

Penalization of blasphemy and religious insults as an infringement of freedom of expression in Europe*

Ιωάννης Ιγγλεζάκης, Αναπληρωτής Καθηγητής, Νομική Σχολή,
Αριστοτέλειο Πανεπιστήμιο Θεσσαλονίκης.

Despite the commitment to freedom of expression of European States, which are members of the EU and of the Council of Europe, the penalization of blasphemy persists in some European countries, which provide for criminal charges for blasphemy or defamation of religion. However, these laws have a chilling effect on free speech. The European Court of Human Rights has considered that these laws do not infringe the ECHR, as it assumed a right not to be insulted in religious beliefs which must be balanced with the right to freedom of speech. This paper discuss the necessity for having laws prohibiting religious insults and defamation of the divine. It is argued that such laws constitute absolute restrictions of the right to freedom of expression and it is proposed to abolish such laws.

Laws on blasphemy have proliferated in certain Islamic countries, in which also violent acts were performed in the name of Islam, but they are also not foreign in Christian tradition.^[1] However, the separation of church and state, and the creation of secular states, in Europe have resulted into the abolishment of blasphemy laws, in many, though not all European countries. Some European states still provide for criminal charges for blasphemy or defamation of religion.^[2] However, laws on blasphemy and defamation of religion have a serious impact on freedom of expression and thus, their existence is creating ambiguity, to say the least.

This is not the case in the U.S. Notably, the U.S. Supreme Court has held in 1952 that “the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doc-

trine”.^[3] In Europe, however, many European states still punish blasphemy and the case law of the European Court of Human Rights does not preclude restrictions of freedom of expression in case of religious insults.

Various incidents in the past and in recent years have cast light on the expression of statements insulting religious beliefs. In particular, violent reactions of Muslims erupted because of the publication of Salman Rushdie’s novel “the Satanic Verses” in 1988, and in 2005 the publication of Prophet Mohammed cartoons in a Danish newspaper sparked violent reactions which culminated in the terrorist attack against satirical magazine Charlie Hebdo which left twelve people killed and eleven injured.^[4] Consequently, a social media campaign was launched, i.e., the #jesuischarlie campaign, which symbolized the adherence with freedom of expression and the denunciation of the terrorist attacks.^[5]

These incidents bring forward the tension between the right to freedom of expression and the forbiddance of speech that offends

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* Paper presented in the International workshop “From Online Hate Speech to cyberterrorism: Freedom of expression VS Security: what regulations are possible?”, Montpellier, February 8th, 2017.

[1] M. Gatti, Blasphemy in European Law, in M. Díez Bosch and J. Sánchez Torrents (eds), On Blasphemy (Blanquerna, 2015), pp. 49-64.

[2] J. Temperman, Blasphemy, Defamation of Religions and Human Rights law, 26(4) NETH. Q. HUM. RTS. 517, 530-533 (2008).

[3] Judgement of the U.S. Supreme Court, Joseph Burstyn, Inc. v. Wilson, 26 May 1952, 343 U.S. 495.

[4] See The Telegraph, 04 May 2015, <http://www.telegraph.co.uk/news/worldnews/europe/france/11341599/Prophet-Muhammad-cartoons-controversy-timeline.html>

[5] M. Groppo, To Be or Not to Be Charlie?, <http://www.booksandideas.net/To-Be-or-Not-to-Be-Charlie.html#nb1>

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religious beliefs. On the one hand, in the occasion of the publication of the Danish cartoons various legal proceedings were brought at national level complaining that this publication violated the right to freedom of religion of Muslims, and religious organizations called for stricter regulations of speech that offends religious beliefs. On the other hand, liberals have advocated in favor of the freedom of expression, condemning the penal sanctions against blasphemy.^[6]

I. The purpose of blasphemy laws

The question which comes first into mind is what is the purpose of penalizing blasphemy. Legal sanctions against defamation of religion exist in states in which there is one predominant religion and where politics and religion remain intertwined. They have been enacted and enforced in order to protect the dominant religion and evidently, they stress the importance of the state church system in one country.

More particularly, the purpose of such laws is to limit the freedom of speech and expression related to blasphemy in order to protect God or a particular religion, seemingly. For instance, the Greek Penal law provides for a penalty to insulting publicly and maliciously, God, and the divinity or the Greek orthodox Church as such or any other religion, tolerable in Greece. The justification for prohibiting blasphemy cannot be, however, the fear of punishment by an angry God as the one depicted in the Old Testament. The actual purpose is rather to protect the religious feelings of the majority of the population and rarely, the religious beliefs of minorities. Since blasphemy may upset religious believers, it could cause violent reactions and lead to social unrest and breach of the peace. Thus, the need to protect freedom of religion and preserve peace seems to be the justification for preserving sanctions

against blasphemy and not the protection of religion.^[7]

Since laws imposing legal sanctions on blasphemy may have a chilling effect on freedom of expression, the right of freedom of religion must be balanced against the first right. It must be borne into mind that freedom of expression is a fundamental cornerstone of democracy and it is applicable not only to “information” or “ideas” that are favorably received or regarded as inoffensive or indifferent, but also to those that offend, shock or disturb.^[8] Therefore, any society must permit open discussions on issues related to religion. It is notable that according to the Venice Commission, in a democratic society, religious groups must tolerate, as must other groups, critical public statements and debate about their activities, teachings and beliefs, provided that such criticism does not amount to intentional and gratuitous insult and does not constitute incitement to disturb the public peace or to discriminate against adherents of a particular religion.^[9]

Limitations of the right to freedom of expression may only be legitimate if they fall within the conditions defined in Article 10 para. 2 ECHR, i.e. they must be prescribed by law and be necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, and so forth. It should be, therefore, scrutinized whether national laws of European countries on blasphemy pass this test.

There is evidently no generally accepted definition of blasphemy. According to the definition provided by the Committee on Culture, Science and Education of the Parliamentary Assembly of the Council of Europe, it is the offence of insulting or showing contempt or lack of reverence for God

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^[6] Letsas, Is there a right not to be offended in one's religious beliefs?, Electronic copy available at: <http://ssrn.com/abstract=1500291>

^[7] J. Patrick, The Curious Persistence of Blasphemy, Florida Journal of International law vo. 23 (2011), pp. 187-220.

^[8] ECtHR, Handyside v. the United Kingdom, § 49.

^[9] Preliminary Report adopted on 16-17 March 2007 by the Venice Commission.

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and, by extension, towards anything considered sacred. Relevant criminal law provisions exist in six EU member states: Austria, Denmark, Finland, Greece, Ireland and Italy. The punishment for blasphemy varies; countries such as Italy and Ireland impose a fine, while Denmark, Austria and Finland impose imprisonment extended to a few months, and only in Greece the sanction is up to years of prison.

Religious insult is a similar offence which takes different forms in various EU countries; it is defined as an insult based on a particular religion or an insult to religious feelings and it incurs a penalty of imprisonment from a few months up to five years and/or a pecuniary fine.

In most EU countries incitement to religious hatred is punished as a specific instance of incitement to general hatred. In some countries, however, it is required that incitement is likely to create discrimination or violence. It is also noted in many states in case incitement to hatred was committed or provoked through violence, this constitutes an aggravating circumstance.

II. The case law of the European Court of Human Rights

The European Court of Human Rights addressed the issue of the speech that offends religious feelings in a series of decisions, beginning in the late 80s. In the leading judgement in the case of *Otto-Preminger-Institut v. Austria*, the Court held that the responsibility to ensure the peaceful enjoyment of freedom of religion lies with the state and that a State may legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas, judged incompatible with the respect for the freedom of thought, conscience and religion of others, as was held in the *Kokkinakis* judgement.^[10] Thus, the respect for the religious

feelings of believers would be violated by provocative portrayals of objects of religious veneration and such portrayals can be considered as a violation of tolerance, which is a constituent of a democratic society.

Furthermore, in the case of *Wingrove v United Kingdom*, a complaint was submitted by a film director whose film 'Visions of Ecstasy' was denied a certificate because it showed St Teresa of Avila having ecstatic visions of Jesus Christ and being engaged in acts of sexual nature. The applicant complained that this denial amounted to a violation of freedom of expression, however, the Court found that the English law on blasphemy, which was the legal basis for this limitation, pursued a legitimate aim, which was to protect the right of citizens not to be offended in their religious beliefs. It reiterated the doctrine of the *Otto-Preminger-Institut* that there is a duty to avoid so far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profanatory.

It is, thus, argued that this case law brings forward the claim that there is a right not to be insulted in one's religious beliefs and this claim clashes with freedom of speech.^[11] Moreover, in the particular cases, it is reasoned that the European Court carried out the balancing of the right to freedom of religion and the right to freedom of expression erroneously, because the limitation was actually disproportionate to the legitimate aim and freedom of artistic expression should have prevailed.^[12]

In our view, this reasoning of the Court is wrong, since it introduces an absolute limitation of the right to freedom of expression; in our view, it should rather carry out a balancing of rights, in accordance with the theory of practical concordance applied by the German Federal Constitutional Court, which seeks to avoid sacrificing one right against the other.^[13] Instead, it tries to find a

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^[10] *Otto-Preminger-Institut*, para. 47; *Kokkinakis v Greece*, 1993, para. 48.

^[11] *Letsas*, *ibid.*

^[12] *Letsas*, *ibid.*

^[13] See *Kommers & Miller*, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed., 2012, p. 67-68: "Practical Concordance is a

"canon that holds that protected constitutional values must be harmonized with one another when they conflict, it requires the optimization of competing rights. In short, one constitutional value may not be realized at the expense of a competing constitutional value. In the German view, constitutional interpretation is not a zero-sum game"... Professor Hesse

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compromise between the conflicting rights by limiting the exercise of both rights.

III. Further initiatives of the Council of Europe

The debate in Europe on the essence of blasphemy offences is quite interesting and despite the ECtHR's case law the incompatibility of such offences with the protection of the right to freedom of expression has been demonstrated.

The Council of Europe issued the Report of the Committee on Culture, Science and Education of 8 June 2007, in which it highlighted that it should be ensured that national law and practice:^[14]

- permit open debate on matters relating to religion and beliefs and do not privilege a particular religion in this respect, which would be incompatible with Articles 10 and 14 of the European Convention on Human Rights;
- penalise statements that call for a person or a group of persons to be subjected to hatred, discrimination or violence on grounds of their religion as on any other grounds;
- prohibit acts which intentionally and severely disturb the public order and call for public violence by references to religious matters, as far as it is necessary in a democratic society in accordance with Article 10, paragraph 2 of the European Convention on Human Rights.

Subsequently, the Venice Commission has examined the relevant European legislation and researched the issue whether there is a need for specific supplementary legislation in this area. The conclusions of the Report by the Venice Commission, *inter alia*,^[15] are the following:

- a. That incitement to hatred, including religious hatred, should be the object of criminal

sanctions as is the case in almost all European states, with the exception only of Andorra and San Marino.

b. That it is neither necessary nor 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.

c. That the offence of blasphemy should be abolished (which is already the case in most European states) and should not be reintroduced.

This is an important policy statement, as it recommends clearly the abolishment of blasphemy offence, since it is considered that criminal charges are inappropriate in respect of insult to religious feelings. This does not include hate crimes and it is affirmed that criminal charges related to incitement to religious hatred are appropriate.

Conclusion

In our view, it must be considered that speech which contributes to a debate of general interest is protected under the right to freedom of expression, which is established in Article 10 ECHR and in the Constitutions of European countries.^[16] Thus, theatrical and cinema plays, satirical presentations and illustrations, cartoons, etc., which are mainly the target of blasphemy laws, should not be prohibited and sanctioned, even if they touch upon religiously sensible issues. This calls essentially for the abolishment of blasphemy laws, which constitute absolute restrictions of the right to freedom of expression, but with the exception of the offence of incitement to religious hatred, which must be retained, since behavior that constitutes such incitement goes beyond the realm of free speech and cannot be protected under such right.

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wrote, 'The principle of the Constitution's unity requires the optimization of [values in conflict]: Both legal values need to be limited so that each can attain its optimal effect. In each concrete case, therefore, the limitations must satisfy the principle of proportionality; that is, they may not go any further than necessary to produce a concordance of both legal values.'

^[14] Parliamentary Assembly, doc. 11296, 8 June 2007, Blasphemy, religious insults and hate speech against

persons on grounds of their religion, Report Committee on Culture, Science and Education Rapporteur: Mrs Sinikka Hurskainen, Finland, Socialist Group, <http://www.assembly.coe.int/>

^[15] Venice Commission, Blasphemy, insult and hatred: finding answers in a democratic society, Science and technique of democracy, No. 47, 2010.

^[16] See ECtHR, *Von Hannover v. Germany*, 24.9.2004, application no. 59320/00.

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