the religious feelings of Muslims, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.’\(^{17}\)

A Constitution Order adds that:

In the Constitution and all enactments and other legal instruments, unless there is anything repugnant in the subject or context: (a) ‘Muslim’ means a person who believes in the unity and oneness of Almighty Allah, in the absolute and unqualified finality of the Prophet-hood of MUHAMMAD (PBUH), the last of the Prophets, and does not believe in, or recognize as a prophet or religious reformer, any person who claimed or claims to be a prophet, in any sense of the word or of any description whatsoever, after MUHAMMAD (PBUH); and (b) ‘non-Muslim’ means a person who is not a Muslim and includes a person belonging to the Christian, Hindu, Sikh, Buddhist or Parsi community, a person of the Qadiani group or the Lahori group (who call themselves ‘Ahmadis’ or by any other name), or a Bahai, and a person belonging to any of the Scheduled Casts.\(^{18}\)

In other words, practising the Ahmadi belief is in itself pretty much outlawed inasmuch as such believers cannot in word, teaching, observance of rituals and so on, give expression to the essence and roots of their beliefs.

In South East Asia, specifically in Indonesia and Bangladesh, Ahmadis suffer from similar laws and policies (Marshall and Shea 2011: 151–61). The treatment of Bahá’ís as apostates, blasphemers or heretics primarily in Iran, but also in, for instance, Afghanistan and Egypt, is further illustration.

\(^{15}\) Drawing on Temperman 2010b: 185–86.
\(^{17}\) Art. 298-C of the Penal Code, introduced by Ordinance No. E:17 (1) 84-Pub, Anti-Islamic Activities of Quadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance, XX/1984 of 26 April 1984. The same Ordinance added an article on the ‘Misuse of epithets’ to the Penal Code (art. 298-B) which specifically targets Ahmadis as well.
\(^{18}\) The Constitution (Third Amendment) Order, President’s Order 24/1985, No. EI7(3)/85 Pub., of 1985 (effective from 19 March 1985).
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of the fact that when states ostensibly act in the interest of protecting ‘religious orthodoxy’ they are liable to undermine the very foundations of religious freedom (Marshall and Shea 2011: 41–46, 63–65, 106. See also Ghanea 2002).

Some states do not see the protection of a universal right to freedom of religion as a major concern – what is considered the main challenge is retaining the strong position and ‘purity’ of the traditional and dominant (state) religion. For that purpose, some states have ‘internationalized’ their agenda of combating what they experience as threats to the respect that is due to their state religion.

**Defamation of religion**

For more than a decade, a coalition of predominantly Muslim states, led by Pakistan, pushed for more rigorous international and national measures combating so-called ‘defamation of religion’. These UN Resolutions, tabled by the Organization of Islamic Conference, have been vehemently criticized by Western states, legal scholarship and human rights NGOs. Combating defamation of religion would be tantamount of destroying the core right of freedom of expression, but also the right to freedom of religion. The latter right, after all, includes a right to manifest beliefs that may be heretical, defamatory or blasphemous to another person.

More recently, as of 2011, the tone of these Resolutions has changed so as to accommodate Western criticism. Presently, the Resolutions are entitled *Combating intolerance, negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons, based on religion or belief*. Although the content of the revamped Resolutions seemingly accords better with standards of international human rights law, within Western legal doctrine anxiety remains that these political Resolutions will serve as justifications for national practices that unduly stifle speech critical of majority religions. The new consensus Resolution certainly does not take a strong enough stance against the countless suffocating blasphemy laws and policies that stifle all unpopular speech about religion. Indeed, as Blitt observes,

> [b]y advancing a consensus approach to combatting intolerance without addressing and accounting for the false linkages that continue to be made between incitement and defamation, states concerned with protecting human rights have created an opening that risks perpetuating defamation-type offenses under the ostensible sanction of international law.

*(2011: 209)*

Interestingly, international monitoring bodies and international independent expert bodies are divided about the question of whether blasphemy or combating defamation laws can pass the human rights test. Specifically, whereas the UN Special rapporteur on freedom of religion or belief and the UN Human Rights Committee have taken a firm position against all religious defamation laws, the regional European Court of Human Rights has repeatedly

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19 This section summarizes some of the findings described in Temperman 2014.
21 E.g. General Assembly Resolution 66/167, *Combating intolerance, negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons, based on religion or belief*, adopted on 19 December 2011 (A/RES/66/167); and General Assembly Resolution 67/178, *Combating intolerance, negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons, based on religion or belief*, adopted on 20 December 2012 (A/RES/67/178).
permitted blasphemy restrictions imposed by States parties to the European Convention on Human Rights.

The Special Rapporteur has called national criminal bans on defamation of religion ‘counter-productive’, reasoning that:

the right to freedom of religion or belief, as enshrined in relevant international legal standards, does not include the right to have a religion or belief that is free from criticism or ridicule. Moreover, the internal obligations that may exist within a religious community according to the faith of their members (for example, prohibitions on representing religious figures) do not of themselves constitute binding obligations of general application and are therefore not applicable to persons who are not members of the particular religious group or community, unless their content corresponds to rights that are protected by human rights law. The right to freedom of expression can legitimately be restricted for advocacy that incites to acts of violence or discrimination against individuals on the basis of their religion. Defamation of religions may offend people and hurt their religious feelings but it does not necessarily or at least directly result in a violation of their rights, including their right to freedom of religion. Freedom of religion primarily confers a right to act in accordance with one’s religion but does not bestow a right for believers to have their religion itself protected from all adverse comment.

The UN Human Rights Committee, since 2011, considers blasphemy restrictions an actual violation of international law, thus in effect calling for their removal. Newly adopted General Comment No. 34 provided the following on the matter of national prohibitions of defamation of religion, including blasphemy bans:

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. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.

Accordingly, as far as the Human Rights Committee is concerned, unqualified forms of defamation of religion (blasphemy, disrespect of religion, gratuitously offensive speech, satire, religious criticism, etc.) are not to be combatted by states by means of national legal prohibition. The only exception made is in relation to forms of speech that would reach the threshold of incitement within the meaning of Article 20(2) of the ICCPR.

23 Report of the Special Rapporteur, paras. 36–37, 42 (paragraph numbers omitted in quote).
Blasphemy restrictions on free speech: European Court of Human Rights

The European Court of Human Rights has developed a body of jurisprudence that strikingly deviates, especially in the older cases, from the emerging UN doctrine that is strongly preoccupied with robust free speech protection as just described. In the view of the European Court of Human Rights also low-threshold blasphemy restrictions can legitimately restrict free speech.\(^{25}\)

For instance, in *X. Ltd. And Y. v. United Kingdom*,\(^{26}\) the former European Commission of Human Rights dealt with a publication in a magazine called *Gay News* of a poem entitled ‘The Love that Dares to Speak its Name’. The poem, in the words of the Commission, ‘purported to describe in explicit detail acts of sodomy and fellatio with the body of Christ immediately after His death and ascribed to Him during His lifetime promiscuous homosexual practices with the Apostles and other men.’\(^{27}\) Both publisher and editor were accused of ‘unlawfully and wickedly publish[ing] or caus[ing] to be published a blasphemous libel concerning the Christian religion, namely an obscene poem and illustration vilifying Christ in His life and in His crucifixion’.\(^{28}\) The Commission considered that:

> the offence of blasphemous libel as it is construed under the applicable common law in fact has the main purpose to protect the right of citizens not to be offended in their religious feelings by publications . . . The Commission therefore concludes that the restriction was indeed covered by a legitimate purpose recognized in the Convention, namely the protection of the rights of others.\(^{29}\) Accordingly, a right not to be offended in one’s religious feelings is read into the right to freedom of religion or belief. This is quite remarkable. As three judges of the ECtHR formulated these points in a later case, the European Convention does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom of religion, which in effect includes a right to express views critical of the religious opinions of others.\(^{30}\)

The Strasbourg Court solidified its position that blasphemy restrictions can be legitimate limitations on free speech in such cases as *Wingrove v. the United Kingdom* (revolving around the film *Visions of Ecstasy*), and the famous ruling in the *Otto-Preminger-Institut v. Austria* case. The latter revolved around the film *Das Liebeskonzil*,\(^{31}\) which includes erotic scenes involving God, the Devil and the Virgin Mary.\(^{32}\) The Austrian Court sanctioned the seizure of the film as it deemed the content of the film within the definition of the criminal offence of disparaging religious precepts. The European Court reasoned that ‘[t]he respect for the religious feelings of believers as guaranteed in Article 9 [of the European Convention on Human Rights] can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration.’\(^{33}\)

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\(^{25}\) Some of these cases are more extensively discussed in Temperman 2008.


\(^{27}\) Ibid., para. 1 in which the Commission cites from the House of Lords’ decision (*R. v. Lemon*, 1979).

\(^{28}\) Ibid., para. 2.

\(^{29}\) Ibid., para. 11 (emphasis added).

\(^{30}\) Joint Dissenting Opinion of Judges Palm, Peckkanen and Makarczyk to *Otto-Preminger-Institut v. Austria*, para. 6.


\(^{32}\) *Otto-Preminger-Institut v. Austria*, see para. 22 for a comprehensive narration of the film.

\(^{33}\) Ibid., para. 47 (emphasis added).
How strikingly this body of case law differs from the UN position on blasphemy restrictions becomes furthermore evident when we turn to the question of necessity. In Gay News, for instance, the question of whether the rights of religious believers in the UK to freely have or adopt a religion or belief and to freely manifest a religion or belief could ever reasonably be considered at risk on account of the mentioned publication – and thus in such dire need of protection that it would justify restricting the fundamental right of freedom of expression – is not looked into by the Commission in its decision.\textsuperscript{34} It seems very unlikely that a poem in a magazine intended for a small homosexual readership would be able to cause the type of harm that international incitement restrictions see to.

In the Otto-Preminger case, too, questions about – let alone proper assessment of – criteria such as ‘likelihood’ or ‘imminence’ (of harm being done to the targeted group), are utterly lacking. The film Das Liebeskonzil was no doubt blasphemous, yet the Court made an important error when it stated that it could not ‘disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities purportedly acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner.’\textsuperscript{35} Yet the reverse argument seems infinitely stronger: as the local population mostly adhered to this majority religion, their individual rights were never going to be undermined by a small-scale cinema screening of this film.

In the case of I. A. v. Turkey, concerning an allegedly blasphemous novel by Abdullah Riza Ergüven entitled Yasak Tümceler (‘The Forbidden Phrases’), both the Turkish authorities and unfortunately also the ECtHR exclusively focus on content, again altogether omitting a proper context assessment.\textsuperscript{36} Specifically, the Strasbourg court failed to address the question of likelihood of harm, including ‘imminence’ (of breaches of the rights of others). At the least, the ECtHR could have demanded that the Turkish authorities would present more information on the question of harm, failing which a violation would need to be pronounced. As the no less than three dissenting judges contended, the context and also the medium used were such that the likelihood of harm was perhaps quite low, while imminent violations of the rights of others were altogether unforeseeable.\textsuperscript{37}

The three dissenting Judges to the I. A. v. Turkey case argued that ‘the time has perhaps come to “revisit” this case-law, which in our view seems to place too much emphasis on conformism or uniformity of thought and to reflect an overcautious and timid conception of freedom of the press’.\textsuperscript{38} The recent cases of Klein v. Slovakia and Nur Radyo Ve Televizyon Yayinciligi A.S. v. Turkey are in fact trend-breakers. There the doubtless defamatory statements are ultimately deemed protected speech by the Strasbourg Court as a result of a proper risk assessment. The ‘religious rights of others’ in those cases were not truly at stake, hence no balancing of rights at the expense of free speech was necessary.


\textsuperscript{35} Otto-Preminger-Institut v. Austria, para. 56, where it essentially accepts the government’s position which had ‘stressed the role of religion in the everyday life of the people of Tyrol. The proportion of Roman Catholic believers among the Austrian population as a whole was already considerable – 78% – but among Tyroleans it was as high as 87%’ (para. 52).


\textsuperscript{37} Joint dissenting opinion of judges Costa, Cabral Barreto and Jungwiert, paras. 2–3.

\textsuperscript{38} Ibid., para. 8.
In *Klein v. Slovakia* the European Court of Human Rights accepts the argument by the applicant that it is very hard to see how an unqualified defamatory statement, in this case moreover about a religious leader rather than about the religion – Catholicism – at stake, could lead to a horizontal limit on the freedoms to have and manifest a religion freely.\(^{39}\) While in *Nur Radyo Ve Televizyon Yayinciligi A.S. v. Turkey* the Strasbourg Court applies for the first time a well-balanced combination of content and context tests.\(^{40}\) The context test used by the Court focuses strongly on the factor of likelihood of harm done, which indeed is the foremost context factor. The case revolved indirectly around the remarks made by a leader of the Mihr religious community in Turkey; indirectly, because the case was in fact not brought by the latter but by the broadcasting company that was punished for the former’s rather shocking statements. The Mihr representative had, among other things, claimed that the recent earthquake killing thousands of persons in Izmit was ‘a warning from Allah’ against the ‘enemies of Allah’, by which he was referring to non-believers. The question for the Strasbourg Court was whether or not the subsequent suspension of the company’s broadcasting license was permitted in light of freedom of expression. The Strasbourg Court goes a long way in recognizing Turkey’s concerns. It certainly recognizes the seriousness of the impugned statement, particularly in light of the tragic context in which they were made, the devastating earthquake (‘le contexte particulièrement tragique’).\(^{41}\) It further notes that the proselytizing nature of the statements – by means of transmitting religious significance to a natural disaster – may inspire superstition and intolerance in some persons.\(^{42}\) However, it rules that shocking and offensive though the statements may be, they ‘in no way incite violence’ (content test) and ‘are not likely’ to stir up hatred against people who are not members of the religious community in question (context test).\(^{43}\)

In *Vona v. Hungary*, moreover, concerning a member of the Hungarian Guard Association, which group intimidated Roma and occasionally Jewish people by means of organizing paramilitary rallies, we can once more appreciate how the Strasbourg Court increasingly complements its content assessment with an appraisal of the context.\(^{44}\) This is done in order to establish the real risk emanating from extreme speech, and thus to establish whether or not a ‘pressing social need’ makes interferences with extreme speech necessary. In relation to the (context) factor the Court emphasized in this case that:

> [T]he domestic courts found that, even though no actual violence had occurred on account of the respondents’ activities, they were liable for having created an anti-Roma atmosphere by verbal and visual demonstrations of power, which amounted to an abuse of the relevant law on associations, ran counter to human dignity and prejudiced the rights of others, that is, those of Roma citizens . . . In the courts’ view, the latter amounted to creating a public menace by generating social tension and bringing about an atmosphere of impending violence.\(^{45}\)

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\(^{44}\) *Vona v. Hungary*, Application No. 35943/10, Judgment of 9 July 2013, paras. 6–10, which is not strictly an extreme religious speech case; however, it shines a light on how the Court deals with extreme speech.

These cases indicate that personal insult ought not to guide a human rights assessment. In a world where religious sensitivities are all too easily overstated, that would be the end of free expression. In sum, we need to make use of more ‘objective’ factors that show real impact on the rights of the targeted group, i.e. beyond the fact that their feelings may be hurt. Several expert forums within the UN are looking into this matter.

Religious hate speech that incites violence or discrimination

In the last decades somewhat of a shift in the approach to dealing with extreme speech about religion can be discerned. This is not exclusively a European phenomenon, comparative data about decriminalizing blasphemy suggests that the momentum is much broader than that (see the Americas, see sub-Saharan Africa, the Pacific, and – the glass is half-full – even large parts of Asia). Essentially, this could imply a more definitive move away from blasphemy and religious defamation strategies – accordingly, this can also very much be seen as a reaction to the combating defamation schism within the UN – to high-threshold hate speech legislation revolving around the crime of ‘incitement’. This shift resonates well with and clearly is reinforcing the discussed developments within UN expert bodies. Thus, this development can be described as an urge to decriminalize defamation of religion while taking seriously the issue of incitement to violence and discrimination.

The recent Rabat Plan of Action can be seen as the most profound manifestation of this new ‘paradigm’. This action plan is a worldwide critical endeavour to conceptualize the prohibition of advocacy of hatred that constitutes incitement, and was instigated by the UN Office of the High Commissioner for Human Rights and recently adopted by an international group of legal experts. Of course, this approach is not universally supported – there remain sceptics, not least the US.

Article 20, paragraph 2, of the UN International Covenant on Civil and Political Rights (ICCPR), applicable to more than 160 states that have ratified this treaty, provides: ‘Any advocacy of... religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.’ Up until recently, save a handful of cases (mostly on Holocaust denial and other forms of anti-Semitism) and some remarks in the ‘Concluding Observations’ issued by the

46 The case of Vereinigung Bildender Künstler v. Austria fits this new line of jurisprudence too, though it must be noted that it is not strictly speaking a religious defamation case. See Vereinigung Bildender Künstler v. Austria, Application No. 68354/01, Judgment of 25 January 2007.

47 Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Conclusions and recommendations emanating from the four regional expert workshops organized by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012. In four regional workshops – Europe (Vienna, 9 and 10 February 2011); Africa (Nairobi, 6 and 7 April 2011); Asia and the Pacific (Bangkok, 6 and 7 July 2011); and the Americas (Santiago de Chile, 12 and 13 October 2011) – some 50 experts and more than 200 observers and other stakeholders have reflected on the question of incitement in the meaning of Article 20(2) ICCPR. These workshops cumulated in this Rabat Plan of Action. The Plan has been welcomed by leading human rights and freedom of expression NGOs, notably by Article 19.

48 The Rabat group that adopted the final outcome document (Plan of Action) consisted of the four moderators and those experts that participated in all four regional workshops, including the Special Rapporteur on Freedom of Opinion and Expression, the Special Rapporteur on Freedom of Religion or Belief, and the Special Rapporteur on Racism, Racial Discrimination, Xenophobia and Related Intolerance, a member of the Committee on the Elimination of Racial Discrimination and a representative of the freedom of expression NGO Article 19.
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Human Rights Committee in relation to state reports, not a lot of benchmarking could be discerned in relation to this provision. This remarkable observation has its explanation in the fact that, for a long time, this provision was understood as a typical post-Holocaust principle, which in present times would have lost most of its practical relevance. In recent times, however, in light of the fierce societal, political, and legal debates on the limits of freedom of expression in religiously pluralist societies, the Human Rights Committee (and other human rights monitoring bodies or independent experts) have been increasingly preoccupied with mapping out the precise scope of freedom of expression and the precise threshold of incitement.

Particularly in General Comment No. 34 on freedom of expression, adopted in 2011, the Committee is determined to conceptualize the prohibition of religious hatred so as to deal with extreme speech more actively and effectively – and, arguably, at the same time so as to differentiate this type of extreme speech from blasphemy/defamation of religion which, according to the Committee, must be protected rather than countered by states.

In the meagre case law revolving around both Articles 19 (freedom of expression) and 20 (extreme speech), the advantage of assessing speeches or publications in light of the incitement prohibition is instantly clear: instead of taking subjective factors such as insult as a point of departure (i.e. the ‘Strasbourg approach’), more objective factors can be scrutinized in order to judge whether a state rightly interfered with the applicant’s free speech. To illustrate, Ross v. Canada concerned a teacher propagating anti-Semitic sentiments. The UN Human Rights Committee came to the conclusion that the impugned speech acts (anti-Semitic flyers) could legitimately be restricted (disciplinary sanctions were imposed) on the basis of a textual analysis of the statements and publications and in light of the actual social context in which statements were made. In that respect two things were important to the Committee. First, the author’s statements included an element of incitement for he had ‘called upon true Christians . . . to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy, and Christian beliefs and values’. Second, the Committee confirmed the existence of a ‘poisoned school environment’, thus establishing a pressing need to interfere with the teacher’s publications.

Accordingly, the centre of gravity of legal assessment becomes the actual speech (text: are objective elements of incitement discernible?) and even more importantly, the actual or potential reaction vis-à-vis the group or persons addressed by the speech (context: are there clear and imminent threats to the rights of the targeted persons as a result of the publication/speech?) instead of the reaction or potential reaction by the targeted group itself (i.e. feelings of insult). Note, however, that the question as to which factor, textual or contextual, ought to be decisive in the assessment of hate speech cases, is still subject to intense debates. An elegant mixture of textual and contextual approaches was offered in the pioneering six-prong test developed by Article 19, a leading freedom of expression NGO. Importantly, the mentioned Rabat Plan of Action had endorsed this six-part threshold test. Accordingly, in order for an extreme speech act

49 Human Rights Committee, General Comment No. 34: Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, adopted 12 September 2011.
51 Ibid., para. 11.5.
52 Ibid., following earlier observations made by the Canadian Supreme Court and a domestic Board of Inquiry in paras. 4.6 and 4.7.
53 ARTICLE 19, Prohibiting incitement to discrimination, hostility or violence (policy brief), 2012.
to amount to punishable ‘incitement’ within the meaning of international law we must assess: (1) the severity of the speech act; (2) the intent of the hate-monger; (3) the precise content of the impugned speech act; (4) the extent of the public speech act; (5) the context in which the impugned speech act was received; and (6) the likelihood of adverse acts being committed to the targeted group, including the imminence thereof.

These recent benchmarks and developing case law provide us with clearer definitions of what constitutes ‘incitement’ and what does not. Notably, Article 20(2) of the ICCPR does not impose ‘hate speech laws’: it requires incitement laws. Moreover, the ‘incitement’ element in turn is heavily qualified and circumscribed: laws concerning the advocacy of religious hatred that constitute ‘incitement to discrimination, hostility or violence’ are to be adopted following the ratification by a State of the ICCPR. Accordingly, the ICCPR’s incitement clause revolves around a Triangle of Incitement. That is, for Article 20(2) ICCPR to be triggered, an extreme situation is required: an advocator who incites an audience to commit specific adverse acts – discrimination, hostility, or violence – against a target group (e.g. a religious minority). Whether or not an advocacy ‘is likely to trigger imminent acts’ (cf. early draft General Comment No. 34), or whether a statement ‘creates an imminent risk’ (cf. Camden Principles), or whether ‘likelihood, including imminence’ (cf. Rabat Plan of Action) can be proven, will depend partly on the content of the hate speech, partly on the intent of the speaker, but also significantly on the overall – social, historical, political – context in which the speech is made. ‘Context’ can be literally the socio-historical and political context, but could also refer to factors such as: the speaker/person responsible for the communication; the extent of the speech; and importantly, the question likelihood of adverse acts being committed against the targeted group.

**Conclusion: Momentum for a move from insult to a triangle of incitement?**

Does the phenomenon of ‘extreme speech’ about religion warrant legal restrictions with free speech so as to protect religious practitioners? Clearly not all extreme speech about religions or all extreme religious speech amounts to inciting speech. Blasphemy typically does not engage the triangle of incitement that has been drawn by recent benchmarks on incitement prohibitions. Most defamation/blasphemy laws are premised on only two actors: the blasphemer vis-à-vis the targeted group that is likely to take offence. One of the most recent blasphemy laws, that of Ireland, makes this explicit:

> a person publishes or utters blasphemous matter if (a) he or she publishes or utters matter that is grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion, and (b) he or she intends, by the publication or utterance of the matter concerned, to cause such outrage.

Accordingly, defamation laws are typically enforced irrespective of a legal threshold question as to whether or not there is a real risk that a third party (an audience) will adversely – violently, discriminatorily – act against the targeted group. These laws are concerned with the feelings

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54 Draft General Comment No. 34, Article 19, 2nd Revised Draft, CCPR/C/GC/34/CRP.3 (June 28, 2010), para. 53.


56 Article 36 of the [Irish] Defamation Act 2009, Number 31 of 2009 (emphasis added).
and sensitivities of religious people, not with harm being done by a third party. The original rationale behind adopting blasphemy and religious defamation laws, of course, was precisely that: fostering respect for the dominant religion. Consequently, these laws prohibit certain content per se, with little to no consideration for context factors. In this contribution it has been argued that blasphemy laws create a ‘lose-lose situation’. The Rabat Plan of Action appears to be a sensible way forward: decriminalization of blasphemy laws, while taking real incitement cases more seriously.

Bibliography


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