



Introduction

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1.1 Of *Charlie Hebdo* and ‘The End of Blasphemy’?

The attacks on 7 January 2015 against editors and employers of satirical magazine *Charlie Hebdo*, killing twelve and wounding eleven persons, did not mark a new era in Western legal thinking on free speech and permissible exceptions. While not a watershed, the massacre is significant for many reasons. Notably, it was a large-scale ‘attack on free speech’ on Western soil. *Charlie Hebdo*’s director and cartoonist Stéphane Charbonnier, who was killed in the attack, was on al-Qaida’s hit list – a group with which the two gunmen identified themselves. Also, the event was soon followed by similar attacks ostensibly ‘avenging’ Western-style free speech, like the shooting, killing two and wounding five persons, that occurred on 14 February 2015 in Copenhagen, Denmark, at a public event called ‘Art, Blasphemy and Freedom of Expression’, involving, among other speakers, the Swedish artist Lars Vilks, who has gained notoriety since 2007 as a result of his drawings of Muhammad. Then on 3 May 2015 the Curtis Culwell Center attack was carried out – the first assault on US soil for which ISIS claimed credit; this time there were no fatalities other than the two gunmen, who did, however, wound a security officer before a SWAT team took them out. This conference centre hosted an exhibition of images of Muhammad as well as a Muhammad-drawing ‘contest’ – the winning cartoon, with the caption ‘You can’t draw me!/That’s why I draw you’, won US\$12,500 – and featured speeches by critics of Islam including Pamela Geller and Geert Wilders.

These attacks largely functioned to augment most Western states’ politicians’ and legal scholars’ pro-free speech resolve, cumulating in the *Je Suis Charlie* mantra. Many Western jurisdictions in recent times have abolished blasphemy offences, and these events did nothing to foster their reintroduction – quite the contrary. There is some evidence, as the chapter on Norway in this volume, for instance, shows, that *Charlie Hebdo*

has functioned as the final straw for some states to definitively strike the offence off their statute books.

That said, other states – where similar momentum was building to abrogate blasphemy laws – are currently experiencing second thoughts. Thus while *Charlie Hebdo* has not quite led to the reintroduction of blasphemy laws in ‘the West’, in some states the incident has contributed to a sense of fear that this point in history may not be the best moment for a largely symbolic decision on ‘the end of blasphemy’. It should be noted, though, that in such states this type of fear is typically part of a much larger and genuinely legal concern about equal protection under the law of non-dominant religions and their adherents. See, for example, the chapter on Denmark, which serves as an excellent case in point here.

This book investigates the status and tenability of blasphemy laws in Western jurisdictions. There is vast knowledge on non-Western blasphemy laws and their chilling effect on free speech as well as the way these laws have been used and abused to stifle undesirable dissident speech and unorthodox speech acts on the part of religious minorities.¹ The discussion on Western blasphemy laws tends to trivialise their significance in two ways. First, they would be mere relics, largely dormant legal curiosities and, in any event, shortly to be a thing of the past. Second, Western legal doctrine would be virtually uniformly on the side of their complete abolition.

I.2 Of Double Standards

On the former point, this book takes as point of departure that ‘the West’ in fact is not quite as progressive on this point as often thought or portrayed. True, Western countries formed an outspoken front against the Defamation of Religion resolutions that aimed at imposing limits on offensive speech.²

¹ For a recent comprehensive comparative study, see Paul Marshall and Nina Shea, *Silenced: How Apostasy & Blasphemy Codes Are Choking Freedom Worldwide* (Oxford: Oxford University Press, 2011), chiefly focussing on Muslim-majority countries.

² E.g., Commission on Human Rights, Resolution 1999/82 on ‘Defamation of Religions’ of 30 April 1999; Resolution 2001/4 on ‘Combating Defamation of Religions as a Means to Promote Human Rights, Social Harmony and Religious and Cultural Diversity’ of 18 April 2001; Resolution 2002/9 on ‘Combating Defamation of Religions’ of 15 April 2002; Resolution 2003/4 on ‘Combating Defamation of Religions’ of 14 April 2003; Resolution 2004/6 on ‘Combating Defamation of Religions’ of 13 April 2004; and Resolution 2005/3 on ‘Combating Defamation of Religions’ of 12 April 2005; a trend subsequently continued by the Human Rights Council, see, e.g., Resolution 4/9 on ‘Combating Defamation of

These Resolutions, tabled by the Organization of the Islamic Conference (OIC) in the political organs of the United Nations, the UN General Assembly and the Human Rights Council, were rejected for threatening the core of the right to freedom of expression and the right to freedom of religion or belief. The latter right, legal scholarship also pointed out,³ includes a right to manifest beliefs that may be heretical, defamatory or blasphemous to another person.

True, moreover, the twenty-eight (soon to be twenty-seven) European Union countries specifically take a firm position against blasphemy laws in their foreign policy vis-à-vis third countries. In the 2013 *EU Guidelines on the promotion and protection of freedom of religion or belief* the EU boldly announced that it will ‘at all appropriate occasions’ advocate the position ‘that laws that criminalize blasphemy restrict expression concerning religious or other beliefs; that they are often applied so as to persecute, mistreat, or intimidate persons belonging to religious or other minorities, and that they can have a serious inhibiting effect on freedom of expression and on freedom of religion or belief; and recommend the decriminalisation of such offences.’⁴ While one may find this an admirable cause, what is problematic in terms of public diplomacy is that a number of EU states themselves still have blasphemy restrictions on their statute books.⁵

Religions’ of 30 March 2007; and Resolution 7/19 on ‘Combating Defamation of Religions’ of 27 March 2008. See also General Assembly Resolutions 60/150 of 16 December 2005, 61/164 of 19 December 2006, and 62/154 of 18 December 2007 (all on ‘Combating Defamation of Religions’).

³ A selection: Jeroen Temperman, ‘Blasphemy, Defamation of Religions & Human Rights Law’ (2008) 26 *Netherlands Quarterly of Human Rights*; L. Bennett Graham, ‘Defamation of Religions: The End of Pluralism?’ (2009) 23 *Emory International Law Review*; Sejal Parmar, ‘The Challenge of “Defamation of Religions” to Freedom of Expression and the International Human Rights System’ (2009) 3 *European Human Rights Law Review*; Allison G. Belnap, ‘Defamation of Religions: A Vague and Overbroad Theory that Threatens Basic Human Rights’ (2010) *Brigham Young University Law Review*; and Rebecca J. Dobras, ‘Is the United Nations Endorsing Human Rights Violations? An Analysis of the United Nations’ Combating Defamation of Religious Resolutions and Pakistan’s Blasphemy Laws’ (2009) 37 *Georgia Journal of International & Comparative Law*.

⁴ EU Guidelines on the promotion and protection of freedom of religion or belief, adopted by the Foreign Affairs Council meeting, Luxembourg, 24 June 2013, para. 32.

⁵ Indeed, in 2012 Pew Forum counted 32 states in the world that have criminalized blasphemy, 16% out of a total of 198 countries studied. Pew Forum, *Laws Penalizing Blasphemy, Apostasy and Defamation of Religion Are Widespread* (2012). In that report it counted eight European countries that maintain their blasphemy laws, i.e. 18% within this region. In its 2014 report, due to legal changes in the Netherlands, the percentage for this region dropped to 16%.

One of this book's objectives, hence, is to investigate exactly how 'dormant' those laws are. Could they still be enforced, or is that impossible under reigning constitutional (case) law? What are the landmark cases (if any)? What type of penalties (if any) are imposed in blasphemy cases? In addition, we asked the authors of the comparative chapters on more (Finland, Germany, Greece, Italy and Poland) or less (Australia, Canada, Denmark, Ireland, United States) active blasphemy or religious defamation laws to engage with such questions as whether criminal investigations (if any) following criminal complaints cause a chilling effect in their own right and whether there exists (political or societal) momentum to abolish the offence. Yet further questions are what these laws aim to protect, religions, religious doctrines and/or persons. How is a breach of a blasphemy law determined? What type of *mens rea* (if any) is required? And so on.

A second objective is more historical: to unveil what were the precise forces and incentives behind recent legislative initiatives abrogating – often-times ancient – blasphemy laws. Was this inspired by developments in international law and/or developments of domestic constitutional law? Which political factions were in support or against the abolition? Has the offence been annulled altogether, or has it rather been replaced by new 'speech offences' – potentially offences that are deemed more international law compliant, like 'incitement' or 'hate speech' offences? To that effect, recent legislative choices and debates in the Netherlands, Norway and the United Kingdom have been scrutinized.

I.3 Of Fragmentation of International Law

On the point of compliance with international law, it must be pointed out that this body of law is highly fragmented, if not outright contradictory, as far as the issue of blasphemy is concerned. International standards and their interpretations on the tenability of blasphemy laws vary from organisation to organisation and even between organs of the same international organisation.

The European Court of Human Rights (ECtHR, the Strasbourg Court) of the Council of Europe consistently calls the freedom of expression a cornerstone of a democratic society and underscores that also, if not especially, ideas that 'offend, shock or disturb' are to be protected. Yet it is the Strasbourg Court that has gone out of its way to accommodate religious sensitivities and in fact has gone as far as to permit blasphemy(-style) restrictions in its

(older) case law.⁶ At the same time, other organs of the Council of Europe have repeatedly advised the annulment of blasphemy laws. Accordingly, the Council of Europe's Parliamentary Assembly in 2007 considered that

blasphemy, as an insult to a religion, should not be deemed a criminal offence. A distinction should be made between matters relating to moral conscience and those relating to what is lawful, matters which belong to the public domain, and those which belong to the private sphere. Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.⁷

The Assembly also notes the inherently discriminatory nature – the fact that they traditionally aim to protect dominant religions – of most blasphemy laws.⁸ Accordingly, it urges the Committee of Ministers to review national law and practice in the member states of the Council of Europe 'in order to decriminalise blasphemy as an insult to religion.'⁹ An earlier parliamentary Assembly Resolution had already posited that 'blasphemy laws should not be used to curtail freedom of expression and thought.'¹⁰ Engaging with the 2005–06 Danish cartoons row, the Assembly realised that '[r]eactions to images perceived as negative, transmitted through books, films, cartoons, paintings and the Internet, have recently caused widespread debates about whether – and to what extent – respect for religious beliefs should limit freedom of expression. Questions have also been raised on the issues of media responsibility, self-regulation and self-censorship.'¹¹ In the final analysis the Assembly concludes that

[b]lasphemy has a long history. The Assembly recalls that laws punishing blasphemy and criticism of religious practices and dogmas have often had a negative impact on scientific and social progress. The situation started

⁶ The landmark case is *Otto-Preminger-Institut v. Austria*, Application no. 13470/87, judgment of 20 September 1994. See also *X. Ltd. and Y. v. United Kingdom*, Application no. 8710/79, decision of 7 May 1982; *Wingrove v. the United Kingdom*, Application no. 17419/90, judgment of 25 November 1996; and *İ.A. v. Turkey*, Application no. 42571/98, judgment of 13 September 2005. It should be noted that not all these judgments concern 'proper' blasphemy offences.

⁷ Parliamentary Assembly Recommendation 1805 (2007) on 'Blasphemy, religious insults and hate speech against persons on grounds of their religion', adopted on 29 June 2007 (27th Sitting), para. 4.

⁸ *Ibid.*, para. 10.

⁹ *Ibid.*, para. 17.2.4.

¹⁰ Parliamentary Assembly Resolution 1510 (2006) on 'Freedom of expression and respect for religious beliefs', adopted during Assembly debate on 28 June 2006 (19th Sitting).

¹¹ *Ibid.*, para. 6.

changing with the Enlightenment, and progressed further towards secularisation. Modern democratic societies tend to be secular and more concerned with individual freedoms.¹²

Thus the Danish cartoon row and recent free speech rows such as the one resulting from instalments of *Charlie Hebdo* that mock Muhammad pose a critical question to the Enlightened world: shield religious sensitivities from gratuitous insult or promote an unabridged freedom of speech ideal? While the Strasbourg Court has repeatedly opted for the former, the Parliamentary Assembly has repeatedly passionately pleaded for the latter.

The latter body's views resonates with another Council of Europe organ, the Venice Commission, an advisory body composed of independent constitutional law experts. In its comprehensive report on the issue of *Blasphemy, religious insult and incitement to religious hatred*,¹³ it concludes that 'the offence of blasphemy should be abolished (which is already the case in most European states) and should not be reintroduced'.¹⁴ Specifically, the Venice Commission held that it is not 'necessary or desirable to create an offence of religious insult (that is, insult to religious feelings) *simpliciter*, without the element of incitement to hatred as an essential component'.¹⁵ Realising that this reference to accepted restrictions on free speech under international law is also not without its own complexity, it emphasised that

[i]t is true that the boundaries between insult to religious feelings (even blasphemy) and hate speech are easily blurred, so that the dividing line, in an insulting speech, between the expression of ideas and the incitement to hatred is often difficult to identify. This problem, however, should be solved through an appropriate interpretation of the notion of incitement to hatred rather than through the punishment of insult to religious feelings.¹⁶

While regional human rights courts have under some circumstances permitted blasphemy laws, international monitoring bodies and independent

¹² *Ibid.*, para. 7.

¹³ This report was requested by the Parliamentary Assembly as per its Resolution 1510 (2006), para. 18.

¹⁴ Venice Commission Study 406/2006 on blasphemy, religious insults and incitement to religious hatred, adopted at the Commission's 70th Plenary Session, 16–17 March 2007 at para. 89(c) (this study is included in Venice Commission, *Science and Technique of Democracy, No. 47: Blasphemy, Insult and Hatred – Finding Answers in a Democratic Society* (Strasbourg: Council of Europe Publishing, 2010)).

¹⁵ *Ibid.*, para. 64.

¹⁶ *Ibid.*, para. 68.

experts have recently united in condemning such restrictions on freedom of expression. Specifically, the UN Human Rights Committee, overseeing State parties' compliance with the UN International Covenant on Civil and Political Rights (ICCPR), stipulated in 2011 that '[p]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant'.¹⁷ In the same General Comment the Committee expressed its concern that existing blasphemy or religious insult regulations typically discriminate between religions in that insults to some but not all religions tend to be covered by those laws.¹⁸

The UN Special Rapporteur on freedom of religion or belief, moreover, has called national blasphemy laws 'counter-productive'.¹⁹ In a recent report, the Special Rapporteur reiterated this by underscoring that 'according to his experiences, blasphemy laws typically have intimidating effects on members of religious minorities as well as on critics or dissenters'.²⁰ Therefore, he called on all parties to the ICCPR to repeal blasphemy laws.²¹ Similarly, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has recently issued a report expressing his concern about 'anti-blasphemy laws, which are inherently vague and leave the entire concept open to abuse'.²² He added that 'international human rights law protects individuals and not abstract concepts such as religion, belief systems or institutions. ... Moreover, the right to freedom of religion or belief, as enshrined

¹⁷ Human Rights Committee, *General Comment 34: Article 19: Freedoms of Opinion and Expression* (CCPR/C/GC/34, adopted at its 102nd session, Geneva, 11–29 July 2011), para. 48. The Committee makes an exception for those speech acts that amount to incitement in the meaning of Article 20(2) ICCPR.

¹⁸ Human Rights Committee, General Comment 34, para. 48: '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.'

¹⁹ *Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance*, UN Doc. A/HRC/2/3, 20 September 2006, para. 42.

²⁰ Special Rapporteur on Freedom of Religion or Belief, *Tackling Manifestations of Collective Religious Hatred* (A/HRC/25/58, 26 December 2013), para. 59.

²¹ *Tackling Manifestations of Collective Religious Hatred*, para. 70(e).

²² Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Report of the Special Rapporteur to the General Assembly on Hate Speech and Incitement to Hatred* (A/67/357, 7 September 2012), para. 53.

in relevant international legal standards, does not include the right to have a religion or belief that is free from criticism or ridicule.²³

Furthermore, the recently adopted *Rabat Plan of Action*,²⁴ a worldwide endeavour by leading human rights experts, organised by the UN Office of the United Nations High Commissioner for Human Rights (OHCHR), also indicates that anti-blasphemy legislation does not qualify as acceptable limits on the right to freedom of expression. Specifically, the *Rabat Plan* states that blasphemy laws are

counter-productive, since they may result in the de facto censure of all inter-religious/belief and intra-religious/belief dialogue, debate, and also criticism, most of which could be constructive, healthy and needed. ... There are numerous examples of persecution of religious minorities or dissenters, but also of atheists and non-theists, as a result of legislation on religious offences or overzealous application of various laws that use a neutral language.²⁵

Consequently, the *Rabat Plan of Action* lists among its recommendations that ‘States that have blasphemy laws should repeal these as such laws have a stifling impact on the enjoyment of freedom of religion or belief and healthy dialogue and debate about religion.’²⁶

In sum, as far as the UN treaty bodies and independent experts are concerned, there is no place for blasphemy bans under international law – a position that sharply contrasts with the (older) ECtHR case law. Yet *within* the UN we could previously discern fragmentation, too, due to the said resolutions that aimed at combating defamation of religion at the international and domestic levels. However, as a result of Western pressure, these resolutions have now been revamped into resolutions *Combating intolerance, negative stereotyping, stigmatization, discrimination, incitement to*

²³ A/67/357, para. 53.

²⁴ *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 organised 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 fifty experts and more than 200 observers and other stakeholders have reflected on the question of incitement in the meaning of Article 20(2) ICCPR.

²⁵ *Rabat Plan of Action*, para. 19. Earlier, in para. 17, this document already approvingly quotes the Human Rights Committee’s recent rejection of blasphemy laws as formulated in General Comment No. 34.

²⁶ *Rabat Plan of Action*, at p. 5.

violence and violence against persons, based on religion or belief,²⁷ or the 16/18 approach, after the initial resolution of that type – an approach that may serve to bridge ‘the West’ and ‘the non-West’ as far as preferred legal and other approaches to ‘extreme speech’ are concerned.

I.4 Of ‘Western’ Legal Doctrine

A final objective of this book, then, is to show that blasphemy and its legal treatment within ‘Western’ legal doctrine is perhaps less monolithic than oftentimes portrayed. While none of the scholars brought together in this volume passionately defends blasphemy laws – in the final analysis, the authors in this volume reject them or at the very least are very concerned about their potential impact – these legal theory contributions do argue that traditional Western legal discourse against these laws still has a lot to answer for. Such critiques, among many other points, pose questions of desirability and/or viability, including basic conceptual queries, regarding the norms that are supposed to replace blasphemy prohibitions, like anti-hate speech standards. Are religious minorities sufficiently protected under the latter standards? And is it in actual legal practice truly possible to distinguish between verbal attacks on a religion and attacks on religious believers/groups?

Naturally, the book’s central discussion would not be balanced should there not also be a number of contributors fiercely rejecting any limits on free speech in the interest of ‘respect for religions’. While some authors in this volume present arguments on, for instance, why and how the ECtHR should reverse its blasphemy jurisprudence, others defend unabridged free speech from the original perspective of ‘democratic self-governance’.

This book primarily discusses the legal systems of the ‘Western world’, although this concept is far from clearly defined. If the term is actually used to designate the ‘West’, in other words Western European states (the

²⁷ Human Rights Council Resolution 16/18 ‘Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief’ (UN Doc. A/HRC/RES/16/18, adopted on 24 March 2011). See also the parallel revamped General Assembly Resolutions: General Assembly Resolution 66/167, ‘Combating intolerance, negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons, based on religion or belief’ (UN Doc. A/RES/66/167, adopted on 19 December 2011); and General Assembly Resolution 67/178, ‘Combating intolerance, negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons, based on religion or belief’ (UN Doc. A/RES/67/178, adopted on 20 December 2012).

United Kingdom, France, Germany, Austria, the Benelux states, etc.) and probably North America and Australia, then we can indeed find several similar *tendencies* in the way the legal systems of these countries address the issue of blasphemy. However, the exact legal approaches to blasphemy and the related jurisprudence of these countries are far from identical.

How the European and American approaches to freedom of speech are different is a cliché,²⁸ and also within Europe the individual countries of Southern Europe, Central Europe and Eastern Europe have quite different legal approaches to dealing with blasphemy. For example, there is no blasphemy ban in the majority of the post-communist countries – with the exception of Poland, as discussed in this book. The primary reason for this is not that these legal systems organically and naturally developed this approach but rather that the inherent anti-religiousness of the communist system eradicated these bans from the Criminal Codes, and later, following the democratic political transitions, these bans were not re-imposed in most of the countries. This was not necessarily the result of a principled decision; rather, it signified the decreasing social importance of religious communities collapsing under the yoke of dictatorship. However, religious communities remained significant enough in certain Southern European countries (like they do in Poland), and hence their legal systems upheld the bans serving to protect them.²⁹

This book also outlines that, although there are identifiable common tendencies, no such thing as a unified European or Western approach exists in terms of the legal interpretation of blasphemy. Though these identifiable trends point towards the direction of removing restrictions, the absolute disappearance of blasphemy bans on the continent will nevertheless apparently be a long process, if it ever takes place at all. At the same time, certain types of blasphemous opinions will remain subject to restriction due to other types of bans (such as the regulation against hate speech or discrimination). As Jeremy Patrick puts it:

The drive to push against boundaries, to provoke thoughts which at first seem abhorrent and then become accepted, to express truth in the face of pain, imprisonment, and death, always remains present in some members

²⁸ See, for example, Frederick Schauer, ‘The exceptional First Amendment’, in Michael Ignatieff (ed.), *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005), p. 29.

²⁹ For the distinction between ‘longstanding, stable, and prosperous’ democracies and other democracies in the context of hate speech regulations, see Eric Heinze, *Hate Speech and Democratic Citizenship* (Oxford: Oxford University Press, 2016).