Matti Kotiranta
(ed.)

Freedom of Speech and Religion in the European Union

Liberté d'expression et religion dans l'Union européenne

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The European Consortium for Church and State Research dedicates these proceedings to Brigitte Basdevant-Gaudemet, in honour of her active membership in the Consortium (1992–2022).

* * *

Le Consortium européen pour l'étude des relations Églises-État dédie ces actes à Brigitte Basdevant-Gaudemet, en hommage à son investissement en tant que membre du Consortium (1992–2022).

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This volume contains the proceedings of the XXXVth Annual Meeting of the European Consortium for Church and State Research, held in Joensuu (Finland) on 22–24 September 2023, on the topic *'Freedom of speech and Religion in the European Union'*.

PREFACE

The XXXVth Annual Conference of the European Consortium for Church and State Research was held at the University of Eastern Finland in Joensuu and amidst the renowned cultural landscape of Koli, Finland, on 22–24 September 2023. The theme of the meeting was 'Freedom of Speech and Religion in the European Union'.

The conference was organized and prepared on behalf of the Consortium by Professor Matti Kotiranta, University of Eastern Finland. The conference papers presented in this volume of proceedings were prepared and circulated in advance, with the delegates including both Consortium members and the respective national reporters. The conference was attended by forty-one people representing the countries of the European Union.

The conference was preceded on 21 September by the International Conference and Celebration Symposium, '100 Years of Religious Freedom in Finland', in the Aurora building of the University. The opening ceremony included an introductory welcome from the Academic Rector of the UEF, Tapio Määttä, the Law School of the UEF; by Ms Hanna Kiiskinen, Senior Ministerial Adviser/Legal Affairs, representing the Ministry of Education and Culture; and four keynote speeches by Professors Martin Scheinin, Tuomas Ojanen, Matti Kotiranta and the deputy ombudsman, Ms Maija Sakslin. Acting as chair and moderator of the Celebration Symposium was Professor Pamela Slotte. Later that same day, consortium members and national reporters visited the Monastery of the Transfiguration of Christ at New Valamo, which is a male monastery of the Finnish Orthodox Church located at Heinävesi in North Karelia. The monastery's abbot, Archimandrite Mikael, acted as guide.

The opening session of the Consortium meeting, chaired by Professor *Jonatas Machado*, dealt with blasphemy and the defamation of religion. Many changes have occurred since 2008 and many European countries have repealed blasphemy laws, and hence the focus was placed in particular on the following key issues: the legal implementation of blasphemy and defamation of religion in national contexts, the fundamental norms regulating freedom of expression, and the prohibition of blasphemy in religiously motivated hate speech as restrictions on freedom of expression.

The second session, chaired by Professor *Rik Torfs*, was concerned with religious hate speech against religious communities and their members, an area that has experienced a wide variety of approaches across Europe. The following key issues are particularly worth mentioning: crimes against international law and the preparation and denial of genocide and of crimes against humanity, and in general the freedom of scientific research into historical events.

The third session, chaired by Professor *Mark Hill*, dealt with hate speech by religious clergy against others, such as homosexuals, and the thorniest issue of whether hate speech can ever be legitimate as an expression of religious freedom and whether religious feelings should be protected or not.

The fourth session was chaired by Professor *Merilin Kiviorg* and was concerned with protecting and promoting freedom of religion in the digital age and the relationship between freedom of religion and freedom of expression.

The final session, chaired by Professor *Lina Papadopoulou*, dealt with Blasphemy and Art – Ecclesiastical Objects, Symbols, and Their Protection. Are there art works that can insult a religion (Symbols of God or the Prophet, etc.)? Which kind of art is suitable for churches and what is the nature of an artist's freedom of expression? The discussion also covered the performing arts and legal cases that have resulted in blasphemy or defamation charges.

I should like to thank all those who have contributed to this volume and to the meeting of the Consortium: members, reporters, and invited guests. I should also thank most wholeheartedly all those who helped organise the conference, the sponsors of the event, Joensuun yliopiston tukisäätiö (the Joensuu University Support Foundation), Olvi-säätiö (the Olvi Foundation), Oskar Öflunds Stiftelse, the Federation of Finnish Learned Societies, Suomen Kulttuurirahasto/Pohjois-Karjalan rahasto (the Finnish Cultural Foundation/North Karelia Regional Fund), Karjalaisen kulttuurin edistämissäätiö (the Foundation for the Promotion of Karelian Culture), Joensuun kaupunki (the City of Joensuu), the Church Council of the Evangelical Lutheran Church of Finland, the Orthodox Church of Finland, and His Eminence, Arseni, the Metropolitan of Kuopio and Karelia, who hosted the gala dinner at the Monastery of the Transfiguration of Christ at New Valamo on the first day of the conference. Special thanks also go to Ms Nina Venhe, Communications Specialist, and to Ms Bettiina Lievonen, Graphic Designer from the Development Services, University Services, who were responsible for event communications, programme booklets, and roll-ups.

Finally, I am indebted to Dr John A Stotesbury, FEA, for working on the final English-language format of this volume of proceedings. It has been a great pleasure and privilege to work with him. I also thank Editorial Comares, in Spain, for their work in its publication.

Joensuu, 16 December 2024

Matti Kotiranta
University of Eastern Finland

THE RELATIONSHIP BETWEEN FREEDOM OF SPEECH AND RELIGION AS A THEME OF THE ECCSR JOENSUU MEETING IN 2023: AN INTRODUCTION TO THE NATIONAL REPORTS

Matti Kotiranta[1]

Defining the topic

Although there has been some desire in modern Europe to keep legislation on freedom of expression separate from the domain of religion, both the individual liberty to express one's views (democracy not only guarantees the right to speak freely but imposes this as a civic duty for opinion formation and political will) and also the multicultural character of the society that we live in have once again revived the question of whether particular protection should be given to religion and religious feelings.

This is most evident when people are talking about the prohibition of blasphemy and of religiously motivated hate speech as restrictions of free speech and expression. The same applies to other structurally and functionally similar concepts, such as religious insults, insults to religious feelings, defamation of religion, hurtful comments, group defamation, and disturbing the religious peace.

Both freedom of speech and the expression of hate speech have indirectly been the topic of the ECCSR discussion in two meetings. At the Järvenpää meeting of 2–5 October 2008 the focal topic was Religion and Criminal Law, and at the Tallinn meeting of 16–18 November 2017 the topic was Securitization of Religious Freedom: Religion and Limits of State Control. In Järvenpää the focus of the discussion was on the penal protection of religion, especially blasphemy and offenses against religion, while at the Tallinn conference hate speech was discussed by Jonatas Machado[2] and Lina Papadoupoulou in the introductory part of the proceedings[3].

[1] *University of Eastern Finland.*

[2] Jónatas E. M. Machado, 'Hate Speech and Individual Freedom', in *M. Kiviorg (ed.*), Securitization of Religious Freedom: Religion and Limits of State Control (Editorial Comares 2020), pp. 49–98.

[3] Lina Papadoupoulou, 'Hate Speech and Autonomy of Religious Communities', in *M. Kiviorg (ed.*), Securitization of Religious Freedom: Religion and Limits of State Control (Editorial Comares 2020), pp. 99–123.

The need to return to the same topics stems from the historical change that has occurred in Europe in society and the law. Since 2008 many European countries have repealed blasphemy laws, and today questions about the nature and scope of freedom of expression remain highly topical. Even within the context of the EU countries, freedom of expression has changed from something secure and certain into a contested concept.

It is not simply a subject that attracts academic interest: in many countries it is under discussion in the daily newspapers and at the workplace. At a time when freedom of expression, at least in theory, has spread throughout the world and is solidly entrenched in international treaties, it has become less easy to deal with. The question is: why?

I would refer here to Sophie van Bijsterveld, who as the then president (in 2008) of the European Consortium for Church and State Research in her speech at the opening ceremony of the Järvenpää conference very wisely drew attention to the challenges facing freedom of expression that were raised by multiculturalism:

> "It is not because *we have come to believe that it* [freedom of expression] *is an absolute right: it is subject to limitation, and indeed restricted*. It cannot be used to justify discrimination on the grounds of race, ethnicity, homosexuality or physical or mental handicap, for instance. And it is not only civil law that offers protection against such discrimination; criminal law does so as well.
>
> It is not limitations on these grounds that trigger the new debates. At the core of the current debate is the relationship – the somewhat uneasy relationship – between freedom of expression and religion. *Questions arise in the context both of attacks on religion and of statements made from a religious point of view which excite political controversy*. These questions are often dormant in socially, culturally and politically relatively stable times, but they are ready to surface at times of change.
>
> The issue of the relationship between freedom of expression and religion has an international dimension as well, and not merely the international dimension we have become familiar [in 2008] with over the last decades. As we all know, international human rights treaties guarantee liberties of expression and of religion, and ban discrimination. These liberties are meant to function within the national context."[4]

With regard to the criminal law, while the overriding principle in the European context has been that legislation on freedom of religion should not form part of criminal law and that the two should be kept separate, it is precisely the emergence of a multicultural society, as mentioned above, that raises serious questions about the protection of religious feelings. These issues were discussed at the Järvenpää meeting under three headings during the conference: protection of religion in criminal law, crimes committed in the name of religion, and religious sects in criminal law.

[4] *Italics* mine.

At the Joensuu/Koli Meeting in 2023 the focus was on the simultaneous tension between freedom of speech, on the one hand, and freedom of religion, on the other, and also on where the boundaries of freedom of speech in fact lie when it comes to speech that can be interpreted as hate speech.

Freedom of Speech and Religion – Grille thématique / Thematic Grid

The grille thématique, or thematic grid, consists of a set of instructions given to national reporters for them to use as a tool in making a comparative study of state laws by applying the same questions and the possible alternative answers to each type of freedom of speech and hate speech. The grid has been designed so that the main patterns of historical evolution are presented clearly and so that eventually a critical evaluation becomes possible based on the shared constitutional principles.

While guiding the preparation of national reports, and assuring some consistency across the various sections, the thematic grid / grille thématique was by no means intended to frustrate the freedom, initiative, and creativity of the contributors.

I. Freedom of Conscience, Religion, and Expression

1.1. The fundamental norms regulating freedom of expression

Freedom of expression is a structural principle of any free and democratic society. It is considered a fundamental right in the Western tradition of constitutional law and international human rights law. Freedom of expression plays a central role because it serves different individuals and groups, as well as diverse aspects of *individual* and *collective* relevance.

- How are the fundamental norms regulating freedom of expression established in the Constitution and other legislation in your country?
- Into which kind of views of life, it is possible to incorporate freedom of expression? Are there any restrictions?

The European Court of Human Rights has underlined the importance of open debate concerning topics of public interest, which in turn requires awareness of the impact of offensive (hate) speech and of the inevitable personal animosity that may follow. In the view of the ECtHR, the search for truth, objectivity and rigour does not require absolute proof of truth. Value judgements, for instance, can be protected if they have a sufficiently factual basis.

- How has national legislation in your country ensured that the right to freedom of expression 'is applicable not only to information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb'?

- Is there a soft law in the regulation of the freedom of expression and practices which may have significance even in a law court in situations involving interpretation of freedom of expression provisions?
  [As an example, the Council for Mass Media in Finland (*Julkisen Sanan Neuvosto*) and its resolutions regulate those media that have signed the basic treaty of the Council. The CMM is not a court of justice nor does it exercise public authority. However, its decisions are carefully observed in Finland. They form a soft law in the regulation of the freedom of expression and practices which may have significance even in court in situations involving interpretation of freedom of expression provisions. In its decisions the CMM in Finland expresses what it considers to correspond to journalistic ethics. Its decisions express what the customary law in freedom of expression is.]

The connection between freedom of expression and a free and democratic society is especially important when discussing topics such as the role that Sharia law and the Sharia courts (e.g., in England, Germany, and Canada) should play in a political, legal, and institutional setting that is constructed in most European countries on the constitutional principle of the separation of church and state. Since Sharia law has a direct impact on matters such as politics, family structures, and the social and legal status of women and children, it is obvious that it will affect society, becoming a central question of democratic self-government.

- Has Sharia law and its impact on family issues raised any significant controversy over the meaning of freedom of expression and freedom of speech in your country?

1.2. **Freedom of Religious Expression and Hate Speech**

The Council of Europe distinguishes between three different kinds of speech directed against religion or religious people, namely:

(a) blasphemy, (b) religious insults, and (c) hate speech against individuals on grounds of their religion, as shown in its Recommendation 1805 (2007) on blasphemy, religious insults and hate speech against individuals on grounds of their religion.[5]

In this Recommendation the Parliamentary Assembly of the Council of Europe (PACE) considered that "blasphemy, as an insult to a religion, should not be deemed a criminal offence." It also added that "national law should only penalise expressions about religious matters which intentionally and severely disturb public order and call for public violence."

[5] Assembly debate on 29 June 2007, Recommendation adopted by the Assembly on 29 June 2007. See also Res (2006) 1510 on Freedom of Expression and Respect for Religious Beliefs, adopted by the Assembly on 28 June 2006.

- Can you describe how the recommendations made by PACE have been dealt with in legislation of your country?

1.3. **Context of Public Debate**

- Name the major legal cases related to hate speech that have sparked public debate in your country.

II. Blasphemy, Religious Hate Speech, and Limitations of Freedom of Speech in Religious Context

The aim of section II is to evaluate the legal treatment in Europe of two different types of speech – i.e., *blasphemy* and *hate speech* – from a constitutional and also especially from a human rights perspective. Both blasphemy and hate speech are prohibited in international law and/or in many European legal systems. At least at first glance, these bans constitute *a limitation of freedom of speech as a special form of expression*.

The question therefore arises as to where the boundaries of freedom of speech lie, when God, religious principles, or symbols are insulted (blasphemy), or when judgments pronounced in the name of freedom of speech and religious freedom are based on a hostile attitude towards, e.g., sexual orientation, Islam, or race (hate speech). Where does the legislature draw the line in its understanding of hate speech as a motive based on race, national or ethnic origin, religion or belief, sexual orientation or disability or other similar grounds?

2.1. **Blasphemy and Defamation of Religion**

Legal Implementation of Blasphemy and Defamation of Religion in National Contexts

Blasphemy has appeared in Europe as a violation of ecclesiastical and canonical law for many centuries. Historically, the recognition of crimes against the freedom of religion has largely served to protect the majority churches from heresies and atheism. Therefore, many states have often regarded the protection of the dominant religion as a crucial factor in securing social and spiritual peace. Legislation against blasphemy has since been repealed in most parts of Europe, especially in Eastern Europe and in many parts of Western Europe, including countries that formerly recognized State religions, such as Sweden (until 1970) and the United Kingdom (until 2008). However, blasphemy is still a crime in approximately 70 countries worldwide. In Europe, at the start of the present century, 36 of the continent's 45 countries had such laws or

policies prohibiting blasphemy or the defamation of religion,[6] and Austria, Cyprus, Finland, Germany, Italy, Poland, Russia, Spain, and Turkey still have penal codes against either blasphemy or the defamation of religion.[7]

Nowadays, blasphemy – as Lina Papadopoulou has remarked – is "'an offence against God, the tenets and symbols of a religion' or, in the case of Islam, an offence against God's Prophet. It is a kind of speech, or any other kind of expression that is considered to be contemptuous of God or the divine. A similar crime is that of insulting or abusing religions. The criminalisation of these acts aims at protecting God or religion, sometimes only the prevailing one, but also, more recently, all known and legal religions."[8]

Legal developments

Identify and describe legal issues and current or possible/probable developments of your country related to earlier legislation (compared to 2008 situation; for more detail see the national reports issued by the Järvenpää meeting).

Defamation or outrage impacting on the content of religion. **Describe briefly:**

- Which offences correspond to blasphemy or have replaced blasphemy as an object in your country's legal history? Is there equal protection regarding all religions?
- How is the relevant statutory provision phrased with respect to each offense?
- What is the protected target (God's honour, religious feelings of the believers, public peace)? What are the objective or material aspects and the subjective or psychological elements (intention or also recklessness, knowledge or also reckless knowledge) of the offense and what is the punishment for each offense?
- Is incitement to discrimination, hatred or violence toward a person or a group of persons (hate speech) because of their religion regarded in particular as criminal?
- How has religion emerged alongside other 'racist motives' in your country's Criminal Code, and if it has, how can the punishment be increased if a person has been motivated by an act of religion or belief?
- Are the convictions of philosophical associations (worldview associations such as Freemasonry or anthroposophist associations) equally protected?

[6] Lina Papadoupoulou, 'Prohibitions of Religiously Loaded Speech. (How) Can Advocacy for Allowing Blasphemy be Reconciled with Supporting the Prohibition of Hate Speech?' in Kerstin von der Decken & Angelika Günzel (Hrsg.), *Staat – Religion – Recht. Festschrift für Gerhard Robbers zum 70*. Geburtstag. Baden-Baden: Nomos, 2020, p. 848. I am grateful to Professor Papadopoulos for this article she provided, which helped significantly in the preparation of the Grille thematique.

[7] *Ibid.*, p. 849.

[8] *Ibid.*, p. 848.

2.2. **From Blasphemy to the Prohibition of Hate Speech**

Freedom of expression and freedom of religion are rights that have been enshrined in all European constitutions and in the jurisprudence of the European Court of Human Rights. The ECtHR has insisted that freedom of expression "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population".[9]

The criticism and mockery of religion is allowed, even in those legal orders in which blasphemy and the abuse of religions is prohibited. **The main question is** when this abusive speech against religion exceeds the limit of what is permissible and becomes criminally punishable, while also possibly generating civil liability.

It seems that in its jurisprudence the ECtHR has emphasized freedom of speech more than freedom of religion, in which case these two rights come into conflict. The ECtHR's consideration of emphasis can be seen, for example, in the currently pending Finnish court case involving MP Päivi Räsänen (Christian Democrat), where the Helsinki District Court ended by emphasizing freedom of speech in relation to freedom of religion and defamation. The acquittal decision was based on the fact that Päivi Räsänen's speech directed at those living in gay and lesbian relationships was offensive, but it did not meet the limits of hate speech: in other words, it was not hate speech that could be considered to lie beyond the protection of freedom of speech.[10]

Legal status

Describe briefly, **on the one hand**, the present blasphemy legislation concerned with

- Menaces, violence, or application of force against another's freedom of religion or of conscience. Are they punished within the framework of the general offences of assault, coercion, etc. Or is there a specific offence? In this case what are the material and the psychological elements of the offence and what is its punishment?
- Discrimination in relation to of religion. What kinds of discriminatory conduct can be regarded as criminal offences? What are the material and psychological elements of the offense and what is its penalty?

[9] See ECtHR, *Handyside v. The United Kingdom*, appl. no. 5493/72, Judgment, 7 December 1976, § 49. https://hudoc.echr.coe.int/eng?i=001-57499. Accessed 2 Sept. 2022.

[10] For more detail, see, Information from the Helsinki District Court dated 30 March 2022: https://oikeus.fi/karajaoikeudet/helsinginkarajaoikeus/fi/index/tiedotteet/2022/tiedotehelsinginkarajaoikeushylkasisyytteetkiihottamisestakansanryhmaavastaan.html#. Accessed 2 Sept. 2022.

- Offenses against the public peace in a place of worship or during a religious practice. What are the kinds of offence (outrage or public defamation of public authority, incitement to civil disobedience or others) and what are the material and psychological elements of each and the due penalties?
- Abuse of a corpse or desecration of a sepulchre. What are the material and psychological elements and what are the due penalties? What is the ruling if the offense is committed because of the religion of the buried person?

The European Court of Human Rights, Fact Sheet on Hate Speech, June 2022, states that hate should be understood "as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."[11]

Describe briefly, **on the other hand**, how national legislation in your country renders hate speech punishable:

- when directing hate speech in public at persons whom the speaker claims or believes to have a particular characteristic, including adherence to a particular religion.
- Is it a criminal offense to target someone as deserving of punishment?
- If so, is there any special legislation on targeting?

2.3. **Challenging Dominant Paradigms**

a. *Incorporation of Blasphemy Laws and Hate Speech Prohibitions in the Modern Catalog of Fundamental Rights*

In the past the blasphemy laws used to protect various firmly established ideas and beliefs (whether religious or non-religious) held by those exercising either institutional or physical power. Nowadays the prohibition of blasphemy or defamation of religions or hate speech can no longer be upheld solely in favor of the majority or dominant religion but, at a time of religious equality and state neutrality, it has come to provide equal protection for all (legal) religions and believers or non-believers.[12]

[11] Cf. ECtHR, Fact Sheet on Hate Speech, June 2022. See, https://www.echr.coe.int/documents/fs_hate_speech_eng.pdf. For more detail, see Nina Peršak, *Criminalising Hate Crime and Hate Speech at EU Level: Extending the List of Eurocrimes Under Article 83(1) TFEU*. See, https://link.springer.com/article/10.1007/s10609-022-09440-w.

[12] For more detail, see Silvio Ferrari, *Shifting protection from beliefs to beleivers*, in Freedom of Faith, A Symposium on pluralism, blasphemy, tolerance, Seminar 667, March 2015, pp. 29–34, available at: http://www.india-seminar.com/2015/667/667_silvio_ferrari.htm. See also, Papadoupoulou 2020, p. 854.

As a result, hate speech prohibitions do not focus on an ideology or belief system but are *based instead on the value of equal human dignity for all*.

ECtHR jurisprudence endows the ECHR with a certain degree of substantive and not simply procedural liberalism by accepting a certain minimum level of paternalism on the part of the state as required for the maintenance of liberal democracy.

- How has Art. 17 of the European Convention, which prohibits the destruction and excessive restriction of the rights and freedoms set out in the Convention, been implemented in the national legislation of your country with regard to hate speech? (e.g., denial of the Holocaust, justifying a pro-Nazi policy, the linking of all Muslims with a serious act of terrorism, etc.)

b. *Crimes Against International Law – Denial of Genocide (Holocaust) and Crimes against Humanity*

Crimes against Public International Law have been enshrined as rights in all European constitutions and in the jurisprudence of the European Court of Human Rights.

The Code of Crimes against Public International Law protects religion and religions against genocide, against crimes against humanity, and also against prohibited methods of warfare. The provisions concerning genocide in Europe are based mainly on the Convention adopted by the UN General Assembly in 1948.

- In what way is **genocide** defined in your country's penal code in relation to "Holocaust" and how does the criminal law provide for **war crimes and crimes against humanity**?
- Has religion emerged alongside other 'racist motives' in your country's Criminal Code, and if so, to what extent can the penalty be increased if a person has been motivated by an act of religion or belief?
- Name the major law cases in your country involving Denial of Genocide (Holocaust).
- A religious motive is one of several elements that may be referred to in a legal description, but it may not explain a particular detail of the way the crime can be regulated by law. Are there offenses with a religious motivation whose description in the law makes no reference to religion (e.g., crimes linked with terrorism or with Islamic jihad) in your country?
- How are the preparation of genocide and conspiracy to commit genocide defined as punishable in your national legislation?

2.4. **Is Hate Speech an Expression of Religious Freedom?**

a. *The Prohibition of Religiously Motivated Hate Speech as a Restriction of Freedom of Expression*

The tendency to remove laws that restrict the freedom to criticize or mock religion and God has coincided with another – antithetical – tendency: the establishment of laws that prohibit racist or hate speech.

The prohibition of hate speech aims at protecting individuals belonging to specific social groups, including religious groups. This is provided for in Art. 20 para. 2 of the International Covenant on Civil and Political Rights (ICCPR). Article 20 states:

> (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The other two instruments are: the recommendations of the Council of Europe's European Commission against Racism and Intolerance (ECRI) and the EU Council's framework decision 2008/913/JHA.[13]

- Have the recommendations of the Council of Europe's European Commission against Racism and Intolerance (ECRI) and the EU Council's framework decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law (Framework Decision) been taken into account in your country's legislation?
- Does the national legislation in your country follow the recommendations by ECRI penalising when it is a question of:
  (a) public incitement to violence, hatred, or discrimination,
  (b) public insults and defamation, and
  (c) threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin, and other similarly intentionally aggressive expressions of hate and racism?[14]
- What is the relationship between the recommendations of ECRI and the EU Council's framework decision 2008/913/JHA in your country to Art. 20 par. 2 of the International Covenant on Civil and Political Rights (ICCPR)?[15]

[13] OJEU No. L 328, 6 December 2008, p. 55.

[14] European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, adopted by the ECRI on 13 Dec. 2002, Doc. No. CRI (2003)8REV. See also Lina Papadoupoulou, *Prohibitions of Religiously Loaded Speech. (How) Can Advocacy for Allowing Blasphemy be Reconciled with Supporting the Prohibition of Hate Speech?* in Kerstin von der Decken & Angelika Günzel (Hrsg.), *Staat – Religion – Recht. Festschrift für Gerhard Robbers zum 70. Geburtstag.* Baden-Baden: Nomos, 2020, pp. 849–850.

[15] Lina Papadopoulou has insightfully pointed out ain the article mentioned above (p. 849) that "Art. 20 para. 2 of the International Covenant on Civil and Political Rights (ICCPR) is incompatible with prohibitions of displaying lack of respect for a religion or other belief system, including blasphemy."

b. *The Trickiest Issue: Protecting "Religious Feelings"*

The protection of religious peace, as a manifestation of social peace, is a conclusive legitimate aim, whereas the protection of religious feelings would appear to be problematic and highly controversial. What is blasphemy from the point of view of criminal law, for instance? Who is to be accused and who defended?

It is constitutionally inconceivable to protect everyone's feelings, religious or otherwise. Religious feelings, due to the deeply subjective nature of feelings, cannot be considered more important than all other feelings. However, prohibition of religious hate speech aims at protecting both each person's equal dignity and their equal freedom of speech. Thus, hate speech prohibitions do not primarily focus on an ideology or belief system (religious or not) but are rather based on the value of equal human dignity for all.

Furthermore, a certain priority obtains between the protection of religious convictions and freedom of expression, so that one may then ask whether separate protection should be afforded to religious sensibilities and *whether in this case sensibility should be interpreted as collective* or whether it is t sufficient for an *individual to feel subjectively that a certain deed is an affront to his or her religious feelings.* For example, in Finnish jurisprudence the starting point is that the task of a public authority is to prevent discrimination and promote equality, but a private person has a certain right in the context of freedom of speech to also express offensive opinions. Not all offensive speech fulfills the criteria for hate speech.

As Lina Papadoupoulou has suggested, one workable "solution" might be that laws concerning religious insults should be seen as "positive", which would provide protection for two different public goals:

> "First, those protecting religion and God, i.e., the content of religious faith, such as blasphemy and defamation of religion. Second, those protecting the holders of religious faith, whether natural persons or legal entities (such as churches or religious communities), through measures like hate speech prohibitions.[16]

According to this view, there are two different kinds of religiously loaded speech that are legally relevant. "These can be distinguished from each other on the basis of the object of the protection provided: speech that insults a religious faith on the one hand, and speech that insults the adherents of a faith on the other."[17]

Although it is very difficult to make a conceptual distinction between insulting religion as such and insulting and undermining the human dignity of the followers of a religion,

[16] Papadopoulou, *ibid.*, p. 851.
[17] Papadopoulou, *ibid.*, p. 851.

- how does the national legislation in your country draw a distinction between an attack on someone's beliefs and an attack on an individual's dignity?
- Or: it may be a question of a case-by-case assessment since the ECtHR recognizes a wide margin of appreciation for the national courts by giving space to the perception of the "…absence of a uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions". [18]
- If so, describe in more detail the most important emphases that have been used as justifications for case-by-case assessment in your country.
- Are violations of religious feelings expressed in a public office/or by a Member of Parliament more punishable than those produced by ordinary people? What is the role of political rights in this case?

III. Freedom of Expression, Digitalisation, and Fundamental Rights Protection Online

The articles on freedom of expression in the human rights agreements protect general opinions, information, and ideas. Thus, with respect to the sphere of application of the Constitution's Freedom of Expression, does national legislation in your country make distinction, for instance, between political, *religious*, artistic, scientific, commercial, entertainment-related, and other messages?

- And if it does, how the fundamental norms regulating the legal status of the media and religion are established in the Constitution? Is freedom of expression bound to any particular method of communication (neutrality as to instruments)?

Digitalisation has a straight impact on freedom of religion and the interrelationship between it and freedom of speech. The national or transnational measures to eradicate "religious online hate speech" can also be problematic in terms of freedom of speech. [19] Therefore, it is crucial to analyse possibilities of digitization in terms of positive religious freedom.

[18] ECtHR, E.S. v. Austria, appl. no. 38450/12, judgment, 25 Oct. 2018, para 50 in fine; Lina Papadopoulou, *ibid.,* p. 861.

[19] For more detail, see Bilyana Petkova and Tuomas Ojanen (ed.), *Fundamental Rights Protection Online. The Future Regulation of Intermediaries.* US/Texas: Elgar Law, Technology and Society Series, 2020. The purpose of the book will be to analyse the European legislative and judicial responses to the evolving role of online platforms (Facebook, Twitter, other social media, blogging platforms, as well as online hosting portals and search engines).

Protecting and promoting freedom of religion in the digital age and the relationship between freedom of religion and freedom of expression

- Digitalisation gives rise to both opportunities and challenges for freedom of religion. What is the impact of digital technology on freedom of religion? What are the potential benefits and pitfalls of digitalisation for freedom of religion? How have the Internet and other new communication technologies been taken into account in legal practise in your country?
- Freedom of religion and freedom of expression are two closely interrelated and mutually reinforcing rights, but online expression also includes views that may offend religious communities, as well as constituting incitement to discrimination, hostility or violence. What measures have been adopted in your country to combat 'hate speech online'? How have these measures affected the relationship between freedom of religion and freedom of expression? Have domestic responses to online hate speech also impacted negatively on freedom of expression in your country?

IV. Blasphemy and Art – Ecclesiastical Objects, Symbols, and their Protection

Preamble

Churches and religious communities in Western and Eastern Europe own a considerable number of cultural and historical monuments. Church buildings and synagogues form a significant part of Europe's national building heritage. Churches, chapels, and synagogues were originally constructed using the best knowledge and materials of their own time. Ecclesiastical artefacts and art increase both knowledge and an understanding of the history of a community and of the ecclesiastical identity of the churches and religious communities. They help to connect people to the continuum of the generations, they carry the spiritual and cultural heritage of the churches and religious communities, and they form an integral part of the history and cultural heritage of each community.

Works of art and symbols of faith, whether related to Christian, Jewish or Muslim traditions, have been extremely important to the faithful. Also, in connection with these symbols – when they are publicly insulted in a multicultural society – a serious question arises about the protection of religious feelings.

a. *Art Works that insult a Religion (Symbols of God or the Prophet etc.)*

The desire to protect religious feelings from the point of religious symbols of faith is a sensitive matter. We all remember how the discussion flared up in 2006 in response to the extensive debate within Europe over cartoons depicting the Prophet Mohammed (and related terrorist attacks that took place across Europe), which con-

cerned freedom of expression and freedom of religion as specifically European values, and even elicited a statement from the then chairman of the European Commission, Jóse Manuel Barroso: "Freedom of speech is part of Europe's value and tradition. Let me be clear. Freedom of speech is not negotiable."[20]

- Have there been recent incidents in your country in which the Muslim community has felt that their religious feelings have been violated?
- Have the events of 2006 and the terrorist attacks that followed them changed the relationship of the legislature, not only in terms of criminal law (the anti-terrorism laws) but also to better protect religious feelings in your country? If so, how?

b. *Which kind of art is most suitable for the churches* and what is the artist's freedom of expression?

It is also important to discuss whether church art, Jewish art, or Muslim art differ from other forms of art and, if so, what makes it different. There may also be discussion of whether the cross or an image of Christ, for example, needs to be present in the art displayed in a church, rather than a decision based simply on taste or appropriateness in general. It can be stated that the meanings associated with these objects are stratified, changing over time, and may convey conflicting meanings.

- What kind of discussion has arisen in your country regarding the kind of art that may be most suitable for the churches (e.g., an altar painting, a mural, or a simple woollen wall-hanging)?
- Who gives permission, on his/her own part, authorizing productions of the performing arts on church premises? Are there some legal restrictions?
- What kind of performing arts has led to law cases in the sense of blasphemy or defamation in your country? What range of penalties has been imposed? [In Finland the only major case has involved a 1969 work by the pop artist *Harro Koskinen* in which he depicted a crucified pig-like Jesus with a halo around his head. The pig affair surrounding the 'Pig Messiah' is remembered mainly for its blasphemy charge, which eventually led to the imposition of fines on Koskinen and his exhibitors.]

[20] 15 February 2006: Brussels.

NATIONAL REPORTS

BLASPHEMY AND HATE SPEECH: THE EU REPORT

Michał Rynkowski[1]

I. Freedom of Conscience, Religion and Expression

Freedom of conscience, of religion and of expression is variously enshrined in a number of Articles of the Charter of Fundamental Rights: Article 10 (freedom of thought, conscience and religion), Article 11 (freedom of expression and information), Article 12 (freedom of assembly and association) and Article 14 (the right to education, mentioning the right of parents to ensure the education of their children in conformity with their religious convictions). Non-discrimination is guaranteed in Article 21 and the cultural, religious and linguistic diversity is protected by Article 22. Additionally, these freedoms are protected by the Treaty on the Functioning of the European Union, which in Article 67 describes the EU as "the area of freedom, security and justice with respect for fundamental rights […]".

In addition to the various provisions of EU law, both primary and secondary law, the European Convention on Human Rights (ECHR) remains a key act, with the European Court of Human Rights (ECtHR) playing the central role. In the absence of the respective jurisprudence of the Court of Justice of the EU[2], most of the EU documents refer to the judgements of the ECtHR. Also, since the Lisbon Treaty, the European Union is legally obliged to accede to the Convention, the process was, however, halted by opinion 2/2013 of the Court of Justice of the EU in December 2014[3], in which the Court stated that the draft Agreement (on the Accession of the EU to the ECHR) was not compatible with the Treaties.

[1] *Dr. Iur. Habil., LL.M.Eur. Member of the Legal Service of European Commission.* All opinions are solely those of the author and they do not in any way bind the European Commission.

[2] A very few pertinent cases are listed in a footnote below.

[3] ECLI:EU:C:2014: 2454.

The Court of Justice of the EU has not issued judgments relating directly to the freedoms in question: this has, however, happened in related cases[4], i.e., concerning: taking an exam on a day that was a Jewish holiday[5], ritual slaughter[6], and more recently, wearing religious garments by the employees of private companies throughout Europe[7]. The question of religious freedom was an important point of the ECJ case Bahtiyar Fathi v Predsedatel na Darzhavna Agentsia Za Bezhantsitse, concerning the fear of being persecuted on religious grounds in an asylum application[8]. The freedom of conscience, religion and expression has been guaranteed predominantly by the European Court of Human Rights in its various judgments.

II. Blasphemy, Religious Hate Speech, and Limitations on Freedom of Speech in Religious Contexts

II.1. Blasphemy

II.1.1. *No legal basis to legislate on blasphemy within the EU*

This section of the EU report could be extremely short, like the response given by Commissioner Jourová to a Member of the European Parliament (MEP), in which the Commission stated very clearly: "The European Union has no legal basis to legislate on blasphemy", 27 May 2016 (E-000485/2016 (ASW).

Earlier, in a much more elaborated way, the Commission replied to similar questions asked by the Members of the EP, who keenly followed national developments in the area of blasphemy law. In 2008 the Commission stated that "The Commission would remind the Honourable Member that national blasphemy laws are a matter for the domestic legal order of the Member States. It is their responsibility to ensure that freedom is speech is safeguarded when implementing this type of legislation" (E-1542/2008, ASW).

[4] Some of the cases discussed: V. Petralia, 'The Protection of Freedom of Religion in the EU Law' in L. Paladini, M. A. Iglesias Vázquez (eds.), *Protection and Promotion of Freedoms of Religions and Beliefs in the European Context*, Cham 2023, s. 167.

[5] C-130/75, Vivien Prais v Council of the European Communities, judgment of 27 Oct. 1976.

[6] C-426/16, Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen, VZW and Others v Vlaams Gewest, judgement of 29 May 2018; C-497/17, Oeuvre d'assistance aux bêtes d'abattoirs (OABA) v Ministre de l'Agriculture et de l'Alimentation and Others, judgement of 26 Feb. 2019; C-336/19, Centraal Israëlitisch Consistorie van België e.a. and Others, judgment of 17 Dec 2020.

[7] See C-157/15, Samira Achbita e Centrum voor gelijkheid van kansen en voor racismebestrijding contro G4S Secure Solutions NV, judgement of 14 Mar 2017, and C-188/15, Asma Bougnaoui e Association de défense des droits de l'homme (ADDH) contro Micropole SA, judgement of 14 Mar. 2017.

[8] C-56/17, Bahtiyar Fathi v Predsedatel na Darzhavna Agentsia Za Bezhantsitse, judgment 4 Oct. 2018.

A few years later, in 2012, the Commission stated that: "Freedom of expression constitutes one of the essential foundations of our democratic societies, enshrined in the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. However, according to Article 51 (1) of the Charter of Fundamental Rights, its provisions are addressed to the Member States only when they are implementing Union law. When enacting or maintaining national blasphemy laws the Member States concerned do not act in the course of implementation of EC law. In that matter it is thus for these Member States alone to ensure that their obligations regarding fundamental rights — as resulting from international agreements and from their internal legislation — are respected" (question E-009015/2012, ASW).

II.1.2. *Blasphemy laws outside of the EU*

The Guidelines on the promotion and protection of freedom of religion or belief[9] [outside the EU], adopted by the Foreign Affairs Council meeting during the meeting in Luxembourg on 24 June 2013, refer twice to the issue of blasphemy. In a section addressing freedom of expression, the EU stated that, when faced with restrictions to freedom of expression in the name of religion or belief, the EU will:

— Recall on all appropriate occasions 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.
— Forcefully advocate against the use of the death penalty, physical punishment, or deprivation of liberty as penalties for blasphemy.

In 2018 the High Representative for Foreign and Security Policy F. Mogherini replied to a question (E-005136-18) regarding whether the EU should take more decisive actions as regards the blasphemy laws in the countries outside of the EU, pointing to the Guidelines and the EU efforts.

On 29 April 2021 the European Parliament (EP) adopted a resolution on the blasphemy laws in Pakistan, referring in particular to the case of the couple, Shagufta Kausar and Shafqat Emmanuel (2021/2647(RSP)), who were detained for years for allegedly sending text messages insulting the Prophet Mohammed. One of the most intriguing elements of the case is the fact that both detainees were illiterate. In one of the recitals, the EP noted that 2 March 2021 marked 10 years since the former Pakistani Minister for Minorities Affairs Shahbaz Bhatti was assassinated following threats made against him after his publicly speaking out against the blasphemy laws.

[9] https://www.eeas.europa.eu/sites/default/files/137585.pdf, accessed on 29 Feb. 2024.

The resolution of the EP was mainly addressed to the Pakistani authorities but also to the diplomatic personnel of the EU, suggesting their attendance at the trial, to request prison visits and to make sure that the couple and their lawyer could legally arrive in the EU should they need to leave Pakistan.

II.1.3. *Reactions after the Mohammed cartoons and the Charlie Hebdo massacre*

The various reactions to the Mohammed cartons (Jylland Posten) and the Charlie Hebdo massacre were described in the national reports. The Fundamental Rights Agency (FRA) collected and published 'Reactions to the Paris attacks in the EU: fundamental rights considerations' (2015)[10].

The Charlie Hebdo massacre also triggered other reactions, such as in the field of air transport and data protection: including changes in the area of Passengers Name Records[11]. A good example is the directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime[12], with data being shared between states.

II.2. **Hate speech**

II.2.1. *Hate speech/hate crime in various legal acts*

The EU legal framework concerning hate speech is marked by Article 19 of the Treaty on the Functioning of the European Union (TFUE, prohibition of any form of discrimination) and Article 67 TFEU, according to which the EU constitutes an area of freedom, security and justice with respect for fundamental rights.

The fundaments were laid down by the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law[13], which in recitals 8 and 9 explained the notions of a religion and of hatred[14], respectively.

While the issue is not new, the COVID-19 pandemics caused all of the fear and related (or even unrelated) hate speech to flourish, as in many countries people were confined at home, and the spread of online misinformation easily fueled various

[10] Available at https://fra.europa.eu/sites/default/files/fra-2015-paper-01-2015-post-paris-attacks-fundamental-rights- considerations-0_en.pdf, accessed on 10 Sept. 2023.

[11] W. Gregory Voss, 'After Google Spain and Charlie Hebdo' in Vol. 71, Winter 2015–2016, *The Business Lawyer*; p. 289.

[12] OJ L 119, 4 May 2016, p. 132, ELI: http://data.europa.eu/eli/dir/2016/681/oj.

[13] OJ L 328, 6 Dec 2008, p. 55.

[14] 'Religion' should be understood as broadly referring to persons defined by reference to their religious convictions or beliefs; 'Hatred' should be understood as referring to hatred based on race, colour, religion, descent or national or ethnic origin.

fears. Following these very negative trends, the Commission proposed to extend the list of EU crimes to include hate speech and hate crime. This proposal was included in the Communication from the Commission to the EP and the Council published in December 2021[15]. Currently, the list of the types of EU crime includes 10 crimes (see Article 83 TFEU):

- Terrorism
- Trafficking in human beings
- Sexual exploitation of women and children
- Illicit drug trafficking
- Illicit arms trafficking
- Money laundering
- Corruption
- Counterfeiting by means of payment
- Computer crime
- Organised crime

Adding hate speech and hate crime to this list requires two steps: In the first, the Council, acting unanimously and with the consent of the European Parliament, must agree to the expansion of the list. In the second step, the Commission will have to prepare a draft directive to be adopted by the Council and the European Parliament in accordance with the ordinary legislative procedure and then implemented in the national laws of the Member States. The draft directive was attached to the Communication COM(2021)777 in its Annexe[16].

In this context, one should mention not only the employment/anti-discrimination directives[17] but also the Audiovisual Media Services Directive[18], which in Articles 6 and 28b bans both the incitement to hatred in the audiovisual media services and also the promotion of discrimination in audiovisual commercial communications.

[15] Communication from the Commission to the European Parliament and the Council: A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime, 9 Dec 2021, COM(2021)777 final.

[16] After the Joensuu meeting of the Consortium, the EP called on the Council in December 2023 to continue the legislative work. Hence, the legislative process is not yet finished.

[17] Council Directive 2000/43/EC of 29 Jun. 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19 Jul 2000, p. 22 and Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 Dec. 2000, p. 16.

[18] Consolidated text: Directive 2010/13/EU of the European Parliament and of the Council of 10 Mar. 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

From another angle, hate speech in its most extreme form: incitement to acts of terror, has to be prevented; see Article 21 of directive (EU) 2017/541 of the European Parliament and of the Council on combatting terrorism[19].

II.2.2. *Hate speech/hate crime in soft law. The Internet Code of Conduct (2016)*

The issue of hate speech was also present in soft-law documents, for example: Council conclusions on freedom of religion or belief of 2009[20] and Council Conclusions on intolerance, discrimination and violence on the basis of religion or belief of 2011[21]. The Council noted the global dimension of the problem: "…recent violence and acts of terrorism, in various countries, against Christians and their places of worship, Muslim pilgrims and other religious communities, which it firmly condemns. Regrettably, no part of the world is exempt from the scourge of religious intolerance". Even if the term "hate speech" was not used explicitly in these documents, they clearly refer to this (negative) phenomenon, including also violence. The notion of "hate crime" emerged up for the first time in the Council conclusions on combating hate crime in the European Union – at the Justice and Home Affairs Council meeting, Brussels, 2013[22].

The European Parliament has frequently taken a stand on hate crimes[23]. A notable number of EP resolutions have tackled various aspects of hate speech, discrimination and violence, such as in the following resolutions: 2018/2869(RSP) concerning neo-fascist movements, October 2018; resolution 2020/2009(INI) – hate speech and disinformation, November 2020; resolution 2021/2557(RSP) concerning hate speech against the LGBTQ community, March 2021; resolution 2021/2035(INL): gender-based violence and hate speech, September 2021; resolution (2021/2055(INI), religion-based hate speech crimes, May 2022.

Just a few weeks after the tragic Zaventem Airport/Maelbeek metro station attacks in Brussels on 22 March 2016, the Code of Conduct on countering illegal hate speech online was elaborated by the European Commission in cooperation with Face-

[19] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 Mar. 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88, 31 Mar. 2017, p. 6.

[20] 2973rd General Affairs Council meeting, Brussels, 16 Nov. 2009.

[21] 3069th Foreign Affairs Council meeting, Brussels, 21 Feb. 2011.

[22] 5-6 Dec. 2013, available under: https://www.consilium.europa.eu/uedocs.eu/cms_data/docs/pressdata/en/jha/139949.pdf.

[23] https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/733520/EPRS_ATA(2022)733520_EN.pdf, Combating hate speech and hate crime in the EU (europa.eu), accessed on 10 Sept. 2023.

book, Microsoft, Twitter and YouTube[24]. A few other companies, including Snapchat and Instagram, also joined the Code. In the course of three pages the Code describes how the companies should react if hate speech is detected/notified. The Commission publishes regularly reports[25] concerning cooperation with the largest internet platforms (Facebook, Twitter, YouTube, TikTok, Instagram and JeuxVideo), which present their data on the basis of the notifications they receive and the number of posts/items that they removed following these notifications. As an example, in 2022, YouTube removed 90.4% of the content flagged, Facebook 69.1%, TikTok 60.2%, Instagram 58.4% and Twitter 45.4%. Apart from YouTube, all of the other platforms had a lower removal rate than in 2021, although often with minor variations (for example, Facebook removed 70.2% of content in 2021 and Twitter 49.8%). A new reinforced Code of Conduct on countering illegal hate speech online is expected to be finalised in early 2024[26].

II.2.3. *Hate speech/hate crime in strategies and studies*

In 2015 the European Parliament published an extensive study concerning "The European legal framework on hate speech and blasphemy, and their interaction with freedom of expression"[27], prepared at the request of the LIBE committee. The study discusses various aspects of these threats but also notes that the Parliament waived the immunity of a French Member of the European Parliament[28] who was accused of incitement to hatred, discrimination or violence against a group of persons on the ground of their religious affiliation, an offence provided for in French law.

The new study "Hate speech and hate crime in the EU and the evaluation of online content regulation approaches" was commissioned by the LIBE Committee of the EP and published in 2020[29]. It provides extensive insights into the respective developments at the EU level, the ECtHR/ECHR level and in a number of Member States.

[24] code_of_conduct_on_countering_illegal_hate_speech_online_en_C08AC7D9-984D-679D-CAEF129AD536E128_42985.pdf

[25] Countering illegal hate speech online, 7th evaluation of the Code of Conduct, Nov. 2022: available under: Factsheet - 7th monitoring round of the Code of Conduct.pdf (europa.eu).

[26] Joint communication to the European Parliament and the Council entitled: No place for hate; a Europe united against hatred, JOIN (2023) 51 final of 6 Dec. 2023, p. 9.

[27] Study PE 536.460, 2015.

[28] MEP Marine Le Pen, European Parliament decision of 2 Jul 2013 on the request for waiver of the immunity of Marine Le Pen (2012/2325(IMM)), available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-292, accessed 10 Sept. 2023.

[29] https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655135/IPOL_STU(2020)655135_EN.pdf, Hate speech and hate crime in the EU and the evaluation of online content regulation approaches (europa.eu), accessed 29 Feb. 2024.

In 2020 the European Commission adopted a communication on the EU security Union strategy[30], in which preventing and countering the spread of hate speech was mentioned as one of the elements of countering illegal content online. Radicalisation (including religious radicalisation) also constitutes one of the threats.

Finally, it is important to take due care of the victims: the 2020–2025 EU Strategy on victims' rights[31] notes the need to ensure specialist support and protection for victims of hate crime, with Jews and Muslims being the most affected communities.

Following the Consortium meeting in Joensuu, the Commission, together with the High Representative of the Union for Foreign Affairs and Security Policy, adopted a joint communication to the European Parliament and the Council entitled: No place for hate; a Europe united against hatred, JOIN (2023) 51 final of 6 Dec. 2023. Of particular interest is the part devoted to the protection of people and spaces, in the sense of physical protection. This is also linked to the EU funding, which is distributed though the calls for proposals, such as the "2020 PROTECT call". The Jewish communities are at the centre of these efforts. The Commission also envisages closer cooperation with police authorities, both with CEPOL (European Union Agency for Law Enforcement Training) and with Europol.

Publication of this 2023 communication was followed by a so-called "Article 17 dialogue meeting"[32] between the Vice-President of the European Commission, M. Schinas, and the religious leaders, on 19 Dec. 2023.

II.2.4. *Hate speech – the High Level Group and its work*

One of the bodies contributing to shaping the EU policy in this respect is the High-Level Group (HLG) on combating racism, xenophobia and other forms of intolerance (HLG)[33]. As explained by Commissioner Jourova in a reply to an MEP[34], "[it is] a Commission expert group which aims at tackling horizontal issues relating to preventing and combating hate speech and hate crime and addressing specific forms of intolerance. The HLG replaces the previous Commission expert group on the Framework Decision on combating racism and xenophobia[35], which ran for 7 years

[30] COM (2020)605 final of 24.7.2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0605, accessed 29 Feb. 2024.

[31] COM(2020)258 final, 24 Jun. 2020.

[32] Referring to Article 17 of the Treaty on the Functioning of the European Union, providing for an open, transparent and regular dialogue between the Union, on the one hand, and churches and religious, philosophical and non-confessional organisations on the other.

[33] More information about the High-Level Group and the minutes of its meetings can be found in the Register of Commission Experts Groups.

[34] E-005994/2016, Sept 2016.

[35] Expert Group on Framework Decision 2008/913/JHA on combating racism and xenophobia by means of criminal law(E02394).

and was attended by Member States only. The new HLG is intended as a means to improve coordination and maximise synergies between all relevant actors: close co-operation between national authorities, civil society and EU and international bodies is essential to make a real difference on the ground."

In November 2018 the HLG issued a highly useful Guidance note[36], which – although not legally binding – will help the Member States to facilitate the practical implementation on the basis of the Council Framework Decision 2008/913/JHA. It also helps in differentiating between hate speech and hate crime, making sure the Member States qualify them properly.

II.3. **Denial (of the Holocaust and the Armenian Genocide)**

The denial of genocide was already mentioned in the Joint Action 96/443/JHA document, which provided that the Member States should ensure judicial cooperation in the case of "public denial of the crimes defined in Article 6[37] of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 insofar as it includes behaviour which is contemptuous of, or degrading to, a group of persons defined by reference to colour, race, religion or national or ethnic origin;"[38]

According to Article 1(1) of Framework Decision 2008/913/JHA, each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:

> "(c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;"

The representatives of the Commission, including the first Vice-President F. Timmermans, participated on various occasions in the events commemorating the Holocaust.

[36] Guidance Note on the practical application of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, Nov. 2018.

[37] Those are: "*(c)* Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".

[38] Joint action/96/443/JHA of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia.

The year 2015 marked the centenary of the Armenian Genocide. On this occasion the European Parliament adopted a special resolution[39]. It recalled its own resolution of 18 June 1987 on finding a political solution to the Armenian question[40]. In 2020 the changing attitudes of the Turkish authorities triggered the questions raised by members of the European Parliament addressed to the High Representative for the Foreign Policy, concerning how the EU intended to react (i.e., to the fact that the Turkish authorities intended to deny the Armenian Genocide)[41]. The EuroNest Parliamentary Assembly, composed of 60 Members of the EP and of 10 members from each of Armenia, Azerbaijan, Georgia, Moldova and Ukraine, adopted on 15 March 2015 in Yerevan its own resolution concerning the Armenian Genocide[42] (despite Azerbaijan denying the genocide).

III. Art

While the Charter of Fundamental Rights in Article 13 protects the freedom of the arts and science, there is no direct (or even indirect) reference to blasphemy or to religious objects. In consequence, this part of the thematic grid cannot at present be further elaborated.

V. Antisemitism, Islamophobia (anti-Muslim hatred)[43]

Both antisemitism and anti-Muslim hatred ranked high on the list of hatred posts notified to the internet platforms in 2022, at 9.9% and 8.7% respectively (thus, antisemitism being a stronger sentiment than islamophobia)[44]. The hate factor with the highest percentage is antigypsyism, with 16.8%, double that of antisemitism or anti-Muslim hatred. While cases are widespread online, they are also present offline: the EP had to waive the immunity of one of its members (see above), and even more hate-related speeches and incidents occurred during the election campaign to the European Parliament.

[39] European Parliament resolution of 15 April 2015 on the centenary of the Armenian Genocide (2015/2590(RSP)).

[40] OJ C 190, 20 Jul 1987, p. 119.

[41] Question for written answer E-005399/2020, answer given by J. Borrell on 7 Jan. 2021.

[42] Resolution on the centennial of the Armenian Genocide (europa.eu), OJ C 315, OJ 23 Sept. 2015, p. 23.

[43] While both terms are used in public discourse, it seems that the EU institutions prefer the term "anti-Muslim hatred".

[44] Countering illegal hate speech online, 7th evaluation of the Code of Conduct, Nov. 2022: available under: Factsheet - 7th monitoring round of the Code of Conduct.pdf (europa.eu), p. 4. The 7th evaluation is the most recent available at the time of writing (Feb. 2024).

Unfortunately, the existing statistics concerning antisemitism or anti-Muslim hatred incidents remain very incomplete, as only a small percentage of them is ever reported to the authorities.

On 6 December 2018 the Council adopted a "Declaration on the fight against antisemitism and the development of a common security approach to better protect Jewish communities and institutions in Europe"[45]. In addition, in December 2018 a report was published on "Experiences and perceptions of antisemitism. Second survey on discrimination and hate crime against Jews in the EU"[46] was published by the FRA. Two years later, on 2 December 2020, the Council adopted another conclusion entitled: "Council Declaration on mainstreaming the fight against antisemitism across policy-areas"[47].

A communication from the Commission "EU Strategy on Combating Antisemitism and Fostering Jewish Life (2021–2030)" was adopted on 5 Oct 2021[48]. The Fundamental Rights Agency (FRA), an EU agency based in Vienna, compiled a brochure entitled "Antisemitism – Overview of antisemitic incidents recorded in the European Union 2010–2020 (Annual Update)", which is available online[49]. Following the Joensuu Consortium meeting, and especially following the outbreak of the war between Hamas and Israel in October 2023, the Member States have noted a fast-growing number of antisemitic incidents.

Within the Commission's DG JUST (Directorate General for Justice) there is a coordinator for combating antisemitism and fostering Jewish life, Ms Katharina von Schnurbein, who was appointed in 2015. There is also an antisemitism working group. In May 2023 the fourth meeting of this group took place in Romania in presence of the Vice President of the European Commission, Margaritis Schinas.

On 1 February 2023 the European Commission appointed Marion Lalisse as its new coordinator for combating anti-Muslim hatred. To follow the developments at a national level, the FRA placed on its website a database concerning national judgments made in 2012–2020 in the area of anti-Muslim hatred[50].

[45] https://data.consilium.europa.eu/doc/document/ST-15213-2018-INIT/en/pdf, accessed 29 Feb. 2024.

[46] https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-experiences-and-perceptions-of-antisemitism-survey_en.pdf, Experiences and perceptions of antisemitism/Second survey on discrimination and hate crime against Jews in the EU (europa.eu), accessed 29 Feb. 2024.

[47] https://www.consilium.europa.eu/media/47065/st13637-en20.pdf, accessed 29 Feb. 2024.

[48] Communication from the Commission to the EP, the Council, the EESC and the Committee of the Regions, COM (2021) 615 final.

[49] https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-antisemitism-overview-2010-2020_en.pdf, accessed 29 Feb. 2024.

[50] https://fra.europa.eu/en/databases/anti-muslim-hatred/ accessed on 29 Feb 2024 (HOME | Anti-Muslim hatred (europa.eu).

SOUTHERN AND WESTERN EUROPE

THE RELATION BETWEEN FREEDOM OF SPEECH AND RELIGION IN CYPRUS

Achilles C. Emilianides[1]

1. Freedom of Conscience, Religion, and Expression

1.1. The Fundamental Norms Regulating Freedom of Expression

Article 19 of the Constitution of Cyprus, corresponding to Article 10 ECHR, provides that every person has the right to freedom of speech and expression in any form. This right includes the freedom to hold opinions and receive and impart information and ideas without interference by any public authority and regardless of frontiers. The exercise of such a right may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary only in the interests of the security of the Republic or the constitutional order; or the public safety; or the public order; or the public health; or the public morals; or for the protection of the reputation or rights of others; or for preventing the disclosure of information received in confidence; or for maintaining the authority and impartiality of the judiciary. It is further stipulated that seizure of newspapers or other printed matter is not allowed without the written permission of the Attorney-General of the Republic, which must be confirmed by the decision of a competent court within a period not exceeding seventy-two hours, failing which the seizure shall be reversed. In addition, the Republic may, in accordance with Article 19, require the licensing of auditory and visual broadcasting or cinema enterprises.[2]

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[2] See generally A. Emilianides, *Constitutional Law in Cyprus* (3rd Ed., The Hague: Kluwer, 2024), C. Stratilatis and A. Emilianides, *Media Law in Cyprus* (2nd Ed., The Hague: Kluwer, 2019), C. Tornaritis, *The State Law of the Republic of Cyprus* (Nicosia: Cyprus Research Centre, 1982, in Greek), 148 ff.; A. Loizou, *Constitution of the Republic of Cyprus* (Nicosia: 2001, in Greek), 114 ff. S. Aktypis, P. Jougleux, T.E. Synodinou (eds), *Freedom of Expression of Journalists and Cartoonists. Protection and Restrictions of the Right under Greek and Cypriot Law* (Athens-Thessaloniki: Sakkoulas, 2016, in Greek).

Freedom of expression is considered to constitute one of the essential foundations of a democratic, tolerant and pluralistic society, and includes all forms of expression such as paintings, books, films, statements in radio interviews and information pamphlets. It is not merely applicable to information or ideas regarded as inoffensive, or indifferent, but also to those that offend, shock or disturb the State or any sector of the population. Thus, freedom of expression safeguards the manifestation of all kinds of religious beliefs, including the minority's religious beliefs. The Supreme Court has categorised the causes in respect of which freedom of expression may be limited into three sub-groups: (a) the integrity of the State (the grounds of state security, public safety, constitutional order and public order); (b) social harmony (the grounds of public health, public morals, the protection of the reputation or rights of others and the preservation of confidential information); and (c) justice (the ground of authority and impartiality of the judiciary). It has been held that Article 19 of the Constitution enumerates exhaustively the causes in respect of which freedom of speech and expression may be limited.[3] Any other limitations of freedom of speech should be accordingly struck down as unconstitutional. It has further been held that legislation which purports to limit fundamental rights is *ipso facto* of a temporary character. Therefore, even if the limitation was permissible at the time it was introduced by legislation in light of national or social realities prevailing at the time of enactment, it may still be declared unconstitutional if the grounds justifying its enactment have in the meantime disappeared.

In order to declare whether a legislative measure was "necessary" for the purposes of Article 19 of the Constitution, there should be a serious, though not inevitable, risk that one or more of the causes defined therein will be imperiled. It should be assessed whether the interference corresponded to a pressing social need; whether it was proportionate to the legitimate aim pursued; and whether the reasons given by the authorities to justify it are relevant and sufficient. The nature and severity of the penalty or fine imposed are also factors to be taken into account when assessing the proportionality of the interference. The sanction should not be such as to have a chilling effect on the exercise of freedom of expression.

The constitutional protection extends to both true and false statements. The right of freedom of speech and expression is thus not qualified by the truth and accuracy of the content of the expression. However, whereas truth may be tolerated even where it appears to be damaging to, for example, state security, no such justification exists for suffering falsity in similar circumstances. Consequently, intolerance of false news or information, which is damaging to the causes for which freedom of speech and expression may be limited in accordance with the Constitution, is not intrinsically de-

[3] *Police v. Ekdotiki Eteria Inomeni Dimosiographiki Dias Ltd* [1982] 2 CLR 63.

rogatory to the exercise of the right. While the existence of facts can be demonstrated, the requirement to prove the truth of a value judgment is impossible to fulfil, since value judgments are not susceptible of proof. Where allegations are made about the conduct of a third party, it may sometimes be difficult to distinguish between statements of fact and value judgments. In any event, even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, consisting of generally known facts, basic verification or independent research. In this respect, it has been held that requiring an individual to prove the truth of her statements, while depriving her of the opportunity to adduce evidence in order to support such statements, and thereby show that the statements constituted a fair comment, would amount to a disproportionate interference in her freedom of expression.

1.2. **Freedom of Religious Expression and Hate Speech**

A publication may sometimes be considered to be blasphemous or offensive to a particular religion. However, interaction between criminal law and religion in Cyprus has so far not been an issue causing major debate. This is probably due to the system of coordination prevailing in Cyprus, which has, in general, promoted religious tolerance between the various religious communities.[4] Accordingly, the practical application or importance of the offences relating to religion, which are enumerated in the criminal code, has been limited.[5] Part IV of the Criminal Code Cap. 154 – entitled "Offences Injurious to the Public in General: Offences Relating to Religion" – protects certain religious manifestations. The criminal offences that are characterised as religion-related in the Cypriot penal code are the following: (a) defamation of religions; (b) disturbance of religious assemblies; (c) unlawful trespassing on burial places; (d) affront to religious sentiment by word or act; (e) circulation of defamatory publications; (f) impersonating clergy; and (g) offences linked with acts of worship.

Hate speech is generally considered to be a legitimate restriction of freedom to speech, since the protection or reputation of others is a ground for restricting freedom of speech. There are several legislative provisions which restrict and/or punish hate speech. If any offence has been committed against a group of persons due to bias against their race, colour, national or ethic descent, religious or other beliefs, sexual orientation or gender identity, a Court may consider such a bias to be an aggravating factor during the sentencing and imposition of any penalty. The Supreme Court has generally defined hate speech within the context also of the Council Framework De-

[4] See generally A. Emilianides, *Religion and Law in Cyprus* (4th Ed., The Hague: Kluwer, 2024), Idem, 'State and Church in Cyprus', in G. Robbers (ed.), *State and Church in the European Union* (3rd Ed., Baden-Baden: Nomos Verlagsgesellschaft, 2019), pp. 281–296.

[5] *See* A. Emilianides, 'Religion in the Criminal Law in Cyprus', in M. Kotiranta and N. Doe (eds), *Religion and Criminal Law* (Leuven: Peeters, 2013), pp. 35–40.

cision 2008/913/JHA,[6] as any speech publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin.[7] The Court has stressed that hate speech offences are extremely serious, and sentencing should be proportionate to the seriousness of the offences. It should be noted, however, that the European Commission against Racism and Intolerance has indicated, in its latest Report of 7.3.2023, a number of areas where it suggests further action on behalf of Cypriot authorities to tackle hate speech.[8]

Article 28 section 2 of the Constitution provides that every person shall enjoy all the rights and liberties provided for in this Constitution without any direct or indirect discrimination against any person on the ground of his/her community, race, religion, language, sex, political or other convictions, national or social descent, birth, colour, wealth, social class, or on any ground whatsoever, unless there is express provision to the contrary in this Constitution. Article 28 is autonomous and its application is not dependent on a finding of violation of another Article of the Constitution. A violation of fundamental rights is actionable and thus an aggrieved person may file an action in civil courts against those perpetrating the violation, with the aim of recovering just and reasonable compensation for any pecuniary or non-pecuniary damage that such a person has suffered because of the discrimination; such discrimination may be either direct or indirect. The person may further demand that the Court should hold that any discrimination inflicted upon him/her, on the basis of a Law, or an administrative act, is illegal and thus should be declared invalid and with no effect. The Republic of Cyprus has further enacted legislation in harmonisation with EU law which prohibits discrimination. Anti-discrimination laws could thus amount to a legitimate ground for restricting freedom of expression.

Sharia law has not had any particular impact in freedom of speech cases. Since the early 1950s, the Interim Committee of Turkish Affairs held that, while the matrimonial relations of the Turkish Cypriot Muslims ought to retain their religious character and derive their origin and basic principles from the Quran, they should also be modified on the basis of Kemalic reforms and of the principles of the Civil Code of Turkey of 1926.[9] On the basis of the observations of the Interim Committee, the Turkish Family (Marriage and Divorce) Law CAP. 339, and the Turkish Family Courts CAP. 338, exclude sharia law for Turkish Cypriot Muslims, who are the

[6] Of 28 November 2008 on combatting certain forms and expressions of racism and xenophobia by means of criminal law, as enacted in Cyprus by Law 134(I)/2011.

[7] *Police v. AA*, Crim. App. 4/21, Judgment of 1.7.2021 (in Greek).

[8] Available in https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/cyprus (last accessed 15.7.2023).

[9] *Interim Report of the Committee on Turkish Affairs: An Investigation into Matters Concerning and Affecting the Turkish Community in Cyprus* (Nicosia, Cyprus Government Printing Office, 1949).

dominant Islamic community in Cyprus, and therefore there has been no application of sharia law in the Cypriot legal order.

2. Blasphemy, Religious Hate Speech and Limitations of Freedom of Speech in a Religious Context

2.1. Blasphemy and Defamation of Religion

The offence of defamation of religions is provided for in Section 138 of Cap. 154, which provides that any person who destroys, damages or defiles any place of worship or any object which is held sacred by any class of persons, with the intention thereby of insulting their religion or with the knowledge that such a class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, is guilty of a misdemeanour. Misdemeanour is any offence which is not a felony; Section 35 of Cap. 154 provides that when no punishment is specially provided for any misdemeanour it shall be punishable with imprisonment for a term not exceeding two years or with a fine not exceeding €2562.90, or with both punishments. The protected good is the public order and also the religious feelings of the believers who may be offended by the act of destruction, damage or defiling of a particular place of worship or of an object which is held to be sacred. In order for the offence to take place, the court must be satisfied that there has been intention of insulting the religion of the class of persons who hold the destroyed, damaged or defiled object as sacred or who attend the place of worship. Mental element is, therefore, a prerequisite for the existence of the offence. The offence of defamation of religions applies to all religions and not simply to Christianity. Although there has been no interpretation of the notion of religion in the Cypriot legal order, it is safe to assume that this only includes religions whose doctrines or rites are not secret and are included in the scope of protected religions, since only such religions are considered not to be secret and therefore to be known within the meaning of Article 18 §2 of the Constitution.

The offence of affront to religious sentiment by word or act is provided for in Section 141 of Cap. 154, which provides that any person who, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, is guilty of a misdemeanour and is liable to imprisonment not exceeding one year. The good protected is public order and also the religious feelings of believers who may be offended by the words, sounds, gestures or objects placed. The intention of wounding religious feelings is a prerequisite for the offence to take place. The offence applies to all religions.

The offence of circulation of defamatory publications is provided for in Section 142 of Cap. 154. It is provided that any person who publishes a book or pamphlet or any article or letter in a newspaper or periodical which any class of persons considers to be a public insult to their religion, including the intent to vilify such a religion

or to shock or to insult believers to such a religion, is guilty of a misdemeanour. The good protected is public order and also the religious feelings of believers who may be offended by the publication. It could be argued that the *actus reus* of the offence is to be determined on the basis of the criteria prevailing in English Law with respect to the common law offence of blasphemy, and thus the manner in which the views are expressed is more important than the views themselves.[10] The publication should have an element of vilification, ridicule or irreverence that would be likely to infuriate others. The court must be satisfied that the offender has intended to vilify such religion or to shock or insult believers of such religion. The offence applies to all religions. A prosecution for the offence of circulation of defamatory publication may not be commenced except by, or with the consent of, the Attorney-General of the Republic of Cyprus.

There have been no Supreme Court decisions maintaining that a publication is blasphemous or that a publication ought to be seized because of its blasphemous content; thus, the extent to which Section 142 of Cap. 154 is consistent with Article 19 of the Constitution, or to which a publication might be seized because its content is considered to be blasphemous, has not been thoroughly considered by the Cypriot courts. It would seem that Cypriot prosecuting authorities have been unwilling to prosecute cases of blasphemy. The prevailing opinion, however, seems to be that the offence of blasphemy is only marginally acceptable in a modern European democratic society and that therefore, even if the prevailing moral opinion is supported by an overwhelming majority of the population and is marked by widespread indignation and disgust, this should not in principle mean that such a majority can impose its views on a minority through the use of criminal law.[11]

2.2. **From Blasphemy to the Prohibition of Hate Speech**

The offence of disturbing religious assemblies is provided for in Section 139 of Cap. 154, which states that any person who voluntarily causes disturbance to any assembly lawfully engaged in the performance of a religious worship or religious ceremony is guilty of a misdemeanour. The protected good is the public order, which may be disturbed by the act of causing disturbance to the assembly that has been lawfully engaged in the performance of religious worship or religious ceremony. The court must be satisfied that there has been an intention to cause disturbance and

[10] *R v. Ramsay and Foote* (1883) 15 Cox CC 231, which was approved by the House of Lords in *Bowman v. Secular Society Ltd* [1917] AC 406, HL.

[11] See A. Emilianides, 'Can God Be Offended? The Common Law Offence of Blasphemy and the European Convention on Human Rights' in M. Moravcikova (ed.), *Contemporary Issues and Trends at the Beginning of the 21st Century* (Bratislava: Institute for State-Church Relations, 2008): pp. 232–239.

thus the mental element is a prerequisite for the existence of the offence. The offence applies to all religions.

The offence of unlawful trespass in burial places is provided for in Section 140 of Cap. 154, which states that any person is guilty of a misdemeanour who, with the intention of wounding the feelings of any person or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship or in any place of sepulchre or in any place set apart for the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the purpose of funeral ceremonies. The protected good is the public order and also the religious feelings of believers that are likely to be offended by the act of trespassing in the places of worship, or sepulchre, or depositories, or by the indignity exhibited to the human corpses, or by the disturbance caused to the assembly of persons. Intention must be proved in order for the offence to take place. The offence applies to all religions.

A recent amendment to the Criminal Law, with Law 39(I)/2023, has introduced a new Section 233B, which criminalises the offering of services, or application of practices or techniques, which aim to change, suppress or eliminate the sexual orientation, gender identity or expression of another person. Any person violating Section 233B is liable to two years' imprisonment and/or a fine of up to €5.000. The same penalty is also provided for persons advertising such services. If the services are offered, or the practices or techniques are applied, to minors or persons who are in a vulnerable position due to illness, incapacity, or mental condition, or by a person who has a position of power or influence over persons who are subject to such practices or techniques, or who receive such services, the penalty imposed may be imprisonment imposed of up to three years and/or a fine of up to €10.000. The same penalty is also provided for any lawful guardians who send their wards to receive such services or to be subjected to such practices or techniques. The legislator has clarified that the offering of consulting, psychological, or medical services that refer to the free development of sexual orientation or gender identity of any person, or of scientifically established clinical acts by specialised health professionals that are applied with regard to the sexual health of any person, do not amount to a criminal offence to the extent that they do not intend to change, suppress or eliminate the sexual orientation, gender identity or expression of another person.

It has been further clarified that this section does not preclude the application of the constitutional principles safeguarding freedom of religion. This was an unnecessary addition, since clearly any statutory legislation is subject to the Constitution, but was enacted pursuant to an intense request by the Orthodox Church of Cyprus. The Church issued an official announcement disagreeing with the criminalisation, and expressed its concern that the ambit of the new section 233B might criminalise the

expression or acts of Orthodox priests.[12] Although the Church of Cyprus has never applied any techniques or practices aiming to change, suppress, or eliminate gender identity or sexual identity, their concern was whether members of the clergy might be held to act inconsistently with such criminal provision if they consult their faithful and express their – negative – views on homosexuality.

Section 3 of Law 134(I)/2011 on combatting certain forms and expressions of racism and xenophobia by means of criminal law, which has incorporated the Framework Decision 2008/913/JHA in the Cypriot legal order, provides that any person publicly inciting, or publicly disseminating, in a way that incites violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin is subject to a penalty of five years imprisonment and/or a fine of up to €10.000. The same penalty is also provided for any person publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, or in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, to the extent that such crimes have been either recognised by an international court with a final judgment or by a unanimous decision of the House of Representatives. The speech penalised should be directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin, when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group. Reference to religion is intended to cover at least conduct that constitutes a pretext for directing acts against a group of persons or a member of such a group defined by reference to race, colour, descent, or national or ethnic origin. There has so far been no case-law applying such provisions in the Cypriot legal order.

3. Freedom of Expression, Digitalisation and Fundamental Rights Protection Online

New technologies are undeniably a major challenge for the evolution of free speech law. However, it would seem that the Cypriot courts have so far mostly aimed at applying the traditional rules to the new technologies. There have been no leading cases that have helped shape the new limits of freedom of speech and, in consequence, the issue is still under review. In principle, however, offences restricting freedom of expression, including hate speech, may also take place in a digital or online environment. The potential impact of the medium of expression is, however, an important

[12] https://www.alphanews.live/cyprus/fylo-den-einai-epilogi-ti-apofasise-i-ekklisia-gia-therapeies-metastrofis, last accessed 15.7.2023.

factor in determining whether the interference is proportionate; the audiovisual media have a more immediate and powerful impact than the print media, and this is a factor to be taken into account when assessing the proportionality of the interference.

With regard to television and radio organisations, it has been held that restrictions on freedom of speech should be considered within the wider framework of ensuring that there is a pluralism, diversity of views and opinions, avoidance of excessive concentration of media in the hands of a few owners, and protection of the rights of individuals, and particularly minors. The Cyprus Radiotelevision Authority (CRTA) therefore exercises its regulatory and supervisory authorities with the aim of ensuring that audiovisual media providers respect the principles of European media law. The Supreme Court has held that the imposition of administrative sanctions by the CRTA is not in principle inconsistent with the constitutional protection of freedom of speech, although of course the specific facts of each individual case may be examined in order to determine whether the sanction has been imposed in accordance with the constitutional principles and whether it is consistent with the principle of proportionality.[13]

The state-owned Cyprus Broadcasting Corporation (CyBC) is required to ensure that the provision of its services will not incite feelings of hatred based on race, sex, religion or nationality. In conducting its supervisory role, the CRTA is particularly severe when enforcing this latter obligation. Furthermore, all radio and television organisations are prohibited from transmitting any programmes which contain incitement to hatred based on race, sex, religion or nationality. It is not only *incitement to hatred* on the basis of race, sex, religion or nationality that is prohibited but also the transmission of programmes that *insult the dignity as such* of the two sexes, of racial, national or religious groups, or of people with disabilities.

4. Blasphemy and Art

A recent incident in Cyprus reignited the debate about the limits of artistic freedom.[14] Gavriel, a director and teacher of art of a secondary education public school, who is also an artist in his leisure time, in September 2020 posted on social media pictures of some of his latest paintings. Some of them had a clear anti-Church theme, with one picture in particular showing a naked Jesus riding a motorcycle and wearing a scarf bearing the symbols of a well-known Cypriot soccer team and another picturing a dog urinating on the current Archbishop of the Orthodox Church of Cyprus. Other paintings were expressly political or were described as sexist and misogynist

[13] *Sigma Radio TV Ltd v. The Cyprus Radio and Television Authority* [2004] 3 CLR 134 (in Greek), *Sigma Radio Television Ltd v. Cyprus*, Judgment of 21 July 2011, Apps No. 32181/04 and 35122/05.

[14] See in detail A. Emilianides, 'Disciplinary Action and Freedom of Artistic Expression' (2022) in *The Cambridge Journal of Law, Politics and Art*, pp. 318-320.

due to the manner in which the female body was depicted. Following a public uproar, and complaints by organised groups, who called for Gavriel's dismissal, including a letter to this effect by the Archbishop himself to the Minister of Education, Culture, Sports and Youth, the Ministry (i.e., Gavriel's employer) launched a probe to examine whether the teacher-artist was liable for disciplinary offences. The alleged offence was the violation of section 48 (1) (d) and (e) of the Public Education Law 10/1969, which states that no educational officer should act in a manner that might defame the educational service in general or his office in particular or which might tend to hinder the trust of the public in the educational service. The Ministry noted that the freedom of artistic expression could not justify the insulting of public feeling, while the messages of the paintings cultivated a sense of contempt or possibly a climate of intolerance within the student community when such an expression derives from an official in the field of public education. Many defended Gavriel's art, or at least his right to be provocative, and accused the Ministry of arbitrarily violating the freedom of artistic expression. The debate included announcements by political parties and statements by individual politicians, as well as heated discussion and passionate statements by organised groups or the public at large, either supporting or criticising the disciplinary action. Eventually, the Council of Ministers decided to terminate the disciplinary action against Gavriel, taking into account the societal division that this had caused.

The Cypriot Ombudsman, who has also been appointed as the head of the National Authority for Human Rights, in a controversial statement issued immediately after the probe was announced by the Ministry held that Gavriel had crossed the acceptable boundaries for the exercise of his freedom of expression. The Ombudsman noted that the manner in which the artistic work in question had been expressed had offended the rights and religious sentiments of third persons, which is a legitimate objective for restricting freedom of artistic expression in a democratic society. The Ombudsman specifically referred to the ECtHR case of Otto Preminger.[15] Since the disciplinary proceedings against Gavriel were prescribed by law and had a legitimate aim, the more challenging question was whether the restriction would be necessary and proportionate in a democratic society. It should be taken into account that the Cypriot authorities neither prosecuted Gavriel for his paintings nor prohibited their dissemination; Gavriel has since held exhibitions and shown his paintings to the public without any restrictions or problems. If disciplinary offences were found, this would be expected, considering the prior practice of authorities in similar cases, to lead to minor sanctions, at worst. There is little doubt that the paintings have been offensive to the religious feelings of Christians in a country where the majority of the

[15] *Otto-Preminger-Institut v. Austria*, Judgment of 20 September 1994, App. No 13470/87. See also *E.S. v. Austria*, Judgment of 25 October 2018, App. No 38450/12.

population is religious. The paintings have also specifically targeted the Archbishop at a personal level.

An implied argument of the disciplinary probe, however, was that the right of artistic expression of Gavriel the teacher, should not be equivalent to the said right of Gavriel the artist. This distinction would be more convincing if Gavriel had expressed his anti-religious, political, or other sentiments, during the exercise of his professional duties as a teacher. There was, however, no indication that Gavriel had in this case presented himself at any time as anything other than an artist, and there was no report of him acting in a given way during his teaching. Accordingly, the disciplinary offences, if any, referred to the actions of Gavriel outside his working hours or his work as a teacher, and in particular to his artistic expression as an individual artist. Art should not be subject to a single interpretation. Even if it is not accepted that works of art are open to each specific reader's interpretation, a work of art is still in search of its "model reader" and as such it is distinct from its author. The mere fact that a category of "readers" understands art as blasphemous or offensive should not mean that this is actually blasphemous or offensive. The right of the single individual to express himself artistically should be considered to be equally important as the right of a religious group to believe in whatever religion they want. Freedom should therefore not be curtailed merely because its exercise is unpleasant for the majority, as neglecting art's distinctive ontology would be detrimental to both art and law. This might also potentially lead the large category of public employees to become hesitant to express themselves artistically due to fear of disciplinary sanctions.[16] It has therefore been suggested that the mere fact that artistic freedom expressed outside the school premises is offensive towards a – potentially large – section of the public, should not lead to disciplinary proceedings because of the artist's parallel status as a member of the public educational service. Neither the public's trust in the educational service is hindered nor the educational service defamed simply because a teacher might be considered by part of the public to be a bad or provocative artist.[17]

[16] See also P. Kearns, 'Obscene and Blasphemous Libel: Misunderstanding Art' [2000] in *Criminal Law Review*: p. 652, A. Bradney, *Religions, Rights and Laws* (Leicester: Leicester University Press, 1993): p. 97.

[17] A. Emilianides, 'Disciplinary Action and Freedom of Artistic Expression' (2022) in *The Cambridge Journal of Law, Politics and Art*: p. 320.

LIBERTÉ D'EXPRESSION ET RELIGION – FRANCE

Anne Fornerod[1]

La liberté de religion[2] et la liberté d'expression sont toutes deux consacrées en droit constitutionnel français dans la Déclaration des droits de l'homme et du citoyen de 1789. Selon l'article 10, « Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par la Loi », tandis que l'article 11 proclame que « La libre communication des pensées et des opinions est un des droits les plus précieux de l'Homme : tout Citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la Loi. » La jurisprudence du Conseil constitutionnel a précisé « que le principe de laïcité impose notamment le respect de toutes les croyances, l'égalité de tous les citoyens devant la loi sans distinction de religion et que la République garantisse le libre exercice des cultes »[3] et a consacré en 1984 la liberté d'expression et de communication comme « une liberté fondamentale, d'autant plus précieuse que son exercice est l'une des garanties essentielles du respect des autres

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[2] Les dispositions constitutionnelles et législatives consacrant la liberté de religion ne seront pas abordées en détail dans le présent rapport dans la mesure où elles ont fait l'objet de nombreuses études et ont été mentionnées régulièrement dans les chapitres consacrés à la France dans les précédents volumes du Consortium. Peuvent être toutefois citées les quelques références suivantes : P.-H. Prélot, « La religion dans les constitutions françaises. De la Constitution civile du clergé à la laïcité constitutionnelle (1789-1958) », dans S. Akgönül (dir.), *Laïcité en débat. Principes et représentations en France et en Turquie*, Strasbourg, PUS, 2008, p. 115 ; P.-H. Prélot, « La liberté de religion en droit français : un bref état des lieux », dans A. Fornerod (dir.), *La liberté de religion en question(s)*, Bruxelles, Larcier, 2022, pp. 153-166 ; J.-M. Woehrling, « La liberté de religion est-elle reconnue en droit constitutionnel français ? », dans *Droit et religion en Europe. Mélanges en l'honneur de Francis Messner*, Strasbourg, Presses universitaires de Strasbourg, 2014, pp. 561-576.

[3] Conseil constitutionnel, Décision n° 2012-297 QPC du 21 février 2013.

droits et libertés et de la souveraineté nationale »[4], formule que le Conseil constitutionnel a repris régulièrement par la suite.

Les rapports entre liberté de religion et liberté d'expression peuvent, de façon classique, être appréhendés de deux façons. D'une part, en s'intéressant aux diverses limitations à la liberté d'expression et aux éventuelles spécificités qu'elles présentent dès lors que les croyances, les sentiments ou symboles religieux sont visés. Or, en droit français, aucun texte ne réserve un statut ou une protection à part pour les convictions religieuses confrontées à l'exercice de la liberté d'expression (I). L'appréciation se fait au cas par cas, par la jurisprudence, sur le fondement du droit applicable de manière générale à la liberté d'expression (II). D'autre part, se pose la question de la singularité de la liberté d'expression religieuse, au sens où les limitations à la liberté d'expression – ou son exercice – revêtiraient une forme spécifique du fait qu'elle serait utilisée par les groupes religieux eux-mêmes ou en leur nom, afin de véhiculer des opinions rattachées à une doctrine religieuse (III).

I. La liberté d'expression et le respect des convictions religieuses

Le cadre juridique de la liberté d'expression est encore aujourd'hui largement celui défini par la loi du 29 juillet 1881 sur la liberté de la presse (1), même s'il a connu par la suite des aménagements pour tenir compte de la spécificité de l'audiovisuel et, surtout, d'internet. Le cadre très élaboré de l'exercice de la liberté d'expression posé par la loi de 1881 a en effet été traversé, ces dernières années, par des interrogations sur sa pertinence et son adaptabilité au contexte contemporain, sur sa capacité à demeurer « le cadre unique et fondamental de la liberté d'expression, au moyen d'un régime juridique sophistiqué, élitiste et vénérable ».[5] Cette remise en question de l'applicabilité de la loi de 1881 à l'ensemble des abus de la liberté d'expression s'est concrétisée dans le cadre de la lutte contre les contenus haineux sur internet, particulièrement ceux liés au terrorisme islamiste (2).

[4] Conseil Constitutionnel, Décision n° 84-181 DC du 11 octobre 1984. Loi visant à limiter la concentration et à assurer la transparence financière et le pluralisme des entreprises de presse, considérant n° 36-37 : « 36. Considérant que le principe [contenu dans l'article 11 DDHC] ainsi proclamé ne s'oppose point à ce que le législateur, compétent aux termes de l'article 34 de la Constitution pour fixer « les règles concernant les droits civiques et les garanties fondamentales accordées aux citoyens pour l'exercice des libertés publiques », édicte des règles concernant l'exercice du droit de libre communication et de la liberté de parler, écrire et imprimer ; 37. Considérant que, cependant, *s'agissant d'une liberté fondamentale, d'autant plus précieuse que son exercice est l'une des garanties essentielles du respect des autres droits et libertés et de la souveraineté nationale* [nous soulignons] la loi ne peut en réglementer l'exercice qu'en vue de le rendre plus effectif ou de le concilier avec celui d'autres règles ou principes de valeur constitutionnelle ».

[5] P. Beauvais, « Vers un nouveau régime pénal de la libre expression ? », *Archives de politique criminelle*, 2018/1 (n° 40), pp. 7-22.

1. Le cadre juridique de la liberté d'expression : la loi du 29 juillet 1881

La loi de 1881, qui émane d'un contexte historique et politique tendant vers une laïcisation du droit et des institutions en germe depuis la fin du XVIII[e] siècle, ne prévoit logiquement pas de protection spécifique contre l'atteinte aux convictions ou sentiments religieux (a). Cette loi constitue encore aujourd'hui l'essentiel du droit applicable à la libre expression (b).

a. *L'absence de protection spécifique des sentiments et convictions religieux*

Le droit français protège l'exercice de la liberté de religion dans les limites, classiques, du respect de l'ordre public. L'exercice du culte dans les édifices qui lui sont consacrés fait l'objet d'une protection expressément formulée, mais cette protection ne s'étend pas aux sentiments et convictions religieuses des croyants de manière générale.

L'exercice du culte fait l'objet d'une protection expresse dans la loi du 9 décembre 1905 concernant la séparation des Églises et de l'État et, indirectement, dans le Code pénal. La première prévoit en effet que « sont punis d'un an d'emprisonnement et de 15 000 euros d'amende ceux qui, soit par menaces contre un individu, soit en lui faisant craindre de perdre son emploi ou d'exposer à un dommage sa personne, sa famille ou sa fortune, ont agi en vue de le déterminer à exercer ou à s'abstenir d'exercer un culte, à faire partie ou à cesser de faire partie d'une association cultuelle, à contribuer ou à s'abstenir de contribuer aux frais d'un culte. Les peines sont portées à trois ans d'emprisonnement et 45 000 euros d'amende lorsque l'auteur des faits agit par voie de fait ou violence. » (article 31) et que « seront punis des mêmes peines ceux qui auront empêché, retardé ou interrompu les exercices d'un culte par des troubles ou désordres causés dans le local servant à ces exercices » (article 32).

Quant au droit pénal, il punit « la destruction, la dégradation ou la détérioration » d'un édifice affecté au culte (article 322-3-1 du Code pénal).

Dans le cas précis de l'exercice de la liberté d'expression qui viendrait heurter les sentiments et convictions religieuses des croyants, la loi française est donc muette. D'autant plus que la loi du 29 juillet 1881 vient précisément mettre fin à une prise en compte de leur spécificité dans la mesure où il est généralement considéré qu'elle a supprimé le délit de « blasphème ». L'article 10 de la DDHC avait proclamé la liberté d'opinions, « même religieuses », mais le régime de la Restauration (6 avril 1814 – 20 mars 1815/7 juillet 1815 – 2 août 1830) mit ensuite « en place deux délits – très proches du blasphème – qui resteront en vigueur jusqu'à la loi du 29 juillet 1881 ».[6] Sont en effet créés « en 1819, le délit d'outrage à la morale publique et reli-

[6] N. Mallet-Poujol, « 1789-1905. Du blasphème aux droits et devoirs des ministres du culte », *Légicom*, 2015, p. 7.

gieuse[7] et, en 1822, le délit d'outrage aux religions reconnues par l'État[8] ».[9] Certes, le décret-loi « Marchandeau » du 21 avril 1939 avait ajouté aux délits d'injure et de diffamation prévus par la loi de 1881 les propos haineux envers des catégories de personnes déterminées par leurs caractéristiques, dont la religion, mais l'on ne saurait en déduire un statut à part – et une protection distincte – des convictions et sentiments des croyants.

En outre, la loi n° 2017-86 du 27 janvier 2017 relative à l'égalité et à la citoyenneté a abrogé l'article 166 du Code pénal local applicable dans les départements du Bas-Rhin, du Haut-Rhin et de la Moselle qui était considéré comme la dernière trace en droit français d'un délit de blasphème.[10] Cet article 166 du Code pénal adopté en 1871 « n'a fondé aucune condamnation depuis le retour de l'Alsace-Moselle au sein de la République française » en 1918.[11] Son abrogation est directement liée au contexte de l'attentat du 7 janvier 2015 contre le journal *Charlie Hebdo*. Selon le parlementaire auteur de l'amendement en ce sens, cet attentat « visait la liberté d'expression, et l'une de ses dimensions, le droit de blasphémer. […] Il nous permet en effet de réaffirmer que la liberté d'expression est un bien précieux de notre République, et qu'ici, le blasphème est un droit. »[12]

Le silence de la loi de 1881 se traduit en jurisprudence par le rappel fréquent que cette loi protège les croyants visés par les abus de la liberté d'expression et non leurs croyances en elles-mêmes. À titre d'exemple, il avait été jugé que l'expression

[7] L'article 8 de la loi du 17 mai 1819 disposait que « tout outrage à la morale publique et religieuse, ou aux bonnes mœurs, par l'un des moyens énoncés en l'article 1er, sera puni d'un emprisonnement d'un mois à un an, et d'une amende de 16 francs à 500 francs ».

[8] L'article 1er de la loi du 25 mars 1822 prévoyait que « quiconque, par l'un des moyens énoncés en l'article 1 de la loi du 17 mai 1819, aura outragé ou tourné en dérision la religion de l'État, sera puni d'un emprisonnement de trois mois à cinq ans, et d'une amende de trois cents francs à six mille francs. Les mêmes peines seront prononcées contre quiconque aura outragé ou tourné en dérision toute autre religion dont l'établissement est légalement reconnu en France. »

[9] N. Mallet-Poujol, « 1789-1905. Du blasphème aux droits et devoirs des ministres du culte », art. cité, p. 7.

[10] L'article 166 disposait que « Celui qui aura causé un scandale en blasphémant publiquement contre Dieu par des propos outrageants, ou aura publiquement outragé un des cultes chrétiens ou une communauté religieuse établie sur le territoire de la Confédération et reconnus comme corporation, ou les institutions ou cérémonies de ces cultes ou qui, dans une église ou un autre lieu consacré à des assemblées religieuses, aura commis des actes injurieux et scandaleux, sera puni d'un emprisonnement de trois ans au plus ». Sur cette question, voir J.-M. Woehrling, « Au sujet d'un prétendu délit de blasphème en droit local alsacien-mosellan », *Revue du droit des religions*, 1 | 2016, pp. 155-159.

[11] R. Hammadi, Ph. Bies, M.-A. Chapdelaine, V. Corre, *Rapport fait au nom de la commission spéciale, chargée d'examiner, après engagement de la procédure accélérée, le projet de loi « égalité et citoyenneté »*, n° 3851, Assemblée nationale, 17 juin 2016, p. 689.

[12] https://www.assemblee-nationale.fr/14/amendements/3679/CSEGALITE/833.asp (dernière consultation : 22 mars 2025).

employée dans une interview écrite par l'écrivain Michel Houellebecq selon laquelle l'Islam est « la religion la plus con » ne peut constituer le délit d'injure raciale, car elle « ne revient nullement à affirmer ni à sous-entendre que tous les musulmans devraient être ainsi qualifiés » et constitue simplement une « appréciation » portant uniquement sur « une religion considérée comme système de pensée, et comparée à d'autres ».[13] La Cour de cassation a retenu une solution inverse à propos de la mise en vente et de la publicité faite sur les sites internet des organisations *Riposte laïque* et *Résistance républicaine* d'un tract comportant les mots : « islam assassin, islam dehors », en lettres blanches, figurant sur un fond rouge sang pour les deux premiers et sur un fond noir pour les deux autres mots. La cour d'appel, après avoir admis que « les termes incriminés sont véhéments et peuvent caractériser une exhortation explicite à la haine ou à la violence », avait retenu que les propos poursuivis « s'inscrivent dans le cadre d'un débat d'intérêt général relatif à la critique d'une religion et des actes que certains de ses adeptes commettent en son nom, ne dépassant pas les limites admissibles de la liberté d'expression ». La Cour de cassation a fait une autre lecture de ces éléments, qui « étaient de nature à conférer aux propos poursuivis le caractère d'une exhortation à la haine ou à la violence, à l'encontre de la communauté des musulmans dans son ensemble, personnes définies par leur appartenance religieuse et présentées comme animées par un esprit de conquête ».[14]

De la même façon, à la suite du vote par le conseil régional d'Alsace d'une subvention en vue de la construction d'une mosquée à Strasbourg, deux conseillers régionaux d'extrême droite ont diffusé un tract intitulé « Pas de cathédrale à la Mecque, pas de mosquée à Strasbourg » et « accompagné d'un dessin représentant deux paysans priant dans la campagne en direction d'un minaret dénonçant ce financement et appelant le public à protester contre celui-ci ». Mais ils n'ont pas été condamnés pour provocation à la discrimination religieuse. Certes, « le fait que les musulmans de France ou encore d'Alsace constituent un groupe protégé par la loi en raison de son appartenance à une religion ne fait pas difficulté », mais le tract en question s'oppose à une action « favorable à l'islam pris en tant que religion dont les pratiquants ne sont pas visés en tant que tels » et « n'a pas pour objet de stigmatiser ceux qui pratiquent ce culte, de manière à les exposer à la haine d'autrui ». Ainsi, « les propos dénoncés n'excédaient pas les limites admissibles à la liberté d'expression au sens de l'article 10 de la Convention européenne des droits de l'homme ».[15]

[13] TGI Paris, 17e ch., 22 octobre 2002.
[14] Cass., 16 mars 2021, n° 20-83.325.
[15] Cass., 30 mai 2007, no 06-84.328.

b. *La loi du 29 juillet 1881, cadre juridique de la libre expression*

L'article 11 de la DDHC proclame que « La libre communication des pensées et des opinions est un des droits les plus précieux de l'Homme : tout Citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la Loi. » En fait de « Loi », c'est la loi du 29 juillet 1881 sur la liberté de la presse, encore en vigueur aujourd'hui,[16] qui a posé les fondements de l'encadrement légal de la liberté d'expression en droit français. Le titre de la loi est en partie trompeur, car son article 23 prévoit un large éventail de moyens d'expression – et sur lesquels se fondent les infractions – tels que « le texte écrit ou imprimé, le dessin, la gravure, la peinture, l'emblème, l'image ou tout autre support de l'écrit, de la parole ou de l'image vendus ou distribués », ainsi que les moyens électroniques. La loi du 29 juillet 1881 couvre donc une large gamme de moyens d'expression tout en prévoyant la sanction des abus de la liberté d'expression. Des années 1970 jusqu'à aujourd'hui sont venues s'ajouter régulièrement des dispositions qui ont étendu le champ matériel des délits : « le fait que les sociétés démocratiques et libérales soient devenues multiculturelles, qu'il n'y ait plus de croyance dominante et largement partagée, que les groupes et les communautés religieuses puissent de la même façon s'attendre à être respectés et que certains parmi eux accordent un prix considérable à leurs croyances religieuses, ont contraint à revoir les argumentations traditionnelles en matière de limitations de la liberté d'expression. »[17]

La loi dispose que « l'imprimerie et la librairie sont libres » (article 1er), mais institue comme limites principales deux délits : l'injure publique et la diffamation.

L'injure est définie comme « toute expression outrageante, termes de mépris ou invective qui ne renferme l'imputation d'aucun fait » tandis que « toute allégation ou imputation d'un fait qui porte atteinte à l'honneur ou à la considération de la personne ou du corps auquel le fait est imputé est une diffamation. » (article 29). Plus précisément, la loi distingue trois catégories de victimes (et donc de délits) d'injure et de diffamation : une personne morale de droit public ou assimilée comme telle (articles 30 et 33), une personne physique exerçant certaines fonctions d'intérêt public (articles 31 et 33), ou les particuliers (articles 32 et 33). Les fonctions d'intérêt public incluent, outre « le Président de la République, un ou plusieurs membres du ministère, un ou plusieurs membres de l'une ou de l'autre Chambre, un fonctionnaire public, un dépositaire ou agent de l'autorité publique… », les ministres « de l'un des cultes salariés par l'État », ce qui revient à protéger les ministres des cultes statutaires du

[16] Sur l'approche historique de la loi du 29 juillet 1881, voir : Th. Besse, *La pénalisation de l'expression publique*, Paris, LGDJ, Institut Francophone pour la Justice et la Démocratie, 2019 ; N. Mallet-Poujol, art. cité, p. 7 et s.

[17] M. Canto-Sperber, « Liberté d'expression et quête de la vérité », *Raisons politiques*, 2016/3, pp. 103-112.

droit local des cultes alsacien-mosellan. S'agissant des particuliers, la loi distingue encore entre les propos diffamatoires « envers une personne ou un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance à une ethnie, une nation, une race ou une religion déterminée » (article 32 alinéa 2) et la diffamation « envers une personne ou un groupe de personnes à raison de leur sexe, de leur orientation sexuelle ou identité de genre ou de leur handicap » (article 32 alinéa 3). Ces précisions reflètent l'évolution du dispositif de 1881, qui a été régulièrement augmenté à partir des années 1970, pour tenir compte de l'aspiration de certaines minorités (ethniques, religieuses, sexuelles…) à voir leur identité protégée et de l'émergence de sujets de débats politiques et sociaux (contestation de génocides).

La première mesure réprimant les abus de la liberté d'expression visant des catégories de personnes déterminées par leurs caractéristiques est le décret-loi dit « Marchandeau », adopté le 21 avril 1939. Ce texte introduisait au sein des articles 32 et 33 de la loi du 29 juillet 1881 des délits de diffamation et d'injure publiques dirigées « envers un groupe de personnes appartenant, par leur origine, à une race ou à une religion déterminée lorsqu'elles auront eu pour but d'exciter à la haine entre les citoyens ou habitants ». Ce texte, adopté « en plein essor de la propagande nazie en Europe, présentait l'inconvénient d'un champ d'application restreint. En effet, d'une part, les seuls 'groupes de personnes' étant visés, le ministère public conservait l'initiative des poursuites à défaut d'une victime individuelle, et, d'autre part, la constitution de l'infraction était subordonnée à la présence d'un dol spécial que constituait le but d'exciter à la haine entre les citoyens ou habitants. »[18]

La première évolution significative tient dans la loi du 1er juillet 1972 relative à la lutte contre le racisme, dite loi Pléven,[19] intégrée dans la loi de 1881, qui ajoute à la diffamation et à l'injure un troisième délit punissant ceux qui, par des propos tenus en public, « auront provoqué à la discrimination, à la haine ou à la violence à l'égard d'une personne ou d'un groupe de personnes à raison de leur origine ou de leur appartenance ou non-appartenance à une ethnie, une nation, une race ou une religion déterminée ». Un apport conséquent de cette loi, déterminant dans le volume contentieux relatif à la liberté d'expression, a consisté à autoriser les associations dont l'objectif de lutte contre le racisme est inscrit dans leurs statuts, et qui ont une existence de cinq ans, à se constituer parties civiles lors d'un procès.[20]

[18] Th. Besse, *La pénalisation de l'expression publique*, *op. cit.*, p. 136.

[19] Du nom du ministre de la Justice en exercice à l'époque, René Pleven. Cette loi a été adoptée à la suite de la ratification par la France, en 1971, de la Convention internationale sur l'élimination de toute forme de discrimination raciale qui impose aux États de prendre les mesures de droit interne nécessaires.

[20] Pour apprécier la différence avec le régime antérieur, voir Cass., crim., 6 avril 1965, no 63-91.503 : en l'espèce, « les articles incriminés [parus en 1961 dans l'hebdomadaire Fraternité française] présentent les juifs en France comme un groupe étranger à la nation française, que celle-ci héberge, dont l'enrichissement en France constitue un pillage aux dépens des français et à qui toute influence sur la vie

Doit également être signalée ici la loi n° 90-615 du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xénophobe qui interdit « Toute discrimination fondée sur l'appartenance ou la non-appartenance à une ethnie, une nation, une race ou une religion » (article 1er) et insère dans la loi du 29 juillet 1881 des dispositions visant à punir « ceux qui auront contesté, par un des moyens énoncés à l'article 23, l'existence d'un ou plusieurs crimes contre l'humanité[21] tels qu'ils sont définis par l'article 6 du statut du tribunal militaire international annexé à l'accord de Londres du 8 août 1945 et qui ont été commis soit par les membres d'une organisation déclarée criminelle en application de l'article 9 dudit statut, soit par une personne reconnue coupable de tels crimes par une juridiction française ou internationale. »[22] Enfin, peut être mentionnée la loi du 27 janvier 2017, qui étend l'incrimination de négationnisme. L'article 24 bis de la loi sur la presse est modifié pour permettre de sanctionner des mêmes peines que la contestation publique de la Shoah (1 an d'emprisonnement et 45 000 € d'amende) ceux qui « auront nié, minoré ou banalisé de façon outrancière, par un des moyens énoncés à l'article 23, l'existence d'un crime de génocide autre que ceux mentionnés au premier alinéa du présent article, d'un autre crime contre l'humanité, d'un crime de réduction en esclavage ou d'exploitation d'une personne réduite en esclavage ou d'un crime de guerre ».

2. **La libre expression et l'évolution des technologies**

L'encadrement de la liberté d'expression a dû tenir compte de l'évolution continue des technologies. Le principe de liberté de communication a été reconnu dans le domaine audiovisuel (a) puis sur internet (b). La réglementation en ce domaine n'a pu échapper au défi des contenus haineux qui s'y déploient (c).

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politique nationale devrait être interdite, et qui sont menaces d'une vague d'antisémitisme dans la mesure ou les hauts dignitaires juifs, dont ils sont solidaires, acquièrent fortune et influence ». Les auteurs ont été renvoyés devant le tribunal correctionnel sous la prévention d'injures envers un groupe de personnes dans le but d'exciter à la haine entre les citoyens ou habitants, délit prévu et puni par l'article 33 de la loi du 29 juillet 1881. Mais l'arrêt conclut à l'irrecevabilité du pourvoi du mouvement contre le racisme et l'antisémitisme et pour la paix, car l'association n'était pas personnellement visée et « ne pouvait se prétendre atteinte par les imputations injurieuses, fussent-elles caractérisées ».

[21] Une loi réprimant « la contestation de l'existence des génocides reconnus par la loi » et qui visait en réalité le génocide arménien avait été adoptée par le parlement en 2012. Elle a cependant été censurée par le Conseil constitutionnel qui a estimé qu'en procédant ainsi pour des « crimes qu'il aurait lui-même reconnus et qualifiés comme tels, le législateur a porté une atteinte incontestable à l'exercice de la liberté d'expression et de communication », Conseil constitutionnel, 28 février 2012, n° 2012-647 DC, *Loi visant à réprimer la contestation de l'existence des génocides reconnus par la loi*.

[22] Il est à noter qu'il est prévu par la même loi que, le 21 mars de chaque année, « la Commission nationale consultative des droits de l'homme remet au Gouvernement un rapport sur la lutte contre le racisme » et que « ce rapport est immédiatement rendu public. »

a. *La libre communication audiovisuelle*

En raison de sa spécificité technique, mais également de son « influence considérable »,[23] la régulation de la communication audiovisuelle fait l'objet d'un encadrement plus strict, toutefois sans « de grands changements dans l'architecture [du] droit de la presse, conçu initialement pour l'imprimerie et la librairie ».[24] Ainsi, la loi du 30 septembre 1986 sur la liberté de communication proclame cette liberté, mais pose expressément une longue liste de limites à son exercice que sont le respect de la dignité de la personne humaine, de la liberté et de la propriété d'autrui, du caractère pluraliste de l'expression des courants de pensée et d'opinion, la protection de l'enfance et de l'adolescence, la sauvegarde de l'ordre public, les besoins de la défense nationale, les exigences de service public, les contraintes techniques inhérentes aux moyens de communication, la nécessité, pour les services audiovisuels, de développer la production audiovisuelle (article 1er). La loi instaure le Conseil Supérieur de l'Audiovisuel (CSA)[25] qui exerçait – jusqu'à son remplacement par l'Autorité de régulation de la communication audiovisuelle et numérique en 2021 – une mission de régulation du secteur et de surveillance des programmes, surtout au nom de la protection de l'enfance et de l'adolescence et du respect de la dignité humaine. En outre, cette autorité administrative indépendante devait s'assurer que « les programmes mis à la disposition du public par un service de communication audiovisuelle ne contiennent : 1° Ni incitation à la haine ou à la violence fondée sur l'un des motifs visés à l'article 21 de la Charte des droits fondamentaux de l'Union européenne ou à raison de l'identité de genre ; 2° Ni provocation publique à commettre les infractions mentionnées aux articles 421-2-5 et 421-2-5-1 du code pénal », c'est-à-dire la provocation à des actes de terrorisme et l'apologie de ces actes.[26] Le CSA disposait d'un pouvoir de sanction des opérateurs de radio et de télévision.[27] Ainsi, à la suite de la diffusion sur une chaîne télévisée d'une émission humoristique « traitant de l'élection du nouveau pape, Benoît XVI, au début de laquelle apparaît à

[23] Conseil constitutionnel, décision n° 88-248 DC du 17 janvier 1989, considérants 26-27.

[24] J.-Y. Monfort, « Liberté d'expression, loi de 1881, et respect des croyances : une cohabitation impossible ? », *Légicom*, 2015 p. 29.

[25] Depuis, la loi n° 2021-1382 du 25 octobre 2021 relative à la régulation et à la protection de l'accès aux œuvres culturelles à l'ère numérique a créé l'Autorité de régulation de la communication audiovisuelle et numérique (Arcom), issue de la fusion du Conseil supérieur de l'audiovisuel (CSA) et de la Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet (Hadopi).

[26] Ces infractions ont été créées par la loi du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme, voir *infra*.

[27] Les décisions du CSA étaient susceptibles de recours devant le juge administratif : voir, par exemple, Conseil d'État, 9 octobre 1996, *Association « Ici et maintenant »*, n° 73073 : il valide les sanctions prononcées contre l'association qui animait une émission de radio au cours de laquelle des auditeurs étaient, à plusieurs reprises, intervenus en tenant des propos racistes et antisémites.

l'écran un bandeau comportant la mention : 'Adolf II' et au cours de laquelle la marionnette représentant le nouveau pape tient les propos suivants : 'Je vous bénis au nom du père, du fils et du troisième Reich' », le CSA avait considéré que « l'assimilation du pape Benoît XVI à un tenant du régime nazi » dans cette émission « a porté atteinte à son image, à son honneur et à sa réputation ; qu'en outre, la société Canal+ n'a pas respecté les différentes sensibilités religieuses de son public et a encouragé des comportements discriminatoires en raison de la religion ou de la nationalité » et mis en demeure la chaîne de télévision de respecter ses obligations en la matière.[28]

b. *La libre expression sur Internet*

Initialement considéré comme un formidable nouvel espace de libre expression dont pouvait se saisir tout un chacun,[29] internet s'est progressivement révélé être aussi un espace illimité d'abus dans l'usage de cette liberté[30] et a soulevé des difficultés inédites. Pour lutter contre les discours de haine en ligne, le législateur a fait le pari « de reproduire, en les adaptant, les mécanismes qui avaient fait leurs preuves avec les techniques précédentes : régime des responsabilités, mesures de transparence, et même droit de réponse ».[31] L'encadrement de la liberté d'expression sur Internet emprunte donc à la fois au droit – libéral – de la presse et à celui, très proche, mais adapté, de la communication audiovisuelle.

La loi du 1er août 2000 assimile ainsi le réseau internet à un moyen de communication audiovisuelle au sens de la loi du 30 septembre 1986 relative à la liberté de communication. Depuis la loi pour la confiance dans l'économie numérique du 21 juin 2004, dite LCEN, c'est même la communication audiovisuelle qui est englobée dans

[28] https://www.csa.fr/Reguler/Espace-juridique/Les-textes-adoptes-par-l-Arcom/Les-decisions-du-CSA/Les-Guignols-de-l-info-Canal-mise-en-demeure (dernière consultation : 22 mars 2025).

[29] Dans sa décision n° 2009-580 DC du 10 juin 2009, *Loi favorisant la diffusion et la protection de la création sur internet*, le Conseil constitutionnel avait affirmé « qu'en l'état actuel des moyens de communication et eu égard au développement généralisé des services de communication au public en ligne ainsi qu'à l'importance prise par ces services pour la participation à la vie démocratique et l'expression des idées et des opinions, ce droit [à la libre communication des pensées et des opinions] implique la liberté d'accéder à ces services ».

[30] Commission nationale consultative des droits de l'homme, *Avis sur la lutte contre les discours de haine sur internet*, 12 février 2015 (disponible en ligne : https://www.cncdh.fr/publications/avis-sur-la-lutte-contre-les-discours-de-haine-sur-internet), p. 87 : « La prolifération des contenus haineux sur la toile, qui se nourrissent régulièrement des tensions sociales et de la crise de la citoyenneté, devient un phénomène très inquiétant. Elle constitue le terreau de conflits croissants entre groupes et communautés remettant en cause le 'vivre ensemble' démocratique. Les discours de haine ne sont pas que des discours, ils peuvent provoquer la violence, même la plus extrême, comme l'ont montré les crimes terroristes des 7 au 9 janvier 2015 à Paris, inspirés par une propagande de mort et de haine largement présente sur le web. »

[31] J.-Y. Monfort, « Liberté d'expression, loi de 1881, et respect des croyances… », art. cité.

la notion de « communication au public par voie électronique ». La LCEN a introduit à l'article 23 de la loi de 1881 sur la liberté de la presse comme support de la liberté d'expression « tout moyen de communication au public par voie électronique ». Sont concernés par ce cadre législatif les messages diffusés par un site web, mais pas la fonction de communication privée d'internet.[32] C'est en raison de son caractère public que l'expression en ligne peut entrer dans le champ des infractions de presse prévues par la loi du 29 juillet 1881 (diffamation, injure, provocation à la haine, à la violence et la discrimination, l'apologie et la provocation à commettre des délits et des crimes, l'apologie et la contestation des crimes contre l'humanité…).

La loi du 21 juin 2004 s'inspire également des règles applicables à la communication audiovisuelle en instaurant un régime de responsabilité des acteurs de l'internet, qu'il s'agisse des intermédiaires techniques (fournisseurs d'accès à internet et hébergeurs) ou des éditeurs de contenus. La responsabilité principale repose sur ces derniers, mais les premiers doivent demeurer vigilants, car leur responsabilité peut en effet être engagée à certaines conditions. Il leur incombe de mettre en place un dispositif permettant à toute personne qui consulte le site de porter à leur connaissance des contenus manifestement illicites. Ce dispositif de signalement vise plusieurs catégories d'infractions particulièrement graves dont certaines infractions de presse (images de violences, la pédopornographie, l'apologie des actes de terrorisme, les provocations à la discrimination, à la haine ou à la violence…). L'intermédiaire technique doit notifier ces contenus à l'Office Central de Lutte contre la Criminalité liée aux Technologies de l'Information et de la Communication.[33]

En 2020, partant « du constat d'une banalisation des discours racistes, sexistes, homophobes, notamment sur les réseaux sociaux, qui entraînerait une recrudescence des violences du même type »[34] et dépasserait « les capacités de traitement des tribunaux », le projet de loi visant à lutter contre les contenus haineux sur internet entendait renforcer la responsabilité des opérateurs de plateforme numérique qui « sans remplir de fonction éditoriale […] ne sont pas de simples hébergeurs : ils interviennent sur les contenus au stade de leur ordonnancement, ce qui peut accélérer ou ralentir leur diffusion. La logique binaire, opposant les éditeurs de services aux prestataires techniques, issue de la directive 2000/31/CE du 8 juin 2000, paraît dépassée. » Il était donc prévu de leur imposer de retirer des contenus haineux dans un délai de 24 h après notification, voire dans un délai d'une heure concernant les contenus

[32] Ch. Féral-Schuhl, Praxis Cyberdroit, Chapitre 713 : Atteintes aux libertés individuelles, 2020-2021.

[33] Le manquement à cette obligation est sanctionné par 1 an d'emprisonnement et 250 000 € d'amende (Loi n° 2004-575, 21 juin 2004, art. 6, VI, 1 mod. par L. n° 2020-766, 24 juin 2020 visant à lutter contre les contenus haineux sur internet).

[34] E. Dreyer, « Présentation de la proposition de loi Avia », *Légipresse*, 2020-1, p. 13.

terroristes et pédopornographiques. Le projet fut largement censuré par le Conseil constitutionnel dans sa décision du 18 juin 2020. Tout en rappelant que « la diffusion d'images pornographiques représentant des mineurs, d'une part, et la provocation à des actes de terrorisme ou l'apologie de tels actes, d'autre part, constituent des abus de la liberté d'expression et de communication qui portent gravement atteinte à l'ordre public et aux droits des tiers », le juge constitutionnel a pris en considération le fait que « la détermination du caractère illicite des contenus en cause […] est soumise à la seule appréciation de l'administration » et que « l'engagement d'un recours contre la demande de retrait n'est pas suspensif et le délai d'une heure laissé à l'éditeur ou l'hébergeur pour retirer ou rendre inaccessible le contenu visé ne lui permet pas d'obtenir une décision du juge avant d'être contraint de le retirer. » Il en a conclu que « le législateur a porté à la liberté d'expression et de communication une atteinte qui n'est pas adaptée, nécessaire et proportionnée au but poursuivi. »[35]

Par la suite toutefois, la loi du 24 août 2021 confortant le respect des principes de la République – dite « loi séparatisme » – a introduit de nombreuses dispositions relatives à la lutte contre la haine en ligne, qui constituent « tout un arsenal de nature à renforcer les moyens de lutte contre ce fléau, qui modifie significativement la régulation de la communication au public en ligne. »[36] Pour l'essentiel, la loi insère dans le Code pénal un article 223-1-1 réprimant « le fait de révéler, de diffuser ou de transmettre, par quelque moyen que ce soit, des informations relatives à la vie privée, familiale ou professionnelle d'une personne permettant de l'identifier ou de la localiser aux fins de l'exposer ou d'exposer les membres de sa famille à un risque direct d'atteinte à la personne ou aux biens que l'auteur ne pouvait ignorer ». Ces dispositions peuvent être lues comme une réponse à la mort de l'enseignant d'histoire-géographie Samuel Paty, décapité à la sortie de son collège, assassinat relié directement aux réactions haineuses sur les réseaux sociaux qu'avait suscité son cours autour des caricatures du prophète Mahomet. Considérée comme ne portant pas atteinte à la liberté d'expression et de communication par le Conseil constitutionnel (décision du 13 août 2021), cette infraction a été qualifiée d'« hybride »[37] dans la mesure où elle s'inspire des provocations et incitations à commettre des actes délictueux du Code pénal et de la loi de 1881, mais aussi des infractions telles que la mise en danger de la vie d'autrui.

En outre, après la censure du Conseil constitutionnel en juin 2020, la loi du 24 août 2021 a modifié la LCEN du 21 juin 2004 (article 6-1.7) en prévoyant que les plateformes de partage et les sites de réseaux sociaux dotés d'une certaine affluence

[35] Conseil constitutionnel, décision n° 2020-801 DC du 18 juin 2020.

[36] Ch. Bigot, « Les discours de haine et les contenus illicites en ligne », *Revue française de droit administratif*, 2021, p. 835.

[37] *Ibid*.

doivent concourir à la « répression de l'apologie, de la négation ou de la banalisation des crimes contre l'humanité, de la provocation à la commission d'actes de terrorisme et de leur apologie, de l'incitation à la haine raciale, à la haine à l'égard de personnes à raison de leur sexe, de leur orientation sexuelle, de leur identité de genre ou de leur handicap ainsi que de la pornographie enfantine, de l'incitation à la violence, notamment l'incitation aux violences sexuelles et sexistes, ainsi que des atteintes à la dignité humaine ». La loi de 2021 accentue le devoir de vigilance et de coopération des opérateurs de plateforme avec les autorités judiciaires et administratives et prévoit de possibles sanctions des utilisateurs qui diffusent des contenus haineux.[38]

Quelques mois plus tard, la loi n° 2021-1382 du 25 octobre 2021 relative à la régulation et à la protection de l'accès aux œuvres culturelles à l'ère numérique, a créé l'Autorité de régulation de la communication audiovisuelle et numérique (Arcom), issue de la fusion du Conseil supérieur de l'audiovisuel (CSA) et de la Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet (Hadopi). L'Arcom est investie de la lutte contre les discours haineux, de la lutte contre la diffusion de fausses informations ainsi que de la protection des œuvres, des droits d'auteur et des droits voisins et assure le contrôle des grandes plateformes numériques en veillant à ce qu'elles mettent bien en œuvre leurs obligations de signalement ou encore de modération.

c. *Lutte contre les discours de haine et lutte contre le terrorisme*

Lutte contre les discours de haine en ligne et lutte contre le terrorisme se sont rejointes, conduisant le législateur à recourir à des dispositifs spécifiques éloignés de l'esprit libéral de la loi de 1881. L'attentat contre le journal *Charlie Hebdo* en janvier 2015, démonstration tragique du terrorisme islamiste, a ravivé l'attachement à la liberté d'expression et remis au premier plan la nécessité de la protéger. Pour autant, et assez paradoxalement, la lutte contre le terrorisme, initiée antérieurement, s'est traduite dans ce domaine par une mise à l'écart de la loi du 29 juillet 1881. En effet, « les abus de l'expression ne sont pas des infractions comme les autres », car « ces infractions ne mettent pas seulement en balance, dans un rapport classique de nécessité, la valeur sociale pénalement protégée avec une répression, par définition, attentatoire aux libertés individuelles (liberté physique d'aller et de venir…), mais in-

[38] Pour une analyse détaillée, voir Ch. Bigot, « Les discours de haine … », art. cité. Pour une application, voir le litige entre l'association Mouvement contre le racisme et pour l'amitié entre les peuples, l'union des étudiants juifs de France, l'association SOS racisme, l'association J'Accuse !… Action internationale pour la justice et l'association La ligue internationale contre le racisme et l'antisémitisme et Twitter : Cass., 23 mars 2023, n° 22-13.600.

tègrent également, dans l'équilibre recherché, la protection de la liberté d'expression à laquelle l'incrimination porte atteinte. »[39]

Il convient au préalable de préciser que « la prise en compte spécifique par le législateur des faits de terrorisme a débuté par le vote de la loi n° 86-1020 du 9 septembre 1986 relative à la lutte contre le terrorisme et aux atteintes à la sûreté de l'État. Adoptée à la suite d'une série d'attentats intervenus en 1985 et 1986 à Paris, cette loi définissait l'intention terroriste comme 'une entreprise individuelle ou collective ayant pour but de troubler gravement l'ordre public par l'intimidation ou la terreur'. Cette intention devait s'ajouter à certains crimes et délits déjà prévus par le Code pénal pour constituer les infractions terroristes [infractions de droit commun comme les atteintes aux personnes, aux biens, blanchiment, etc.]. »[40] Depuis 1986 et jusqu'à la loi n° 2012-1432 du 21 décembre 2012 relative à la sécurité et à la lutte contre le terrorisme, le dispositif juridique français de lutte contre le terrorisme reposait sur « la compétence spécialisée de la juridiction parisienne, la création de l'infraction d'association de malfaiteurs en vue de la préparation d'un acte de terrorisme, l'allongement de la prescription des crimes et délits de terrorisme, l'extension des prérogatives des services de police et de gendarmerie compétents dans ce domaine ».[41]

En dépit de l'étendue et des moyens offerts par ce cadre juridique, l'évolution du contexte a conduit le législateur à l'adoption de la loi du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme. Cette loi tirait à l'époque sa nécessité d'un double constat : « d'une part, les départs de plusieurs centaines de Français vers des zones de combat, essentiellement en Syrie, d'autre part, le développement intensif de la propagande terroriste sur le réseau internet, qui contribue de manière décisive à ces départs. »[42] La loi du 13 novembre 2014 « a transféré l'incrimination et la répression de la provocation directe à des actes de terrorisme, et l'apologie [publique] de ces actes, de la loi de 1881 à l'article 421-2-5 nouveau du Code pénal, en aggravant au passage les peines encourues, et, surtout, en ouvrant ainsi les voies procédurales du droit commun : par exemple le recours à la comparution immédiate, interdite pour les infractions de presse. »[43] Sont ici visés tous les actes de terrorisme définis par les articles 421-1 à 422-7 du Code pénal. Ces peines sont portées à sept ans d'emprisonnement et à 100 000 € d'amende lorsque les faits ont été commis en utilisant un service de communication au public en ligne.

[39] P. Beauvais, « Vers un nouveau régime pénal de la libre expression ? », art. cité.

[40] Sénat, *Rapport sur le projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme*, 9 octobre 2014, p. 10.

[41] *Ibid*., p. 12.

[42] *Ibid*.

[43] J.-Y. Monfort, « Liberté d'expression, loi de 1881, et respect des croyances… », art. cité, p. 29.

Cette loi a été analysée, et ces dispositions validées, par le Conseil constitutionnel, via une question prioritaire de constitutionnalité[44]. Il a estimé, de manière générale, que « le législateur a poursuivi l'objectif de valeur constitutionnelle de prévention des atteintes à l'ordre public et des infractions, dont participe l'objectif de lutte contre le terrorisme. » Plus spécifiquement, si le délit d'apologie publique d'actes de terrorisme, par son insertion dans le Code pénal, « n'est pas entouré des garanties procédurales spécifiques aux délits de presse prévues par la loi du 29 juillet 1881 mentionnée ci-dessus, les actes de terrorisme dont l'apologie est réprimée sont des infractions d'une particulière gravité susceptibles de porter atteinte à la vie ou aux biens. Par conséquent […] l'atteinte portée à la liberté d'expression et de communication par les dispositions contestées est nécessaire, adaptée et proportionnée à l'objectif poursuivi. » Si les infractions de presse « classiques » sont applicables à la plupart des discours de haine sur internet, ceux qui peuvent être reliés au terrorisme leur échappent et sont susceptibles de relever des infractions d'apologie d'actes terroristes et de provocation à la commission de tels actes. La mise en balance de la liberté d'expression avec les nécessités de la sécurité nationale se traduit par la possibilité pour les autorités publiques « d'exercer une surveillance sur internet, d'intercepter et de collecter des données en lien notamment avec les infractions d'apologie d'actes terroristes et de provocation au terrorisme ».[45]

Depuis la promulgation de la loi de 2014, « le nombre de condamnations pour apologies d'actes de terrorisme a fortement augmenté, les peines infligées étant par ailleurs sans commune mesure avec les peines auparavant infligées dans le cadre du contentieux de la presse. De nombreuses condamnations ont été prononcées, le plus souvent à des peines de prison ferme ».[46] Quelques affaires illustrent la façon dont sont appliquées ces dispositions.

Le tribunal de grande instance de Paris a condamné sur le fondement de l'article 421-2-5 du Code pénal, l'humoriste Dieudonné M'Bala M'Bala à deux mois de prison avec sursis pour avoir, le 11 janvier 2015, fait publiquement l'apologie d'un acte de terrorisme en utilisant un service de communication en ligne, « en l'espèce en publiant sur sa page Facebook le message suivant : 'Après cette marche historique, que dis-je … Légendaire ! Instant magique égal au Big Bang qui créa l'Univers! … ou dans une moindre mesure (plus locale) comparable au couronnement de Vercingétorix, je rentre enfin chez moi. Sachez que ce soir, je me sens Charlie Coulibaly' ». Des extraits du jugement du 18 mars 2015 méritent d'être cités dans la mesure où il intervient peu de temps après l'adoption de la loi du 13 novembre 2014, dont il cite

[44] Conseil constitutionnel, décision QPC n° 2018-706 du 18 mai 2018.

[45] P. Beauvais, « Vers un nouveau régime pénal de la libre expression ? », art. cité.

[46] F. Pillet et T. M. Soilihi, *Rapport du Sénat relatif à l'équilibre de la loi du 29 juillet 1881 sur la liberté de la presse à l'épreuve d'Internet*, n° 767, 2016. p. 40.

les travaux préparatoires : « il convient désormais de prendre en compte la désinhibition à la violence extrême conduisant à une radicalisation bâtie sur 'une confusion culturelle mêlant des connaissances religieuses limitées, un sentiment de victimisation de la communauté musulmane dans le monde, un rejet des valeurs occidentales et laïques, une condamnation des engagements militaires de la France en terre d'Islam et un antisémitisme d'amalgame associant intérêts juifs et Israël' ». Le jugement précise également qu'il « est de jurisprudence constante que l'apologie n'est pas synonyme ni d'éloge ni de provocation directe, et que l'écrit, qui présente comme susceptibles d'être justifiés des actes constitutifs de crimes de guerre, doit être considéré comme en ayant fait l'apologie. »

En 2019, la cour d'appel de Grenoble a déclaré une personne « coupable d'apologie publique d'un acte de terrorisme commise au moyen d'un service de communication public en ligne pour avoir publié sur son compte Facebook un texte regroupant des sourates du Coran en langue française faisant l'apologie du terrorisme. La publication litigieuse est en l'espèce intervenue au lendemain des attentats terroristes ayant frappé l'Espagne revendiqués par l'État islamique. »[47] En 2021, la cour d'appel de Montpellier a retenu la même solution pour une personne qui avait publié sur un site internet la photographie d'une tête décapitée et ensanglantée avec le message « Samuel est Paty ». Or, l'assassinat de Samuel Paty, deux jours avant la publication litigieuse, « est un acte de terrorisme au sens du Code pénal et le message poursuivi a été créé et diffusé par le prévenu qui est à la fois l'auteur et le directeur de publication, et donc auteur principal du délit ; le fait de présenter sur un ton qui se veut humoristique un acte terroriste est de nature à inciter à porter sur cette infraction ou leurs auteurs un jugement favorable et doit, pour ce motif, recevoir la qualification d'apologie d'acte de terrorisme ».[48]

La loi précitée du 1er juillet 1972 avait ouvert aux associations compétentes en ces domaines la possibilité de se porter parties civiles auprès des tribunaux, ce qui a conduit des associations souhaitant défendre le respect des croyances religieuses à être à l'origine d'un contentieux régulier depuis.

II. Les enseignements de la jurisprudence

En l'absence d'un texte protégeant spécifiquement les croyances religieuses, l'articulation entre liberté d'expression et liberté de religion relève du juge, essentiellement sur le fondement des dispositions de la loi de 1881. En dépit de l'étalement dans le temps et de la nécessaire diversité des espèces, les contours de cette jurisprudence sont bien connus et il apparaît que la balance judiciaire tend à pencher en

[47] Cour d'appel de Grenoble, 6 février 2019, n° 18/01002.

[48] Cour d'appel de Montpellier, 1re chambre correctionnelle, 25 février 2021, n° 20/02392.

faveur de la liberté d'expression, au point qu'aujourd'hui, « rares sont les actions qui aboutissent au bout du compte à sanctionner ceux qui attentent, de fait, à la conscience religieuse d'autrui »[49], ce qui conduit certains à déplorer l'insuffisant respect des convictions religieuses en droit français[50] (1). La jurisprudence française s'est élaborée depuis plus de trente ans sur le fondement de recours d'associations de croyants, principalement catholiques,[51] même si, sans doute sous l'effet de la pluralisation religieuse de la société, le contentieux concernant la religion musulmane s'épaissit. À l'instar du contentieux initié par les associations contre le racisme et des organisations juives, la jurisprudence relative à l'islam met en lumière l'ambiguïté de l'« offense » aux convictions des croyants, entre origine, appartenance à une race ou une religion (2).

1. Une jurisprudence généralement favorable à la liberté d'expression

Que la liberté d'expression bénéficie d'une manière générale d'une forte protection devant les tribunaux se vérifie dans la jurisprudence relative aux affiches (publicitaires ou de films) et films ou spectacles, tandis que le registre humoristique bénéficie d'une traditionnelle tolérance des juges.

Les affiches

Les supports de la liberté d'expression que sont les affiches publicitaires, de spectacles ou de films, se caractérisent par le fait qu'elles sont susceptibles de s'imposer à la vue du plus grand nombre par leur exposition dans l'espace public, ce qui laisse à penser qu'elles pourraient être soumises à une appréciation plus rigoureuse que les œuvres accessibles uniquement par un public volontaire.[52] Or, quelques affaires emblématiques montrent que cet élément n'est pas déterminant. Elles illustrent une évolution dans un sens favorable à la liberté d'expression, dont on peut se demander si elle reflète une sécularisation synonyme d'une moindre sensibilité à l'égard des croyances religieuses ou plus généralement une libéralisation d'un contexte social

[49] J.-Y. Monfort, « Liberté d'expression, loi de 1881, et respect des croyances… », art. cité, p. 29.

[50] E. Dreyer, « La Cour de cassation et le désarroi des croyants », D. 2007, p. 2072. A. Sériaux, « La liberté religieuse en droit français actuel. Un point de vue chrétien », *Revue du droit des religions*, nº 10, 2020, pp. 157-172.

[51] H. Leclerc, « Laïcité, respect des croyances et liberté d'expression », *Légicom*, 2015, p. 43.

[52] Sur ce point, voir le jugement du tribunal de grande instance de Paris au sujet du livre les Versets sataniques, dans lequel les juges ont retenu que « si certains passages des Versets sataniques (…) venaient à être lus par un croyant et étaient de nature à le heurter et à lui donner le sentiment d'être atteint dans sa foi, force est de constater que personne ne se trouve contraint de lire un livre », TGI Paris, 29 juillet 1989.

dans lequel les différents médias s'autorisent davantage d'irrévérence.[53] Toujours est-il que la Cour de cassation, dans un arrêt du 12 juillet 2000, a décidé que « les abus de la liberté d'expression prévus et réprimés par la loi du 29 juillet 1881 ne peuvent être réparés sur le fondement de l'article 1382 du Code civil ».[54] Elle écarte l'application du droit commun de la responsabilité civile et ainsi la possibilité pour le juge « d'édicter des normes de comportement et de définir lui-même des abus susceptibles de caractériser des fautes ».[55] Dans un arrêt du 8 mars 2001 (cf. *infra*), la Cour de cassation étendra cette approche stricte des abus de la liberté d'expression au domaine des croyances religieuses, faisant donc primer le droit spécial libéral de la liberté d'expression.

La première affaire à signaler est celle de l'interdiction de l'affiche du film *Ave Maria*,[56] représentant une jeune femme fixée sur une croix, la chemise ouverte et exhibant largement sa poitrine dénudée, au motif que « la représentation du symbole de la Croix, dans des conditions de publicité tapageuse et en des lieux de passage public forcé, constitue un acte d'intrusion agressive et gratuite dans les tréfonds intimes des croyances de ceux qui, circulant librement sur la voie publique et ne recherchant aucun contact ou colloque singulier avec une œuvre ou un spectacle déterminé se voient - hors de toute manifestation de volonté de leur part - nécessairement et brutalement confrontés à une manifestation, publicitaire et commerciale, contestable et trompeuse, constitutive en tout état de cause, d'un trouble manifestement illicite ».

Plus d'une décennie après, l'affiche du film de Milos Forman *Larry Flint* représentait un homme en position de crucifié avec, en arrière-plan, le bassin d'une femme en bikini. Les deux ordonnances de référé estiment qu'il n'apparaît pas « que cette affiche incongrue, même si elle peut choquer, constitue un outrage flagrant aux sentiments religieux des requérants ».[57] Une solution comparable sera retenue pour l'affiche du film *Amen* de Costa-Gavras, représentant une croix chrétienne rouge sang prolongée sur trois branches par une croix gammée. Estimant que l'affiche suggérait que les catholiques avaient cautionné le nazisme, les demandeurs

[53] H. Leclerc, « Laïcité, respect des croyances… », art. cité, p. 43.

[54] Cass., Ass. plén., 12 juillet 2000, n° 98-10.160. D'autant que la faute civile est plus facile à caractériser que, par exemple, le délit de provocation à la haine ou à la violence, qui suppose une intention coupable d'offenser le public ou une partie du public. Autrement dit, « la seule conscience de choquer, dans une démarche strictement publicitaire, n'équivaut pas à la volonté d'appeler à la haine à l'égard de la religion considérée. » (J.-Y. Monfort, « Liberté d'expression, loi de 1881… », art. cité).

[55] Ch. Bigot, « Blasphème, respect des croyances et liberté d'expression : l'impasse de l'article 1382 du Code civil », *Légicom*, 2015 p. 59.

[56] TGI Paris, 23 octobre 1984, *Gazette du Palais,* 1984, p. 722.

[57] TGI Paris, 20 février 1997, n o 52151/97, Gaz. Pal. 1997, p. 328.

s'étaient fondés sur l'article 32, 2e alinéa de la loi de 1881 (diffamation d'un groupe de personnes en raison de leur appartenance à une religion).[58]

Par la suite, la Cour de cassation, en 2005, met un point final à l'affaire d'une affiche publicitaire pour une marque de vêtements qui parodiait la fresque de Léonard de Vinci La Cène en y remplaçant les personnages masculins par des femmes. Elle juge en effet que cette « parodie de la forme donnée à la représentation de la Cène n'avait pas pour objectif d'outrager les fidèles de confession catholique, ni de les atteindre dans leur considération en raison de leur obédience », ne voyant pas là « l'injure, attaque personnelle et directe dirigée contre un groupe de personnes en raison de leur appartenance religieuse ».[59]

Enfin, à propos d'un tract traitant du sida, alors que la cour d'appel avait estimé que « l'association de l'image dénaturée d'une religieuse, à l'expression 'Sainte Capote' et à un dessin de préservatifs, a pour effet de créer un amalgame provocateur et de mauvais goût, ayant pu être ressenti comme une offense envers la communauté catholique en raison de sa croyance et de ses pratiques », la Cour de cassation retient que, « même s'il a pu heurter la sensibilité de certains catholiques, ne dépasse pas les limites admissibles de la liberté d'expression et ne constitue pas une injure religieuse, le contenu d'un tract diffusé par les responsables d'une association de lutte contre le sida, qui, pour annoncer une manifestation d'information et de prévention de cette maladie, représente, sous la légende 'Sainte Capote protège-nous', l'image d'une religieuse associée à celles d'un angelot et de deux préservatifs. »[60]

La libre expression artistique (films, spectacles…)

Même si le juge judiciaire n'a pas expressément étendu au trouble manifestement illicite de l'article 809 du Code de procédure civile la logique de sa jurisprudence relative à l'utilisation de la responsabilité civile (article 1382 Code civil) dans les litiges en matière de liberté d'expression, il s'avère que sa mobilisation pour faire cesser une atteinte aux croyances religieuses se révèle le plus souvent infructueuse. Outre la loi du 29 juillet 1881, l'article 809 du Code de procédure civile, qui prévoit que le président du tribunal judiciaire peut prendre les mesures d'urgence qui « s'imposent, soit pour prévenir un dommage imminent, soit pour faire cesser un trouble manifeste-

[58] TGI Paris, 21 février 2002, Légipresse, 2002, p. 105.

[59] Cass., 14 novembre 2006, nos 05-15.822, 05-16.001. Pourtant, le tribunal de grande instance de Paris avait jugé que l'affiche constitue « un acte d'intrusion agressif et gratuit dans le tréfonds intime des croyances » et, la cour d'appel de Paris, que « la représentation d'une scène sacrée à seule fin d'une publicité commerciale peut, comme en l'espèce, faire outrage aux convictions religieuses fondées sur un récit près de deux fois millénaire et célébré quotidiennement dans la liturgie catholique » …

[60] Cass., crim., 14 février 2006, n° 05-81.932.

ment illicite »[61], demeure pourtant régulièrement invoqué dans les affaires mettant en jeu la libre expression artistique.

Le trouble manifestement illicite a été utilisé à propos de films. La jurisprudence en la matière, ancienne et devenue quelque peu datée, ne sera donc que brièvement évoquée ici. Le jour de la sortie en salles du film de Jean-Luc Godard, *Je vous salue Marie*, en 1985, deux associations catholiques ont demandé son interdiction, estimant qu'il « tournait en dérision de façon outrageante les croyances chrétiennes » et constituait un délit de provocation à la discrimination en raison de la religion. La Cour de cassation déclara que « l'auteur d'une œuvre de l'esprit doit bénéficier du droit à la liberté d'expression, sans autres restrictions que celles imposées par la loi, dès lors que dans sa finalité ou son expression, l'œuvre ne constitue pas une apologie de crimes ou délits sanctionnés par la loi pénale ou une provocation à en commettre ».[62] En outre, si les « atteintes au respect des croyances et des sentiments religieux des adhérents des associations demanderesses » ont été relevées, elles ne constituaient pas un trouble manifestement illicite. Le juge des référés, puis la cour d'appel de Paris, rejetait cette demande avant que la Cour de cassation, par un arrêt du 21 juillet 1987, casse au motif que la cour d'appel avait jugé que les atteintes portées au respect des croyances et des sentiments religieux ne constituaient pas « un trouble de gravité exceptionnelle ».[63]

En 1988, la sortie du film de Martin Scorsese *La Dernière Tentation du Christ* a donné lieu à une nouvelle action engagée par des associations catholiques pour solliciter l'interdiction et la saisie du film sur le fondement de l'article 809 du Code de procédure civile. La Cour de cassation exprime clairement l'exigence d'équilibre en la matière : « le principe de la liberté d'expression, notamment en matière de création artistique, d'une part, comme, d'autre part, celui du respect dû aux croyances et le droit de pratiquer sa religion étant d'égale valeur, il appartenait aux juges du fond de décider des mesures appropriées à faire respecter ce nécessaire équilibre ». En l'espèce, le trouble manifestement illicite n'était pas été reconnu, mais la cour d'appel avait ordonné que tous les instruments de publicité du film soient accompagnés d'un

[61] En 2021, l'article 809 est devenu l'article 835 du Code de procédure civile, sans que le changement de numérotation n'ait d'incidence sur sa mise en œuvre.

[62] Cass., civ. 1ère, 21 juillet 1987, n° 85-15.044.

[63] La cour d'appel de Dijon statuant sur renvoi a toutefois confirmé l'absence de trouble manifestement illicite. La cour retient que diverses scènes du film constituaient une inutile provocation, étaient choquantes, outrancières ou insolentes. Elle estime cependant que les personnes potentiellement choquées peuvent s'abstenir de s'exposer aux troubles qu'elles dénoncent en n'allant pas voir le film et que la réprobation contre celui-ci n'était pas unanime, n'étant pas partagée par tous les catholiques dont la hiérarchie n'était pas présente au procès. CA Dijon, 22 mars 1988.

avertissement afin" d'éviter que quiconque se trouve, parce que non prévenu, en situation d'être atteint dans ses convictions profondes ».[64]

Plus près de nous, l'association catholique l'AGRIF avait demandé, sur le fondement de l'article 809 du code de procédure civile, que l'association Collection Lambert soit condamnée à retirer la photographie intitulée « Piss Christ » d'Andrès Serrano, sur le site Internet de l'association et sur tout support visible sur la voie publique (affiches, documents publicitaires). La photo servait de publicité pour une exposition et représentait un Christ en croix plongé dans un vase rempli d'urine. L'AGRIF invoquait aussi les articles 23 et 24 alinéa 8 de la loi du 29 juillet 1881 (provoqué à la discrimination, à la haine ou à la violence à l'égard d'une personne ou d'un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance à une ethnie, une nation, une race ou une religion déterminée). Le tribunal a estimé que « le trouble allégué ressort donc non de la photographie et de l'affiche, mais de l'analyse conceptuelle de celle-ci, analyse qui n'est pas flagrante », alors que « pour constituer un trouble illicite, l'obscénité, l'offense doivent être objectivement déterminées et non ressortir d'une analyse subjective, externe et non visible. En affichant une photographie d'un Christ en croix sur fond orangé sortant d'un fluide, nulle offense publique ne peut être utilement invoquée. » En outre, « la nécessaire protection du sentiment religieux des membres de l'AGRIF ne peut être admise qu'à l'égard d'œuvres visant à une dénégation violente, disproportionnée et prosélyte des croyances religieuses. Elle exclut l'expression d'idées hostiles à la religion, ce qui en tout état de cause, comme exposé ci-avant, n'apparaît pas le cas en l'espèce où le caractère profanatoire de l'œuvre n'est pas établi. »[65]

Quelques années plus tard, l'AGRIF reprochait cette fois à la pièce *Golgota picnic* du dramaturge argentin Rodrigo Garcia et programmée par un théâtre parisien, de présenter l'iconographie chrétienne comme une image de la terreur et de la barbarie et avait porté plainte sur le fondement de l'article 24, alinéa 8, devenu alinéa 7, de la loi du 29 juillet 1881. Le recours a été rejeté au motif que « les propos incriminés sont tirés d'une œuvre de fiction à vocation artistique ne prétendant, en tant que telle, à l'affirmation d'aucune vérité, mais participant de l'échange des idées et opinions indispensable à toute société démocratique sous réserve des seules limites fixées par la loi ; qu'en l'occurrence, les juges retiennent que ces propos, quelque provocateurs, voire choquants pour certains chrétiens, qu'ils soient, se rapportent à une image de Jésus Christ totalement inventée et désacralisée, de sorte qu'ils ne peuvent être pris au pied de la lettre, ni induire une quelconque animosité ou sentiment de rejet à l'égard de l'ensemble des personnes qui se réclament de celui-ci ; qu'ils ajoutent que ceux relatifs à l'iconographie religieuse, présentée comme cruelle et perverse, ne peuvent

[64] Cass., 29 octobre 1990, n° 88-19.366.

[65] TGI Avignon, 20 avril 2011, *AGRIF c/ Association Collection Lambert*.

être interprétés comme visant précisément et spécifiquement les chrétiens, dès lors que le legs graphique ainsi dénoncé participe de l'héritage culturel commun au monde occidental ».[66]

La libre expression humoristique

La tolérance dont bénéficie de manière générale le registre humoristique[67] s'applique aux dessins et articles de presse offrant une image caricaturale de la religion, qui donnent lieu à un contentieux régulier, susceptible d'être qualifié de « classique », si la publication des « caricatures de Mahomet » n'avait eu les suites dramatiques que l'on connaît. Quelques exemples donnent la mesure de cette « tolérance prétorienne ».[68]

Ainsi, en décembre 1989, le journal périodique *Fluide glacial* avait publié, en page de couverture d'un de ses numéros, « une caricature représentant une religieuse d'aspect grotesque, occupée devant un sapin de Noël à gonfler avec une pompe à bicyclette un Christ en croix, trouvé parmi d'autres cadeaux ». Si « les images et propos de la bande dessinée, tendaient incontestablement à tourner en dérision les religieuses représentées sous des traits grotesques, et étaient de nature à heurter la sensibilité des catholiques », la provocation à la discrimination, à la haine ou à la violence à l'égard d'un groupe de personnes, à raison de leur appartenance à une religion n'était pas caractérisée (art. 24 L. 1881).[69]

En 1991, l'hebdomadaire satirique *La grosse Bertha* était mis en cause pour avoir publié dans plusieurs de ses numéros des dessins moquant la religion catholique, dont, sur la couverture de l'un d'eux, sous le titre : « Le Pape chez les travelos », un dessin représentant le pape Jean-Paul II sodomisé par un travesti qui s'écrie : « bienvenue au Brésil ! ». Aux yeux de la Cour de cassation, dans l'arrêt du 28 février 1996, « les dessins représentaient des personnages et des symboles religieux assortis de légendes outrancières et provocantes » constituaient un abus de la liberté d'expression susceptible d'être réparé sur le fondement de l'article 1382 du Code civil[70]. Or, saisie de l'arrêt de la cour d'appel rendu sur renvoi après cassation, elle a estimé que « tous les dessins en cause tournent en dérision la religion catholique, les croyances, les symboles et les rites de la pratique religieuse, mais n'ont pas pour finalité de susciter

[66] Cass., 14 novembre 2017, n° 16-84.945.

[67] B. Ader, « Les 'lois du genre' du discours humoristique », *Légicom*, 2015/1, n° 54, p. 18. Ces « lois du genre », « telles que dégagées par la jurisprudence française, sont : la critique de la personne publique (I) ; l'absence de sérieux (II) ; l'exclusion de buts illégitimes (III). »

[68] F. Gras, « La tradition française de protection des caricatures », *Légicom*, 2015, p. 17. Voir aussi C. Viennot. « Les caricatures de Mahomet appréciées par les juridictions françaises », *Les Cahiers de la Justice*, vol. 2, no. 2, 2015, p. 265-282.

[69] Cass., crim., 7 décembre 1993, no 92-81.091.

[70] Cass., 2e civ., 28 févr. 1996, *AGRIF*, n° 93-20.663.

un état d'esprit de nature à provoquer à la discrimination, la haine ou la violence, et ne caractérisent pas l'infraction prévue par l'article 24, alinéa 6, de la loi du 29 juillet 1881 ».[71] Surtout, par cet arrêt, la Cour a étendu au domaine des croyances religieuses une jurisprudence établie l'année précédente et qui limite l'encadrement de la liberté d'expression aux abus spécifiquement réprimés par la loi du 29 juillet 1881, qui ne peuvent donc plus être appréhendés via l'application du droit commun de la responsabilité civile (article 1382 du Code civil).

De même, des extraits d'un « numéro spécial Pape » de *Charlie Hebdo*, paru en 2008, ont été poursuivis devant le TGI de Paris [TGI Paris, 2 juin 2009]. L'association partie civile soutenait qu'un court texte satirique qui comprenait les termes « Que l'on redonne les chrétiens à bouffer aux lions ! » pouvait être reçu comme un « appel à la violence, voire au meurtre » des chrétiens, et qu'un second associait Jésus-Christ à la pédophilie. La Cour de cassation confirma l'arrêt de la cour d'appel qui avait jugé que « ironiques et volontairement outranciers, inconvenants peut-être, les passages incriminés ne peuvent tromper sur le but poursuivi : faire rire le lecteur, lequel ne peut se méprendre sur leur sens et leur portée ; qu'il ne saurait en effet être sérieusement soutenu que ces propos, délibérément provocateurs et dans la ligne éditoriale générale de cet hebdomadaire satirique, incitent de quelque façon que ce soit le public à la discrimination, à la haine ou à la violence à l'égard d'un groupe de personnes à raison de leur appartenance à une religion déterminée et que s'ils peuvent heurter quelques sensibilités, ces passages, imprégnés de l'humour sommaire en vigueur dans les cours de récréation [sic], ne dépassent pas les limites permises de la liberté d'expression ».[72]

[71] Cass., civ. 2, 8 mars 2001, no 98-17.574.

[72] Cass., crim., 15 mars 2011, n°10-82.809. En revanche, a été condamné pour injure publique envers un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance à une ethnie, une nation, une race ou une religion déterminée et contestation de crimes contre l'humanité l'auteur d'un document mis en ligne sur un site internet « se présentant comme la première page d'un journal intitulé «Chutzpah Hebdo», comportant en dessous de ce titre principal un dessin représentant le visage de Charlie Chaplin devant une étoile de David, entouré d'un savon, d'un abat-jour, d'une chaussure et d'une perruque, objets liés à des bulles indiquant «ici», «là» et «et là aussi», en réponse à la question posée par le personnage de Chaplin 'Shoah où t'es?', dessin comportant également un encart où l'on peut lire 'historiens déboussolés' », dans la mesure où « le dessin incriminé vise la communauté juive » et au motif que « ce dessin satirique et provocateur a pour but de ridiculiser cette communauté en tournant en dérision le génocide dont elle a été victime par le biais de représentations particulièrement outrageantes, en rabaissant la souffrance subie dans les camps d'extermination et en s'en moquant avec un mépris affiché particulièrement provocateur, et dépasse par son contenu et sa portée les limites de la tolérance reconnue à l'expression humoristique ». Le dessin litigieux, « loin de participer à un quelconque débat d'intérêt général, constitue, en ce qu'il est outrageant et méprisant à l'égard d'un groupe de personnes à raison de leur appartenance à une religion déterminée, une injure antisémite dont la répression est une restriction à la liberté d'expression nécessaire dans une société démocratique », Cass., crim., 26 mars 2019, n° 18-81.770.

Au-delà de la singularité liée au caractère humoristique et volontairement provocant des caricatures, cette jurisprudence libérale traduit la distinction fondamentale entre protection des croyances et protection des croyants, qui ressort également de l'appréhension judiciaire de la publication des caricatures de Mahomet dans Charlie Hebdo. Le 7 février 2006, cinq associations, dont l'UOIF (Union des organisations islamiques de France), avaient demandé en référé de la parution était prévue pour le lendemain d'un "Numéro Spécial" reproduisant entre autres les caricatures publiées dans un journal danois pour violation de l'article 33 de la loi du 29 juillet 1881 (injure envers une personne ou un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance à une ethnie, une nation, une race ou une religion déterminée). Dans un jugement du 22 mars 2007,[73] dont de longs extraits méritent d'être cités, le tribunal de grande instance de Paris a estimé que le délit d'injure n'était pas constitué. Il a rappelé que « toute caricature s'analyse en un portrait qui s'affranchit du bon goût pour remplir une fonction parodique, que ce soit sur le mode burlesque ou grotesque ; que l'exagération fonctionne alors à la manière du mot d'esprit qui permet de contourner la censure, d'utiliser l'ironie comme instrument de critique sociale et politique, en faisant appel au jugement et au débat ; […] Le genre littéraire de la caricature, bien que délibérément provocant, participe à ce titre de la liberté d'expression et de communications des pensées et des opinions ; que, du fait de l'excès même de son contenu volontairement irrévérencieux, il doit être tenu compte de l'exagération et de la subjectivité inhérentes à ce mode d'expression pour analyser le sens et la portée des dessins litigieux, le droit à la critique et à l'humour n'étant cependant pas dépourvu de limites ». Dans la mise en balance entre liberté d'expression et liberté de religion, le TGI juge que « en France, société laïque et pluraliste, le respect de toutes les croyances va de pair avec la liberté de critiquer les religions quelles qu'elles soient et avec celle de représenter des sujets ou objets de vénération religieuse ; que le blasphème, qui outrage la divinité ou la religion, n'y est pas réprimé, à la différence de l'injure, dès lors qu'elle constitue une attaque personnelle et directe dirigée contre une personne ou un groupe de personnes en raison de leur appartenance religieuse ». Il conclut que « en dépit du caractère choquant, voire blessant, de cette caricature pour la sensibilité des musulmans, le contexte et les circonstances de sa publication dans le journal Charlie-Hebdo, apparaissent exclusifs de toute volonté délibérée d'offenser directement et gratuitement l'ensemble des musulmans ; que les limites admissibles de la liberté d'expression n'ont donc pas été dépassées ».[74]

[73] TGI Paris, 22 mars 2007, n° 2007-327959.

[74] Solution confirmée par Cour d'appel de Paris, 12 mars 2008, n° 07/02873.

2. L'« offense » aux convictions religieuses entre origine, antisémitisme, appartenance à une race ou une religion

La sanction de l'expression visant des personnes à raison de leur appartenance à une catégorie déterminée par certaines caractéristiques n'est pas nouvelle. Telle était déjà l'ambition du décret-loi Marchandeau de 1939 puis de la loi du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xénophobe, qui punit expressément la contestation de crimes contre l'humanité. L'importante et inquiétante progression contemporaine des idéologies extrémistes ajoute aux propos antisémites les discours critiques envers l'islam et contribue à la persistance du contentieux.

Dès l'origine, apparaissait dans la législation française la frontière incertaine entre racisme, antisémitisme et critique de l'appartenance à la religion juive. Il s'agirait d'une « spécificité » française qui a ses racines dans le décret-loi Marchandeau de 1939, adopté dans un contexte de montée de l'antisémitisme. Ce texte de circonstance incrimine, de manière générale, la diffamation et l'injure « commises envers un groupe de personnes appartenant par leur origine à une race ou une religion déterminée, lorsqu'elles auront eu pour but d'exciter à la haine envers les citoyens ou habitants ». Il vise « une situation particulière. Ici, celle des Juifs, qui n'ont pas tous, dans les circonstances de l'époque, la qualité de citoyens français »,[75] mais préfigure la loi Pleven de 1972 qui punit ceux qui, par des propos tenus en public, « auront provoqué à la discrimination, à la haine ou à la violence à l'égard d'une personne ou d'un groupe de personnes à raison de leur origine ou de leur appartenance ou non-appartenance à une ethnie, une nation, une race ou une religion déterminée ». La loi Pleven étend les critères qui fondent une répression de la diffamation ou de l'injure (ou de la provocation à la discrimination, à la haine ou à la violence), mais reprend le « rapprochement »[76] entre race et religion alors que, comme cela a pu être souligné, la Convention internationale sur l'élimination de toutes les formes de discrimination raciale de 1965 ne met pas « sur le même pied discrimination raciale et discrimination religieuse ».[77]

Il ressort de la jurisprudence contemporaine réprimant les abus de la liberté d'expression une incertitude dans le critère de détermination du groupe de personnes protégé, une certaine confusion entre l'origine, la race et la religion dès lors qu'il s'agit de choisir un des éléments de caractérisation des personnes prévus par la loi de 1881, qui s'observe précisément – sinon exclusivement – à propos du judaïsme et de l'islam.

[75] J.-Y. Monfort, « Liberté d'expression, loi de 1881… », art. cité, p. 29.
[76] *Ibid*.
[77] *Ibid*.

En 1983, la Cour de cassation avait retenu le délit de *diffamation raciale* pour des propos tenus dans une émission radiophonique, qui visaient notamment « le prétendu génocide des juifs » et évoquaient le fruit du « mensonge historique », à savoir « la gigantesque escroquerie politico-financière dont bénéficièrent et l'État d'Israël et le sionisme international et les juifs de la diaspora ».[78] Quelque vingt ans plus tard, dans une interview donnée à un journal lyonnais en 2002, l'humoriste – et alors candidat à l'élection présidentielle – Dieudonné M'Bala M'Bala avait déclaré que « les juifs, c'est une secte, une escroquerie. » Les propos avaient donné lieu à une citation directe du procureur de la République pour délit d'*injure publique raciale*, mais le contentieux s'est déplacé sur le terrain religieux. Alors que la cour d'appel de Paris (9 février 2006) avait estimé que ces propos relèvent « d'un débat d'ordre théorique sur l'influence des religions et ne constituent pas une attaque dirigée contre un groupe de personnes en tant que tel[79] » et n'avait pas retenu le délit d'injure publique envers un groupe de personnes (articles 29 et 33 L. 1881), la Cour de cassation avait jugé qu'il y avait bien atteinte injurieuse « en raison de leur appartenance religieuse, à un groupe de personnes précisément désigné, à savoir la communauté juive de France » et que « ces propos mettaient précisément en cause la communauté juive à raison de sa religion, ce qui manifestait une conviction ouvertement antisémite ».[80] En revanche,

[78] Cass., crim., 28 juin 1983, no 82-92.904.

[79] Afin de caractériser les infractions de presse envers « un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance à une ethnie, une nation, une race ou une religion déterminée », les tribunaux sont le cas échéant amenés à établir une distinction au sein de ce groupe et les tribunaux considèrent parfois que le groupe de personnes ciblé par un propos ne l'est pas « dans son ensemble », formulation qui peut induire en erreur. Elle ne signifie pas qu'il est « nécessaire que le message vise individuellement chaque personne composant le groupe considéré, l'infraction étant constituée dès lors que la teneur ou la portée du propos, en lien direct avec l'origine, l'ethnie, la nation, la race ou la religion, rejaillit sur la totalité de la communauté ainsi définie ; en revanche, il n'y a pas de délit quand est seulement visée une catégorie de personnes qui se distingue du groupe par des comportements spécifiques, auxquels le groupe dans son ensemble n'est pas assimilé. » (Tribunal de grande instance de Paris, 18 février 2011, n° 1015908238 et n° 1008909314). Voir, par exemple, l'affaire dans laquelle était invoquée la provocation à la haine ou à la violence en raison d'un article contre l'homophobie publié sur internet après les manifestations des 17 et 18 novembre 2012 dites « Manifs pour tous » (pour contester l'adoption de la loi autorisant le mariage des personnes de même sexe). Or, en l'espèce, le texte « ne vise pas la communauté des catholiques dans son ensemble, mais ceux d'entre eux, qualifiés d'intégristes, qui composent des groupes d'opposition au vote de la loi sur le mariage pour tous, si bien que les termes du texte critiqué ne rejaillissent pas sur l'ensemble de la communauté catholique » : Cour de cassation, 20 juin 2017, n° 16-83.968. Sur ce point, voir Th. Hochmann, « Provocation à la haine : les immigrés, les musulmans, les immigrés musulmans », *Légipresse*, 2023, p. 227.

[80] Cass., Ass. plén., 16 février 2007, nº 06-81.785. De façon comparable, les délits d'injure raciale et de provocation à la haine antisémite ou raciale ont été retenus à l'encontre d'une personne pour avoir publié sur son compte, via un réseau social russe, les termes : « le journaleux qui explique la virologie à un médecin est bien sûr un infâme juif », « pour les bougnouls », « cette racaille juive » et « cette saloperie juive qui gère la France… ». Selon la cour d'appel de Montpellier, « les propos sont manifestement

Dieudonné fut relaxé du chef de *diffamation publique à caractère raciste* pour son intervention dans une émission de télévision, où il s'était présenté avec « un chapeau noir affublé de papillotes, mais aussi une cagoule et une veste de treillis » et tenant des propos extrémistes et violents. En effet, il a été estimé qu'il n'incarnait « pas 'les personnes de confession juive' en général, mais une fraction de cette communauté, qui professe des thèmes extrémistes et n'hésite pas, le cas échéant, à recourir à l'action violente, faisant ainsi référence pour le spectateur normalement averti, compte tenu des propos proférés et de l'accoutrement, aux ultra-radicaux israéliens »[81].

Des associations de lutte contre l'antisémitisme et le racisme avaient fait citer un essayiste d'extrême droite pour « provocation à la *discrimination raciale, diffamation et injure publiques raciales* », à la suite de la publication sur internet de différents propos et images extraits d'un clip musical, qualifiant diverses personnalités notoirement juives, ainsi que le Conseil Représentatif des Institutions Juives de France, la chaîne de télévision israélienne i24 News et la banque Rothschild, de « parasites » – qui « renvoyait au vocabulaire utilisé par les nazis pour désigner les juifs » selon la Cour –, tout en mettant en scène des autodafés de portraits de ces personnalités et de logos de ces institutions. Or, loin de considérations de doctrine religieuse, était au cœur du litige la question de savoir si ces images et propos visaient ou non la communauté juive dans son ensemble, représentée par ces personnalités et institutions (et à laquelle la Cour de cassation a répondu positivement, reprochant aux juges d'appel de ne pas avoir tiré les conclusions appropriées des « nombreuses références aux clichés antisémites figurant dans le texte et les images »).[82]

Sans entrer dans la discussion sur la spécificité – ou son absence – de l'antisémitisme, il est à observer qu'une forme d'indécision et d'imprécision apparaît également en jurisprudence pour les propos où se mêlent les débats sur l'immigration et l'islam, rendant difficile de faire la part du racisme ou de « l'islamophobie ».[83]

Il y a presque 30 ans, s'agissant d'un article de journal signé par des élus membres du Front national intitulé « À propos de la mosquée de Beysson », la Cour de cassation jugeait qu'« il est normal que les citoyens débattent des difficultés relatives à l'immigration, fussent-elles d'ordre religieux, et puissent exprimer leur opinion, que la seule crainte du risque de racisme ne saurait priver les citoyens de la liberté de pensée et d'expression, dans la mesure où le débat se déroule de bonne foi, et

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dirigés contre un groupe de personnes identifiables, ici les personnes de confession juive et les personnes d'origines arabe ou maghrébine », Cour d'appel de Montpellier, 21 avril 2022.

[81] Cass., crim., 3 avril 2007, n° 05-85.885.

[82] Cass., crim., 5 octobre 2021, n° 20-87.163.

[83] Voir en ce sens : J.-Y. Monfort, « Liberté d'expression, loi de 1881… », art. cité, p. 29. Sur cette question, voir aussi : L. Bakir, « Provocation à la haine, à la discrimination ou à la violence à l'égard d'un groupe de personnes à raison de leur religion : le curseur fixé par la Cour de cassation pour qualifier l'infraction », *Europe des Droits & Libertés / Europe of Rights & Liberties*, 2022/2, n°6, pp. 310-324.

sans but de discrimination, au sens de l'article 24 de la loi du 29 juillet 1881, et qu'il n'est établi, en l'espèce, ni par la partie civile, ni par le ministère public, que les propos litigieux auraient constitué une *provocation à la discrimination raciale ou religieuse* ».[84] Quelques années plus tard, l'actrice Brigitte Bardot, qui s'exprimait au nom de ses positions en faveur de la cause animale, avait été déclarée « coupable de provocation à la discrimination, à la haine ou à la violence à l'égard d'une personne ou d'un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance à une ethnie, une nation, une race ou une religion déterminée » en violation de l'article 24 de la loi du 29 juillet 1881, après avoir dénoncé dans un journal la pratique de l'abattage rituel musulman et, surtout, étendu « son propos à des considérations beaucoup plus générales relatives à la présence musulmane en France ». La cour d'appel de Paris, dont l'arrêt est confirmé par la Cour de cassation, avait jugé qu'« à ce degré d'intensité, de dramatisation, d'extension, la critique, qui n'est plus seulement véhémente, revêt la portée d'un message, équivaut, de par son impact, à une exhortation claire et sans équivoque au rejet, à l'injonction de réagir, de s'opposer, suscite la haine (notamment par la référence au sentiment d'humiliation résultant du manque d'estime et de respect), outrepasse ainsi l'argumentation d'un débat légitime relatif à l'immigration ».[85]

Au sujet d'un texte publié sur internet et intitulé « Que faire des musulmans une fois le Coran interdit ? » et décrivant la situation, rêvée par l'auteur, d'un État où serait proscrite la pratique publique de leur religion et expulsés du territoire national ceux qui ne respecteraient pas cette prescription : sans plus de précision, la Cour de cassation retient que les propos tendent, par leur sens et leur portée, à susciter un sentiment de rejet à l'égard des musulmans, que le délit de provocation à la discrimination, à la haine ou à la violence à l'égard d'un groupe de personnes à raison de leur appartenance ou de leur non-appartenance à une ethnie, une nation, une race ou une religion et, enfin, que l'exercice de la liberté d'expression, proclamée par l'article 10 de la Convention européenne des droits de l'homme, peut être soumis à des restrictions ou sanctions qui constituent, comme en l'espèce, des mesures nécessaires, dans une société démocratique, à la défense de l'ordre et à la protection des droits d'autrui ».[86]

Dans une autre affaire, le rédacteur en chef du magazine était poursuivi pour délit de *provocation publique à la discrimination, à la haine ou à la violence raciale ou*

[84] Cass., 17 mai 1994, n° 91-82.129.

[85] Cass., crim., 5 octobre 1999, n° 97-85.708. Après avoir publié une lettre dans un journal quotidien dans laquelle elle dénonçait à nouveau l'abattage rituel, l'actrice fut condamnée à une amende, car ses « propos imputent à la communauté musulmane, à raison de sa religion, des faits qui portent ainsi atteinte à son honneur » et pour provocation à la discrimination et à la haine raciale : voir Cass., crim., 25 janvier 2000, n° 98-87.278.

[86] Cass., 28 mars 2017, n° 15-87.415.

religieuse, à propos de la couverture de l'hebdomadaire *Valeurs actuelles* figurant un buste de Marianne [symbole de la République française] recouvert d'un voile, qui renvoyait à une série d'articles débattant de la naturalisation des personnes de religion musulmane.[87] Aux yeux de la Cour de cassation, « les propos litigieux, portant sur une question d'intérêt public relative à la politique gouvernementale de naturalisation, ne dépassaient pas les limites admissibles de la liberté d'expression et que, même si leur formulation peut légitimement heurter les personnes de confession musulmane, ils ne contiennent néanmoins pas d'appel ou d'exhortation à la discrimination, à la haine ou à la violence à leur égard ».[88]

En revanche, c'est la provocation à la discrimination et à la haine religieuse envers la communauté musulmane française qui a été clairement retenue pour condamner des propos tenus par l'homme politique Éric Zemmour, à l'époque journaliste, tenus en 2016 au cours d'une émission télévisée.[89] Pour la Cour de cassation, « par leur sens et leur portée, les propos incriminés, qui désignaient tous les musulmans se trouvant en France comme des envahisseurs et leur intimaient l'obligation de renoncer à leur religion ou de quitter le territoire de la République, contenaient un appel à la discrimination. »[90]

[87] Le texte figurant sur la couverture du numéro daté du 26 septembre au 2 octobre 2013 : « Naturalisés. L'invasion qu'on cache : Deux français sur trois contre les naturalisations massives de Valls. Islam, immigration : comment la gauche veut changer le peuple ; « Le poids des musulmans n'a cessé d'augmenter », les propos étant associés à la reproduction d'un buste de Marianne revêtue d'un voile intégral noir.

[88] Cass., 7 juin 2017, n° 16-80.322. La jurisprudence en la matière a évolué dans la mesure où, jusqu'en 2017, il suffisait que les propos incriminés tendent à susciter un sentiment d'hostilité ou de rejet à l'égard d'une personne ou d'un groupe de personnes (à raison de leur appartenance). Désormais, les tribunaux ont tendance à retenir une conception restrictive de la « provocation » et à exiger un appel ou une exhortation à la discrimination, à la haine ou à la violence. Voir A.-M. Sauteraud, « Les nouveaux contours de la provocation à la haine ou à la violence raciale ou religieuse », *Légipresse*, vol. 61, 2019, pp. 33-38. Cette évolution n'est pas sans incidence sur le fond, mais ce que l'on retient ici, ce sont les variations dans l'analyse du fondement de la haine ou de la discrimination.

[89] Les propos incriminés sont les suivants : « Nous vivons depuis trente ans une invasion, une colonisation, qui entraîne une conflagration […] Dans d'innombrables banlieues françaises où de nombreuses jeunes filles sont voilées, c'est également l'islam, c'est également du djihad, c'est également la lutte pour islamiser un territoire qui n'est pas, qui est normalement une terre non islamisée, une terre de mécréant. C'est la même chose, c'est de l'occupation de territoire » et « je pense qu'il faut leur donner le choix entre l'islam et la France ».

[90] Cass., 17 septembre 2019, n° 18-85.299. Dans cette affaire, la Cour européenne des droits de l'homme a conclu à la non-violation de l'article 10 : « le recours à des termes agressifs exprimés sans nuance pour dénoncer une 'colonisation' de la France par 'les musulmans' avait des visées discriminatoires et non pour seul but de partager avec le public une opinion relative à la montée du fondamentalisme religieux dans les banlieues françaises. Dans ces conditions, et à la lumière de l'article 17, la Cour considère que les propos du requérant ne relèvent pas d'une catégorie de discours bénéficiant d'une protection renforcée de l'article 10 de la Convention, et en déduit que les autorités françaises jouissaient d'une

III. Liberté d'expression religieuse

Alors qu'il n'existe « expressément aucune disposition formelle imposant à ceux qui s'expriment publiquement de respecter les croyances » religieuses,[91] la liberté de religion n'autorise pas une plus grande liberté d'expression aux croyants (2). Dans certains cas, le droit français traduit même la tendance ancienne des autorités publiques à surveiller et limiter l'expression des convictions religieuses, sous la forme de discours ou d'écrits, et la consécration de la liberté de religion à l'ère des droits de l'homme ne l'a pas effacée, loin de là (1).

1. Une liberté d'expression religieuse sous contrainte directe et indirecte

Cette tendance historique vise essentiellement les ministres du culte. Certaines dispositions de la loi du 9 décembre 1905 concernant la séparation des Églises et de l'État font des ministres du culte « de possibles propagateurs d'un discours antirépublicain et donc hostile à la séparation. Ces dispositions, qui figurent dans le titre IV de la loi de 1905 consacré à la Police des cultes, peuvent être interprétées comme une version 'républicaine' »[92] de la « préoccupation de tous les États aussi de maintenir l'ordre dans le culte, dans les assemblées du culte. […] Les États craignent leurs prédicateurs. »[93] D'un point de vue historique, il s'agissait d'éviter la propagation, au sein des lieux de culte, de discours anti républicains de la part du clergé catholique.[94]

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large marge d'appréciation pour y apporter une restriction. » (§ 61). Elle ajoute que « ces propos ne se limitaient pas à une critique de l'islam, mais comportaient, compte tenu du contexte général dans lequel ils s'inscrivaient et des modalités de leur diffusion, une intention discriminatoire de nature à appeler les auditeurs au rejet et à l'exclusion de la communauté musulmane dans son ensemble et, ce faisant, à nuire à la cohésion sociale. » (§ 63), CourEDH, 20 décembre 2022, *Zemmour c. France*, n° 63539/19.

[91] H. Leclerc, « Laïcité, respect des croyances… », art. cité, p. 43.

[92] A. Fornerod, « Relation de travail et ministres du culte en France », *Derecho y religión*, Vol. XVI, 2021, pp. 165-166.

[93] G. Le Bras, *La police religieuse dans l'ancienne France, Cours d'histoire du droit public de 1940-1941*, polycopié, p. 11.

[94] Voir notamment les articles 34 (« Tout ministre d'un culte qui, dans les lieux où s'exerce ce culte, aura publiquement par des discours prononcés, des lectures faites, des écrits distribués ou des affiches apposées, outragé ou diffamé un citoyen chargé d'un service public, sera puni d'une amende de 3 750 euros et d'un emprisonnement d'un an, ou de l'une de ces deux peines seulement. La vérité du fait diffamatoire, mais seulement s'il est relatif aux fonctions, pourra être établi devant le tribunal correctionnel dans les formes prévues par l'article 52 de la loi du 29 juillet 1881. Les prescriptions édictées par l'article 65 de la même loi s'appliquent aux délits du présent article et de l'article qui suit. ») et 35 (« Si un discours prononcé ou un écrit affiché ou distribué publiquement dans les lieux où s'exerce le culte contient une provocation directe à résister à l'exécution des lois ou aux actes légaux de l'autorité publique ou s'il tend à soulever ou à armer une partie des citoyens contre les autres, le ministre du culte qui s'en rend coupable est puni de cinq ans d'emprisonnement et de 75 000 euros d'amende, sans préjudice des peines de la complicité dans le cas où la provocation est suivie d'une sédition, révolte ou guerre civile. »)

D'autres dispositions ont été ajoutées par la loi du 24 août 2021 confortant le respect des principes de la République qui s'inscrivent plus ou moins explicitement dans la logique de lutte contre le terrorisme. Ainsi, une personne condamnée pour acte de terrorisme (articles 421-1 à 421-6 du Code pénal) « ne peut diriger ou administrer une association cultuelle pendant une durée de dix ans » (article 36-2 L. 1905), durée réduite à cinq ans lorsque la personne a été reconnue coupable du délit de provocation directe à des actes de terrorisme ou d'apologie publique de ces actes (article 36-2 L. 1905).

Par ailleurs, deux types de mesure peuvent s'analyser en des limitations à la liberté d'expression religieuse extérieures au dispositif de la loi de 1881 : la fermeture de lieux de culte et la dissolution d'association. Ainsi, la préfecture de police peut, pour une durée maximale de deux mois, « prononcer la fermeture temporaire des lieux de culte dans lesquels les propos qui sont tenus, les idées ou théories qui sont diffusées ou les activités qui se déroulent provoquent à la haine ou à la violence envers une personne ou un groupe de personnes ou tendent à justifier ou à encourager cette haine ou cette violence. » (article 36-3 L. 1905). Ces dernières dispositions, qui évoquent nettement celles de l'article 24 de la loi du 29 juillet 1881,[95] équivalent à une sanction spécifique, « collective », du délit de provocation à la haine ou à la violence. Un litige révèle l'articulation complexe avec l'article L. 227-1 du Code de la sécurité intérieure qui permet à la préfecture de police, pour six mois maximum, et « aux seules fins de prévenir la commission d'actes de terrorisme », de « prononcer la fermeture des lieux de culte dans lesquels les propos qui sont tenus, les idées ou théories qui sont diffusées ou les activités qui se déroulent provoquent à la violence, à la haine ou à la discrimination, provoquent à la commission d'actes de terrorisme ou font l'apologie de tels actes. » Sur ce fondement, la préfecture de la Gironde avait prononcé la fermeture, pour une durée de six mois, d'un lieu de culte musulman en raison des propos tenus par ses imams sur internet, messages incitant, entre autres, « au repli identitaire, à méconnaître les lois de la République présentées comme incompatibles avec l'islam et condamnant les musulmans ne partageant pas leur vision rigoriste ». Or, le Conseil d'État a jugé que ces éléments, « s'ils sont susceptibles de caractériser la diffusion d'idées et de théories provoquant à la violence, à la haine ou à la discrimination envers une personne ou un groupe de personnes ou tendant à justifier ou à encourager cette haine ou cette violence, de nature le cas échéant à fonder une mesure de fermeture temporaire du lieu de culte en application de l'article 36-3 de la loi du 9 décembre 1905, ne permettent pas de caractériser un lien avec un risque de

[95] « Ceux qui, par l'un des moyens énoncés à l'article 23, auront provoqué à la discrimination, à la haine ou à la violence à l'égard d'une personne ou d'un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance à une ethnie, une nation, une race ou une religion déterminée, seront punis d'un an d'emprisonnement et de 45 000 euros d'amende ou de l'une de ces deux peines seulement. »

commission d'actes de terrorisme ou une apologie de tels actes au sens des dispositions de l'article L. 227-1 du code de la sécurité intérieure. »[96] L'applicabilité de ces dispositions repose sur l'établissement d'un lien entre la provocation à la violence, à la haine ou à la discrimination et la commission d'actes terroristes ou la qualification d'apologie de tels actes. Sont pris en considération les propos tenus dans un lieu de culte, mais également ceux « exprimés, dans les médias ou sur les réseaux sociaux, par les responsables de l'association chargée de la gestion de ce lieu ou par les personnes en charge du culte qui y officient ainsi que des propos émanant de tiers et diffusés dans les médias ou sur les réseaux sociaux relevant de la responsabilité de cette association ou de ces personnes en charge du culte. »[97]

La dissolution d'association pourrait également apparaître comme une autre forme d'encadrement de la liberté d'expression religieuse. L'article L. 212-1, 6° du Code de la sécurité intérieure permet au gouvernement de dissoudre une association provoquant à la discrimination, à la haine ou à la violence envers une personne ou un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance à une ethnie, une nation, une race ou une religion déterminée, soit propagent des idées ou théories tendant à justifier ou encourager cette discrimination, cette haine ou cette violence, tandis que l'article L. 212-1, 7° permet de dissoudre l'association se livrant à des agissements en vue de provoquer des actes de terrorisme en France ou à l'étranger. Sur le premier fondement, « a été jugée légale la dissolution d'une association dont l'imam et son adjoint 'prêchaient au sein de la mosquée un islamisme radical, marqué par une forte hostilité à l'égard des chrétiens, des juifs et des chiites, prônant un rejet des valeurs et de certaines lois de la République [et] affichaient dans ces prêches leur soutien au djihad armé et à certains membres de la cellule terroriste dite de Cannes-Torcy ayant fréquenté régulièrement la mosquée'[98] ».[99] Sur le fondement de la seconde disposition, un décret du Président de la République avait dissous l'association « Fraternité musulmane Sanâbil ». La légalité de ce décret a été confirmée par le juge administratif qui a pris en compte le fait que « l'association requérante a développé, au travers de ses activités, en particulier sur

[96] Conseil d'État, ord., 26 avril 2022, n° 462685.

[97] Conseil d'État, ord., 29 novembre 2021, n° 458385 : confirmation de la fermeture d'une mosquée dont les dirigeants de l'association gestionnaire et les imams qui y officient « promeuvent une pratique radicale de l'islam, légitiment le recours au 'djihad' par les armes et cultivent la haine des personnes ne pratiquant pas la religion musulmane, en deuxième lieu, qu'ils ont légitimé des attentats terroristes commis en France, en troisième lieu, qu'ils entretiennent des relations avec des individus appartenant à la mouvance islamiste radicale et acquis aux thèses djihadistes et enfin, qu'ils diffusent un enseignement très radical au sein de l'école existant au sein du lieu de culte. »

[98] Conseil d'État, 26 janvier 2018, *Association Rahma de Torcy Marne-la-Vallée*, n° 412312.

[99] F. Dieu, « Liberté de religion et radicalisation devant le juge administratif », dans A. Fornerod (dir.), *La liberté de religion en question(s)*, Bruxelles, Larcier, 2022, p. 197 et s.

des sites internet et par l'organisation de rencontres, notamment de pique-niques, un important réseau relationnel dans le cadre duquel elle manifeste de la sympathie et apporte son soutien à des individus en lien avec la mouvance terroriste se revendiquant de l'islamisme radical ».[100]

Une affaire récente étend la question des limites à la liberté d'expression religieuse via la dissolution d'une association au-delà de la problématique du terrorisme islamiste. L'association Civitas a ainsi été dissoute par décret le 4 octobre 2023.[101] Cette dissolution a été décidée notamment du fait que l'association « promeut une idéologie consistant à hiérarchiser les êtres humains, promeut l'infériorité des communautés juive et musulmane présentées comme des menaces pour la société, et ce faisant, tient un discours ouvertement antisémite, gravement hostile aux musulmans et d'une manière générale xénophobe » et qu'elle diffuse cette idéologie à travers des conférences, des rassemblements et des vidéos. En outre l'association « diffuse une idéologie hostile aux personnes de confession musulmane, et présentant les étrangers, réels ou supposés, comme des terroristes ou des assassins et appelle à des actes de violences à leur égard ».

Outre ces formes spécifiques de limitation de la liberté d'expression religieuse, les croyants sont, comme toute personne, soumis au droit général de la liberté d'expression.

2. L'application des règles générales de la liberté d'expression aux croyants

En considérant les formes classiques de la liberté d'expression lorsqu'elles sont utilisées par les croyants, au nom de leur appartenance religieuse, il apparaît que la jurisprudence en la matière est rare et repose surtout sur les incriminations en matière de provocation d'actes terroristes ou d'apologie de tels actes.

On peut citer une affaire dans laquelle des poursuites avaient été engagées à l'encontre d'un prêtre pour les propos qu'il avait tenus lors d'une homélie, déclarant : « Il est né à Bethléem en Palestine. Il est né à Bethléem. Pauvre innocent ! Sharon lui a tiré dessus… ». Pour prononcer la relaxe, la cour d'appel de Montpellier, approuvée par la Cour de cassation, avait retenu que « les propos reprochés au prévenu ne visent

[100] Conseil d'État, 26 janvier 2018, *Association Fraternité musulmane Sanâbil-Les Épis*, n° 407220.

[101] Selon les termes du décret, l'association Civitas, « déclarée le 23 juillet 1999 et qui s'est transformée en parti politique depuis la modification de ses statuts en 2016, a pour objet d'œuvrer 'en tant que parti politique à promouvoir et défendre la souveraineté et l'identité nationale et chrétienne de la France en s'inspirant de la doctrine sociale de l'Église, du droit naturel et des valeurs patriotiques, morales et civilisationnelles indispensables à la renaissance nationale ; mener conformément à ses objectifs à tous les échelons, du local, national à l'international, toutes les actions qu'il jugera utiles, y compris le soutien à des candidats à un scrutin ou la participation à des élections' ». Voir le texte du décret : https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000048151580 (dernière consultation: 15 mars 2024).

qu'à condamner la politique suivie par M. Sharon, sans que soit mis en cause ni le peuple d'Israël ou de Palestine, ni le peuple juif, ni la religion juive » et que « les propos incriminés ne sont que l'expression de la liberté, reconnue à tout citoyen, dans une démocratie, de critiquer la politique suivie par un Gouvernement ».[102] Plus récemment, ont été également analysés à la lumière du délit de provocation à la discrimination, à la haine ou à la violence, les propos d'un imam tenus au cours d'un prêche.[103] Pour déclarer l'imam coupable du chef de provocation à la haine raciale, les juges ont entre autres retenu qu'il n'avait donné aucune explication au « hadith »[104] qui aurait permis d'en faire une autre lecture que celle de l'appel, textuel, au meurtre des juifs qu'il contient et ont conclu que « les propos poursuivis exhortent à la haine ou à la violence à l'égard de l'ensemble des juifs […] à raison de leur origine ou de leur appartenance à la religion juive. »

Toutefois, et sans surprise, ce sont surtout des propos reliés au terrorisme islamiste qui sont source de contentieux. On citera trois affaires, à titre d'exemples, qui reflètent les liens avec trois attentats différents (contre *Charlie Hebdo*, l'assassinat de Samuel Paty ainsi que l'attentat de Nice). Dans la première, lors d'un rassemblement en hommage aux victimes des attentats ayant frappé la France entre les 7 et 9 janvier 2015, le prévenu a exhibé une pancarte sur laquelle il était écrit, d'un côté, "je suis humain - je suis Charlie", et de l'autre, "je suis la vie", avec la représentation d'un cœur, et "je suis K…" de l'autre, ce qui était une référence indéniable à deux frères impliqués dans les attentats terroristes visés par cette manifestation. Ayant par ce comportement lors d'un rassemblement public, « manifesté une égale considération pour des victimes d'actes de terrorisme et l'un de leurs auteurs à qui il s'identifiait », le délit d'apologie d'actes de terrorisme était caractérisé.[105] Dans la deuxième, la prévenue a été poursuivie du chef d'apologie d'actes de terrorisme pour avoir dit à une enseignante : « vous les profs vous êtes faits pour vous faire égorger ». Pour confirmer le jugement de relaxe, l'arrêt retient que, si les propos poursuivis ont été prononcés publiquement, quelques jours après un assassinat, il ne s'agissait pas d'inciter publiquement à porter sur ces infractions ou leurs auteurs un jour favorable. Les juges ajoutent que la prévenue ne présente aucun signe de radicalisation ou de soutien à une action terroriste et que, si elle se dit attachée à sa religion, c'est pour affirmer que les personnes qui commettent des péchés vont en enfer, sans que cette allégation ne soit suffisante pour retenir son appartenance personnelle à une quelconque organisation terroriste, la consultation d'un fait d'actualité au moyen d'un moteur de recherche en

[102] Cass., crim., 12 avril 2005, n° 04-82.507.

[103] Cass., crim. 19 décembre 2023, n° 22-87.200.

[104] Il s'agissait du hadith « des pierres et des arbres », traduit dans l'arrêt par « Il y a un juif derrière moi, viens et tue le »

[105] Cour de cassation, 25 avril 2017, n° 16-83.331.

source ouverte ne pouvant pas non plus être retenue comme un signe de soutien à une action terroriste.[106] Le prévenu était poursuivi pour avoir « sur le réseau internet et par des courriers électroniques adressés à de nombreux destinataires, d'une part, fait l'apologie d'actes de terrorisme en écrivant : 'les terroristes sont une force du bien', 'L… A… mérite notre compassion, notre pitié et notre sympathie', 'va au paradis, L… A… tu es un héros, l'histoire le montrera', 'L… devrait avoir une statue de 10 mètres devant […]', d'autre part, menacé de mort » plusieurs personnes, dont un juge d'instruction et le procureur de la République de Nice, le maire de cette ville. Les propos « poursuivis sous la qualification d'apologie ont été diffusés publiquement et, glorifiant des actes terroristes, et spécialement l'attentat commis à Nice le 14 juillet 2016, et faisant l'éloge de leurs auteurs, sans se prêter à aucune interprétation et sans qu'il soit possible de leur trouver un sens philosophique ou satirique, caractérisent le délit de l'article 421-2-5 du code pénal ».[107]

106 Cour de cassation, 23 mai 2023, n° 22-82.185.
107 Cour de cassation, 17 septembre 2019, n° 18-83.472.

FREEDOM OF SPEECH AND RELIGION IN GREECE

Lina Papadopoulou[1]

I. Defining the topic

Both freedom of speech and freedom of religion are protected in Greece on the basis of the country's national Constitution and international and European Union law. The European Convention on Human Rights and the Strasbourg jurisprudence are the most important sources of international law obligations and function as a guide for the national jurisprudence. The rights of the freedom of speech and the freedom of religion are interconnected as they are both special manifestations of a more general intellectual freedom. Expressing one's religious beliefs, in the form of speech, clothing, symbols etc., is a manifestation of both rights as religious worship can also be considered to be a special form of expression. Nevertheless, the two rights are sometimes considered to be in conflict with each other. This is the case when free speech may attack religious beliefs (blasphemy or defamation of religion) or believers (hate speech), or when religious preaching falls under the prohibited (in Greece) mode of proselytism. These three different kinds of speech deserve closer examination.

On the one hand, in Greece – as elsewhere in the EU – freedom of speech is considered to be one of the fundamental rights and freedoms. However, Article 14 of the Greek Constitution (hereafter GrConst) provides for a long list of grounds on which the freedom of expression can be limited. On the other hand, not only is religious freedom guaranteed by the national Constitution and international law but religion is still a very important factor in the social life of the Greeks, with the Christian Orthodox Church, representing the dominant religion in the country,[2] enjoying an enhanced legal protection and exercising a significant influence on political decisions.

[1] *Aristotle University of Thessaloniki.*

[2] See, generally, Lina Papadopoulou, 'Greece', in G. Robbers & W.C. Durham (eds.), *Encyclopedia of Law and Religion*, Leiden: Brill 2016, 156ff.

The expression of religious faith, views and criticism, of course, may conceptually fall under both of these rights, namely the freedom of religion and the freedom of expression; they are considered to be manifestations of the religious freedom covering the *forum externum* as a *lex specialis*. Religion and religious views can be the motive and means of expression but they can also be the target: religious views, sacred persons and symbols themselves and also people holding specific religious views, especially minority ones may be the target of extreme, insulting or hate speech. This bifurcation of extreme or insulting religious speech – one targeting religion as such, its views and symbols (legally termed as blasphemy or defamation of religion) and the other targeting the believers or non-believers (hate speech) – is of great legal significance. As will be shown below, these two, apparently similar, delicts protect two very different legal goods and should, therefore, be legally treated in a different way. Indeed, this bifurcation results – *de lege lata* – in a different legal formalization and constitutional evaluation of the respective delicts / crimes. While blasphemy / defamation of religions tends to be abolished in the EU Member States (and beyond), and has indeed been abolished in Greece, hate speech is forbidden on the basis of an EU-wide legal regulation (framework decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law).

A special question arises in the case of the type of speech that might hurt believers' religious feelings (or so, at least, is claimed by certain believers). The question of whether such speech falls under the category of blasphemy / defamation of religion or that of religious hate speech / group defamation needs to be explored. A further debate concerns the belief that these two rights, namely those of free speech and the freedom of religion, might be in conflict when somebody freely expresses a criticism or even ridicules a religion or its symbols, beliefs or sacred persons. Is there really a conflict or tension between free speech and religious freedom in such a case? Does religious freedom not only protect a person's ability to express their religious beliefs but also prevent everybody else from criticizing or ridiculing these same beliefs? If I am free to do something, does that mean that nobody else is free to criticize what I do or believe? Does the freedom of establishing a political party, for example, go so far as to mean that everybody loses their freedom to criticize my political beliefs or to ridicule the party's beliefs, leaders or symbols? Or should religion be understood as something 'sacred' and, as such, different from any other organization or system of beliefs, something beyond the reach of secular things?

This essay deals with these questions of legal theory and also with the treatment of such speech *de lege lata* in the Greek legal order. It proceeds in four stages. First, it gives an overview of the national constitutional landscape, showing the breadth of free speech protection and its limits. Second, the essay provides a brief overview of the offences of blasphemy and defamation of religions, as they were formalized in Greek penal law. The abolition of blasphemy in 2019 is a telling example of the

more general tendency that can be observed worldwide. Third, the essay provides an analysis of the existing jurisprudence of the national courts concerning hate speech. However, as will be shown below, convictions in the area of hate speech are still very rare. The final section contains a summary of the legal situation in Greece and of the arguments and views expressed in this essay.

II. Freedom of Conscience, Religion, and Expression in the Greek legal order

A. The fundamental norms regulating freedom of expression

1. *General freedom of expression*

Freedom of expression is considered as both a civil and a political right, as it is connected with both the free development of one's own personality (personal autonomy) and with democracy (collective autonomy).[3] This means that it is vital not only for the self-realization of a single person but also for the smooth functioning of any democratic and liberal regime, closely connected with the freedom of the press and political pluralism.

International law, including Articles 9 and 10 of the European Convention on Human Rights (ECHR, ratified through Legislative Decree 56/1974), 19 §§2-3 of the International Covenant on Civil and Political Rights, ICCPR, 1966, ratified through Law 2462/1997) also guarantees freedom of expression and is binding on the Greek legal order. Within the framework of EU law, Article 11 of the Charter of Fundamental Rights of the EU (Charter) protects this same right in Greece, interpreted – as provided for by Article 52§3 Charter – in harmony with the ECHR.

In order to define the specific contours of speech protection in Greece, the current[4] Greek Constitution (GrConst) has to be taken into consideration, keeping in mind that the national Constitutions have to be interpreted nowadays in harmony with the jurisprudence of the ECtHR, which teaches us that not only the content but also the context of speech is to be evaluated in order for its legal limits to be defined. Article 14§1 GrConst stipulates:

> Every person may express and propagate his/her thoughts orally, in writing and through the press in compliance with the laws of the State.

This provision protects the positive freedom of opinion and, more generally, of speech, or more broadly, of expression, but also, in its negative manifestation, the refusal to disclose beliefs and opinions. It includes everybody's right to form, hold,

[3] Council of State (plenary) 1901/2014, 3914/2015. The Council of State (hereafter CoS) is the supreme administrative court in Greece (N.B. there is no constitutional court in the country).

[4] Similarly in the previous Constitutions, see Arts 10 GrConst 1844, 14 GrConst 1864, 14 GrConst 1911, 16 GrConst 1925, 16 GrConst 1927, 14 GrConst 1952.

express, disseminate or silence, but also to receive, an opinion, view or idea, or to react positively or negatively to such.[5]

This right is a constituent element of many other individual intellectual and spiritual rights, such as the freedom of assembly or association, the freedoms of art, science and education, as well as religious freedom. Therefore, its limitation is not only linked to the limitation of other intellectual freedoms, but also brings it about. This provision is complemented by special manifestations of intellectual production and expression, and, specifically, the freedoms of art, science, research and teaching which are guaranteed in Article 16 §1 GrConst, as absolute rights, and constitute a *lex specialis* against the general freedom of expression.

In its positive dimension, the recognition and securing of a civil right implies, in principle, that every individual can express and spread their 'reflections', i.e., opinions, views and beliefs, on any possible matter. Everybody can also receive other people's reflections and information. All of these should occur – since we are speaking here about a freedom – without any negative consequences brought about by the state or by private agents (horizontal effect). It is, however, disputable whether commercial speech and advertising is protected by Article 14 (freedom of expression)[6] or under the more flexible Article 5§1 GrConst (re. the general free development of one's personality in its special manifestation of economic freedom), which allows for more far-reaching restrictions.

Notably, the freedom of expression includes the right to form, hold, express, disseminate or seek, receive, accept or reject and criticize any opinion or view, regardless of its correctness, one-sidedness, popularity, social utility, provocativeness, cause of offence or displeasure, or cause of concern or disturbance to the state or part of its citizens. In the same way as the ECHR, the Greek Constitution ensures that the right to freedom of expression is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.

2. *Freedom of information*

Furthermore, the freedom of expression includes the freedom to inform and be informed,[7] that is, both the active and passive freedom to circulate not only opinions but, in principle, information as well.[8] In its passive dimension, this right, in combina-

[5] Wassilios Skouris, 'The Fundamental Rights of Communication', in A. Weber (ed.), *Fundamental Rights in Europe and North America*, Part B: The Individual Rights, III: Greece, Supplement 7, Kluwer Law International, 2003, 59, 62.

[6] Skouris, 'The Fundamental Rights of Communication,' *op. cit.*, 63ff.

[7] Council of State 2209/1977.

[8] Skouris, 'The Fundamental Rights of Communication,' *op. cit.*, 59ff.

tion with Articles 5§1 (free development of one's own personality) and 5A GrConst (the right to information)[9] also includes the freedom of each person to be informed regularly and freely from any available source on any matter of interest to them.[10] The right of Article 5A is closely related to the right of free expression and opinion of Article 14 GrConst, since the fulfilment of the freedom to express an opinion presupposes the right to information, which also contributes significantly to the formation of a pluralistic public opinion. Obviously, the freedom of information is also closely linked to the freedom of the press, and has been transformed from a "passive" kind of freedom (the freedom to receive information) into one which includes the more active role of not only searching for information and data but also transmitting such, especially due to the Web 2.0.

In harmony with the jurisprudence of the ECtHR, opinions and value judgements are more resistant and enjoy a more enhanced freedom and protection when they clash with other rights, as compared to information, which is softer and may be limited more easily when it is fake or constitutes a defamation of a person.[11] Hate speech is one manifestation of opinion that is not tolerated – a type of opinion which, however, is very often complemented by, and closely connected to, fake and defamatory information about its target group. On the other hand, when it comes to the distribution of information, fake news is not protected.

3. *Media freedom*

According to Article 14§2 GrConst, "The press is free. Censorship and all other preventive measures are prohibited." The functioning of the media is regulated by an Independent authority, namely the National Council for Radio and Television (NCRTV) (*Ethniko Symvoulio Radiotileorasis*, ESR). The NCRTV, founded in 1989, is an independent public authority that supervises and regulates the radio/television market. It was later enshrined into the Constitution, in Article 15 para 2, via the 2001 revision, and was guaranteed, together with other Independent authorities also provided for by the Constitution, through Article 101A GrConst. It is a nine-member

[9] This article was added in the extensive constitutional revision of 2001 and makes the following provisions:

1. All persons have the right to information, as specified by law. Restrictions to this right may be imposed by law only insofar as they are absolutely necessary and justified for reasons of national security, of combating crime or of protecting rights and interests of third parties.
2. All persons have the right to participate in the Information Society. Facilitation of access to electronically transmitted information, as well as of the production, exchange and diffusion thereof, constitutes an obligation of the State, always in observance of the guarantees of articles 9, 9A and 19.

[10] See the judgements of the Council of State 3880/2002· 3335/2007· 1901/2014· 626/2016.

[11] See Council of State 1213/2010 (Plenary) and 1731/2017 (Section D΄).

body, consisting of a President, a Vice President and seven members, all appointed by the Greek Parliament.[12] It ensures that all broadcasts comply with the provisions laid down by the law of the Greek state, from which they emanate, as well as by the ¨Television without Frontiers¨ Directive of the European Commission.

B. Limitations of the freedom of speech

1. *General limitations*

The freedom of expression is, as Articles 14 GrConst and 10 ECHR stipulate, not absolute but susceptible to a long series of limitations. It is worth mentioning that this is the sole provision of the Convention which mentions (§2) that this freedom "carries with it duties and responsibilities". In harmony with the requirements laid down by the Convention, the Greek Constitution also allows for limitations on the right to free speech if such a limitation:

- **i.** is provided for by the Constitution itself or by a law, with the characteristics required by the ECtHR[13]
- **ii.** pursues a legitimate purpose (constitutionally imposed or allowed for) and
- **iii.** does not violate the principle of proportionality.

2. *The special protection of religion / religious freedom through limitations imposed on free speech*

a) *Seizure of newspapers*

Following Article 14§2 GrConst, which guarantees press freedom and prohibits censorship and all other preventive measures, the next paragraph (§3) of the same article also prohibits "the seizure of newspapers and other publications before or after circulation". However, it allows for censorship in very specific cases, including a special protection of religion, among other protected legal goods. More specifically, according to Articles 14§3b and 14§4:

> Seizure by order of the public prosecutor shall be allowed exceptionally after circulation and in case of:

[12] It was first established through L 1866/1989 and amended by L 2863/2000 and L 3051/2002. As explained on its website (https://www.esr.gr/information/), "NCRTV is comprised of nine members (Act N. 4357/16), who are nominated by the Conference of the Presidents, a special body of the Parliament in charge of the nomination of the independent authorities, and in which all political parties are represented. The nominees have to be elected by 4/5 of the members of the Conference of the Presidents. The members of the Authority are appointed for a period of six years, not renewed, and enjoy absolute personal and operational independence in the performance of their duties guaranteed by the Constitution, according to the last (18/04/2001) Revision of the Constitution (Article 15 §2).".

[13] Cf. ECtHR Perincek §§ 131-135.

> a) an offence against the Christian or any other known religion,[14]
> b) an insult against the person of the President of the Republic,
> c) a publication which discloses information on the composition, equipment and set-up of the armed forces or the fortifications of the country, or which aims at the violent overthrow of the regime or is directed against the territorial integrity of the State,
> d) an obscene publication which is obviously offensive to public decency, in the cases stipulated by law.
>
> 4. In all the cases specified under the preceding paragraph, the public prosecutor must, within twenty-four hours from the seizure, submit the case to the judicial council, which, within the next twenty-four hours, must rule whether the seizure is to be maintained or lifted; otherwise it shall be lifted *ipso jure*. An appeal may be lodged with the Court of Appeals and the Supreme Civil and Criminal Court by the publisher of the newspaper or other printed matter seized and by the public prosecutor.

According to the author's opinion, Article 14§3a GrConst, as it stands, conflicts with the ECHR. The conflict is even greater after the abolition from the Greek Penal Code of the delicts of blasphemy and defamation of religions.

b) *Prohibition of proselytism*

According to Article 13§2 GrConst, "Proselytism is prohibited". This prohibition is absolute and definitive but it does not oblige the Greek legislator to formalize proselytism as a crime, as is now the case. Moreover, the definition of proselytism is a difficult endeavour. The speech act of proselytism is a manifestation of both the freedom of expression (of the perpetrator) and of religion (of both the perpetrator and the victim).

As the law now stands, the offence of proselytism is provided for in two mandatory laws promulgated before WWII by an autocratic government (Metaxas's dictatorship), namely L 1363/1938 and L 1672/1939. According to these laws, "anyone engaging in proselytism shall be liable to imprisonment and a fine". Article 4 (2) of Law 1363/1938 (as amended by Article 2 of L 1672/1939) stipulates that proselytism is

> 'in particular' the direct or indirect attempt to penetrate through all kinds of benefits or through the promise of such or other moral or material treatment, through fraudulent means through the abuse of inexperience or trust or by taking advantage of need, spiritual weakness or deafness the religious consciousness of heterodox[15] for the purpose of changing its content.

[14] The concept of 'known religion' does not presuppose an approval or in any manner recognition by means of a state or ecclesiastical act, see CoS 310/1997, CoS 493/1997.

[15] Heterodox meaning of a different religious persuasion.

This prohibition clearly limits the extent of expression of religious faith and beliefs,[16] when this expression is directed at others with the aim of changing their different religious views. Moreover, the wording of the law is very vague and it can include any religious teaching. In particular, the phrase 'in particular' undermines legal certainty,[17] which is indispensable in penal law, as it allows for further features of proselytism to be added.

While until 1927 acts of proselytism were conceivable only against the prevailing religion, since then it has been possible for such acts to be carried out in favour of the prevailing religion,[18] namely the religion of the Greek Orthodox Church.[19] However, for most of the 20th century the Greek courts applied this prohibition mainly to the Jehovah's Witnesses. Although the aim needs to be penetration into another person's conscience, the crime is completed even if this penetration is not finally successful.[20] Greek courts found that this crime can be committed by a parent − usually in case law this parent was a member of a minority religion − when he/she abused their parental duty to guide their underage child into religious faith, or even between spouses. In the latter case, proselytism can be a ground for divorce.[21]

It needs to be emphasized that, in order for the constitutional prohibition of proselytism to be in harmony with the general freedoms of religion and expression (in their combined application as a free expression of religious beliefs), proselytism can only be understood – as the ECtHR has made clear in the two remarkable cases of *Kokkinakis v Greece*[22] and *Larissis and Others v Greece* – as involving the use

[16] And not of worship.

[17] For this argument see also see the partially dissenting opinion of Judge Repik in *Larissis and Others v. Greece* (No. 140/1996/759/958-960, 24 February 1998):

"a believer who tries to spread his religious beliefs can never be certain whether his conduct is illegal or not. The law is not sufficiently precise and its effects are therefore not sufficiently foreseeable; it cannot guarantee legal certainty or equality of treatment, nor can it afford protection against arbitrary measures by the authorities responsible for applying it."

[18] This has been expressly recognized also by Areios Pagos in its judgement 480/1992 (penal).

[19] For a concise presentation of the status of the prevailing religion in Greece, see 'Law and Religion in Greece,' in G. Robbers & W.C. Durham (eds), *Encyclopedia of Law and Religion*, Vol 4: Europe, Leiden/Boston: Brill 2016, 156-166; Constantine Papageorgiou, Papageorgiou, Constantine. 'Greece' in *International Encyclopaedia of Laws: Religion*, edited by Wouter Druwé. Alphen aan den Rijn, NL: Kluwer Law International, 2021, 31ff.

[20] Cf. Elisavet Gklavini, 'The legal prosecution of proselytism in Greece, before and after the Kokkinakis vs. Greece ECHR case (25.5.1993): an analytical study in comparison to the United States of America Law,' *Pro Justitia* 4 (2021), 39-53 (40-1), available at: file:///C:/Users/linap/Downloads/8508-22235-2-PB.pdf).

[21] Constantinos Papageorgiou, 'The Special Treatment of Religions in the Context of Greek Penal Law', in M. Kotiranta / N. Doe, *Religion and Criminal Law*, Peeters 2013, pp. 115-120 (115).

[22] *Kokkinakis v. Greece* (application No. 14307/88) 25 May 1993; cf. Effie Fokas, 'Kokkinakis at the Grassroots Level,' (2017) *Religion & Human Rights*, 12: 2-3, 210-222.

of unfair means. Merely the dissemination of religious beliefs through pamphlets or merely the preaching to a person or striving to exercise religious influence are not enough. In the landmark *Kokkinakis* case, the compatibility of certain sanctions for proselytism with Articles 7 and 9 ECHR was decided.

Since these two seminal judgments, Greek legislation has been interpreted and applied in harmony with the ECtHR's jurisprudence[23] and the Greek Constitution and Greek courts rarely apply[24] this provision any longer. However, there are recommendations[25] and claims, *de lege ferenda*, that these constitutional and statutory provisions should be abolished.[26] This is mainly because proselytism had been abused for a long time as a sword hanging over the heads of religious minorities, especially the Jehovah's Witnesses, as a tool to safeguard the prevalent religion's privileged treatment by Greek state institutions.

3. *Application of Sharia and freedom of speech*

Greece is the only state in the EU where Sharia courts operate on the basis of national and – allegedly – international law in order to regulate the legal affairs and family and inheritance relationships of the Muslim Greek citizens living in Western Thrace.[27] This jurisdiction was obligatory for all the Muslims of Western Thrace

[23] This has been recognized by the Council of Europe, see Resolution DH (97) 576, adopted by the Committee of Ministers on 15 December 1997 at the 610th meeting of the Ministers' Deputies; ResDH(2004)80 adopted by the Committee of Ministers on 22 December 2004, at the 906th meeting of the Ministers' Deputies.

[24] See, for example, Areios Pagos 1088/2013 (penal) 7 June 2013.

[25] For example, Abdelfattah Amor, the former United Nations Special Rapporteur on Religious Intolerance, "strongly recommended" that Greece abolish the offence of proselytism: see United Nations General Assembly, Doc. A/51/542/Add.1, "Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief", 7 November 1996, §§ 11, 12 and 134.

[26] See, for example, 'World Evangelical Alliance Urges Greece to Change the Legislation Prohibiting Proselytism,' 31 March 2022, at worldea.org/wea-urges-greece-to-change-the-legislation-prohibiting-proselytism/; Nicolas Bauer, The Offence of "Proselytising" in Greece before the ECHR, European Centre for Law and Justice, https://eclj.org/religious-freedom/echr/the-offence-of-proselytising-in-greece-before-the-echr#_ftnref10.

[27] For a detailed analysis of the Sharia regime and the tensions it creates with European human rights law, see Aspasia Tsaoussi / Eleni Zervogianni, 'Multiculturalism and Family Law: the case of Greek Muslims', in K. Boele-Woelki / T. Sverdrup, *European Challenges in Contemporary Family Law*, Intersentia, Antwerp / Oxford / Portland 2008, p. 209ff and Lina Papadopoulou, 'Trapped in History: Greek Muslim Women under the Sacred Islamic Law', in *Annuaire International des Droits de l'homme (AIDH)*, Vol. V, 2010, *Religions et droits de l' homme*, Athen / Bruxelles: Ant.N. Sakkoulas / Bruylant, 2010, pp. 397-418.

from 1923 (when the Lausanne Treaty was signed) with effect until 2018,[28] when the jurisdiction became optional on the basis of Law 4511/2018 in view of the possibility that Greece might be found to be in violation of the ECHR. The latter did indeed happen with the ECtHR Grand Chamber's decision on the case *Molla Sali v. Greece* (Application no. 20452/14, 19 December 2018). Nevertheless, Sharia law and its impact on family issues did not raise any significant controversy over the meaning of freedom of expression and freedom of speech in Greece.

What has caused much controversy, however, indirectly connected with religion and directly with ethnicity, is the fact that Muslims in Western Thrace (the region bordering Eastern Thrace, which is part of Turkey), who are Greek citizens of Turkish origin, in violation of their right to self-determination have been denied by the Greek courts the freedom to call themselves "Turk" or "Turkish" and name their NGOs in similar fashion. In 2012, the Areios Pagos (the Supreme Civil and Penal Court) decided to dissolve the "Turkish Union of Xanthi" by rejecting the application submitted by this Union on 19 March 2010 for annulment of the 477/2009 decision of the Court of Appeal of Xanthi (decision 353/2012, Fourth Civil Department). Decision 840/2021 of the Council of State (29 June 2021) rejected the appeal brought by the "Turkish Union of Xanthi" and considered its dissolution as legal for reasons that were explicitly challenged by the European Court in its final decision of September 27 2008. The respective ECtHR decisions[29] deal with the right of association (Article 11 ECHR), due to the refusal to register associations, which is considered by the Court to be a *lex specialis*[30] of Articles 9 and 10 ECHR, and have not yet been implemented by the Greek state.

[28] The Areios Pagos (Supreme Civil and Penal Court of Annulment, in its decision 1863/2013, 3rd Civil Department), had previously adjudicated, contrary to the decision of the courts of substance, that a person from the Muslim minority did not have the right to decide to inherit on the basis of Greek legislation and a civil law testament!

[29] Cases *Bekir-Ousta and others* (Appl. No. 35151/05, 11.10.2007) and *Emin and others* (Appl. No. 34144/05, 27.03.2008, domestic decisions of last instance in 2006 and 2005, respectively) and to the dissolution of an association (case *Tourkiki Enosi Xanthis and others*, Appl. No 26698/05, 27.03.2008; domestic decision of last instance in 2005) on the grounds that their aim was to promote the idea that an ethnic minority existed in Greece as opposed to the religious minority recognised by the Lausanne Treaty in 1923.

[30] See para 35 of the decision *Tourkiki Enosi Xanthis and others*, Appl. No 26698/05.

III. Blasphemy and Defamation of Religions: abolished in 2019

A. Blasphemy and / or defamation of religions: an outdated crime

> "God does not need the support of the prosecutor to confirm His presence, nor can He be considered as a legally protected interest for He is the beginning and the end of all legally protected interests."[31]

The Council of Europe distinguishes between three different kinds of speech directed against religion or religious people, namely: (a) blasphemy, (b) religious insults, and (c) hate speech against individuals on the grounds of their religion, as shown in its Recommendation 1805 (2007) on blasphemy, religious insults and hate speech against individuals on grounds of their religion.[32] In this Recommendation the Parliamentary Assembly of the Council of Europe (PACE) considered that "blasphemy, as an insult to a religion, should not be deemed a criminal offence." It also added that "national law should only penalize expressions about religious matters which intentionally and severely disturb public order and call for public violence."

As Sarafianos defines it, 'blasphemy is any public manifestation whatsoever (oral, in writing, by way of images, symbols and/or gestures) involving mockery, affront, offensive or vulgar expressions against God as the Supreme Being of monotheistic religions or against the divine, including anything that is considered sacred by a recognised religion'.[33] Within the more general realm of abolishing blasphemy laws, Greece also abolished the relevant provisions as part of an extended modification of its penal law in 2019.

This essay takes as its point of departure the fact that this development is definitely a positive one, as it enhances freedom of expression without undermining a legal good which deserves protection through penal law. Blasphemy and defamation of religions as crimes imply that religious beliefs should enjoy a special status in a society, that the state recognizes their sacredness for everybody and their absolute truth. That is why these crimes only made sense when prescribed against 'heretic' and 'unorthodox' views and religions that were against the state / prevalent religion, when the state was a religious state, and the religious truth of one official religion was obligatory for all the subjects of the King (*cuius regio, eius religio*). They make

[31] A. Kostaras, 'Freedom of art and penal law,' in *Democracy-Freedom-Security [volume in tribute to Ioannis Manoledakis]*, Sakkoulas Pubs., Athens/Thessaloniki, 2005, 428 (in Greek).

[32] Assembly debate on 29 June 2007, Recommendation adopted by the Assembly on 29 June 2007. See also Res (2006) 1510 on Freedom of Expression and Respect for Religious Beliefs, adopted by the Assembly on 28 June 2006.

[33] Dimitris Sarafianos, 'Blasphemy in the Greek Orthodox legal tradition,' in *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society*, Venice Commission, Council of Europe Publishing, *Science and Technique of Democracy*, No. 47, March 2010, 105.

no rational sense today, after the Enlightenment, in liberal democracies, in which no truth is recognized as absolute, religious freedom (not only tolerance) is guaranteed and religion is a matter of the private sphere of individuals, and not a state affair. As Christopoulos and Dimoulis succinctly put it: "To put it simply, whoever offends religion by word or art may well go to hell, but not to prison".[34]

In liberal democracies diverse religious communities coexist with each other in a state of pluralism, and the free expression of religious and political beliefs, ideas and views is a fundamental pillar of democracy and self-autonomy. Obviously this transformation of state and society is not yet complete in the Greek case, where there is a constitutionally entrenched prevalent religion; in Greece a continuous process of modernization is taking place, with political forces working either towards this end or trying to keep Greek society in the pre-Enlightenment era.

B. Blasphemy and defamation of religions in the Greek Penal Code (until 2019)

1. *Legal regulation*

Until 2019[35] and the extensive amendment and modernization of the Greek Penal Code, Greece was one of the few countries of the EU in which blasphemy and defamation of religions were still formalized as crimes. These two crimes were enshrined in Articles 198 and 199 of the old Penal Code respectively, which belonged to the Seventh Chapter on 'Undermining Religious Peace'.[36] The title of the section implies that the protected good is 'religious peace' as a special manifestation of social peace, not God or the religion as such. This chapter is concerned with four crimes:

Article 198 ('malicious blasphemy') stipulated that:

> 1. Anyone who insults God in public and with malicious intent, in any way whatsoever, shall incur a prison sentence of up to two years.
>
> 2. Whoever, except in the case of paragraph 1, publicly manifests with blasphemy a lack of respect towards God shall be punished by imprisonment of up to six (6) months or a fine of up to three thousand (3,000) euros.[37]

[34] Christopoulos and Dimoulis, 'Art Can Legitimately Offend,' 85.

[35] For a concise history of blasphemy laws in Greece, see Michael Tsapogas, 'Blasphemy and justice in a Greek Orthodox context', in *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society*, Venice Commission, Council of Europe Publishing, *Science and Technique of Democracy*, No. 47, March 2010, 113 (114f); Effie Fokas, 'God's Advocates, The Multiple Fronts of the War on Blasphemy,' in the entry on Greece in J. Temperman and A. Koltay (eds), *Blasphemy and Freedom of Expression*, CUP 2017, 389, 391f.

[36] See Dimitris Sarafianos*,* 'Blasphemy in the Greek Orthodox legal tradition,' in *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society*, Venice Commission, Council of Europe Publishing, *Science and Technique of Democracy*, No. 47, March 2010, 105-111.

[37] Article 24 of L 4055/2012 increased the penalty from three months to six months' imprisonment and a fine of up to 3000 euros.

Blasphemy, which could disrupt religious peace "by derision and disparagement of the convictions of others",[38] was only punishable if it was 'malicious'. Strangely, 'religious peace' could be disrupted even if no religious person was the object of the blasphemous speech or expressive act. This reveals that ultimately it was not religious peace but religion itself that was protected.[39]

The word 'malicious' refers to the *mens rea* of the perpetrator and means that a blasphemous speech act was qualified as 'malicious' as long as the perpetrator was aware of the significance of that and that they intended to offend the religion and its adherents.[40] This characterization limited the number of cases in which the crime was committed.

Article 199 (defamation or insulting of religions), stipulated that:

> Anyone who insults the Eastern Orthodox Church or any other religion recognised in Greece, in public and with injurious intent, in any way whatsoever, shall incur a prison sentence of up to two years.

Article 198 aimed at punishing whoever publicly and maliciously cursed God in any way, whereas Article 199 targeted whoever publicly and maliciously insulted in any way the Eastern Orthodox Church of Christ or any other religion tolerated in Greece.

Prosecutions could be initiated by the state or following a lawsuit brought by an individual, who, however, could not be an immediate party in the respective trial. It had been judged that in such cases individuals did not hold the right to pursue a civil action within criminal proceedings.[41] This was due to the jurisprudence of the Areios Pagos,[42] according to which the provisions of Articles 198 and 199 Penal Code aimed to prevent the public and malicious defamation of God and the Eastern Orthodox Church of Christ and any other religion tolerated in Greece and to protect them in

[38] Georgios Poulis, *Religious Criminal Law*, Athens 1996, 24 (in Greek).

[39] Tsapogas, 'Blasphemy and justice in a Greek Orthodox context,' 114.

[40] See also Sarafianos, 'Blasphemy in the Greek Orthodox legal tradition,' 106, who notes that 'at first, even the intention of derisory use of religious symbols was enough to qualify the offence as malicious'. Six years later, the Supreme Court (decisions 928/1984 and 1869/1984) interprets the term 'malicious' as incorporating 'a vilifying act aimed directly at offending a religion for the offender's gratification'.

[41] Areios Pagos 198/2002.

[42] Areios Pagos 1/2000 (in council) and 1298/2002 (Penal):

This view is further justified by reference to jurisprudence and theory and by the consideration that the intangible nature and sanctity of the legal goods protected by the mentioned criminal provisions make them incompatible with the concept of private interest that can be restored by the award, real or symbolic, of a certain amount of money (AP 1/2000) since the protection of the public interest takes precedence in preserving the goods of religious peace, but also the religious feeling, the feeling of reverence, and of religious freedom, regardless of the bodies on which the infringement of these goods reflects.

order to ensure the religious peace of the citizens. This legal good is of an intangible nature and falls under the concept of public interest.

This means, according to the Areios Pagos, that these crimes did not immediately affect the persons enjoying this good, who only indirectly and by reflection suffered as a result of this insult. This is why individual victims were not legalized in the representation of a civil lawsuit when the prosecution was based on Articles 198 and 199 Penal Code. In order to circumvent their exclusion from a criminal trial, the fanatics who turned against blasphemous works started appealing to the civil courts in order to obtain injunctions preventing the exhibition of such works, arguing that by offending God and religion the works also offended them personally.[43]

If one follows more closely the reasoning of these two judicial decisions (Areios Pagos 1/2000 and 1298/2002) and the exclusion of individuals as directly affected victims of these two crimes, one can easily deduce that religious feelings as such, which were hurt through the blasphemous or insulting speech, were not protected through the provisions of Articles 198 and 199 (of the old) Penal Code. Even less can it be argued that they are protected today after the abolition of blasphemy and the defamation of religions.

The two provisions (blasphemy and defamation of religions) were frequently used until their abolition, although, as will be shown below, the defendants were eventually acquitted of the charges. In this context, art enjoys a special protection. For example, it has been held that the act of blasphemy is not committed in a case where pieces of art depicting Jesus Christ and the Virgin Mary in a particular way are exhibited, provided the art is produced for artistic purposes.[44]

2. *The most flagrant incidents and the landmark legal cases of blasphemy / defamation of religions*

As the following list shows, complaints and protests by citizens, politicians and newspapers, more specifically either of a fundamentalist Greek Orthodox or ultra-right wing character, that led to prosecution under Articles 198 and 199 Penal Code more often than not – if not always – concerned an insult to the Orthodox Church rather than the other religions tolerated in Greece.[45] However, the restrictions initially imposed as interim measures in the cases discussed below were not finally ratified in the main proceedings. Nevertheless, they aimed to, and succeeded – as silencing tools

[43] Sarafianos, 'Blasphemy in the Greek Orthodox legal tradition,' 106.

[44] Athens Court of First Instance (Criminal Chamber) 28567/2013.

[45] For older cases, see Sarafianos, 'Blasphemy in the Greek Orthodox legal tradition,' 106.

– in serving the purpose of integrating Church and state,[46] despite the neutral wording of the relevant provisions, which equally applied to all known and tolerated religions.

a) *The prohibition of the film* The Last Temptation of Christ *(1988)*

The Last Temptation of Christ is a religious drama film directed by Martin Scorsese in 1988 as an adaptation of the equally controversial novel bearing the same title, by the famous excommunicated writer Nikos Kazantzakis. Both the novel and the film depict Jesus Christ as a carpenter making crosses used by the Romans to crucify Jews, a man with human traits and emotions and struggling to resist temptation, such as living like an odinary married man until old age, including having children.

Even before its screening in Greece, the Metropolitan of Dimitrias, Christodoulos, who later became the Archbishop of Athens and All Greece (1998 – 2008), wrote a fiery article in a newspaper entitled 'From Hubris to Nemesis', in which, after accusing the director of the film of blasphemy, incited people to violence against the screening of the film, using the following words:

> If we now, due to our tolerance or indifference, cooperate in crime, we will deserve our fate. The Muslims, when their Muhammad is insulted, use a knife for those who insult him. And the Jews, when you insult Jerusalem, denounce you, they threaten to take revenge. Now that they are insulting the most sacred thing we have and are inviting us to pay the price of their own obscenity, will we yield?

When the film was first shown in Athens, a large number of Christian Orthodox fanatics, having paid for their tickets, entered the cinema, took their seats, and, as soon as the film began, rose up shouting and rushed, using knives and scissors, to tear up the cloth of the cinema screen and many seats in order to prevent the screening. In the following weeks, it was only possible to screen the film under police surveillance and it was a big success after the (negative) promotion which it had received from the fanatics.

Subsequently, a Restrictive Measures Petition was filed by eight Christian NGOs and two individuals. They argued that the film publicly and maliciously defamed the Eastern Orthodox Church of Christ, insulted the applicants' religious feelings and faith and, therefore, their personality within the meaning of Article 57 Civil Code (protection of one's own personality).[47] They added that its screening caused intense

[46] Paul Sturges, 'Limits to freedom of expression? The problem of blasphemy', (2015) *IFLA Journal* 41(2), 112, 115.

[47] According to the provisions of Article 57§1 sec. a` Civil Code, whoever suffers an illegal insult to his personality has the right to demand that the insult be removed and not be repeated in the future. According to the judgement, an insult against personality exists in every act committed by a third person by which the existing situation in terms of the various aspects of the personality is disturbed, at the time of the insult. However, a simple insult is not enough, it must also be illegal.

protests, demonstrations and disapprovals that threatened public order and social peace and violated the Constitution and public morals.

The Greek court agreed with the plaintiffs and found that the film insulted their personality. In its relevant judgement 17115/1988, the one-member Athens Court of First Instance, based on a highly ideological and reactionary reasoning, accepted that…

> A manifestation of the personality that must be protected against any insult is also the religious feeling, which is indirectly protected by the provisions of Articles 198-200 of the Penal Code, and the belief that derives from it.

In a passage that looks more like a confession of faith in the Greek Orthodox Church than a judicial decision based on the law and the Constitution, the court emphasized, amongst other things, that religious belief is 'a fact of free choice and moral responsibility of one's conscience', that it is 'an act of high quality'… and 'constitutes one of the most central and happiest human experiences'. It further recognized that the legal goods protected by Articles 198 and 199 of the Penal Code were religious peace and, indirectly, the religious feelings of the believers as a manifestation of religious freedom. And it added:

> This protection of religious feelings … is imperative, because they constitute moral-social values, social and legal interests worthy of protection to the benefit of civilization and of the state. Religion is not merely an individual affair, an entirely internal relationship of the soul towards God, in relation to which the state can be indifferent, but the foundation of the state, a factor of spiritual culture, which affects not only the feelings and the thoughts but also the actions of man.

Given the fact that only an illegal act is legally capable of insulting one's personality and in order to avoid balancing, the court even accepted that the act of screening by the distribution company which imported the film was against good morals, and therefore constituted an abuse of freedom of art and as such was not protected at all by the Constitution. Due to this finding, the court concluded that there was *probably* no constitutional right to be balanced with the protected religious feelings of the plaintiffs and accepted their petition that the film be banned.

b) *The book* M^n *by Mimis Androulakis (2000)*

The next incident had to do with a book with the strange title 'M^n – A Woman's Anti-novel' (1999), by the writer and former politician Mimis Androulakis, which was an essay on the place of women in art, mathematics, literature, economics, science and religion. The title of the book, properly read as 'M to the power of N' (in the Greek language) could sound, if read in a colloquial way, like the vulgar name for the female genitals. Many of the protagonists in this book are women, including Maria Magdalena, portrayed as a modern woman. The author shows how culture has

been misogynous throughout time. This book also depicted Jesus Christ as having sexual desires.

The claimants again requested that the book be prohibited because, as they asserted, it offended their religious feelings, and therefore their personality, as it maliciously insulted the Christian faith and Jesus Christ, and the Apostles and Saints of the religion to which they adhered. The book was indeed provisionally (through interim measures) prohibited in Central Macedonia (one of Greece's regions) by a one-member First Instance Court of Thessaloniki in 2000, five months after the book's release and following protests by fanatic Orthodox Christians, while criminal charges were filed by a prosecutor against the author of the book.

In its decision 5208/2000, the Athens one-member First Instance Court, which revisited the case, also accepted that the right to personality is unitary and that the individual's psychological and emotional world forms part of it. Therefore, religious feeling is offended when one's own creed and everything related to it is insulted. On the other hand, art, as guaranteed in Article 16§1a GrConst, '… is free, and its development and promotion is an obligation of the state'. As the judge explained, art constitutes any creative expression of the human imagination and its freedom includes the freedom to create and circulate works of art, as well as the freedom of public access to works of art. Article 16§1 GrConst does not subject the freedom of art to any kind of special restriction. Therefore the artist is subject to the generally applicable law only. This increased protection of art prevails as *lex specialis* over other constitutional provisions concerning media of free expression, such as the press, which is subject to more restrictions than art itself. Consequently, the judge concluded that the printed material containing mainly a work of art was exempt not only from the pre-circulation but also from the post-circulation confiscation to which the press in general is exceptionally subject under Article 14§3 GrConst, in the cases referred to therein, which include insults against the Christian and any other known religion and obscene publications that obviously offend the public eye. Given that the book under consideration was found by the judge to be a product of art, it should be protected by Article 16§1 GrConst and be neither susceptible to prohibition before or after its circulation nor subject to Article 30 of L 5060/1931 referring to obscene publications. The plaintiffs were left only with the possibility of requesting the author's prosecution and their right to be compensated for the offence against their feelings, but their claim that the book should be prohibited could not be accepted for the reasons mentioned above.

However, in its assessment of this particular book, the court concluded that the author's main aim in this allegorical work of art was to exhibit the misogyny expressed in all historical periods and by many great philosophers rather than to maliciously insult or defame the Orthodox Christian Church and that he did not use vulgar or derogatory expressions in reference to the doctrines of that same Church.

Therefore it could not ultimately be concluded that the claimants' personality had been offended.

In an *obiter dicta* passage, the judge recalled that the protection of freedoms of expression and art covers and justifies even insults against the right to the development of one's personality that may occur in their exercise, even in the way in which the plaintiffs claimed to have suffered insult. This is due to the fact that the personality, even if insulted, as long as human dignity is not violated, enjoys in this specific instance a protection weaker than the abovementioned freedoms.[48] Furthermore, the court continued that holders of the right to the freedom of art:

> are not only the creators of the art but also the persons who enjoy (or are prevented from enjoying) a work of art, i.e., their audience (listeners, viewers, readers, buyers, etc.) and therefore, the invoked personality right of the applicants also conflicts with that of other persons in the free reading of the book in question, which is also constitutionally protected as a manifestation of personality, and in a democratic society as defined by the Constitution in terms of its legal expression, i.e., Greek society, it cannot be considered permissible to impose on others what they should read.

These findings were very important and were warmly welcomed by those defending free speech, although they were received negatively by the religious fanatics, as was to be expected.

c) *The painting* Asperges me *by Thierry de Cordier, at the Outlook exhibition (2003)*

The painting 'Asperges me (Dry Sin)' by Thierry de Cordier (1999) was on display at the Athens School of Fine Arts as part of the *Outlook* exhibition in 2003, which was the crowning event of the cultural Olympiad of the same year. This art work depicted a phallus ejaculating on a cross. For the first one and a half months of the exhibition the painting raised no objections until the leader of an ultra-right wing political party, Giorgos Karatzaferis, visited the exhibition and noticed it. Numerous complaints about it followed, expressed by politicians,[49] newspapers, the Church and a number of other visitors to the exhibition, on the grounds that it was blasphemous. On December 10 2003, the *Outlook* curator removed the painting on the basis that it had 'insulted religious sentiment'. The artist himself reportedly consented to the

[48] With reference also to the Areios Pagos decision 13/1999.

[49] It was mainly the ultra-right-wing political party 'Popular Orthodox Rally' (LAOS) that raised the issue in the media, speaking of an 'insult to the Christian religion' and 'to national symbols', and it submitted a written question to the Minister of Culture and demanded the intervention of the Prosecutor of the Areios Pagos. The leader and other politicians of the main opposition party, New Democracy, aligned with LAOS. The New Democracy leader, Miltiadis Evert stated that 'If they don't take [the painting] down by Friday, I'll go and remove it myself' (Kathimerini, 11 December 2003).

removal.[50] The painting was replaced by a poster informing the public that 'the work provoked strong reactions as an insult to the Cross' and that 'the intense debate that was initiated tended to overshadow the essence of the exhibition and to obstruct the public's contact with contemporary art'. In the following days, other paintings also considered blasphemous were also attacked by Christian fanatics.

This move did not save the internationally famous curator, Christos Ioakimidis, from being prosecuted in 2005 for obscenity, and insulting public morals and the Christian religion, resulting in blasphemy.[51] On 10 May 2006 the one-member Athens Misdemeanours Court acquitted the defendant on the grounds of lack of malice, evidenced by his consenting to have the work removed. One of the prosecution witnesses was Archimandrite Epiphanios, who said that the removal of the painting was an adequate measure and jailing the curator would not be necessary.

This incident[52] revived the debate over blasphemy and censorship in Greece and made headlines both in the Greek press and in academia[53] [54] and beyond.[55]

d) *The comic book* The Life of Jesus*, by Gerhard Haderer*

The Life of Jesus (*Das Leben von Jesus*, 2002) is the title of a comic book by the Austrian Gerhard Haderer, a satire in which Jesus is portrayed as an incense-addicted hippy. The book had already caused controversy in Austria when first published

[50] "Asperges me" (Thierry de Cordier, «Outlook» exhibition), https://civil.lodbook.org/en/esection/147.html.

[51] In the trial, the Christian Orthodox minister Epiphanios Economou, in his testimony as prosecution witness, said: "Nobody's personal perversion can be allowed to qualify as art" (newspaper Eleftherotypia, 11 May 2006), as mentioned by Christopoulos and Dimoulis in 'Art Can Legitimately Offend,' 84.

[52] There was one more case of a removal of an "untitled" painting by Despina Christou in 2004. The art work was a triptych collage on canvas due to be exhibited as part of the group exhibition 'Everyday Hellas' in 2004. One part of the triptych depicted a priest kissing a young boy. The work was removed and replaced by a statement saying that 'Despina Christou's work has been withdrawn on the grounds that it might offend the religious beliefs of some people'. See: https://civil.lodbook.org/en/esection/148.html.

[53] See Diamantopoulou, 'Blasphemy in Contemporary Greece'; Michael Tsapogas, 'Blasphemy and Justice in a Greek Orthodox Context', in *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society*, Venice Commission, Council of Europe Publishing, *Science and Technique of Democracy*, no. 47, March 2010, 113–119; Dimitris Sarafianos, Dimitris Christopoulos and Dimitris Dimoulis in *Blasphemy, Insult and Hatred*; Fokas, *God's Advocates*, *op. cit.* 397.

[54] Dimitris Christopoulos and Dimitris Dimoulis, 'Art Can Legitimately Offend,' in *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society*, Venice Commission, Council of Europe Publishing, *Science and Technique of Democracy*, No. 47, March 2010, pp. 83-90.

[55] See Helena Smith, ''Obscene' art offends Orthodox Greek taste', *The Guardian* 14 Dec 2003, available at: https://www.theguardian.com/world/2003/dec/14/arts.artsnews.

there, where the Catholic Church denounced it as blasphemous.[56] In Greece, when, in 2005, it was translated and published in Greek, the book was confiscated for being blasphemous, on the basis of Article 14§§3-4 (see above) and the seizure was upheld by the court. No criminal charges were imposed on the Greek publishers and four local booksellers, but the author was sentenced in absentia to six months' imprisonment (on the basis of Article 199 of the Criminal Code on 'defamation of religion', as the article was then still in force).[57] This was only the second time in history that Article 14§4 GrConst had been applied, and the first time that it had been applied in a case of blasphemy against religion.[58] According to the prosecutor, this comic book constituted 'a gross and vulgar manifestation of contempt and affront against the person of Jesus Christ … with the ultimate goal of earning money'.[59]

In adjudicating on the matter, as an appellate court, the three-member Athens Magistrate Court[60] acquitted Haderer on the grounds that the book had the character of a comic book with humorous content and that the author did not intend to directly blaspheme the Eastern Orthodox Church of Christ;[61] consequently, it revoked the seizure of the book.

e) Geron Pastitsios *(2012)*

Geron Pastitsios (Elder Pastitsios) was the Facebook persona of Philippos Loizos. The name 'Elder Pastitsios' was a wordplay combining a Greek Orthodox monk's name (Elder Paisios) -- at the time already believed to be a saint and later, in 2015, canonized as such by the Ecumenical Patriarchate – and the famous Greek pasta dish *pastitsio*. [62] In his Facebook page, Loizos portrayed his persona using an image of Elder Paisios's face covered with pastitsio. His intention was to satirize and criticize Elder Paisios's teachings, which was adopted by ordinary people and far-right politicians and included eschatological teachings, prophecies, anti-scientific views, a belief in the return of Constantine, the previous King of Greece, anti-democratic comments about 'atheist' politicians, criticism of the social status of women (which

[56] See *The Life of Jesus*: Gerhard Haderer, available at: https://urbanaspirines.blogspot.com/2011/01/life-of-jesus-gerhard-haderer-2002.html.

[57] First Instance Court of Athens 3371/05, 18 January 2005; see also Vivian Panayotou, 'Jesus comic enrages Greeks,' DW, 8 February 2005, available at www.dw.com/ en/ jesus- comic- enrages-greeks/a- 1480744

[58] Fokas, *God's Advocates*, op. cit, 398.

[59] Tsapogas, 'Blasphemy and Justice', *op. cit.*, 117.

[60] Judgment 4532/2005 of 13 April 2005.

[61] Unpublished decision, cited by Stavros Tsakirakis, *Religion against Art*, Athens: Polis, 2005, p. 73.

[62] Matthaios Tsimitakis, 'A delicate blasphemy case in Greece,' Al Jazeera, 16 October 2012, available at https://www.aljazeera.com/opinions/2012/10/16/a-delicate-blasphemy-case-in-greece.

he believed should be degraded), anti-Western views and an intolerance of everything non-Greek and modernist.[63]

After many Facebook users had attacked his page, Facebook was called upon to suspend the confidentiality and reveal the holder of this page. A member of the Greek Parliament belonging to the neo-Nazi party Golden Dawn asked in Parliament for the immediate removal of Loizos's page.

Following the deletion of his page, as he was asked to do, Loizos was arrested in September 2012 for 'malicious blasphemy and religious defamation'.[64] In January 2014 Loizos was sentenced by the First Instance Court of Athens (decision no. 5635/2014) to 10 months in prison after being found guilty of defamation of religion because, although he had not made blasphemous comments himself, he had failed to delete such comments made by others. His conviction was later overturned on appeal by a Second Instance court on the grounds of a new provision (Article 8 L 4411/2016) providing for the cessation of prosecution for criminal offences committed by 31.03.2016 and punishable by imprisonment of up to two years.

f) Corpus Christi *theatrical play*

Corpus Christi is a theatrical play written by Terrence McNally (and directed by Laertis Vassileiou) depicting Jesus and the Apostles as homosexuals living in present-day Texas.[65] The play was to be staged in Athens in the fall of 2012. Already, on 7

[63] Philippos Loizos, 'How I experienced the laws against blasphemy in Greece,' 25 October 2015, in *The Books' Journal*, available at https://booksjournal.gr/paremvaseis/1528 (in Greek).

[64] For further detail see Fokas, *God's Advocates*, *op. cit.* 399f.

[65] When the play was originally staged in New York in the late 1990s its author received death threats. When the play was staged in London, a death *Fatwa* came from a UK-based Islamic group; see BBC, 'UK Fatwa for "gay Jesus" writer', 29 October 1999, available at: http://news.bbc.co.uk/2/hi/uk_news/493436.stm.

June 2012, the Holy Synod had issued a press release opposing it. In October 2012 protesters organized by the criminal neo-Nazi organization Golden Dawn – masquerading at that time as a political party[66] – along with various religious groups blocked the staging of the play at the Hyperion Theatre in Athens and verbally and physically attacked the production team.[67] A journalist who tried to videotape the incidents was attacked by neo-Nazis in front of the police, who remained inert. After weeks of almost daily protests by priests and ultra-right-wing groups outside the theatre, the theatrical production was cancelled.[68]

The Metropolitan Seraphim of Piraeus (Metropolitan since 2006 and still serving in August 2023) filed a lawsuit against it[69] and the Public Prosecutor charged the organizers, producers and cast of the play with malicious blasphemy and defamation of religion. On its official webpage, Golden Dawn mentioned that a group of its MPs had accompanied Metropolitan Seraphim to the police station where he had gone to file the lawsuit.

C. **The abolition of blasphemy and defamation of religions in 2019**

Both of the above-mentioned crimes, which insisted on limitations of free speech, were abolished by L 4619/2019 (Government Gazette A΄ 95/11.06.2019, which came into force on 1 July 2019).[70]

The forces and incentives behind this abolition are to be found in repeated criticisms by liberal theorists of both penal law and human rights and activist claims that

[66] Golden Dawn was represented in the Greek Parliament between May 2012 and June 2019.

[67] For a commentary see Daphne Halikiopoulou and Sofia Vasilopoulou, 'Political Instability and the Persistence of Religion in Greece: The Policy Implications of the Cultural Defence Paradigm,' RECODE Online Working Paper No. 18 (2013), available at: https://www.recode.info/wp-content/uploads/2013/02/Fin_RECODE-18-Halikiopoulou-Vasilopoulou-2013_Final.pdf.

[68] Stella Tsolakidou, 'Greece Prosecutes Corpus Christi for Blasphemy,' 16 November 2012, available at: https://greekreporter.com/2012/11/16/greece-prosecutes-corpus-christi-for-blasphemy/.

[69] Karolina Tagaris, 'Blasphemy charges filed over gay Jesus play in Greece,' 16 Nov 2012, available at: https://www.reuters.com/article/entertainment-us-greece-blasphemy-idUSBRE8AF0MU20121116.

[70] Article 201 (Insulting the dead) was also abolished. It stipulated that:

'Whoever arbitrarily removes a dead person, or his or her limbs or ashes, from those who have the right to keep them, or carry out abusively inappropriate acts related to them or with a grave is punishable by imprisonment of up to two years.'

According to Article 365 Penal Code on 'Insults against the memory of the deceased',

'Whoever, through the actions of Articles 361, 362 and 363, insults the memory of a dead person or the honour of a person who has been declared missing, is to be punished with a fine or community service.'

The acts of Articles 361, 362 and 363 refer to vilification, defamation and malicious defamation respectively.

were embraced by the SYRIZA[71] government of the time in a far-reaching change of the Penal Code, which was long in the making. Several NGOs had been campaigning to 'End Blasphemy Laws Now' for a long time.[72] CERD had also expressed its concern and recommended that Greece should abolish Articles 198 and 199 on blasphemy from its Criminal Code. Without doubt, international and EU calls in the same direction also played a part. This tendency is also in harmony with a slow process of secularization of Greek society[73] and the pluralization of religious creeds represented in it, due mainly to immigration.[74]

> The Greek Orthodox Church was against this abolition. Seraphim, the Greek Orthodox Metropolitan of Piraeus, expressed[75] his opposition by saying that the abolition of the provisions (Articles 198 and 199) insults and places in immediate jeopardy the legal good defined under the title 'Undermining religious peace', i.e., social cohesion and the peaceful coexistence of different religious beliefs and units, especially in conditions of uncontrolled immigration and the establishment of multicultural conditions.

Only five days after the promulgation of the new Penal Code and a few weeks before the national elections, there appeared an article[76] on a website with Orthodox Christian content urging Christian Orthodox believers not to vote in favour of the two parties who had supported the changes to the Penal Code (SYRIZA and Potami). On the other hand, the Atheist Union of Greece welcomed the abolition of the two provisions.[77] The main opposition party, New Democracy (ND), a centre-right and right-wing party, voted against this change. This party (ND) came to power in July

[71] The new Penal Code, including the abolition of blasphemy and defamation of religions, was passed by the Members of Parliament belonging to two parties, namely, the then governing SYRIZA 'Coalition of the Radical Left' and 'To Potami' (meaning 'the river', a centre-liberal party).

[72] See Fokas, *God's Advocates*, op. cit, 403ff.

[73] A. Sakellariou, 'Moving from traditional religion to atheism in Greek society: "Like a ship distancing from the coast…"', in: *Religion going public*, 10.4.2017, available at: http://religiongoingpublic.com/ archive/2017/moving-from-traditional-religion-to-atheism-in-greek-society-like-a-ship-distancing-from-the-coast, last accessed: 1 September 2017.

[74] Cf C. Papageorgiou, 'Immigration and Religion in Greece,' in A. Motilla (ed), *Immigration, national and regional laws and freedom of religion*, Leuven *et al*. 2012, p. 110ff.

[75] Available in Greek at: https://www.dogma.gr/dialogos/mydroi-peiraios-serafeim-gia-ton-neopoiniko-kodika/102777/.

[76] Philippos Hieromonk (Toubidis), 'The vote in favour of the parties who freed blasphemy is incompatible with the Christian Faith,' 11 June 2019, available at: https://poimin.gr/asymvivasti-me-ti-christianiki-pisti-i-psifos-sta-kommata-poy-apeleytherosan-ti-vlasfimia/

[77] This organization had a history of trying to get Parliament to repeal Articles 198 and 199 Penal Code. See Alice Kirkland, 'Atheist Union of Greece protests outdated blasphemy laws,' 22 January 2014, available at: https://www.indexoncensorship.org/2014/01/greeces-outdated-blasphemy-laws/. Similar protests were staged by the Hellenic League for Human Rights (HLHR), the oldest human rights organization in Greece, first established in 1936.

2019 and immediately changed some provisions of the Penal Code that had recently come into force (1 July 2019) While the reinstatement of blasphemy appeared initially to be one of these changes, the Minister of Justice,[78] on 12 November 2019, withdrew this specific proposal after the reactions caused by its announcement.

Strangely enough – it seems that the legislator forgot to amend this provision after abolishing Articles 198 and 199 Penal Code – Article 158 of the Military Penal Code still punishes any army officer who insults the religion of a prisoner in his / her presence with the punitive measure of imprisonment for a maximum of one year.

In the present Penal Code there is only one offence left in the chapter on 'religious peace', formalized in Article 200 (Disruption of religious gatherings), which stipulates that:

> 1. Whoever maliciously attempts to prevent or intentionally disrupts a state-tolerated religious assembly for worship or ceremony shall be punished by imprisonment for up to two years.
>
> 2. The same penalty applies to anyone who commits abusive and inappropriate acts in a church or in a place designated for a religious gathering tolerated by the state.

This delict is justified since it consists in a proportional limitation of freedom of action and speech so that the free exercise of religious duties may be respected and guaranteed. Para 1 forbids any act preventing 'the preparation, commencement or continuation of a gathering of believers for the purposes of worship', regardless of whether it is in private or public, indoors or outdoors, whereas para 2 is limited to places of worship of known religions.

IV. Religious Hate Speech

A. Context of the Public Debate

Greek society shows a high degree of intolerance towards minorities (religious, esp. Jews and Muslims; ethnic, e.g., Roma; and sexual / gender, e.g., LGBTQ), which often and disconcertingly become the victims of racist crimes, including hate speech.

According to statistics gathered by the Hellenic Police,[79] there were 51 hate speech incidents in 2020, 34 of which were online. The corresponding numbers were

[78] The Minister of Justice Mr Tsiaras justified the proposal to reinstate this provision as an 'attempt to protect the rights of religious minorities', considering the confrontation between groups of immigrants who were settling in Greece and creating tensions. He also noted that at least five European countries had the same provision and that Denmark, which had abolished it, had reinstated it.

[79] As mentioned in the latest ECRI Report on Greece (sixth monitoring cycle), adopted on 28 June 2022, 13, available at: https://rm.coe.int/ecri-first-report-on-greece-adopted-on-28-june-2022-published-on-22-se/1680a818bf.

92 (38 online) in 2019; 63 (39 online) in 2018, 88 (48 online) in 2017 and 29 (15 online) in 2016.

Since there is little systematic gathering of data on hate speech, the Council of Europe's ECRI has repeatedly recommended that:[80]

> the authorities establish a comprehensive monitoring system for hate speech incidents, including online, building on the experiences and expertise of the police and prosecuting services, equality bodies and national human rights institutions, self-regulatory bodies and relevant civil society organisations.

In a 2019 global survey the Anti-Defamation League found that Greece had the highest score (69%) in terms of antisemitic attitudes outside the Middle East and North Africa, including mainly vandalism – usually dozens of incidents each year – as well as hate speech, Holocaust trivialization and conspiracy theories in the mainstream press, on social media and on the internet.[81] Antisemitic stereotypes have permeated large sections of society as well as some parts of the Greek Orthodox Church.[82] Holocaust denial raises little concern among Greeks and there was even a decision by a Greek appeals court in 2006 that, in a related case, declared that the 'pen is free' in order to legitimize antisemitic speech acts.[83]

Metropolitan Seraphim of Piraeus[84] has even accused Jews of orchestrating the Holocaust and accused what he called global Zionism of a conspiracy to enslave Greece and the Orthodox Church. He has also threatened to excommunicate any Member of Parliament who votes in favour of extending civil partnerships to same-sex couples.

ECRI notes[85] in its latest report that the authorities have taken action at various levels in recent years to prevent and combat hate speech, both offline and online.

Religiously intolerant speech covers those manifestations of hate speech that are directed against persons or groups of persons on the basis of their (non-)membership

[80] Council of Europe, European Commission Against Racism and Intolerance, ECRI Report on Greece, 5th monitoring cycle, 24 Feb 2015. See also the latest ECRI Report on Greece (sixth monitoring cycle), adopted on 28 June 2022, all documents available at: www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Greece/GRC-CbC-V-2015-001-ENG.pdf.

[81] ADL, *Anti-Semitism in Greece: A Country Report*, 1 July 2019, available at: https://www.adl.org/resources/report/anti-semitism-greece-country-report.

[82] See also Georgios Antoniou, Elias Dinas, Spyros Kosmidis and Leon Saltiel, *Anti-Semitism in Greece Today*, 2nd ed. 2020, Heinrich Böll Stiftung 2019, available (in Greek) at: https://gr.boell.org/en/2020/01/16/anti-semitism-greece-today-second-edition.

[83] E. Polymenopoulou, 'Arts, Censorship and the Greek Law – Blasphemy versus Hate Speech' (2017) 6 *International Human Rights Law Review*, pp. 109-132, 131.

[84] On the bishop's homophobic remarks, see, for example, R. Mackey, 'A Greek Bishop's Anti-Semitic Tirade', *The New York Times*, 22 Dec. 2010, <https://thelede.blogs.nytimes.com/2010/12/22/a-greek-bishops-anti-semitic-tirade/> (accessed 7 Feb. 2018).

[85] ECRI Report on Greece (sixth monitoring cycle), adopted on 28 June 2022, 13.

in a religious community or their religious or non-religious beliefs, or that emanate from representatives or officials, priests or religious leaders, or communities or Churches against other persons or groups, regardless of the characteristics of the latter.

B. The legal provisions incriminating racist speech in general

1. *Law 927/1979*

The Greek legal order has provided for legislation aimed at the punishment of acts or deeds based on racism since as long ago as 1979 (Law 927/1979). This law aimed at fulfilling Greece's obligations arising from the International Convention on the Elimination of All Forms of Racial Discrimination,[86] since the state signatories to the convention are monitored by the relevant UN committee. In its 2016 report, the Committee on the Elimination of Racial Discrimination[87] expressed its concern:

> about the increase in hate speech since 2009, coinciding with the rise of the Golden Dawn party, essentially targeting migrants, Roma, Jews and Muslims, including through the media, on the Internet and social media platforms. The Committee is also concerned at the increase of racist and xenophobic attacks, particularly against asylum seekers and refugees, which is exacerbated by the economic crisis in [Greece]. Furthermore, the Committee is concerned at the low reporting rate of such crimes, despite some awareness-raising measures taken to that end (arts. 2 and 4).

Law 927/1979 was subsequently modified and brought up to date through Law 4285/2014, which aimed at incorporating Framework-Decision 2008/913/JHA.[88] Its explanatory memorandum states[89] clearly that that modification was deemed necessary[90]

> in view of the serious challenges which our country currently faces in its transition to an open society, where the equal protection of all people, independently of their individual natural and cultural characteristics, emerges as a primary obligation of the State. Consequently, the acquisition of a comprehensive, clear and efficient

[86] UN Treaties Collection, I-9464, Treaties series, v. 660, 1969, 212, <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280008954&clang=_en> (accessed 2 Sept. 2017).

[87] Committee on the Elimination of Racial Discrimination, 'Concluding observations on the twentieth to twenty-second periodic reports of Greece,' 3 Oct. 2016.

[88] Official Journal of the Greek Government (OJGG) 191/10.9.2014.

[89] Justification Report (Αιτιολογική έκθεση) of L 4285/2014, available at: http://www.hellenic-parliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/t-l328-eis.pdf (in Greek).

[90] This section draws on Lina Papadopoulou, 'Securitization of Religious Freedom: Religion and Limits of State Control In Greece", in Merilin Kiviorg (ed.), *Securitisation of Religious Freedom: Religion and Limits of State Control*, European Consortium for Church and State Research, Proceedings of the XXIXth Annual Conference organised in Tallinn, Estonia, 16-18 November 2017, Comares 2020, 257-273.

[law] is considered imperative, so as to deal with the serious manifestations of racist and xenophobic behaviour.

Article 1 L 927/1979, as modified by Article 1 L 4285/2014, stipulates:

(1) Whoever with intent, publicly, orally or through the press, through the Internet or by any other means or manner, stimulates, provokes or incites acts or actions that can cause discrimination, hatred or violence against a person or a group of persons, which is identified on the basis of race, color, religion, genealogical origins, national or ethnic origin, sexual orientation, gender identity[91] or disability, in a manner which jeopardises the public order or poses a threat to the life, the freedom or the physical integrity of the aforementioned persons, is to be punished with imprisonment of three (3) months to three (3) years and a fine of five to twenty thousand (5,000-20,000) euros.

(2) The same penalties are imposed on anyone who intentionally and by the means and methods referred to in paragraph 1, incites, urges or provokes someone else to commit attrition or damage to things, as long as they were used by the above groups or persons, in a way that endangers public order.

(3) If the provocation, stimulation, instigation or incitement of the previous paragraphs resulted in the commission of a crime, imprisonment of at least six (6) months and a fine of fifteen to thirty thousand (15,000-30,000) euros is to be imposed.

In the case of a prison sentence of at least one (1) year, deprivation of civil rights from one to five years is to be imposed.

(4) Whoever constitutes or participates in an organization or association of persons of any form that systematically seeks to commit the acts of paragraphs 1 and 2, shall be punished with the penalties of paragraph 1, if the act is not punished more severely by another provision.

(5) If the act of the previous paragraphs was committed by a public official or employee, in the exercise of the duties assigned to him, the following shall be imposed: a) in the cases of paragraphs 1 and 2, imprisonment of six (6) months to three (3) years and a monetary fine, a penalty of ten thousand to twenty-five thousand (10,000-25,000) euros and b) in the case of paragraph 3, imprisonment of at least one (1) year and a fine of twenty-five thousand to fifty thousand (25,000 - 50,000) euros.

Furthermore, the public approval or denial of crimes is penalized by Article 2 L 927/1979 (as modified by L 4285/2014) and stipulates that:

(1) Whoever with intent, publicly, orally or through the press, through the Internet or by any other means or way, endorses, trivializes or maliciously denies the existence or severity of crimes of genocide, war crimes, crimes against humanity, the Holocaust and Nazi crimes recognized by international courts or decisions of the Greek Parliament and this conduct is directed against a group of persons or a

[91] The words 'gender identity' were added by Article 7§1 L 4491/2017 (OJGG A 152/13.10.2017).

> member of which is determined on the basis of race, color, religion, genealogical origins, national or ethnic origin, sexual orientation, gender identity or disability, when this conduct manifests itself in a way that may incite violence or hatred or involves threats or abuse against such a group or its members it is punishable by the penalties provided for in paragraph 1 of the preceding article.
>
> (2) If the act in the previous paragraph was committed by a public official or employee, in the exercise of the duties assigned to him, imprisonment of six (6) months to three (3) years and a fine of ten thousand to twenty-five thousand (10,000 - 25,000) euros shall be imposed.

Article 21 §5 L 4251/2014 (The Code of Immigration and Social Inclusion) stipulates that these specific offences (Article 1 §§1-2 L 927/1979) can be prosecuted ex-officio.

According to Article 3 (online execution of offences) of the same Law (927/1979, as amended by L 4251/2014):

> When the acts in the previous articles are performed via the internet or another means of communication, the place of performance is also considered the Greek Territory, as long as access to the specific media is provided on its territory, regardless of their place of installation.

Article 4 L 729/1979, which was added by Law 4285/2014 on the combating of racism, constitutes an innovation as it recognized the responsibility of legal persons or associations of persons in the event that:

> one of the punishable offences of the present law was committed in favor or on behalf of a legal person or an association of persons, by a natural person acting either individually or as a member of the body of the legal person or the association of persons which he/she represents in any possible way….

2. *Further legal provisions excluding hate or insulting speech against religious minorities (amongst others)*

Legal developments include the ratification (through L 4411/2016) of the Additional Protocol to the Council of Europe Convention on Cybercrime[92] (in force since 1 May 2017), concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems.

In 2019, L 4619, which, as mentioned above, extensively modified the Greek Penal Code, enhanced Article 184 Penal Code (incitement to commit crimes, violence or discord) which provides that whoever publicly, by any means, offline or online,

[92] Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, ETS No. 189. See also the Explanatory Report to the Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, Strasbourg 28.01.2003.

causes or incites the commission of a crime and puts in danger the public order, is to be punished by one year of imprisonment or with a fine. It also stipulates that if the intention was to perform violent acts against persons who are defined by race, colour, national or ethnic origin, descent, *religion*, disability, sexual orientation, gender identity or sex characteristics, the sentence may be up to three years of imprisonment. According to the Explanatory Report of L 4619/2019, this is a 'crime of potential risk'. It is noteworthy that the same condition ('endangering the public order') also applies to Article 1§1 L 927/1979.

Article 8 of Law 4779/2021 provides that audio-visual media services must not contain incitement to violence or hate against a group of people or a member of a group, which is defined by race characteristics, colour, national or ethnic origin, descent, *religion*, disability, sexual orientation, gender identity or sex characteristics. The National Council for Radio and Television (NCRTV), which supervises radio and TV broadcasts, may act either *ex officio* or following complaints and may impose administrative sanctions, such as fines, or even suspend transmissions of TV or radio programmes.

C. **Landmark decisions**

While blasphemy and defamation of religions were still being used by prosecutors and courts until their abolition in 2019, inciting hatred had never been used in Greek judicial practice until 2014.[93] However, there was no conviction for racist speech until the incorporation of Framework Decision 2008/913/JHA. The stance of the Greek courts and their tolerance of racist (especially anti-Jewish and anti-immigrant) speech threaded this poor jurisprudence.

For example, in a case where a Metropolitan expressed insults against atheists, demanding removal of their Greek citizenship,[94] the unjust character of his statement was considered waived because, on account of his status as a member of the Greek Church's clergy and the place of publication of his text (on his personal website), he was considered not to have gone beyond what was necessary for the expression of his views as a Metropolitan. [95] Equally, an ultra-right-wing writer, Constantinos Plevris, was acquitted by the Plenary of the Areios Pagos (judgement No. 3/2010), despite the fact that his book "Jews, the Whole Truth' (in Greek) was full of hate speech against the Jews.

[93] Polymenopoulou, 'Arts, Censorship and the Greek Law,' p. 124.

[94] Among other things, he wrote that: 'First of all, when within the walls there are Greeks who boast that they are nationless, atheists, and stateless, and the Hellenic Republic is not in a hurry to take away their Greek citizenship and nationality, sending them to the fire outside as traitors to our Fatherland, then the end of Greece is near! […]'.

[95] Order of the Advocate-General of Aigion No 26/2011.

The only exception was the conviction (judgement No. 588/2011 of the Maritime Court of Piraeus) of (only) two of the 39 people who had marched during the 25 March 2010 parade in Athens shouting racist slogans in public such as "You are born Greek, you never become one, we will spill your blood, Albanian pig", "They are called Skopians, they are called Albanians, I will sew my clothes with skins of them", "There will be carnage, then I will be avenged, when you worship flag and cross" (the other 37 were acquitted due to doubts).

This situation seems to have partly changed after the alteration of L 927/1979 through L 4285/2014 and the incorporation of the EU Framework-Decision 2008/913/JHA, as the jurisprudence mentioned below shows.

1. *The 'Richter' case (Rethymno First Instance Court of Misdemeanours, 2015)*

A German professor at the University of Mannheim, Heinz Richter, had been accused on the basis of views expressed in his controversial book *Operation Mercury: The Occupation of Crete in May 1941*, which recounts the 1941 Battle of Crete, in which the writer supported a view of the German occupiers of the island that differed from the dominant one. According to the Calling Act, the author was accused (Article 2 L 927/1979) of 'approving, belittling and maliciously denying the existence and seriousness of the crimes of Nazism recognized by the Greek Parliament' given that 'his reprehensible behavior was directed against the whole of the people defined on the basis of tribe, (…) doing this in a way that [was] directed against the Cretan people and that involved an insulting character at their expense".

In its judgement 2383/2015 the Rethymno one-member First Instance Court of Misdemeanors cleared Professor Richter of all charges.[96] The court found that the provision of Article 2 L 927/1979 violated the Constitution and most particularly the freedom of expression and scientific freedom, mainly in terms of the aspect relating to the binding character of parliamentary decisions, because the legislator:

> in this way establishes and defines the historical truth in a binding and coercive way, through the means of criminal law, following his/her version, while historical truth nevertheless constitutes the scientific field of historical researchers and in some cases the subject of further public discussions and concerns.

As a matter of fact, while the Law was being discussed in the Greek Parliament, the Scientific Committee of the Parliament had actually proposed the addition of a special reason for waiver of the unjust character of the deed in cases where such

[96] See Lina Giannarou, 'History on trial,' 10 Dec 2015, available at: https://www.ekathimerini.com/society/204196/history-on-trial/; and 'German historian Heinz Richter cleared of charges,' 10 February 2016, https://www.ekathimerini.com/news/205840/german-historian-heinz-richter-cleared-of-charges/.

opinions are expressed within the framework of the exercise of the freedom of art or science.[97] However, this addition was not accepted by Parliament.

Finally, the reasoning of the Court of Misdemeanours is of particular interest that Article 2 L 927/1979 is contrary to EU law because the former assigns the possibility of recognizing genocides and crimes against humanity vis-à-vis the legislator, while the latter, and especially Framework Decision 2008/913, assigns this possibility only to national and international courts.

2. *The Golden Dawn candidate*

By virtue of decision No. 65738/2014 of the Single-Member Criminal Court of Athens, a candidate for parliament and member of the Central Committee of the neo-Nazi party 'Golden Dawn' was convicted because, in the context of filming a documentary about the 2012 election campaign, he used obscene language in referring to immigrants. He used expressions like 'primitives', 'sub-humans', 'scum'; when the phrase 'We are ready to open the ovens' was heard in one shot, he added that immigrants 'can become soap but not for people, only for cars or sidewalks, because they are chemicals ….'. He went on to refer to immigrants with dehumanizing expressions, revealing his hatred of them and, as the court noted, inciting others to hatred, discrimination and violence. These opinions and his phrases were deemed by the court to be capable of causing discrimination, since foreigners were treated as inferior beings who occupy the living space of Greeks, and also of inciting people to violence, mainly against groups and persons with specific racial characteristics that are attributed to various ethnic groups from the regions of south and south-west Asia. Judgement 1667/2018 of the First Instance Court of Athens, judging on appeal, validated the first decision.

Although this case is not directly linked to religion, this is nevertheless the case in a mediated way, given the fact that persons with skin darker than that of the average Greek are often seen not only as immigrants but also as Muslims.[98] In consequence, vehement opposition to immigration is tacitly or *in expressis verbis* linked with the religion of most of the immigrants and asylum seekers coming from countries to the east of Greece, mainly as non-legal immigrants.

[97] See Report of the Scientific Service of the Hellenic Parliament 4285/2014, available at: www.hellenicparliament.gr/UserFiles/7b24652e-78eb-4807-9d68-e9a5d4576eff/t-xeno-epi.pdf.

[98] F Baider / A Constantinou / A Petrou, 'The Conceptual Contiguity of Race and Religion,' in Stavros Assimakopoulos / Fabienne Baider / Sharon Millar (eds), *Online Hate Speech in the European Union – A Discourse-Analytic Perspective*, Springer Open 2017, 72.

3. *A newspaper article inciting violence against homosexuals*

On 11 October 2017, after the passing of the law on same-sex registration, the newspaper *Eleftheri Ora* ran a front page with the headline 'The extreme law was voted by 148 abnormal people – Transvestite Parliament – Now – Beat every 'sister'!'[99]

Both the 4th Single-Member Misdemeanour Court of Athens of First Instance (on 27 October 2020), and the 8th Three-Member Misdemeanour Court of Athens (in Second Instance, on 27 October 2021) convicted the publisher of the newspaper, Giorgos Michalopoulos, for 'public incitement of hatred or violence', on the basis of Article 1 §1 L 927/1979. The court imposed the maximum possible sentence of three years in prison and a fine of 20,000 and 10,000 euros (respectively). The District Attorney had also requested conviction on the grounds that the phrase 'beat every sister' incited people to acts of violence and that, despite the relatively low circulation of the newspaper, its influence was wider since it was displayed on newsstands.

4. *The conviction of former Metropolitan Amvrosios (Areios Pagos 858/2020)*

a) *Before the national courts*

While still[100] a Metropolitan of Kalavryta and Aigialeia, on his personal online blog[101] Amvrosios wrote a libel against homosexuals and Members of Parliament who were about to vote in favour of same-sex registered partnerships. In the article in question – which bore the eloquent title 'The scum of society have raised their heads, Let's be honest: Spit on them!' – comments including the following were made:

> Homosexuality is a deviation from the laws of nature! It is a social felony! It is a sin. Those who experience it or support it are not normal people! They are the scum of society!
>
> Unfortunately, my brothers, Greece is governed by some such petty people! Of course, they are a small minority of the total of the Hellenic Parliament; nevertheless, they exist! They are some of the scum of society, marginal people, defective, humiliated, people of the dark, who now, with the rise of the left, have reared their heads!
>
> I would advise you: Do not go near them! Do not listen to them! Do not trust them! They are the damned of society! It is their right, of course, to live secretly – privately – the way they want! But disgraced people cannot defend the passions of their souls in public! Our Greece is now governed by atheists! I would remind you of the words of Lech Wałęsa of Poland: 'a man without God is a dangerous man'.
>
> So, these disgraced people, spit on them! Condemn them! Beat them up! ("Μαυρίστε τους!") They are not human! They are perversions of nature! They are

[99] The word 'sister' is used in Greek as a derogatory term for gay men (similar to 'nancy').

[100] He resigned on 17 August 2019.

[101] The blogpost, written on 9 Dec 2015, is still available (August 2023) on his weblog at: http://mkka.blogspot.com/2015/12/blog-post_9.html.

> suffering mentally and spiritually! They are people with a mental disorder! Unfortunately, these people are worse and more dangerous than some of the people living in nuthouses! Therefore, do not hesitate! When you meet them, spit on them! Do not let them rear their heads! They are dangerous! Our Church is praying for them as follows: 'Let the sinners be consumed from the earth, and let the wicked be no more' (Psalm 103), meaning let all sinners and all the lawless disappear from earth so that they no longer exist! All the damned should go to hell (στον αγύριστο)!

The text was reproduced on multiple websites, media outlets and social media. A few days later (on 21 December 2015) Amvrosios published another article on his personal blog under the title "Let's get things clear – Love the sinner but deal with the sin". In it he made it clear that he had not incited to violence, since as a person of the church he condemned sin but prayed for sinners. According to him, his original article had been a criticism of politicians and more specifically of Members of Parliament who were in favour of legalising same-sex partnerships. He also defended his right to criticise politicians and especially all those who proudly projected their immorality and their unnatural relationships. He also made it clear that the phrase "spit on them" had been used metaphorically and had meant "despise them".

On the basis of his blogpost of 9 December 2015, charges were brought against him for breaching Article 1 of L 927/79 (public incitement to violence or hatred against people because of their sexual orientation), and Article 196 Criminal Code as it was in force at the time (abuse of ecclesiastical office). In the first instance,[102] the Metropolitan was acquitted on the grounds that he had merely made a sharp but permissible criticism of the politicians who supported the extension of cohabitation to same-sex couples.

In contrast, the Aigio Three-Member Misdemeanour Court[103], issuing a further judgment after appeals lodged by the Aigio and Patras public prosecutors, found him guilty and convicted him for violation of Article 1 of L927/1979 to seven months in prison, suspended for three years.

The Appellate Court noted that:

> With the above prompts and characterizations, the defendant denies the specific group of persons with the specific sexual orientation their right to exist in society, to participate, act and express their perceptions and aspirations in social life. Therefore, this specific behavior can incite hatred against homosexuals, as the intensity of the said characterizations and exhortations, taking into account, as mentioned above, the status of the accused as a hierarch, is apt to cause the average person strong

[102] Aigio One-Member Misdemeanour Court decision no. 322/2018 of 15.03.2018.

[103] Judgement nos. 47 and 49 of the Aigio Three-member Misdemeanour Court on 23 and 28 January 2019, also for the offence stipulated in Article 196 of the Civil Code (abuse of ecclesiastical office) in parallel with Article 1 N 927/1979, as it was a matter of different crimes, with different objective situations, and different protected legal goods.

> feelings of loathing, revulsion, hatred, retaliation and special hostility against the above group of persons, due to their special characteristics according to the law, and these feelings may objectively create a risk that acts of violence are committed, in the above sense, against the specific group or its members, disrupting the peaceful and orderly social coexistence and their individual rights.

This decision was validated by the Areios Pagos (Court of Cassation, Supreme Civil and Penal Court)[104] in a decision issued after the defendant's appeal on points of law. The Areios Pagos acquitted the defendant with regard to Article 196 Penal Code (abolished in the meantime) but kept intact his conviction on the basis of L 927/1979. The Court rejected the defendant's claim that his text contained value judgments, given that, interpreted not in fragments but in its entirety, it was liable to cause discrimination and hatred against homosexuals, as it also included, in addition to abusive and derogatory expressions, incitement to violence, discrimination and hatred against homosexuals and called people to take action. The appropriateness and dangerousness of his speech was also enhanced by his status as an ecclesiastical hierarch whose opinion by definition has:

> increased prestige and influence, especially among the numerous believers of the Orthodox Christian religion which is the official religion in our country and of the great majority of the country's inhabitants.

In addition, critical for the conviction was the style of the text, the 'particularly high intensity of the phraseology used, the style and tone of his speech', which were extremely caustic and intensified the despicability of the act. According to the Court, the legal good protected by the provisions of L 927/1979 are the rights of equal treatment, the free development of personality and the prohibition of discrimination (in conformity with Articles 4 §1 and 5 §1 and 2 GrConst). At the same time, the decision recognized that in terms of substantive criminal misconduct, the provision also protects 'public order or order', since hate speech poses risks to the individual legal goods of members of society and, especially, those groups it targets.

b) *Before the European Court of Human Rights*

The former Metropolitan Amvrosios applied against his conviction before the European Court of Human Rights (ECtHR), complaining under Article 10 ECHR that his criminal conviction had violated his freedom of expression. He insisted that his conviction had constituted an interference in his profession and mission as a Metropolitan of the Orthodox Church, given the fact that the Orthodox Church condemns homosexuality and therefore the publication of the disputed blogpost was part of his priestly duties.

[104] Areios Pagos, decision no. 858/2020 (Sixth Criminal Department), 29 June 2020.

In its (final) decision in the case of *Lenis v. Greece*[105] the Court has, by a majority, declared the application inadmissible, as incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and rejected it in accordance with Article 35 § 4. This is because statements that stir up hatred or violence constitute speech that is incompatible with the values proclaimed and guaranteed by the Convention and, as such, they are not protected by Article 10 by virtue of Article 17 of the Convention (para 39). Resort to this Article is rare and − in the context of Article 10 − only "if it is immediately clear that the disputed statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention" (para 52).

In the specific circumstances, the Court accepted that Metropolitan Amvrosios's article referred mainly to homosexuals and secondarily to politicians, as his expressions − often used for the former rather than for the latter − reveal and that his text, taken as a whole, can be regarded as incitement to hatred and violence (para 47). The Court further noted that:

> pursuant to its case law, another factor to be taken into account is whether the statements, fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance[106]

and it added that − the content, tone and context of the whole article having been taken into consideration − the Metropolitan's article indeed included "multiple incitements to violence" and constituted 'hate speech' (para 48). These conclusions were further reinforced by three factors (paras 49-51). First, the applicant's status as a senior official of the Greek Orthodox Church, able to influence many Orthodox Christians, who constitute the majority of the Greek population. Secondly, the medium used, namely the Internet, allowed for easy access and dissemination of his article, which is still to this day accessible online. Thirdly, the applicant's comments targeted homosexuals who need enhanced protection because of the marginalisation and victimisation to which they have historically been, and continue to be, subjected, especially in Greece. In this connection, the Court stressed that "discrimination based on sexual orientation is as serious as discrimination based on 'race, origin or colour'" (para 53).

Finally, the Court differentiated between 'criticism of certain lifestyles on moral or religious grounds', which deserves protection under Article 10 ECHR, and 'dehumanising hate speech' including incitement to violence against a group of people identified on the basis of their sexual orientation. The latter is excluded from such

[105] ECtHR, *Lenis v Greece* (application No. 47833/20), decision of 31 August 2023 (Third Section).

[106] ECtHR, *Lenis v Greece*, para 48.

protection on the basis of Article 17 ECHR, as it attacks people's dignity and human value irrespective of their sexual orientation.

V. Concluding remarks

The '*Amvrosios*' decision by the Areios Pagos caught many legal commentators by surprise, given the traditionally protective and conservative stand taken in previous cases by the High Court of Cassation (the Areios Pagos), especially in the *Plevris* case (mentioned above) more than a decade earlier. Nevertheless, judicial convictions based on the anti-racist legislation aimed at preventing hate speech remain rare in Greece, despite the large amount of racist and hate speech, as mentioned above. However, the case law shows that distinguishing between free speech, even if offensive and insulting, and hate speech is a difficult case-by-case exercise, which may often lead to ambiguous results.

Greek case law does not use Article 17 ECHR in order to outlaw specific behaviours and speech acts. Nor is the respective Article 25§3 GrConst ('The abuse of rights is prohibited') used by Greek courts, as this article has been rather inert, since it is considered to be dangerous for the protection of human rights.

As shown above, art enjoys a privileged position in the Greek constitutional setting as it is protected as an 'absolute' right, not susceptible to other limitations when it clashes with others' fundamental rights. The difficulty lies rather in defining what is and what is not art, as the term remains an empty receptacle without specification in legal texts. If a court accepts something as falling under 'art' then it is likely to adjudicate in its favour.[107] When pieces of art are exhibited in places intended to be visited by the general public, which anybody can also easily avoid visiting, and not intended to force people to see them (like,, for example outside a church), then the prohibition of films or books or the removal of paintings is not justified.[108]

In any case, hate speech cannot be viewed as a manifestation of the freedom of religion. Expressing a religious objection to, for example, homosexuality is and should be free, as an expression of religious belief, but not as an incitement to hatred, discrimination and violence.

[107] Nicos C. Alivizatos, 'Art and religious beliefs: the limits of liberalism,' in *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society*, Venice Commission, Council of Europe Publishing, *Science and Technique of Democracy*, No. 47, March 2010, 73-76 (73).

[108] Alivizatos, 'Art and religious beliefs: the limits of liberalism,' who rightly points out that:

"… the interim prohibition imposed on the screening of the film *The Last Temptation* by Martin Scorsese in Athens, in 1998, was wrong; so too were the confiscation of Mr Androulakis's novel M^n (M to the power of n) in Thessaloniki, in 2000, the removal of a painting by Belgian artist Thierry de Cordier during the Outlook exhibition in Athens, in 2003, the confiscation of a comic book entitled *Life of Jesus* by Austrian cartoonist Gerhard Handerer, also in 2003, and the removal of a video by E. Stephani from the Art Athina exhibition, in 2007."

What is important is the differentiation between some 'crimes of opinion' (blasphemy and defamation of religions, now abolished in Greece and in retreat globally, at least in the Western world) and hate speech prohibitions. While the first aim at protecting God and religion as such, the latter aim at offering protection to believers or non-believers alike, especially to minorities under attack. While the first distinguishes religion as something special, the latter is based on the equal human dignity of all persons, irrespective of specific characteristics such as race, skin colour, gender and gender identity, religion, disability, sexual orientation and the like.

This is why feelings and sentiments cannot be protected by law: equal human dignity also means that the feelings of all persons are equally respected but not legally protected. Legally protecting feelings is impossible in a liberal society, as it would violate the rule of law, in its manifestation as the foreseeability of legal consequences and legal certainty, and would result in the prohibition of any critique but also in making human relationships impossible. As Dworkin has succinctly written, 'no-one, however powerful or impotent, can have a right not to be insulted or offended'.[109]

Indeed, both personal and public relationships necessarily involve the possibility of hurt feelings (from the negation of love to the criticism of political or religious beliefs, or defeat in political elections or football matches). Nothing would be possible if feelings were to be legally protected from being hurt. It is absurd to live in a society and claim the protection of somebody's feelings. Prohibiting anybody from offending or ridiculing what another person sees as 'sacred' is 'not only a sign of personal and political immaturity but also a clear expression of intolerance'.[110]

Nor can only religious feelings be protected, as opposed to other kinds of feelings, since this would amount to the unequal ethical worth and dignity of persons based on religious grounds: religious feelings having more worth than non-religious ones would mean the *forum internum* of religious people was superior to that of non-religious people. This would be contrary to the axiom of a liberal state based on equal human dignity.

[109] Ronald Dworkin, "The right to ridicule", New York Review of Books, Vol. 53/5 (23 March 2006).
[110] Christopoulos / Dimoulis, 'Art Can Legitimately Offend', 85.

THE RELATIONSHIP BETWEEN FREEDOM OF SPEECH AND RELIGION IN ITALY

Silvia Angeletti[1]

I. Freedom of Conscience, Religion and Expression

1. The Fundamental Norms Regulating Freedom of Expression

In the Italian legal system, fundamental norms regulating and protecting freedom of expression can be found in the Republican Constitution of 1948, which all of the lower-level legislation must comply with. International and European binding treaties are also relevant; in particular, Article 10 of the European Convention of Human Rights (ECHR) and Article 19 of the International Covenant on Civil and Political Rights (ICCPR) play a role in national Courts' judgements as their legal framework.

a. *Constitutional Provisions*

Freedom of opinion and expression is guaranteed by Article 21 of the Constitution.

The first paragraph establishes that everyone has the right to freely manifest her thoughts through speech, writing and any other means of dissemination.[2]

On the basis of this provision, everyone (not only citizens) enjoys the liberty to express every kind of idea and disseminate it to an undetermined number of people.[3] Nonetheless, like all of the rights constitutionally recognized, freedom of speech is not absolute and it has to be interpreted in line with the overall fundamental rights and duties.

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[2] Translation by the Author.

[3] R. Bin and G. Pitruzzella, *Diritto costituzionale* (Torino, Giappichelli, 2013), p. 556 ss.

Article 21 lays down an explicit limitation: press publications, public performances and other exhibitions are prohibited if they are contrary to morality (*buon costume*). The concept of morality is basically related to the criminal scope and content of the term and it has been constantly conceived of as decency and modesty, with special regard to sexual behaviour. It is worth recalling that the same limitation (with the same scope) is established by the Constitution with reference to freedom of religion (Article 19).

The constitutional criterion of morality is intended as a curb on public expressions deemed offensive, shocking and disturbing in terms of decency and protection of children. The scope and content of the limitation of 'morality' varies with times, and customs and social opinions concerning sexual behaviour are rapidly changing. Moreover, this criterion has been subjected to a broader interpretation by the Constitutional Court as a limit designed to grant protection to the principles of human dignity and mutual respect.[4] The Supreme Court of Cassation also affirmed that the right recognized in Article 21 is not unconditionally protected, its limitation being determined by the need to respect other fundamental rights, such as equal dignity and social protection.[5]

In a comparison between the national legal framework and the jurisprudence of the European Court of Human Rights (ECtHR), it should be noted that, while in the view of the latter freedom of expression is applicable 'not only to information or ideas which are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb',[6] national provisions tend to narrow the scope of freedom of expression. Article 528 of the Criminal Code (CC) sanctions with a fine the dissemination of obscene publications and performances made with the aim of public exhibition or commerce. The Act of the Press broadened the scope of Article 528 CC, including publications that, through shocking and horrifying details of real or imaginary events, are aimed at disturbing the 'commons sense of morality or the family order' or at provoking 'the diffusion of suicides or crimes'.[7]

The criterion of morality as a limitation to free speech does not apply to art or science: Article 529 CC outlaws acts of gross indecency ('*atti osceni*'); nonetheless, pieces of art or science are explicitly excluded. In practice, however, distinctions cannot be made so smoothly: works of art have sometimes been deemed offensive to morality and have provoked social tensions and critical remarks (see part IV).

[4] Constitutional Court, 17 July 2000, no 293; *Id*., 9 July 1992, no 368; P. Floris, 'Libertà religiosa e libertà di espressione artistica', (2008) 1 *Quaderni di Diritto e Politica Ecclesiastica*, pp. 175-196.

[5] Court of Cassation, Penal Section I, 16 Feb 2016, no 34713; see also Court of Cassation, Penal Section, 7 May 2008, no 37581.

[6] *Otto Preminger Institut v. Austria*, App no 13470/87 (ECtHR, 20 Sept 1994).

[7] Law 8 Feb 1948, no 47, Article 15 (translation by the Author).

b. *Heightened Protection of Satirical Speech*

The issue of the content and limit of the right to satire is also puzzling. In the aftermath of the riots instigated in response to the first Cartoons *affaire* in Denmark, the Council of Europe affirmed that

'the culture of critical dispute and artistic freedom has a long tradition in Europe and is considered as positive and even necessary for individual and social progress (…). Critical dispute, satire, humour and artistic expression should therefore enjoy a wider degree of freedom of expression and recourse to exaggeration should not be seen as provocation'.[8]

National courts share this tendency to reserve satire as 'a wider degree of freedom of expression': mockery is considered to be a meaningful element of the constitutional right to freedom of expression.[9] As the Supreme Court of Cassation put it, satire differs in the case of journalistic chronicles and critics, since it can be unrealistic and is not committed to fact-checking.[10] Nonetheless, it has to be balanced with public morality as established by Article 21 Const., which provides for a general restriction aimed at the protection of fundamental rights. Therefore, a satirical expression cannot go beyond mocking and take the form of contempt or insult *ad personam*.[11]

Judicial assessment seems to be increasingly influenced by social developments in this field, and the broader acceptance at a social level of derisive or even scornful expressions tends to enlarge the scope and protection of satire. The same trend may be seen when it comes to criticism against religion expressed through ironic speech; the number of cases brought before tribunals is extremely low and most of judgments found no vilification of religion.[12]

In a case held in Piacenza (Emilia Romagna), local Muslim groups complained that they had been offended on religious grounds by a leaflet that a right-wing candidate to become mayor had disseminated on the streets. The leaflet presented an unrealistic picture of the candidate representing a mayor opening a new mosque in the same location as that of where the Catholic cathedral is actually located, surrounded by a number of Islamic faithful praying. The image was titled 'Is this the future you

[8] COE, Parliamentary Assembly, Resolution 1510 (2006), *Freedom of Expression and Respect for Religious Beliefs*.

[9] Court of Appeal of Florence, 18 Oct. 1993, no 3.

[10] Court of Cassation, Civil Section III, 8 Nov. 2007, no 23314.

[11] Court of Cassation, Penal Section V, 22 Dec. 1998, no 13563.

[12] Tribunal of Latina, 24 Oct. 2006, no 1725; P. Siracusano, 'Vilipendio religioso e satira: «nuove» incriminazioni e «nuove» soluzioni giurisprudenziali' (2007), *Quaderni di Diritto e Politica Ecclesiastica*, pp. 997-1008.

want?'. The local Tribunal held the view that the leaflet was a form of legitimate satirical speech.[13]

c. *Legal Regulation of the Press*

The constitutional regulation of the press was aimed at strengthening the corresponding freedom, in order to avoid in the future the restrictions suffered by journalists during the Fascist regime. Press censorship or authorisation are not permitted, while confiscation by the judicial authority is legitimate under restrictive conditions, as stated in Article 21. Through Legislative Decree 7 December 2017 no. 203, censorship of film screening was abolished and a Commission for the assessment of cinema works was established.

2. Freedom of Religion and Freedom of Religious Expression

The legal protection of freedom of religion or belief is granted by constitutional provisions and also by international and European standards: in particular, Article 9 ECHR, Article 18 ICCPR and Article 14 of the Convention on the Rights of the Child (CRC).

A number of rules in the Constitution regulate individual and collective religious freedom (Articles 7, 8, 19, 20). The most relevant in the present case is Article 19, according to which everyone has the right to freely profess her/his religion, alone or collectively, to produce propaganda and to privately or publicly worship, as long as the rites are not contrary to morality[14].

Article 19 entails everyone's liberty to express their religious convictions. The explicit provision of a right to produce propaganda, which pertains to individuals as well as to religious groups, goes beyond expressing an opinion to include the liberty to try to persuade people and to strengthen the religious community.[15] In other terms, producing 'propaganda' not only implies free discussion in matters of faith but also a positive action aimed at influencing and convincing others on the righteousness of one's faith and doctrinal position.[16]

As has been emphasized, the Constitution has laid down a meaningful connection between the right to freely profess one's faith and that of freely disseminating it through the means of propaganda.[17]

[13] Tribunal of Piacenza, 26 May 2009, no 375.

[14] Translation by the Author. Among others, V, Pacillo, *Buon costume e libertà religiosa. Contributo all'interpretazione dell'art. 19 della Costituzione italiana* (Milano, Giuffrè 2012).

[15] J. Pasquali Cerioli, *Propaganda religiosa: la libertà silente* (Torino, Giappichelli, 2018) p. 74 ss.

[16] Pasquali Cerioli, *Propaganda religiosa*, p. 119.

[17] Pasquali, Cerioli, *Propaganda religiosa*, p. 75 ss.

The relevance of freedom of religious expression for individuals and groups has been reinforced by the reproduction of the content of Article 21 Const. in the *Villa Madama* Agreement (1984) between the State and the Catholic Church (Article 2) as well as in most of the agreements signed between the Government and religious confessions. According to these agreements, believers and their groups or associations maintain freedom of assembly and freedom of expression 'through speech, writing and any other means of dissemination'.[18] Confessions which signed an agreement with the State (according to Article 8 Const.) also enjoy the right to distribute and affix publications and other material in their places of worship and related premises, without any authorization or interference from the part of the State.

II. Blasphemy, Religious Hate Speech and Limitations of Freedom of Speech in Religious Contexts

1. Blasphemy Laws in the Criminal Code

National legislation on blasphemy has been largely influenced since the 1861 unification of Italy by the political arrangements and legal settlements between the State and the Catholic Church.[19]

a. *Blasphemy Laws, from the Liberal Government to the Fascist Regime*

The Criminal Code enacted in 1889 (commonly referred to as the *Zanardelli* Code) was deeply rooted in a liberal and secular conception of State power, and therefore individual rights were protected from any aggressive interference on the part of the State.

In line with this principle, Articles 140–143 CC, concerning blasphemy, were aimed at guaranteeing all believers their free exercise of worship, while religious institutions as such were granted no particular safeguard. The Legislators had also permitted free discussion in matters of religion, so that religious doctrines were not exempted from public criticism.[20]

In the early 1920s, as soon as the Fascist regime came to power, the Government policy concerning religions other than Catholicism changed dramatically, becoming increasingly aggressive and discriminatory. Restrictive measures on worship were

[18] Law of 25 March 1985, no. 121 (Ratification of the Agreement signed by the Italian Republic and the Holy See on 18 Feb. 1984), par. 2(3).

[19] M. Ventura, 'Italy' in Rik Torfs (ed.) *International Encyclopaedia of Laws: Religion* (Alphen aan den Rijn, Kluwer Law International, 2013), p. 31 ss.; S. Angeletti, 'Blasphemy Laws and Incitement to Religious Hatred: Italian Legal Standards and Social Developments' (2014) 9 *Religion and Human Rights*, pp. 192-208.

[20] Law 13 May 1871, no 214.

imposed on religious minorities and the Jewish communities became subject to the Chart of the Race and the Racial Act.[21]

Following the Lateran Agreements, a new Criminal Code (the so-called *Rocco* Code) entered into force in 1930, deeply embedded in an ideology of the pre-eminence of the State over individual rights.

Reversing the principles underlying the previous Code, blasphemy laws were then conceived as a means to protect collective feelings and institutional religions and tended to favour the Catholic Church. The 1930 Criminal Code punished with imprisonment any blasphemy 'against the religion of the State' (Article 402), defamation of the State religion in the form of vilification of the Catholic faithful and religious ministers (Article 403), damage of worship-related objects (Article 404) and *turbatio sacrorum* of the Catholic Church (the crime of impeding or interrupting rites and public ceremonies, Article 405).

Where the same offences had been committed at the expense of a minority religion, the penalty was reduced (Article 406).

Criminal sanctions were also imposed against blasphemy directed against the Deity, symbols and persons revered in the State religion (Article 724).

b. *Blasphemy Laws under the Republican Constitution*

The confessional shaping of the blasphemy laws did not change when the Republican Constitution of 1948 came into force, despite the enactment of principles of non-discrimination on religious grounds and equal liberty for all religious communities. For almost five decades both the Constitutional Court and the Supreme Court upheld the provisions of the 1930 Criminal Code.[22]

As the Constitutional Court stated, the Catholic religion was part of the ancient, uninterrupted tradition of the Italian people,[23] professed by a large majority of the population, and therefore it deserved a higher protection both as a collective interest and as a social phenomenon.

In the meantime, however, social developments have increasingly changed the setting. In 1990 a debate arose over the case of Martin Scorsese's film '*The Last Temptation of Christ*', shown at the *Biennale* Festival in Venice, because the director was held accountable for 'defamation of the State religion' (Article 402). The Supreme Court held the view that propaganda and critical discussion in matters of religion had to be curtailed in the case of Catholicism.[24]

[21] Royal Law Decree 17 Nov. 1938, no 1728, F. Margiotta Broglio, 'Discriminazione razziale e discriminazione religiosa' (2000) 1 *Quaderni di Diritto e Politica Ecclesiastica*, pp. 269-279.

[22] Constitutional Court, 30 Nov 1957, no 125. See, Ventura, *'Italy'*, p. 175 ss.

[23] Constitutional Court, 30 Nov 1957 no. 125; Constitutional Court, 30 Dec. 1958, no. 79.

[24] Court of Cassation, Penal Section, 17 Jan. 1990.

It was only at the end of the 1990s that both the Supreme Court and the Constitutional Court admitted that their interpretation of criminal provisions had to be harmonized with the constitutional principles of equality and impartiality, and in consequence they reversed their previous judgments.[25]

In compliance with the Constitutional Court's rulings (held between 1995 and 2005), [26] the Legislator amended the Criminal Code by means of Law 85/2006.[27]

Following the 2006 reform, the Criminal Code now sanctions with a fine: 1) blasphemy against religion committed through the defamation of believers (where the person addressed is a religious minister the fine is higher (Article 403); 2) blasphemy through defamation or damage of sacred symbols (Article 404);[28] 3) the act of interrupting or hindering public rites and ceremonies (sanctioned with imprisonment, Article 405[29]).

c. *Balancing Religious Sensitivity and Freedom of Expression*

It is worth noting that, while in other European countries blasphemy laws tended in recent years to be struck down or repealed by broader legislation, the Italian Legislator maintained blasphemy provisions, but they have been settled under an innovative legal framework.

[25] Court of Cassation, Penal Section, 18 Sept. 1998, no. 13364. On the social and legal developments, see Pierluigi Consorti (ed.), *Costituzione, religione e cambiamenti nel diritto e nella società* (Pisa, Pisa University Press, 2019).

[26] Constitutional Court, 14 Nov. 1997, no. 329; Constitutional Court, 18 Oct. 1995 no. 440; Court of Cassation, Penal Section, 2 May 2003, no. 20739.

[27] Law 24 Feb. 2006, no. 85; A.G. Chizzoniti, 'La tutela penale delle confessioni religiose: prime note alla legge n. 85 del 2006 «modifiche al codice penale in materia di reati d'opinione»' (2006) 2 *Quaderni di Diritto e Politica Ecclesiastica,* pp. 437-450; M.C. Ivaldi, *La tutela penale in materia religiosa nella giurisprudenza* (Milano, Giuffré, 2004); N. Marchei, *"Sentimento religioso" e bene giuridico* (Milano, Giuffré, 2006); V. Pacillo, *I delitti contro le confessioni religiose dopo la legge 24 febbraio 2006, n. 85* (Milano, Giuffré, 2007); David Brunelli (ed), *Diritto penale della libertà religiosa* (Torino, Giappichelli, 2010); A. Gianfreda, *Diritto penale e religione tra modelli nazionali e giurisprudenza di Strasburgo* (Milano, Giuffré 2012); C. Cianitto, *L'incitamento all'odio religioso: Stati Uniti, India, Gran Bretagna, Italia* (Torino, Giappichelli, 2012); *Id*., *Quando la parola ferisce. Blasfemia e incitamento all'odio religioso nella società contemporanea* (Torino, Giappichelli, 2016).

[28] The sanction differs: in the case of defamation it is a fine, whereas in the case of damage, imprisonment is prescribed.

[29] On the case of *turbatio sacrorum*, see Court of Cassation, Section III, 20 Jan. 2022 no 2242; A. Licastro, 'Tra devozione popolare e riverenza mafiosa. La Cassazione si pronuncia sull'«inchino» ai boss nel corso delle processioni ecclesiastiche' (2022) 3 *Quaderni di Diritto e Politica Ecclesiastica,* pp. 875-892; G. Marcaccio, 'Le nuove forme di turbamento della funzione religiosa. La strumentalizzazione del rito come condotta penalmente rilevante: pregi, difetti e prospettive' (2023) 3 *Il Diritto Ecclesiastico*, pp. 653-662.

In accordance with the principles of equality and dignity underlying Law 85/2006, the object of penal protection is related to all religious confessions without differentiation or discrimination, and the scope is that of protecting religious sensitivity as intimately linked to freedom of religion.[30] The main issue raised by this assessment is that of balancing religious sensitivity with freedom of expression.

As the UN Special Rapporteur on Freedom of Religion or Belief has phrased it:

> 'the rights to freedom of religion or belief and to freedom of expression do not stand in opposition to each other, but are actually quite close in spirit and formulation. Nevertheless, this positive interrelatedness does not preclude concrete conflicts, as controversial issues may at times emerge at the intersection of both rights'[31]

Providing the criteria for the proper balancing of these two intertwined and, at the same time, conflicting freedoms has proved to be challenging for the national Courts with the result that a straight line in the overall interpretation does not seem easy to figure out. On a general note, it has been remarked that not every form of criticism, dissent or discussion of religious issues can be sanctioned as vilification but only those speeches which address the faithful in an outrageous and gratuitous fashion.[32]

The Supreme Court stated that, in order to be legitimate, critical speech that is directed against religion must be conveyed through a thoughtful and carefully assessed statement, while gratuitous offences, manifesting contempt directed towards the addressed religion, cannot be protected as legitimate criticism and shall be sanctioned as the vilification of religion.[33] This approach appears in line with the 'gratuitously offensive' test developed by the ECtHR jurisprudence.[34]

When a Muslim leader called the Vatican 'a criminal association' and the Crucifix 'a little corpse', the local Tribunal declared the defendant accountable for the violation of Articles 403 and 404 CC[35].

[30] Blasphemy Laws are included within the Fourth Title of the Second Part of CC, entitled 'Crimes against religious sensitivity and piety on the dead'; in particular, Articles 403-405 are entitled 'Crimes against religious confessions'.

[31] A/HRC/31/18, 23 Dec. 2016.

[32] Court of Cassation, Penal Section, 11 Dec. 2008, no. 10535; L. Lacroce, 'La tutela penale del sentimento religioso nella giurisprudenza della Corte di Cassazione' (2012) 3/4 *Il Diritto Ecclesiastico*, pp. 663-679. Court of Cassation, Penal Section III, 7 April 2015, no. 41011. *Contra*, Tribunal of Milan, Section X, 10 July 2018, no 8539, *see* N. Marchei, 'La tutela penale del sentimento religioso dopo la novella: il "caso Oliviero Toscani" (2020) 3 *Stato, Chiese e pluralismo confessionale. Rivista telematica*.

[33] Court of Cassation, Penal Section III, 13 Oct. 2015, no. 41044; Court of Cassation, Penal Section III, 17 Jan. 2017, no. 1952 (Article 403 CC, both cases are concerned with vilification of the Catholic religion).

[34] *Ex multis*, *Otto Preminger Institut v. Austria*, App no. 13470/87 (ECtHR, 20 Sept. 1994); *Wingrove v. The United Kingdom*, App no. 17419/90 (ECtHR, 25 Nov. 1996); *Soulas et Autres c. France,* App no. 15948/03 (ECtHR, 10 July 2008).

[35] Tribunal of Padova, 14 June 2005.

In a case that raised much controversy, the Italian journalist and writer Oriana Fallaci was found accountable for blasphemy (Article 403) because her book, *La forza della ragione*, was claimed to be outrageous in relation to the Muslim community. The Tribunal maintained that the arguments developed in the book were offensive towards Islam and Muslims and showed hatred and contempt.[36]

In other cases, the judge drew up a distinction between blasphemy against religion as such and vilification of the faithful, reaching questionable conclusions. The day after the terrorist attack in Paris in January 2015 the Italian newspaper *Libero* published a headline on its front page containing the words 'This is Islam' linked to a picture of one of the terrorists executing a victim. A group of local Islamic associations filed a suit against the newspaper. The tribunal found no violation of Article 403 Criminal Code.[37] The judge held the view that, even assuming that the headline conveyed a message of an implicit association of Islam with terrorism, Article 403 cannot be interpreted in the sense that the defamation of religion as a doctrinal view immediately entails an offence committed against the faithful.

2. **Prohibition of Hate Speech and Incitement to Hatred**

a. ***Criminal Code Provisions***

Incitement to hatred on racial, ethnic and religious grounds is forbidden by the legal system. There is no universal consensus on what might constitute a clear definition of hate speech nor on legislative measures that would clarify this point. Definitions made at a supranational level are applied in the national legal framework, in particular in the case of the European Commission against Racism and Intolerance General Policy Recommendation No. 15 on Combating Hate Speech,[38] the Council of Europe Recommendation on Combating Hate Speech (2022) and the EU Council Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by means of Criminal Law (2008).[39]

It is a common understanding among scholars that the term 'hate speech' ('*discorso d'odio*') describes incitement to hatred directed against a target group or indi-

[36] Tribunal of Bergamo, 16 May 2005.

[37] Tribunal of Milan, Section X, 10 July 2018.

[38] Council of Europe, ECRI General Policy Recommendation No. 15 *on Combating Hate Speech*, 8 Dec. 2015.

[39] Council of Europe, Recommendation CM/Rec (2022)16 of the Committee of Ministers to member States on combating hate speech (2022); Council Framework Decision 2008/913/JHA, 28 Nov. 2008, *on combating certain forms and expressions of racism and xenophobia by means of criminal law.*

vidual subject on the grounds of their ethnic, national, religious or gender identity. The target group may also be perceived as a minority and vulnerable.[40]

Hate speech delivers a twofold message: one to the victim, whose feelings of liberty and security are undermined, and another to the rest of society, which is supposed to share in the contemptuous opinion.[41]

In order to define an expression of opinion as a form of hate speech, several conditions have to be met: 1) the offensive speech must be public and delivered with the intention of inciting to hatred and violence; 2) it must be potentially able to provoke violence; 3) there must be an actual danger of causing harm.

Italian Criminal Code includes hate speech crimes in the more general Section of 'crimes of opinion'. The most relevant rules are Article 604-bis and Article 604-ter, both in Section 1-bis, entitled Crimes against Equality ('*Dei delitti contro l'eguaglianza*').

This background highlights how the aim of the Legislator was to safeguard the principle of equal dignity,[42] which is rooted in the Constitution (Article 3). Equality and dignity are intertwined and they constitute the rights which freedom of expression must be balanced with.[43]

Article 604-bis penalises the crime of 'propaganda and incitement to commit a crime on the grounds of racial, ethnic and religious discrimination' (Article 604-bis).[44]

Par. a) punishes with imprisonment (up to one year and a half) or a fine (up to 6.000 euros) for the propagation of ideas based on superiority or racial or ethnic hatred, discrimination or incitement to discrimination based on racial, ethnic, national or religious grounds.

Par. b) punishes with imprisonment (of between 6 months to 4 years) any violence or incitement to violence on racial, ethnic, national or religious grounds.

[40] *See* Senate of the Republic, Documento approvato dalla Commissione straordinaria per il contrasto dei fenomeni di intolleranza, razzismo, antisemitismo e istigazione all'odio e alla violenza, nella seduta del 22 giugno 2022, *Indagine conoscitiva sulla natura, cause e sviluppi recenti del fenomeno dei discorsi d'odio, con particolare attenzione alla evoluzione della normativa europea in materia*, Comunicato alla Presidenza il 7 luglio 2022 (hereafter, Segre Commission, *Indagine conoscitiva*).
https://www.senato.it/service/PDF/PDFServer/DF/410798.pdf.

[41] Segre Commission, *Indagine conoscitiva.*

[42] A. Galluccio, *Punire la parola pericolosa? Pubblica istigazione, discorso d'odio e libertà di espressione nell'era di internet* (Milano, Giuffrè Francis Lefebvre, 2020) p. 348 ss.

[43] A. Licastro, 'Incitamento all'odio religioso e tutela della dignità della persona' (2022) 18 *Stato, Chiese e pluralismo confessionale. Rivista telematica*; M. Parisi, 'Spazio pubblico europeo e discorsi d'odio' (2019) 3-4 *Il Diritto Ecclesiastico*, p. 546.

[44] Provision added to the Title XII (Crimes against the person) of Part II CC by Legislative Decree 1 March 2018, no. 21 (Article 2, par. 1(i)). It substitutes Article 3, Law 13 Oct. 1975 no. 654. *See* also Law 25 June 1993 no. 205 (*Urgent measures in matter of racial, ethnic or religious discrimination*).

Article 604-bis also forbids any association, group or organization aimed at incitement to hatred or violence on racial, ethnic, national or religious grounds and punishes with imprisonment anyone participating, directing or promoting such groups (detention of up to six years).

Article 604-ter establishes an aggravating circumstance (penalty increased by half) when a crime is carried out with the aim of discrimination or ethnic, national, racial or religious hatred or with the aim of favouring the activities of groups and associations sharing those purposes.

Looking at the effectiveness of the aforementioned Criminal Code provisions, a first reflection shall consider the problem of under-reporting (between 2016 and 2021, penal proceedings have been 300 and in 80% of cases ending in dismissal) and under-recording.[45] Furthermore, much of hate speech is currently online and anonymity makes it harder to bring the claim to court.

A second remark concerns the scope and content of the provisions. An extension of those rules on religious matter has been suggested by scholars in order to positively cover anti-Semitic and anti-Muslim discrimination. In addition, an enlargement to cover discrimination on grounds of gender identity and sexual orientation has been proposed.[46]

Intersectionality is a third question that should not be underestimated: religion, gender and ethnic origin are likely to place individuals in a position of situational vulnerability, resulting in the victim becoming the target of discrimination and hatred[47].

b. *Crimes against the Sanctity of the Dead*

The Criminal Code punishes with imprisonment (from one to five years) the violation of a tomb or sepulchre (Article 407) as well as the damaging of tombs or other objects in burial places (6 months to 3 years, Article 408). The act of impeding or disturbing a funeral may also be punished with imprisonment (Article 409).

3. Crimes against International Law – Denial of Genocide (Holocaust) and Crimes against Humanity

The final paragraph of Article 604-bis is concerned with Holocaust denial, genocide, crimes against humanity and war crimes, which are not sanctioned in the Criminal Code as separate hate speech crimes but are dealt with only as a reason to increase a punishment for incitement to hatred.

[45] Source: Segre Commission, *Indagine conoscitiva.*

[46] Segre Commission, *Indagine conoscitiva.*

[47] D. Ferrari, *Orientamento sessuale e libertà religiosa. Percorsi e sfide nel diritto internazionale ed europeo* (Bologna, Il Mulino 2023).

The penalty of imprisonment is higher (between 2 and 6 years) when the crime of propaganda or incitement to hatred is based on the denial, minimization or apology of the Shoah, genocide, crimes against humanity or war crimes (as defined by the International Criminal Court Statute), when the manner of execution is likely to cause an actual danger of diffusion.[48]

As far as international crimes are concerned, the domestic legal system is in need of systematic reform in order to fully comply with the provisions of the International Criminal Court Statute and, more generally, with the international criminal system. At present, only Law 237/2012[49] provides for a partial adaptation of the legal system to the rules of the International Criminal Court, while a full accomplishment would be achieved through the establishment of a Code of International Crimes. A comprehensive reform would be seriously needed, since crimes against humanity and aggression are not currently covered by law and the crime of genocide falls under Law 962/1967,[50] which applies the definition of the 1948 Genocide Convention and that of the Rome Statute.

The urgent need to adjust the Italian legal system so that it is in compliance with the most effective rules of international criminal law led the then Minister of Justice, in 2022, to appoint a Commission of Experts (Commission *Palazzo – Pocar*). The Group delivered an extensive Final Report,[51] making suggestions and proposals in order to assess the matter and to innovate and enlarge the definition and scope of the aforementioned crimes. Following the Report, in March 2023 the Council of Ministers voted in a Bill[52] that was intended to introduce a Code of International Crimes. But criticisms of the project have been expressed by judges and scholars, since the Bill does not cover crimes against humanity and genocide, and only introduces the crime of aggression and extends the scope of war crimes.[53]

a. *Legal Developments in Combating Anti-Semitism and Religious Hatred*

A number of measures to combat anti-Semitic prejudice and discrimination have been taken recently by Parliament, and soft-law documents have been produced to

[48] Article 604-bis Criminal Code. On the denial of Shoah, see Court of Cassation, Penal Section I, no. 3808, 3 Feb. 2022.

[49] Law 20 Dec. 2012, no. 237.

[50] Law 9 Oct. 1967, no. 962.

[51] https://www.giustizia.it/cmsresources/cms/documents/commissione_PALAZZO_POCAR_relazione_finale_31mag22.pdf

[52] https://www.governo.it/it/articolo/comunicato-stampa-del-consiglio-dei-ministri-n-25/22114

[53] https://www.magistraturademocratica.it/articolo/i-crimini-internazionali-come-questione-prioritaria-e-qualificante; https://www.questionegiustizia.it/data/doc/3491/crippa-m-l-approvazione-di-un-codice-dei-crimini-internazionali-dimezzato-le-ragioni-di-un-dis-atteso-intervento-normativo.pdf

counter the resurgent phenomenon of anti-Semitism at a number of levels[54]. Following the European Parliament Resolution on combating anti-Semitism[55] delivered in 2017, in 2020 the Government appointed a 'National Coordinator for Fighting against anti-Semitism'[56]. In addition, a Working Group of Experts at the Presidency of the Council of Ministers was established in 2020, 'for the recognition of the definition of antisemitism approved by the IHRA (International Holocaust Remembrance Alliance)'.

In compliance with the EU Council Declaration on Mainstreaming the Fight against Antisemitism across Policy Areas,[57] the Working Group delivered its Final Report in 2021, making recommendations to both institutions and society in general. The Report includes a National strategy for combating antisemitism,[58] with the aim of reinforcing the understanding of antisemitism in its social dimension and also suggesting policies that would effectively counter hate crimes and prejudices. Cooperation between institutions and actors in civil society, including Jewish communities, schools, universities, sport, media and politics, is given prominent importance by the Report.

At the Senate, following a proposal[59] to the Assembly, an 'Extraordinary Commission for combating acts of intolerance, racism, antisemitism and incitement to hatred and violence' (hereafter, Segre Commission) was established in 2021, and Mrs. Liliana Segre, a Holocaust survivor and Senator for Life, was appointed as its President. In June 2022, the Segre Commission delivered an insightful Document regarding a nationwide fact-finding investigation.[60]

At governmental level, it is also worth recalling the elaboration of Guidelines to combat antisemitism at school[61] (2021) and a Declaration of Intent to counter antisemitism in soccer (2023).[62]

[54] On the effectiveness of these measures, R. Mazzola, 'Contrasto ai fenomeni di antisemitismo: contraddizioni e difficoltà della normativa vigente', in Vincenzo Buonomo, Maria D'Arienzo and Olivier Echappé (eds), *Lex rationis ordinatio. Studi in onore di Patrick Valdrini* (Cosenza, Pellegrini, 2022), pp. 1029-1047.

[55] European Parliament, Resolution no 2017/2692, on *Combating anti-Semitism,* 1 June 2017.

[56] The first coordinator was the Professor of Pedagogy Milena Santerini (2020-2022), followed by the Prefect Giuseppe Pecoraro (2023) and the Lieutenant General Pasquale Angelosanto (2024).

[57] Council of European Union, no 13637/20, 2 Dec. 2020.

[58] https://www.governo.it/sites/governo.it/files/documenti/documenti/Presidenza/NoAntisemitismo/StrategiaNazionale/StrategiaNazionaleLottaAntisemitismo_EN.pdf

[59] XVIII Legislature, Senate, Motion no 1-00136, 5 June 2019.

[60] Segre Commission, *Indagine conoscitiva.*

[61] https://www.governo.it/sites/governo.it/files/documenti/documenti/Presidenza/NoAntisemitismo/StrategiaNazionale/LineeGuidaScuolaNoantisemitismo.pdf

[62] https://www.governo.it/sites/governo.it/files/documenti/documenti/Presidenza/NoAntisemitismo/Documenti/DichiarazioneAntisemitismoSport_20230627.pdf

Following the terrorist attacks of 2015 in Paris at the headquarters of the satirical journal Charlie Hebdo, the Italian Parliament introduced provisions to combat international terrorism: Law 43/2015 on 'Urgent measures to combat terrorism, also of international matrix'[63] makes an explicit reference to the Paris attacks,[64] but no mention of religion as grounds for terrorism is made in the description of the forbidden behaviour[65].

b. *Governmental Bodies against Discrimination and Hatred*

Apart from specific instruments related to antisemitism, complaints of discrimination on religious grounds can be dealt with by two governmental institutions which work in synergy.

The National Office Against Racial Discriminations (UNAR) was established in 2003[66] under the EU Directive no. 2000/43/CE, with the aim of combating discrimination and guaranteeing equality to all persons irrespective of their ethnic or racial origin, age, religion or belief, sexual orientation, gender identity or disability. Complaints of discrimination can be reported to the UNAR, which works under the Equal Opportunities Department at the Presidency of the Council of Ministers.

Incidents constituting crimes can be reported to the Observatory on Security against Discriminatory Acts (OSCAD), which operates under the Public Security Department at the Ministry of Interior.[67] The Observatory cooperates in reporting and collecting cases of hate crime, brought by victims and motivated on race, ethnicity or religion. It also helps victims to file suit.

Unfortunately, social awareness and the effectiveness of these instruments remains very limited, while the under-reporting of episodes of hate speech is still a problem.

[63] Law Decree, 18 Feb. 2015, no. 7, converted into Law 17 April 2015, no 43. See also Law 28 July 2016 no. 153. European Union, Directive 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

[64] '*Ritenuta la straordinaria necessità ed urgenza, anche alla luce dei recenti gravissimi episodi verificatisi all'estero, di perfezionare gli strumenti di prevenzione e contrasto del terrorismo*'.

[65] See R. Mazzola, 'Fear and Prevention. 'The ambiguous role of the feeling of "fear" in contemporary judicial system', in Loretta Fabbri and Claudio Melacarne (eds), *Understanding Radicalization in Everyday Life* (Milano, Mc Graw Hill, 2023) pp. 1-43; F. Alicino, *Terrorismo di ispirazione religiosa. Prevenzione e deradicalizzazione nello Stato laico* (Roma, Apes, 2020); A. Negri, *Radicalizzazione religiosa e de-radicalizzazione laica. Sfide giuridiche per l'ordinamento democratico* (Roma, Carocci, 2023).

[66] Legislative Decree 9 July 2003, no. 215.

[67] https://www.interno.gov.it/sites/default/files/allegati/oscad_english_version.pdf

4. Religious Hate Speech and Political Discourse

As the Supreme Court recalled, as far as politicians are concerned their prominent public role should be a good reason for them to appear to be more respectful and careful in expressing potentially offensive opinions than other members of society.[68] Regrettably, this is not always the case, as political ideologies and the search for consensus increasingly heighten discriminatory discourse, both at local and at national level. A common pattern in the jurisprudence seems hard to figure out in this regard.

In the case of a university professor who had disseminated an article arguing that Jewish ritual slaughter goes against the natural animals' rights not to suffer and that this insensitivity would have led to the notion that the Jewish people deserved the gas chambers, the Court of Cassation held the view that in this statement a *quid pluris* to the legitimate manifestation of an opinion could be discerned. The speech was punished as incitement to discrimination and as an offence against the principle of equal dignity.[69]

In another instance, a local political leader who had affixed posters to the city walls expressing contempt against the Roma minority group was found guilty by the Court of propagating discriminatory ideas, since promoting racial prejudice against Roma is a form of incitement to hatred.[70]

A peculiar legal framework puts member of Parliament in a situation of reinforced protection from hate speech regulation.[71]

Article 68 of the Constitution establishes a functional immunity connected to the role. Paragraph 1 says that members of Parliament cannot be punishable for the opinions they utter or the votes they give while carrying out their duties.[72]

This prerogative entails that their expressed opinions are not censurable even if they have been held *extra moenia* (outside the normal Parliamentary work). Nonetheless, since the immunity is closely linked to the specific function held, not every kind of speech is protected.

The Constitutional Court has repeatedly stated that some conditions must be met for the Member of Parliament's speech to be protected *extra moenia*: 1) the functional connection must be clear so that the expressions used can be identified as a manifesta-

[68] Court of Cassation, Penal Section I, no. 47894, 22 Nov. 2012 (Propaganda of ideas based on racial or ethnic superiority, ex Article 3, Law 13 Oct. 1975, no. 654).

[69] Court of Cassation, Penal Section I, 13 March 2012, no. 20508.

[70] Court of Cassation, Penal Section IV, 30 Oct. 2009, no. 41819 (Article 3 par.1 (A), Law 654/1975).

[71] *See*, C. Cianitto, 'Religious hate speech, libertà di religione e libertà di espressione. Intersezioni tra forma e sostanza dei diritti nella società multiculturale' (2019) 16 *Stato, Chiese e pluralismo confessionale. Rivista telematica*.

[72] Translation by the Author.

tion of the exercise of parliamentary duties; 2) a chronological connection between the role held and the speech must be detectable; 3) there must be a substantial coincidence between internal and external opinions and acts, while a generic reference to the relevance of the topic or the political context would not be sufficient to render the immunity applicable.[73]

III. Freedom of Expression, Digitalization, and Fundamental Rights Protection Online

1. Hate Speech Online

Hate speech is augmented by the Internet: as a result of algorithmic logic, online platforms reinforce an extreme language that consolidates a group of users. The Segre Commission highlights in its Document that legislative intervention would be needed, at the same time recognizing the increasingly relevant role played by digital platforms in combating hate speech online since, given the transnational nature of the Internet, they are probably the only actors really able to regulate digital contents. The standards of protection of freedom of expression by digital platforms are, however, highly discretional and their definitions of hate speech vary considerably. Nonetheless, the European Commission has agreed on a Code of Conduct on Countering Illegal Hate Speech Online in collaboration with Facebook, Twitter, Microsoft, YouTube and other platforms.[74] At a national level, UNAR activities include monitoring and combating online discrimination and hate speech crimes. The Agency also cooperates with the social networks, warning them of items to be removed. It also works with institutional and private actors in this field in line with the Committee of Ministers Recommendation to member States on combating hate speech (2022).[75]

Case law regarding hate speech online is limited and is focused mainly on issuing a defence of terrorism.

In a Court of Cassation ruling issued in 2015,[76] the defendant's defence of the Islamic state through the dissemination of speech on internet amounted to an infringement of article 414 CC (criminal solicitation), aggravated by the intention of terrorism. Elsewhere, the Supreme Court recalled that, in order to be found guilty of criminal solicitation, the method employed (the use of the social media) is relevant,

[73] Constitutional Court, 4 Dec. 2013, no. 305.

[74] https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en

[75] Committee of Ministers, Recommendation CM/Rec (2022)16, 20 May 2022.

[76] Court of Cassation, Penal Section I, 1 Dec. 2015, no. 47489.

since it is the potential diffusion to an undetermined number of people[77] (the defendant had posted on his FB profile a defence of the methods and aims of a terrorist association proclaiming jihad).

In a recent ruling, the Court of Cassation went a step further in social protection against hate speech online, holding the view that putting a 'like' on a post on Facebook can constitute a manifestation of incitement to hatred, ex Article 604-bis CC. The case had been brought before the Court by a man who had been subjected to an interim measure since he had put 'likes' on Neo-Nazi Facebook pages with antisemitic content. In the Court's assessment, given the Facebook algorithm, a 'like' in this social network not only shows personal agreement with the content of the post but also helps it to convey the message to a larger amount of people, thus improving the success of the virtual community and ultimately helping in spreading incitement to hatred.[78]

2. **Media Regulation against Hate Speech**

The European Union Directive 2018/1808[79] 'on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)' deals with combating incitement to hatred. In line with European interventions, the Unified Text on Audio-visual Media Services Television and Radio[80] states that audio-visual media services under the national jurisdiction shall not promote incitement or apology of crimes, meaning, in particular, 1) incitement to hatred or violence against a person or a group of persons based on the grounds defined at Article 21 EU Charter for Fundamental Rights or in violation of Article 604-bis CC; 2) incitement to commit terrorist crimes as defined at Article 5 of the EU Directive 2017/541. Religion or belief are, therefore, positively included.

Religious hate speech is also covered by the Regulation adopted in 2019 by the Italian Regulatory Authority for Communications on the matter of respect for human

[77] Court of Cassation, Penal Section I, 15 May 2017, no. 24103; Court of Cassation, Penal Section V, 25 Sept. 2017, no. 55418 (apology of ISIS).

[78] Court of Cassation, Penal Section I, 9 Feb. 2022, no. 4534. A. Galluccio, 'Il piano inclinato dell'odio online: sulla rilevanza del mero like quale condotta di propaganda o istigazione all'odio razziale, etnico o religioso' (2022) II *Foro Italiano*, 326 ss.

[79] European Union, Directive 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU.

[80] Legislative Decree 8 Nov 2021, no. 208 (Article 30). See also Law 31 July 1997 no 249, which established the Communications Guarantee Authority, an independent body to supervise telecommunications.

dignity and the principle of non-discrimination and on combating hate speech.[81] In the Document, hate speech directed at a target group on religious ground is explicitly mentioned in the overall definition of hate speech. The Authority also adopted a Recommendation on the correct representation of the image of women in broadcasting.[82]

IV. Blasphemy and Art. Ecclesiastical Objects, Symbols and Their Protection

1. Religious Cultural Heritage

Article 33 par.1 of the Constitution recognizes freedom of art and science and their teaching. Freedom of scientific research, artistic expression and freedom of teaching are protected by this provision.

Ecclesiastical artefacts and Church art form a significant part of the Italian cultural heritage. In order to preserve the religious cultural heritage and to guarantee, within limits, its public display, a system of coordination and collaboration between the State and religious confessions has been applied, in line with the broader legal framework of cooperation in the relationship between State and confessions.

Following the provisions enacted in the *Villa Madama* Agreement (1984), the Ministry of Cultural Heritage and the President of the Italian Episcopal Conference signed an Agreement for the protection of religious cultural assets.[83] The Document provides for a model of coordination in relation to organizational and security matters, whereas it does not deal with the creation and selection of art objects in the churches' premises or other religious places.

Article 18 of the Lateran Treaty (1929) states that the art and science treasures in the Vatican State and the Lateran Palace will be accessible to scholars and visitors, and gives the Holy See the right to regulate public admittance[84].

The agreements signed by the State with religious confessions, ex Article 8 Const., do not deal with the question of ecclesiastical artefacts or objects, whose selection, choice and display are free and under the sole responsibility of the confession. Artistic objects or performances within places of worship are therefore an issue of the churches' autonomy.

[81] AGCOM, *Regolamento recante disposizioni in materia di rispetto della dignità umana e del principio di non discriminazione di contrasto all'hate speech*, no. 157/19/CONS, 15 May 2019.

[82] AGCOM, *Raccomandazione sulla corretta rappresentazione dell'immagine della donna nei programmi di informazione e di intrattenimento*, no. 442/17/CONS, 24 Nov. 2017.

[83] President of the Republic Decree, 4 Feb. 2005, no. 78.

[84] P. Cavana, 'I tesori d'arte del Vaticano nel Trattato lateranense' (2023) 8, *Stato, Chiese e pluralismo confessionale. Rivista telematica.*

2. Artistic Performances and Religious Sensitivity

Controversial cases on artistic objects and performances allegedly offensive to a religious community are rare and, most of the time, they are not brought to Court but only raise some concern or critical remarks, as happened in connection with the Italian artist Maurizio Cattelan. One of his best-known works, '*The Ninth Hour'*, represents Pope John Paul II lying on the ground after being struck by a meteorite (1999); the work was subjected to widespread debate at the time of its public display.[85]

More recently, Codacons, a group of associations, gathered to defend collective customers' interests and to protect the environment, lodged a complaint against the Italian influencer and digital entrepreneur Chiara Ferragni. A picture realized for Vanity Fair represented Ferragni as a modern Virgin Mary, depicting the ancient portrayal of Giovanni Battista Salvi. The work was included in a collection of pictures by the artist Francesco Vezzoli. The association claimed that the picture was offensive to religious sensitivity and was deemed blasphemous.[86] Codacons also announced that it would lodge a complaint against the Mayor of Pontedera (Pisa) because of the public exhibition of a Nativity where the artist had made a portrait of the Virgin Mary having (again) the face of Chiara Ferragni.[87]

On the occasion of the first 'Festival of arts for freedom of expression against religious censorship', called *Ceci n'est pas un blasphème*, held in Naples in 2021 and staged at the Palace of Arts, a series of posters were hung on the streets' walls in the city center displaying blasphemous insults. The work provoked strong public reactions and the posters were promptly removed.[88]

[85] https://www.artesvelata.it/la-nona-ora-cattelan/

[86] https://www.ilmattino.it/societa/persone/chiara_ferragni_madonna_codacons_denuncia_blasfemia_cosa_succede_ultima_ora_oggi_27_settembre_2020-5488803.html?refresh_ce. Codacons broadcast that it had filed a complaint at the Prosecutor's Office and had informed the Ministry of Cultural Heritage and the Pope (no subsequent information has been found).

[87] https://www.finestresullarte.info/attualita/pontedera-madonna-volto-ferragni-polemica-blasfemia.(no subsequent information about the claim has been found).

[88] https://artslife.com/2021/09/21/bestemmie-illustrate-napoli-festival-blasfemia/.

All websites last accessed 19 Feb. 2024.

FREEDOM OF RELIGION AND EXPRESSION IN PORTUGAL

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1. Introduction

Religion aims at answer the ultimate questions about the origin, meaning and destiny of the Universe and life, starting from the assumption that the answers can be at least partially understood, in a coherent way, by the human intellect enlightened by revelation, whether it is immanent or transcendent. In general, it is understood that this revelation necessarily has to be made explicit, verbalized, symbolized and communicated. Around this communication of religious truth develops the religious community, with its liturgical practices of worship and adoration. There is no religious communion and community without religious communication. This can manifest itself in words, gestures, liturgy, music, poetry, prose, painting, sculpture or architecture. It can use all communication techniques and technologies, from paper and ink, through radio and television to digital programming and artificial intelligence. For this reason, religious freedom is inseparable from freedom of thought and expression. This is an aspect that must be considered firmly established and non-derogable. Religious freedom certainly implies freedom of association and assembly.

This was soon recognized in the Edict of Milan of 313, which established religious toleration for Christianity and other religions, granting all "the right of open and free observance of their worship for the sake of the peace of our times, that each one may have the free opportunity to worship as he pleases". In a time much closer to ours, following the Reformation and the Enlightenment, religious freedom was widely enshrined in declarations of rights, constitutions and international conventions, in a process that is now well known and which we abbreviate with a reference to Articles 18 and 19 of the Universal Declaration of Human Rights and 9 and 10 of the European Convention on Human Rights.

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But religious freedom also cannot exist without the freedom to disseminate the facts and doctrines on which religious belief is based and also the right to transmit it to others and to deepen reflection on all its aspects and its moral and disciplinary implications. for individual and collective conduct. This is the understanding that should guide the interpretation and application of contemporary normative texts on fundamental human rights, both constitutional and international. It is generally recognized that there is an essential link between freedom of expression and religion. The Portuguese Constitution enshrines these rights principally in articles 37 and 41. In Portugal these precepts have been accepted without judicial challenge. Probably thanks to the 2001 Religious Freedom Act[2] and to the demography of religion[3], Portuguese society has respected these rights and benefited from the protection and reassurance which they provide.

2. Constitutional and internacional legal norms

We will begin our analysis with a reference to religious freedom in the Portuguese Constitution, followed by an approach to freedom of expression and its relevance to the religious sphere. Freedom of conscience, of religion and of form of worship is protected in Article 41 of the Constitution. Paragraph 1 of that article states that "[t]he freedom of conscience, of religion and of form of worship is inviolable." This is a strong statement, aimed at guaranteeing very broad protection, even if not absolute. It places the origin of freedom of religion in the individual conscience, understood as the core and guarantee of one's own identity and individual personality. Acting against conscience is seen as a denial of one's dignity, freedom, authenticity and integrity. Underlying this normative text is the idea that religion manifests an openness to a transpersonal supernatural dimension that can imply a relationship that has to be cultivated from the recognition of the unpretentious differences and distances between the natural and the supernatural realms. Worship implies a sense of existential and ethical dependency and subordination, which works at the same time as an inner force for the spiritual and moral elevation of the individual and the community

[2] Act n.º 16/2001, 22.06, successively amended until the version given by Act n.º 66-B/2012, of 31/12.

[3] According to the 2021 census, the number of Catholics in Portugal decreased by 8.1%, from 88.3% in 2011 to 80.2%, with 6.6% more people of no religion. The question regarding religion, in the 2021 Census, is optional, but obtained a response rate of 97%. The percentage of citizens who claim to be Protestant/Evangelical increased by 1.2% (from 0.9% to 2.1%). The Orthodox remained at 0.7%, while the group of people with another religion went from 2.6% to 2.9% over the course of a decade. Muslims are 0,42% and Jews 0,03%. Cfr., Instituto Nacional de Estatística - Censos 2021. XVI Recenseamento Geral da População. VI Recenseamento Geral da Habitação : Resultados definitivos**.** Lisboa: INE, 2022, www: <url:https://www.ine.pt/xurl/pub/65586079>. ISSN 0872-6493. ISBN 978-989-25-0619-7, accessed on 31 July 2023.

that participate in it. Freedom of religion protects all paths and feelings leading to, presiding over, and coming from worship.

Article 41(2) states that "[n]o one may be persecuted, deprived of rights or exempted from civic obligations or duties because of his convictions or religious observance." This means that religious practice cannot affect the rights of equal dignity and freedom of individuals, harming or benefiting them. People should not lose legal benefits for belonging to a religious community, nor should they gain benefits for the same reason. This does not mean, however, that there is no duty to create accommodations, as far as possible, to meet the specificities of a given religious belief, namely allowing a Seventh-day Adventist not to have to take school exams on Saturday. Reasonable and proportionate accommodation solutions may be necessary precisely to maintain, as far as possible, the equal dignity and freedom of individuals in religiously plural societies. Safeguarding the civic status of students requires respect for privacy in matters of religion, precisely to reduce the risk of discrimination and persecution. Therefore, it is said in paragraph 3 of article 41 that "[n]o authority may question anyone in relation to his convictions or religious observance, save in order to gather statistical data that cannot be individually identified, nor may anyone be prejudiced in any way for refusing to answer."

The collective and institutional dimension of religious freedom is by no means forgotten. It is recognized that it is an inseparable element of religious practice, whose protection also refers to the rights of freedom of peaceful assembly and association, provided for in articles 45 and 46 of the Portuguese Constitution. Article 41 n 4 determines that "[c]hurches and other religious communities are separate from the state and are free to organise themselves and to exercise their functions and form of worship." This means that religious communities are masters of their doctrines, their rites, their legal and social organisation and their activity. It is up to them to decide on the existence of cult ministers and officials and to establish selection criteria in accordance with their doctrines. The organisation and functioning also cover the expressive and communicative dimensions. Paragraph 5 of the same article says that "[t]he freedom to teach any religion within the ambit of the religious belief in question and to use the religion's own media for the pursuit of its activities is guaranteed." All of this is a matter exclusively reserved for the religious community. The religious community alone and by itself takes the fundamental decisions about its way of being, acting and presenting itself. For example, the State cannot compel a religious community to ordain a homosexual minister of worship or to celebrate and bless same-sex marriages created by legislative act or court decision, just as it cannot force a religious denomination to celebrate polygamous marriages if one day the political power decides to legalize this practice, driven by polyamory activism.

Another norm of utmost importance, from the point of view of freedom of religion and freedom of expression, concerns the protection of individual freedom of conscience. Article 41(6) says that "[t]he right to be a conscientious objector, as laid

down by law, is guaranteed." The protection of individual conscience is rooted in the Constitution. However, it is dependent on legal implementation, since it cannot be absolute. As with other fundamental rights, freedom of conscience also has to be reconciled with other rights that collide with it. But the legislator's freedom of implementation is not absolute either, and essential dimensions of freedom of conscience cannot be left unprotected, namely when it comes to taking a position on fundamental issues related to life, health and physical integrity, such as conscientious objections to contraception, abortion, euthanasia or surgeries for the elimination or modification of bodily organs, or the refusal to promote or socially validate these practices.

Like all contemporary democratic constitutions, the Portuguese Constitution enshrines broad freedom of expression. Article 37 states that "[e]veryone has the right to freely express and divulge his thoughts in words, images or by any other means, as well as the right to inform others, inform himself and be informed without hindrance or discrimination." This norm is entirely relevant to the domain of religion, which has an underlying right to equal freedom and is heavily dependent on expression in various forms. In addition, it recognizes that the individual naturally seeks answers to the ultimate questions of meaning and seeks all the information that is presented as relevant to answer them. Still in the field of freedom of expression and information, paragraph 2 of article 37 provides that the "[e]xercise of these rights may not be hindered or limited by any type or form of censorship." There is a concern here with all forms of private or public censorship. In the first case, we can find a multitude of situations, such as silencing campaigns, de-platforming, judicial harassment, or acts of suppression of content on the internet and social networks, or professional retaliation and dismissal. In the second case, we have censorship through the law, rules and administrative and regulatory acts or even court decisions. The prohibition of censorship is very important in the field of religion, and it must be understood that freedom of expression includes the possibility of freely exposing everything that religious doctrine and morals teach on controversial topics such as the origin and dignity of life, the meaning and purpose of sexuality and the family, contraception, abortion, euthanasia or care for the poor and vulnerable. As distasteful and uncomfortable as this speech is to the more libertarian moral and ideological sensibilities of others, freedom of thought and expression would be severely undermined if this speech were not absolutely protected.

Article 37(3) provides that "[i]nfractions committed in the exercise of these rights are subject to the general principles of the criminal law or the law governing administrative offences, and the competence to consider them shall pertain to the courts of law or an independent administrative entity respectively, as laid down by law." This norm admits that it is possible to exceed the scope of protection of freedom of expression and violate the rights of others and some constitutional assets of the State and society. But this must be understood restrictively, in accordance with the general principle that liberty is the rule and restriction of liberty the exception. Speech that

incites humiliation, hatred and violence must certainly be prohibited. But this does not apply to discourse that vehemently expresses political, ideological, philosophical, religious, moral or ethical disagreements, even if fundamental and irreconcilable. Article 37 n 4 provides that "[e]very natural and legal person shall be equally and effectively ensured the right of reply and to make corrections, as well as the right to compensation for damages suffered." This norm establishes a constitutional preference to combat speech with more speech and wrong speech with real speech, preserving the openness and freedom of the sphere of public speech and avoiding restriction of freedom of expression as far as possible. Also seen here is a preference for civil liability over criminal liability, although even that must always be understood in the context of broad protection of freedom of expression. In a free and democratic society everyone must assume that sooner or later he will be confronted with speech that he finds distasteful, obnoxious or despicable, and must meet that speech with more speech, responding to arguments with counter-arguments and not with censorship. No one can make their convictions immune to criticism, even when they concern claims about the existence and limits of certain fundamental rights. These perforce have to be socially determined through a public discourse involving the exchange and critical analysis of arguments.

In some concrete situations, freedom of religion and expression can establish an intimate relationship with freedom of artistic creation. This aspect has already been tested in connection with the creation of artistic cakes or websites. In the legal system it has not yet been tested in court. However, the constitutional norms are quite clear in this regard. Article 42 n 1 of the Constitution, concerning the right to freedom of cultural creation, determines that [t]here shall be freedom of intellectual, artistic and scientific creation." Paragraph 2. states that "[t]his freedom comprises the right to invent, produce and divulge scientific, literary and artistic work and includes the protection of copyright by law." For this purpose, we are going to ignore the issue of intellectual property and highlight just a few of the concrete dimensions of this right to artistic and cultural creation. This is a very personal right relating to the dignity, intimacy and identity of the individual, inseparable from the deepest existential, ethical and aesthetic convictions that the individual can sustain, with refractions in the most varied aspects of life in society. On the other hand, it is admitted that this freedom allows the individual to explore ideas and concepts that are not necessarily accepted by the general population, in the sense of expanding the borders of what is culturally thinkable and possible, pushing the line of the intellectual and symbolic horizon further and further. For this reason, no one can be forced to exercise this right contrary to their conscience, even when it involves a professional activity of providing services of a literary or artistic nature. When we are dealing with a provision of services in which individual creativity assumes a central role, we are more in the very personal domain of artistic and cultural freedom than in the domain of the ordinary exercise of freedom of private economic initiative.

There is also an important refraction of freedom of religion and expression, which is the freedom to learn and teach. This is foreseen in article 43 of the Constitution, which in its first paragraph states that "[t]he freedom to learn and to teach is guaranteed." This right can generally be invoked by all individuals, who can use it to defend their right of access to public or private, secular or religious, national or foreign, online or offline schools, without this necessarily meaning that the State must finance all or ensure access to all in the same way. This right is especially relevant for parents when choosing the education to give their children. He does not rule out the mandatory character of education up to the 12th grade, however. Underlying this right is the recognition that education is inevitably influenced by worldviews and ideologies, and that individuals, for themselves and their children, are entitled to seek an education that they feel is closest to or respectful of their beliefs. Teachers are also protected by this provision, insofar as, despite having a program to teach, they must be able to enjoy the freedom to express their opinions on the teaching subject, which must be greater the less suggestibility and greater for the intellectual maturity and capacity of the students. At a university this freedom should be as wide as possible, as it is expected to ensure that all opinions expressed can be freely and openly examined and criticized.

The freedom to learn and teach imposes on the State a position of relative neutrality in relation to ideologies and worldviews. In article 43 paragraph 2 it is said that "[t]he state may not programme education and culture in accordance with any philosophical, aesthetic, political, ideological or religious directives". The State does not exist in a separate space made up of civilisational values and principles. Western constitutional law is built on a long Greek-Roman and Judeo-Christian tradition, from which fundamental parameters freedom, equality, rule of law, democracy and separation of powers are deduced. All teaching must be guided by these values and principles, without prejudice to admitting reasonable differences about their content, their practical implications and their limitation in case of conflict with each other. Public education is a domain in which this orientation is very relevant. Certain political sectors have intended to use citizenship classes to promote ideological perspectives on divisive issues (such as abortion, euthanasia, homosexuality, transsexuality) as if they were self-evident truths, when the truth is these issues are far from being consensual from the perspective of a religious, ideological, moral or even scientific standpointpoint. In these matters, the State must guarantee that the discourse around these themes is open, exploratory, tentative and not categorical or imposing.

If it is true that paragraph 3 of article 43 of the Portuguese Constitution says that "[p]ublic education shall not be linked to a religious belief", it likewise outlaws any attachment of the state to any particular worldview. Furthermore, it is also true that the State cannot purely and simply be insensitive to people's religious convictions, especially when they are based on beliefs that have already faced and overcome the test of time and space – claiming considerable perenniality and universality – and the

alternatives to these beliefs are openly presented as social, intellectual and ideological constructs, sometimes relying on empirical bases that are more than dubious or in open war with empirical reality. The rights of religious freedom and expression are also embodied in the norm of number 4 of article 43 which says that "[t]he right to create private and cooperative schools is guaranteed." This is an important institutional guarantee against any attempt by the state to impose a single thought and create a monopoly of religious or ideological indoctrination. This norm is an inescapable corollary of the free and democratic constitutional order, hostile to unanimity and ideological uniformity. It promotes the ideological, intellectual and cultural initiative of individuals, groups and legal persons, which is the best guarantee of a free, open and plural society.

Religious freedoms and freedom of expression can only be adequately protected through freedoms of assembly, demonstration and association. However, there are specific rules that protect these freedoms. Both must be interpreted and applied in a combined way, highlighting their interdependence. Article 45 of the Constitution protects the right to meet and to demonstrate. In paragraph 1 it states said that [c]itizens have the right to meet peacefully and without arms, even in places that are open to the public, without the need for any authorisation". Paragraph 2 states that "[a]ll citizens are accorded the right to demonstrate." This provision protects the right to assemble and demonstrate, against the background of the fundamental principle that the State has a monopoly on legitimate coercion. As happens in most democratic states, although not in all, the possibility of gathering and demonstrating with weapons is unthinkable. The rights of freedom of religion and expression must be exercised with the aim of peaceful coexistence of people and groups with different and in some cases antagonistic views of the world, which is only possible if there is a climate of free and trusting dialogue, without suspicion, threats and fear.

Article 46 of the Constitution protects the freedom of association. This right protects the possibility of a legal person acquiring legal personality, a statute that is of the utmost importance for the ownership and exercise of the most varied legal rights and duties. In paragraph 1 we read that "[c]itizens have the right to form associations freely and without the requirement for any authorisation, on condition that such associations are not intended to promote violence and their purposes are not contrary to the criminal law." We see enshrined here a general principle of freedom, which dispenses with a reservation of prior authorisation, associated with the aforementioned principle of peaceful coexistence. The freedoms of religion, expression, assembly, demonstration and association cannot be used to incite hatred and violence. Individuals have the right to think and express their thoughts, even when vehemently disagreeing with others or causing others to vehemently disagree with them, but they must do so in a climate of equal freedom and reciprocity. Those who have the right to speak their minds and express their deepest convictions also have a duty to tolerate

others when they do exactly the same thing. Incitement to hatred and violence are red lines that cannot be crossed.

Article 46(2) says that "[a]ssociations shall pursue their purposes freely and without interference from the public authorities, and may not be dissolved by the state or have their activities suspended other than in cases provided for by law and then only by judicial decision." Applied to religious entities, this norm guarantees them the rights of self-organisation, self-regulation, self-determination and self-jurisdiction. The State is not permitted to attempt to force a religious denomination to change its doctrines or to accept cult ministers or members against its substantive rules and its duly expressed institutional will. Paragraph 3 of the same article is also important, because it prohibits any coercion or private persecution. It says that "[n]o one may be obliged to belong to an association, or be coerced to remain therein by any means.". It is out of the question for a religious entity or an ideological movement to try to prevent the departure of its members, to pursue its former members to force them to return or to want to prevent them from changing their religion or ideology, much less is that entity permitted to attempt in some way to control their future lives or punish any of these ways of behaviing. Paragraph 4 states that "[a]rmed associations, military, militarised or paramilitary-type associations and organisations that are racist or display a fascist ideology are not permitted". In the name of protecting the equal dignity of all human beings, this provision establishes two red lines that cannot be crossed: violence and racism.

3. Legal force of fundamental rights

In Portuguese constitutional law, the norms that enshrine rights, freedoms and guarantees are directly applicable and binding in both the public and the private sectors. This follows from article 18.º of the Constitution, which states that "[t]he constitutional precepts with regard to rights, freedoms and guarantees are directly applicable and are binding on public and private entities." In the domain of freedom of religion and expression this has a meaning of the greatest relevance. On the one hand, the primacy and normative force of the constitution is affirmed, where necessary, without the aid of legislative acts, against the legislative acts and instead of legislative acts. The courts are empowered to apply the Constitution directly when they feel that the legislature has fallen short of its constitutional obligations to protect these important fundamental rights. On the other hand, it recognizes the need to protect freedom of religion and expression not only from violations by public authorities, but also from social discrimination and censorship, a fundamental concern which has its origin in the conduct of individuals and private entities.

There are no absolute rights or a hierarchy of rights. Conflicts of rights are inevitable and must be harmonized according to a principle of reasonable balance. This may result in the need to restrict fundamental rights when there is a collision

between them and other constitutionally protected rights and interests. Article 18 of the Constitution regulates this process of harmonising and restricting rights. No. 2 says that "[t]he law may only restrict rights, freedoms and guarantees in cases expressly provided for in the Constitution, and such restrictions must be limited to those needed to safeguard other constitutionally protected rights and interests." It is said here that these restrictions must have a constitutional basis, must be made through formal law, and must respect the principle of proportionality in a broad sense. In this way, a qualified formal legal reserve is established. More specifically, it is required that restrictions imposed on a fundamental right aim at safeguarding constitutionally protected rights or interests. This means that not all purposes justify the restriction of rights. In addition, in line with article 165, paragraph 1, a) of the Constitution, there is also the provision that the rights, freedoms and guarantees can only be restricted through a law passed by parliament or a legislative act of the government based on a legislative authorisation of parliament. Likewise, the restrictions must be appropriate to the purpose pursued and must be strictly necessary, and the least restrictive alternative means must always be sought. They cannot result in greater costs than benefits, in light of a global view of the state of affairs. We see here three fundamental principles of a rule of law: constitutionality, legality and proportionality.

However, restrictions on fundamental rights must also observe other constitutional parameters. According to paragraph 3 of article 18 of the Portuguese Constitution, "[l]aws that restrict rights, freedoms and guarantees must have a general and abstract nature and may not have a retroactive effect or reduce the extent or scope of the essential content of the constitutional precepts." This means that the restrictive norms of rights must respect the principles of universality and equality, rather than discriminating against a particular religion or a particular doctrine. Thus, a prohibition on discrimination is enshrined in the Constitution. The prohibition of retroactivity is linked to the tendentially prospective nature of norms that may aim at regulating future behavior. This prohibition is based on the principle of legal certainty and the protection of citizens' trust. An individual or entity cannot be sanctioned based on legal norms that have been approved only after the conduct that is intended to be sanctioned. Furthermore, it is said that the restrictions cannot go to the point of emptying the law of its useful sense or affecting its essential dimensions. For example, there is no point in guaranteeing religious freedom if one does not accept the possibility of a religious entity that is determining its doctrines, rites, ministers of worship or members. Likewise, no one can be forced to participate in a religious ceremony against their will or to transmit or promote, against their conscience, a religious or ideological message with which they do not agree. In any of these cases, the essential content of freedom of religion and expression would be called into question.

4. The relationship between religion and expression

It is time to explore some aspects of the relationship between freedom of religion and expression that are of great importance for determining the respective normative scope and scope of protection and also for resolving conflicts that may exist vis-à-vis other constitutionally protected rights and interests. In the absence of judicial litigation in which these issues might have been put to the test in concrete practice, we will proceed with a number of considerations that seem to result from the relevant constitutional and legal norms.

4.1. Freedom of religious speech

There is an intimate and unbreakable relationship between religious freedom and freedom of expression. The religious experience certainly has its interior moments of silence, reflection, meditation and contemplation. But also belonging to the religious experience are the external impulses of communication, proclamation and exultation. These are and intend to be heard and integrated in the dialogue that feeds the community and individuals every day and builds their respective identities. Initially,personal convictions are developed, and subsequently they are shared with others. For this reason, freedom of religion contains within itself freedom of expression concerning religion. This would be the case even if there were no autonomous right to freedom of expression distinct from the right to religious freedom. Religious expression can manifest itself through songs, hymns, psalms, homilies, poetry and films, across all editorial and technological platforms. In this respect, it is no different from secularized communication. At most, it can even be characterized by greater intensity, mobilisation and socially disruptive potential, which can sometimes generate some apprehension in external, non-religious sectors.

Religious communication is essentially experiential and sentimental, dealing with collective experiences that may be considered unique or unusual from a spiritual and physical point of view. It deals with situations and states of affairs that can significantly affect the vision projects of people and groups, with repercussions that affect the entire community. It sometimes causes some disturbance by appealing to invisible circumstances as a guiding parameter for interpreting and changing visible circumstances. If we think about how religious discourse has influenced politics, law, economics, society, science, architecture, sculpture, literature or music, we can understand the current and potential impact of religious expression and see why it is not accepted without controversy.

It may be said that religious communication is a manifestation par excellence of the human spirit, of human nature, distinguishing human beings from other animal species. Only in human beings is there a conscious and constant search for the supernatural, for God, for the one who created and sustains the Universe, as many religious believers affirm. Trying to restrict this communication is not possible without

seriously injuring the human spirit in its essential dimensions. Even while taking it for granted that religious expression can affect all areas of life in society, democratic societies must protect this communication and Portugal does this through its Constitution. However, it does also ensure the existence of an open sphere of public discourse in which all religious claims can be successively presented and subjected to critical scrutiny. Religious communities have the right to promote their propositions of faith, even when they touch on politically and ideologically sensitive issues such as life, death, sexuality, family, society, corruption, greed, oppression and poverty. It is not admissible to try to stop religious discourse by mobilising indeterminate concepts, such as "hate speech", which is invalid in criminal law, or by trying to imagine and create all kinds of phobias, in order to try to conceal any means of expression that may be considered inconvenient and therefore, according to some opinions, should be censored and silenced. It is important to bear in mind that we are dealing here with strategies and concepts of ideological struggle which, in a State governed by law, should not be accepted as legal criteria. It is one thing, for example, to incite hatred and violence, while it is quite another to proclaim what is considered to be the truth about human beings and society in the most diverse domains, especially if this generates disagreement.

In Portuguese law, incitement to hatred and violence is criminally punishable. Article 240 of the Penal Code orders the punishment of anyone who establishes or sets up an organisation or carries out organized propaganda activities that incite discrimination, hatred or violence against a person or group of people on the basis of their race, color, ethnic or national origin, ancestry, religion, sex, sexual orientation, gender identity or physical or mental disability, or that encourage such an activity. According to this article, acts of provocation include incitement to violence, defamation and insult or threat directed against a person or group of people on the grounds of their race, colour, ethnic or national origin, ancestry, religion, sex, sexual orientation, gender identity or physical or psychological disability. This does not, of course, encompass the respectful expression of the conviction that adultery, homosexuality or abortion are sinful conduct contrary to the will of God, or that marriage, open to all human beings, should only be between a man and a woman, since all human beings are the direct or indirect result of the union of one man and one woman.

These doctrines are linked to an understanding of the teleology of nature and the human body that can be accepted or rejected but that, by itself, does not violate the dignity of the human person. Moral assessment of conduct does not necessarily imply hatred or violence against the person who practices it, especially in a society where no one has the authority to cast the first stone. Despite this, the norm stated in Article 240 of the Penal Code does not provide religious communities with sufficient legal certainty, which may be confronted, in a surprising and unexpected way, with abusive and excessively restrictive interpretations of their freedom of doctrinal definition and expression. For this reason, it must be considered unconstitutional to use

indeterminate concepts that may be susceptible to interpretative manipulation. Thus far, this provision has not been used to try to challenge the traditional doctrines of a large number of religious communities in the areas of life, sexuality, marriage and family. In our view, the courts should not take sides in debates in these areas, and it should be accepted that all religious and non-religious sectors of the community advance with their factual, ethical and moral arguments on these issues that are so sensitive and important for the political community as a whole. What is at stake is the affirmation of what is considered to be a definitive and unalterable divine standard of human conduct, which in no way diminishes but, on the contrary, promotes the dignity and respect that all human beings are due, regardless of the flaws which they may incur. It is the task of the courts to ensure that this debate about human behaviour complies with reasonable standards of decency, civility and mutual respect.

4.2. **Freedom to speak about religion**

In the sphere of public discourse, there is a direct link between what religious communities say and the way other religious communities and non-religious sectors respond. Religious communities may not be of the world, but they are indeed in the world. This means that they cannot claim immunity from discussion and criticism for their doctrines, rites and conduct. Just as they may make moral and ethical assessments of others, they can also be evaluated using the same yardstick. In some cases, the content of the sacred books and the religious doctrines derived from them come under criticism. In other cases, religious protagonists are criticized, be they founders of religions or religious communities, or current leaders. Often denounced is their hypocrisy, when they teach one thing and do another. Issues of money, sex and power are often raised by religious and non-religious sectors of civil society, exasperated with the practice of religious leaders and institutions.

Child sexual abuse, the luxurious lifestyle of some religious leaders and promiscuity of the kind sometimes exercised between religious power and political power are some of the preferred and justified targets of criticism. In the Portuguese case, in February 2023 an independent commission prepared and published a report on the sexual abuse of children in the Portuguese Catholic Church[4]. Although in relative terms the percentage of priests involved was very small, the truth is that in absolute terms the number of children affected is always intolerable when it goes above zero. And in this case it rose much higher. At the World Youth Day, in Lisbon, the artist Robalo II was noted for exhibiting a rug representing five hundred euro notes in the

[4] Giving Silence a Voice, Independent Commission for the Study of Child Sexual Abuse in the Portuguese Catholic Church, Final Report Executive Summary, https://darvozaosilencio.org/wp-content/uploads/2023/02/SUMARIO_EN.pdf, accessed on 31 July 2023.

event grounds with the aim of criticising public spending on the organisation and realisation of this Catholic event, which took place in August 2023. Criticism centred, to a large extent, on the fact that many last-minute contracts signed with suppliers of goods and services needed for the event were made without public tender owing to the absence of timely planning. More than a criticism of the Catholic Church, it was above all a criticism of the management carried out by public authorities, and only indirectly affecting the Church. These and other negative judgments can sometimes be very vehement, uncomfortable and unpleasant for religious communities and may hurt the sensitivity of their members. However, they are fully protected by the Constitution and law.

The discourse surrounding religion knows some legal limits. Article 251 of the Penal Code orders the criminal punishment of anyone who publicly offends another person or mocks him or her on the grounds of their religious belief or function in a way that is likely to disturb public peace. The same may also apply to anyone who desecrates a place or object of worship or religious veneration in a manner likely to disturb the public peace. In addition, article 252 criminally sanctions anyone who, by means of violence or threat of serious harm, prevents or disturbs the legitimate exercise of religious worship or publicly vilifies or mocks an act of religion. Without going into the merits of each detail of this norm, we should stress that it intends to safeguard the essential dimensions of religious belief and feelings protected by religious freedom. This means that religious expression indisputably admits public discussion and criticism of religious figures, entities, doctrines and practices, but the same must be conducted in a spirit of respect, recognising the importance assumed by religious beliefs and practices for the existence, identity and experience of individuals and communities.

There has never been a legal dispute In Portugal over the burning of a sacred book, and there is no jurisprudence on whether or not this is a protected form of freedom of expression. It might well depend on the specific context. However, it is important to bear in mind the fact that burning a book considered sacred by a religious community is an act of extreme symbolic violence against its members. This act may have a high symbolic value as a demonstration of indignation in the face of a collection of religious doctrines and teachings, but it does nothing to contribute to their serious, serene and rigorous discussion. However, the members of a particular religios organisation cannot object to the claims of this holy book being critically evaluated, even if this may weaken their cogency and persuasive force. The possibility of subjecting everything and everyone to objective, rigorous and impartial critical scrutiny constitutes an essential and imperative element of a free and democratic constitutional order. In any case, it should be stressed that Portuguese legislation does not have express norms concerned with vague, undetermined and subjective concepts such as hate speech, phobias, blasphemy or defamation of religion, of a kind that may

be susceptible to being selectively used to restrict freedom of expression and protect a partyicular religious community.

It is important to emphasise that religious communities can always appeal to the wider public to defend their sacred books, by historically and archaeologically validating the facts to which they refer, by clarifying their correct historical context, by clarifying linguistic and cultural aspects that they consider relevant, by illuminating the moral principles that they are based on or by denouncing the materialistic and naturalistic nature underlying the criticisms directed at them. Out of the question, however, is any attempt to impose a rewriting or reinterpretation of these writings according to standards considered culturally or politically correct in a given context. Above all, they must always remain subject to examination and critical evaluation by all and also subject to the deepening of study of the historical context within which they were produced. The sphere of public discourse guarantees the freedom and continuity of dialogue between the various religious communities and between them and non-religious sectors of society. In an open society, the existence of different communities and points of view in permanent conversation works as a strong antidote against single-mindedness and the authoritarian tendencies that it might otherwise favour. Democracy and the free formation of public opinion and political will depend on this. The pursuit of truth and of knowledge are equally big winners in a society where freedom of religion and expression are robustly protected.

5. Conclusion

The Portuguese Constitution and law guarantee a broad freedom of religion and expression. These rights are fundamental pillars of the democratic constitutional order. They are inseparable and also reinforce each other. They offer numerous possibilities for religious expression within the political community but also allow for critical discussion of religious doctrines and practices. The sphere of public discourse ensures free and open discourse on all religious and related topics. Portuguese society has experienced considerable tranquility in this area, perhaps because of the religious freedom law of 2001, and also as a result of the country's historical and cultural reality and religious demography, where the Catholic Church coexists with many very small religious groups. The Portuguese courts have not yet been called upon to test the limits of the scope of protection of constitutional norms concerning freedom of religion and expression in difficult matters. If and when that happens, they must remember that the right to freedom of religion and expression are not intended to give body and voice to a particular ideology but to guarantee critical dialogue and peaceful coexistence between individual and collective persons who hold different worldviews, religions and ideologies.

FREEDOM OF SPEECH AND RELIGION IN SPAIN

AGUSTÍN MOTILLA[1]

I. INTRODUCTION

For many years, and since the first Spanish Penal Code of 1822, State legislation has protected the official religion, Roman Catholicism, both in its position as the State religion and also its doctrine, its ministers of worship and the manifestations of religious worship.

After the 1978 Spanish Constitution came into force, legislators saw the need to reform the Penal Law in order to adapt it to the principles and values promoted by the Constitution. As a provisional measure it was decided to partially reform the Code then in force, which dated back to 1944, through Organic Law 8/1983 of 25 June. Included under the new part, "Offences against Fundamental Human Rights and Public Liberties", was a section "Offences against Freedom of Conscience". In 1995, and after various failed attempts, a new Penal Code was enacted, approved by Organic Law 10/1995 of 23 November. The 3rd section of chapter II with the title II includes a part on "criminal offences against freedom of conscience, religious sentiments, and respect for the deceased". A large part of the offences included had existed in other historical periods. For this reason, our presentation on penal law in matters related to freedom of speech and religion will cite past judicial decisions in an attempt to clarify and pinpoint just what such specified actions are, while highlighting the changes introduced by the current Code and the interpretation of the types of offences in keeping with constitutional values and principles.

Before the Penal Code was approved in 1995, lawmakers considered that the crime of blasphemy, until then in force, did not conform to the constitutional principles of separation of Church and State and neutrality of the public authorities.

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They pointed out that the said offence had disappeared from the Penal Code in 1988. Blasphemy had been defined by our legal system as "uttering injurious words against God, the Virgin Mary or the Saints". The exclusive protections of persons or dogma of the Catholic Religion, and difficulties over its application to other religious minorities, were the reasons motivating the legislature to decide on its suppression. In any case, the legal principle which it protected can be considered to fall under the offence of defamation of the religious dogmas that will be dealt with in a following section.

II. Freedom of expression and protection of religious feelings

It should be noted that there has been an increase in conflicts between freedom of expression and religious feelings. There may be several reasons behind this increase: the globalization of telecommunications through the Internet, which means that any message can become universal in a matter of seconds, and the increase in the means of expression available. The intensity of migratory flows forces the frequently complicated coexistence between different cultures; this leads to migration issues and the arrival of people whose cultures and religious traditions that are very different from the historical traditions that have predominated in Europe becomes a national problem.

Let us recall, in any case, the constitutional relevance the Spanish Constitutional Court has given to the freedoms of expression and information (Articles 20.1 a. and d., respectively), key in a democratic society as a means of forming public opinion. In line with the legal jurisdiction of the European Court of Human Rights, which has stressed the obligation of States to accept all opinions, including those that "shock and disturb, … as well as those that do not conform to the established order"[2], the Constitutional Court[3] has pointed out that the criminal sanction against the dissemination of harmful or negative ideas – for example genocidal or xenophobic – should only apply to the most serious attacks considering the result of the injury and the danger created for the protected legal principles; it would fall within the criminal sanction if the expression of the ideas constitutes an incitement, direct or indirect, to carry out acts against groups or individuals because of their racial, religious or other personal condition.

Having pointed out one of the limits of freedom of expression, relevant, as we shall see, in the criminalization of the crime of hate speech, the Spanish Penal Code also limits this right in the preservation of the dogmatic contents, objects of worship and ritual ceremonies of the recognized religious confessions. To this end, three

[2] From the *Handyside v. United Kingdom* decision of 7 Dec. 1976 (App no. 5493/72) and repeatedly affirmed in subsequent rulings.

[3] *Vid.*, among others, Ruling 235/2007, of 7 Nov.

different offences are defined: public insult against the dogmas, rites or ceremonies of a denomination; desecration of objects intended for worship; and interruption or disturbance of worship ceremonies.

The choice of the specific protection of religious feelings has been based on the historical tradition of Spanish criminal law, on the importance for the believer of respecting his or her faith, as well as on the particular protection that the Spanish legal system provides for religious beliefs. This does not mean that it is not a controversial issue. A doctrinal sector is in favour of the repeal of the specific Articles on religious matters, advocating the inclusion of the committing of the mentioned crimes within the common ones that protect honour – that is, the crime of slander – and the physical and moral integrity of persons[4].

III. Media and self-limitation in matters of religion and discrimination

Law 13/2022, of 7 July 2002, on Audiovisual Communication establishes mandatory provisions for all media. In general, and based on respect for human dignity, it prohibits any message that incites or encourages violence, hatred or discrimination on the grounds of, among other personal circumstances, an individual's religion, or that is directed toward a specific group[5].

In the area of audiovisual commercial communication, it also prohibits the provocation of hatred or violence based on religion or belief, as well as the promotion of stereotypes based on religion; and broadcasting or publishing advertisements that do not comply with the rules is considered a very serious offence[6]. The possibility of inserting commercial advertisements during the broadcasting of religious programmes is also forbidden[7].

[4] In support of their positions, they mention the 2006 Report of the European Commission for Democracy and Law of the Council of Europe (also known as the Venice Commission), which advocated the suppression of the crimes of blasphemy and religious insult, or, at least, the criminal consideration of the conducts only when they incite hatred or violence against ethnic or religious groups, a distinctive element of the crime of hate speech.

The report of the Venice Commission, and what they consider an evolution of social sensitivity, justified that in February 2021 the left-wing groups of the Spanish Senate presented a motion to urge the Government to abolish the crime defined in Article 525, which specifically protects religious feelings. This motion was approved by the Justice Committee of the Upper House.

[5] Art. 4 of Law 13/2022 of 7 July. In the specific field of safeguarding Catholic beliefs, Article 14 of the Agreement on Education and Cultural Affairs stipulated between the Holy See and the Spanish State establishes the obligation of the public powers to "ensure respect for the feelings of Catholics in the mass media".

[6] Art. 157 of Law 13/2022, of 7 July.

[7] Art. 129 of Law 13/2022, of 7 July.

IV. Crime of scorn or insult to religion (art. 525 of the Penal Code)

The offence of defamation protects the religious teachings and beliefs of all religions without distinction. This is contemplated in Article 525 of the Penal Code, which punishes those who engage in public defamation, through word, documents or other written texts, of the dogmas, beliefs, rites or ceremonies of religions, or who publicly harass those who profess or practise such religion and thus offend the sensibilities of the members of those religious groups. The legal object protected is that of the religious sensibilities of the members of the religions.

As the Constitutional Court ruled in the Decree 18/1986 of 21 February, it is in complete agreement with the Constitution in the legislative option to protect religious and non-religious conventions through the codification of this offence: "It is unimaginable how a precept which aims to guarantee respect for the religious convictions of all citizens can affect the right to religious freedom and the religion of each individual… The lay nature of the State does not imply that the religious beliefs and sentiments of society cannot be the object of its protection. Article 16.3 of the Spanish Constitution also affirms… "that public powers also take into account the religious beliefs of Spanish society…" It explains that "in comparative European law, the incriminations of similar acts are the rule, and that the legal text has, in general, a concept similar to this precept".

The most significant innovation in the drafting of the offence of deformation and outrage is the extension of the same to non-religious convictions. According to paragraph 2 of Article 525, "the same punishment – a fine of 8 to 12 months – will be incurred by those who engage in public defamation, by word or document, of those who do not profess any religion or creed". Despite the fact that this paragraph is meant to guarantee the application of the offence without discrimination in terms of beliefs, it is true that the more intense sensitivity of religious beliefs to gratuitous offences, as the court´s experience demonstrates, leads one to believe that the offence will be applied only in relation to religious beliefs.

As for the elements of the offence, we can point to the following.

The objective element diverges in two ways: defamation or prolonged verbal harassment with the purpose of publicly insulting, or gross and insulting statements issued "in a public way, against the dogma, rites, or ceremonies, that is, the true fundamentals, rules of worship and the external acts of religious practices"[8].

[8] High Court Ruling of 14 Feb. 1984.

As the law has stated, "it is not enough that the religious feelings of others are offended… but it is required that such conduct mocks the dogmas, beliefs, rites and ceremonies of a religious denomination"[9].

From this perspective, according to our legal system, the criticism of the visit of the late Pope Benedict XVI to Spain through posters showing burning churches, the branding of Pope Benedict XVI as a Grand Inquisitor, or the labelling of him as a Nazi – because of his membership, as a teenager, of the National Socialist Youth – do not constitute the crime referred to[10]. Nor is the publication of a graphic image showing male genitalia next to a picture of the Virgin Mary[11]. Nor does a caricature of a parade presided over by the Pope and the bishops in which they impose medals on angels for their "victory against Lucifer"[12]. Nor, finally, and among other examples, the dance performed by a person disguised as Jesus – with a cross on his back – in a discotheque, surrounded by other disciples following the Stations of the Cross[13]. In all these cases the criticisms, in the opinion of the courts of justice, do not affect nuclear aspects of the dogma, beliefs, rites or ceremonies of Catholicism.

The objective element of the crime would occur in the cases of the exhibition of a banner in the public street, before the celebration of a Holy Week procession, in which a photo of Mary and Jesus appears with the inscription: "adulteress and her bastard"[14]. Or the demonstration in the central streets of the city of Malaga, stopping in front of the Cathedral, by a feminist group in which they carried a giant vagina as a sort of Easter float; the demonstrators were dressed as Nazarenes, shouted cries against the Church and parodied Catholic prayers, transforming them and giving them a sexual content[15]. In all cases, in the opinion of the courts, the objective element of attacking central dogmas of Catholic beliefs is present.

This subjective or psychological element required the wilful or malicious intention to offend religious sensibilities. In the words of the High Court, "regarding the element of guilt, not only do their behaviour and the wilful intent of their actions incriminate them for this offence, but the specific aim to slander, as a deliberate synonym, offends"[16]. This thereby eliminates the application of the offence to reasonable and measured criticism. "*Animus injurandi* is excluded – which the ruling of 19 Janu-

[9] Rulings of the Provincial Court of Seville of 7 June 2004 and of the Provincial Court of Madrid of 1 March 2003 and 29 July 2011.

[10] Ruling of the Provincial Court of Madrid of 24 Jan. 2013.

[11] Ruling of the Provincial Court of Seville 353/2004, of 7 June; in similar terms, Ruling of the Provincial Court of Madrid 809/2011, of 29 June.

[12] Ruling of the Supreme Court of 25 Jan. 1983.

[13] Ruling of the Provincial Court of Barcelona 865/2017, of 6 Nov.

[14] Ruling of the Provincial Court of Valladolid 367/2005, 21 Oct. 2005.

[15] Ruling of the Provincial Court of Malaga 226/2021, of 31May.

[16] High Court Ruling of 14 Feb. 1984.

ary 1982 upheld – when *animus criticandi* exists, which is recognized by a serious, scientific, and profound theological study in which some of the truths held, which are the basis of the Catholic faith, are denied; but it is not detected in mere antireligious rebuffs, scoffing or the mockery of basic dogmas"[17].

However, there is a tendency in the most recent case law to take into account the lack of intentionality on the part of the accused in order to justify acquittal for the crime. This also occurs with respect to the application of the crime of profanation, to which we will refer below. Later we will study the subjective element in more detail, especially with respect to the hypothetical pursuit of other purposes by the investigated subject of the crime, such as the pursuit of creative or artistic purposes.

As for the latest decisions of the Spanish courts in the application of the crime of mockery, they consider that the subjective element or *animus injurandi* – which determines the final acquittal of the accused – is not present in the following cases. For lacking such purpose and being motivated by the burlesque, satirical and provocative desire – *animus jocandi* – in the programme of a well-known Spanish singer-songwriter in which he gives instructions about "how to cook a Christ"[18]. The show was organized by a theatre company at the University of Valladolid in which an actor, imitating the Pope, handed out condoms parodying Catholic communion[19]. Or the previously mentioned representation of the figure of Jesus dancing with the cross on his back[20]. Or criticism of Christian dogmas or current events: Mary's virginity in the poster conveyed by photographs of Mary and Jesus under the title "adulteress and her bastard"[21]. The image of the Virgin Mary associated with other images of sexual content, published by LGBT groups in a calendar of limited circulation[22]. Or the blasphemies and outbursts published by a well-known actor on his Facebook page against the sacred figures of the Catholic Church to protest against the decision condemning the "procession of the giant vagina" mentioned above[23]. In this case, however, the Provincial Court of Malaga condemned the participants, maintaining that their parodies of the Catholic religion were based not on mere criticism but directly on the intention to offend and insult[24].

The third element of the crime of scorn refers to the means of commission: there is established legal doctrine that determines that "any type of document" can be cited, including the content of certain drawings and cartoons, to constitute defamation. A

[17] See, along the same lines, the High Court Ruling of 26 Nov. 1990.
[18] Ruling of the Provincial Court of Madrid 224/2013, of 2 Apr.
[19] Ruling of the Provincial Court of Valladolid 251/2011, of 9 June.
[20] Ruling of the Provincial Court of Barcelona 865/2017, of 6 Nov.
[21] Ruling of the Provincial Court of Valladolid 367/2005, of 21 Dec. 2005.
[22] Ruling of the Provincial Court of Madrid 809/2011, of 29 June.
[23] Ruling of the Criminal Court of Madrid 20/2020, of 21 Feb.
[24] Ruling 226/2021, of 31 May.

case in point is one which portrayed a priest in a confessional saying to a penitent: "That will be 345,70 pesetas [the previous Spanish currency] and a donation"[25]; or the exhibition in a private dwelling, one frequently visited and visible to a diverse public, of a drawing of a parodied temple on a toilet door and of the Virgin Mary being sexually assaulted[26]; or the publication in a university gazette of obscene drawings of monks and nuns, or others of the Holy Trinity[27].

V. Desecration of a place of worship or sacred objects of any religion (art. 524 of the Penal Code)

Article 524 of the Penal Code imposes a punishment of a prison term of 6 months to a year or a daily fine that can be imposed over 12 to 24 months' time, on anyone who "in a temple, a place of worship or during religious ceremonies carries out acts of profanation offending legally protected religious sentiments". The criminalization of such acts also aims to protect the religious sensibilities of individuals.

As to the element of the offence, the objective elements, i.e., the acts of profanation, have been interpreted by the legal system in the literal sense of the verb "to profane", which is to treat a sacred object without due respect, to apply profane uses or make indignant use of it[28]. The offence, which the Court itself, in old judicial rulings, considers to be demonstrable in diverse acts of disrespect for the sacred objects of the Catholic church, was described in *de facto* cases such as "taking the host out of one's mouth after receiving communion by throwing it or spitting it out immediately after receiving communion"[29], "taking it out of one's mouth and exhibiting it to those present, in a show of defamation"[30], "opening the tabernacle and taking the host"[31], "opening the tabernacle, taking the chalice and eating part of the host and putting the rest in a pocket"[32], or "drinking wine from the chalice, dumping the host on the floor, burning it with matches, and leaving the empty bottle inside the tabernacle and a number of coins in the chalice"[33].

Considering that the current wording of the crime requires that it be carried out inside a temple or sacred place, the most recent court decisions interpret the objective element, "acts of profanation", in a restrictive manner.

25 High Court Ruling of 11 Oct. 1973.
26 High Court Ruling of 1 July 1975.
27 High Court Ruling of 19 February 1982.
28 High Court Ruling 688/1993, 25 March.
29 High Court Ruling of 22 Dec. 1913.
30 High Court Ruling of 31 Dec. 1896.
31 High Court Ruling of 27 Feb. 1929.
32 High Court Ruling of 15 July 1982
33 High Court Ruling of 10 Dec. 1982.

In one famous case – much commented on in the press because it involved a woman who currently holds the position of councillor on the Madrid City Council – the accused and others burst into the chapel of a university in the capital, shouting against the Pope and the Church for their position on abortion and sexuality, and interrupting a group of students who were praying. They surrounded the main altar, read a manifesto and then bared their torsos and kissed each other. The Provincial Court of Madrid[34] acquitted them of the crime as laid out in Article 524 for not appreciating that any vexatious treatment had been given to any sacred object: they had merely surrounded the altar – which is a sacred object – but did not touch it; and they intended to defame by gestures and words rather than by physical acts. Since the objective element was missing, the defendants were acquitted. Likewise, the Provincial Court of Navarra[35] acquitted an artist who, in order to put on a performance with consecrated hosts, placed several hundred of them in his pocket after going to communion for months; this behavior took place in a temple but, in the court's opinion, the element of publicity or externalization of his will to offend Catholic feelings in the sacred space was missing.

The subjective element requires wilful intention to offend religious sensibilities in a temple or place of worship.

As already mentioned in the present analysis of the crime of scorn, in the application of 524 we can also appreciate the progressive inclination of the most recent legal decisions to discard the lack of intentionality on the part of the individuals prosecuted for alleged profanations, considering their preponderant pursuit of other purposes: artistic creation; criticism of the politics of the Catholic Church, etc.[36]. Therefore, in the opinion of the courts, other freedoms, such as freedom of intellectual creation, expression or protest, prevail over the protection of religious feelings. We will deal with this issue in the following section.

VI. Hindering or disrupting a religious meeting (art. 523 of the Penal Code)

Article 523 of the Penal Code punishes those who "with violence, threats, tumult or acts, impede, interrupt or disturb the acts, functions, ceremonies or demonstrations of the religions inscribed in the public registry of the Ministry of Justice or the Interior", with a punishment of "6 months to 6 years imprisonment, if the act is committed in a place of worship, or a daily fine to be imposed in the course of 4 to 10 months' time if it occurs in any other place".

[34] Ruling 684/2016, 16 Dec.

[35] Ruling 198/2017, 28 Apr.

[36] Thus, in Ruling 684/2016, discussed above, the Provincial Court of Madrid considers that the irruption of feminists into the Catholic chapel had, rather than the purpose of offending, the intention of protesting against the ecclesiastical position in the field of sexuality.

The material element of the offence is conduct that impedes, interrupts or disturbs acts of worship, or religious demonstrations, conduct carried out with violence, threats or commotion. No special psychological element is required, with the offence being committed with the intended realization of the aforementioned violent acts.

This crime protects the sentiment and freedom of religions manifested through the celebration of acts of worship, which constitutes a limit to freedom of expression. The courts tried two very similar cases, which took place in the cities of Palma de Mallorca and Gerona. A large group of people attending Sunday mass stood up shortly after the start of the ceremony in a concerted manner, threw pro-abortion leaflets, shouted slogans against the position of the Church and displayed a banner on the altar bearing the slogan "rosaries out of our ovaries". They brought the mass to a halt for a few minutes and then left the church.

The Supreme Court, in its rulings on the cases[37], upheld the judgments of the lower courts in which the defendants had been convicted of the crime of disturbing religious ceremonies punishable under Article 523 of the Criminal Code. It considered that all of the elements of the criminal offence described in Article 523 were present: the perpetrators entered a place of worship; they did so knowing that the most important act of Catholicism, the Eucharist, was being celebrated, and at high mass on a Sunday; they interrupted the mass for a significant time; and they did so by creating an disturbance, manifested by shouting and banners.

VII. Consideration of the subjective element in the crimes of scorn and profanation; artistic purposes and religious feelings

As pointed out above, the lack of intentionality or specific intent to injure – the absence of *animus injurandi* – is the reason why most of the court decisions issued in the last twenty years are of acquittal in the crimes of mockery and desecration of sacred objects[38].

In line with this principle, the Supreme Court Ruling of 25 March 1993 determined the manner in which the judge needed to proceed to verify whether or not the subjective element was present in the crimes as defined in Articles 524 and 525 of the Criminal Code: the specific intent or deliberate intent to offend, as well as its indirect or circumstantial proof, "[must be] deduced or inferred… from the set of objective factual circumstances that must be accredited".

In the sentences consulted, it can be affirmed that the judge separated himself from acts that objectively reflected the offence to Catholic feelings, justifying the

[37] Rulings 835/2017, of December 19, and 620/2018, of 4 Dec.

[38] Having said that, it should be emphasized that the Supreme Court has not ruled on this matter, so it could be said that until today we do not have a true legal structure or unifying doctrine of the divergent decisions of the lower courts.

lack of *animus injurandi* of the defendants in other motivations, singularly the will to criticize – albeit in a crude and coarse manner – doctrines and dogmas of the Catholic Church. This can be seen in the analysis of the resolutions whose factual assumptions have been described above: the irruption of female feminists in the university chapel was intended – in the court's opinion – to censure the Holy See's policy on sexual matters; the photograph depicting Mary and Jesus with the slogan "adulteress and bastard" was intended to disagree with the dogma of virginity; or, finally, the blasphemies and outbursts uttered by the well-known actor against the Virgin and the Trinity, sacred figures in Christianity, were intended as a protest against a court ruling.

The cases presented exculpatory purposes that reached their fulfilment in acquittals if they concurred – even if diffusely – with a minimum element of artistic creation.

In the previous wording of the crime of mockery of the former 209 of the Penal Code this had already been approved in the Statement of the Supreme Court of 25 March 1993 quoted above. In the case considered in the High Court Ruling, a television presenter and director were accused of this offence in a show concerned with the latest artistic trends, where a music video was broadcast in which a coffin appeared, upon which, rather than a crucifix, there was a human figure on a cross with the head of an animal. The Court absolved the accused of the crime of profanation, maintaining that *animus injurandi* was lacking, and the specific wilful aim of the programme was not to offend but rather to publicise the latest modern music.

In the application of the offences defined in the current Penal Code, the lack of intent to injure and the prevailing spirit of artistic creation justified the acquittal in the Ruling of the Provincial Court of Madrid 224/2013, of 2 April regarding the broadcasting of the documentary "How to cook a Christ"; or in the ruling of the Provincial Court of Navarra 198/2017, of 28 April, in which an individual saved up more than two hundred consecrated hosts in order to use them to write "Pederasty Performance Act" on the floor of an art exhibition, titling his work "Amen". In all of these cases, the Court considered that the purpose had been to provoke through a staging, to attract attention to the work or to certain attitudes of the church, rather than to insult or offend believers. This deduction is reaffirmed by the statements made by the accused during the criminal proceedings and the subsequent apologies to the hypothetical offended parties[39].

[39] As García Pardo points out, the repentance of the accused should not lead to acquittal; the intention to offend must be assessed at the time of the criminal action, which is not modified by repentance after the fact. Although this can be a reason for an attenuating circumstance, as contemplated in Article 21. 5 of the Penal Code. (Cfr., D. García Pardo, 'La protección de los sentimientos religiosos en la jurisprudencia española postconstitucional' in Martí Sánchez-Moreno Mozos (eds.), *Derecho de difusión de mensajes y libertad religiosa* (Madrid, Dykinson, 2018), pp. 177-178.

This has led a sector of the Christian adherents to criticize the courts for substituting the objective factual elements or circumstances that evidenced the intention to offend, given the subjectivity of the judges who have repeatedly found the prevalence of alternative purposes: artistic, critical, joking or parodying[40]. Hence, it is concluded that, at present, there is a reluctance in our courts to consider the concurrence of criminal liability in cases of application of the offences of defamation and profanation[41].

VIII. Hate speech against religions and beliefs; the crime of hate speech

As mentioned above, Spanish law, in compliance with its obligations under international human rights treaties and conventions, and following the recommendations of European organizations[42], has been including in the legal system the criminal punishment of hate speech. We must remember the range within which the punishment of certain conducts is generally applied, as expressed, for example, in the Constitutional Court Ruling 235/2007 of 7 November, referring to Holocaust denialist doctrines: "although the negative contents of such ideas or discriminatory doctrines may be totally reprehensible, the response is not necessarily configured as criminal, the criminal sanction being reserved for the most serious attacks, considering the result of the injury and the danger created for the protected legal assets". The right to freedom of expression in a democratic system, which also protects ideas outside the political system, within the limit of respect for others, and the conception of criminal law as the last resort of the rule of law lead to the consideration that provocation may represent a criminal act, both with respect to genocide and to discrimination, if it constitutes an indirect incitement to carry out acts against groups or individuals because of their racial, religious or other personal condition, or when there is a danger of generating a climate of hostility that materializes in these acts of violence or hatred. From this point of view, it is not enough to spread genocidal or xenophobic ideas. There must be incitement to do so, in the sense indicated, creating a danger that is real, abstract or even potential to the protected legal principle.

[40] See, e.g., E. Herrera Ceballos, '¿Es la aplicación del delito de profanación en España una entelequia? Análisis de algunas resoluciones judiciales en torno al artículo 524 del Código Penal', (2021) 56 *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, pp. 27-28.

[41] García Pardo, "La protección", p. 179.

[42] Particularly relevant, as already mentioned, was the 2006 Report of the European Commission for Democracy and Law of the Council of Europe (also known as the Venice Commission), which advocated suppression of the crimes of blasphemy and religious insult or at least the criminal consideration of such modes of conduct only when they incite hatred or violence against ethnic or religious groups, a distinctive element of the crime of hate speech.

On hate speech in international law, see, e.g., J. M. Gutiérrez del Moral, 'El odio religioso en las Recomendaciones de la Comisión Europea contra el Racismo y la Intolerancia (ECRI)', (2021) 56 *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*.

The Spanish legal system has a mixed system that includes both a specific offence, contemplated in Article 510 of the Criminal Code[43] and an aggravating circumstance with respect to some crimes. In this last aspect, Article 22.4 considers, as a generic element that aggravates criminal liability, the "commission of an offence because of motives that are… antisemitic… (or because of) the religion or beliefs of the victim", or other personal circumstances such as ethnic background, race or nationality, sex or sexual orientation, and physical illness or disability. The application of these aggravating circumstances, aimed at reinforcing the protection of equality and the fight against discrimination, requires that when the criminal acts have been carried out the motivation on the part of the perpetrator would have to have been exclusively because of the religious beliefs – or ethnicity, gender, nationality, etc. – of the victim.

In its current wording Article 510[44] punishes hate speech, i.e., any form of expression that propagates, incites, promotes or justifies racial hatred, xenophobia, antisemitism and other forms of hatred based on intolerance. The legal system, in its interpretation of Article 510, required the concurrence of the following constituent elements of the crime: (i) the instigation to violence by the utterance expression; (ii) that they are directed against certain groups because of their ideological or religious beliefs, their nationality, their race or their sexual condition; (iii) that the utterances have created a direct danger by inciting criminal acts and discrimination based on personal conditions; (iv) the awareness of the accused of the impact of his act; and (iv) the public dissemination of such utterances[45].

In matters of religion and beliefs, the Spanish courts, echoing the legal judgement of the Strasbourg Court, do not consider punishable the mere criticism of doctrines, dogmas or sacred persons of religions, even if it has an offensive nature. However, insults that incite violence or crimes against certain persons because of their belonging to a religion, nationality or sexual condition are punishable. By way of example, Supreme Court Ruling 428/2022 of May 19 upheld the conviction of an individual converted to a radical branch of Islam who through the social media not only uttered vexatious expressions against certain groups – Sunni Muslims, feminist women, homosexuals… even Spaniards in general – but also announced his intention – and

[43] The consequences of events that incite hatred related to religion, ethnicity or other personal circumstance may also have extra-penal consequences, for example, in matters concerning foreigners. The Supreme Court Ruling of May 30, 2014 revoked the nationality of a Pakistani citizen for uttering through YouTube an Islamophobic speech: he expressed his desire to publicly burn a Koran and posted a film on the network in which the Prophet Mohammed was severely insulted. The Court considered that these facts incited hatred and endangered the security of the State, a reason which, according to Law 12/2009, is sufficient cause to proceed to the revocation of nationality.

[44] Pursuant to Organic Law 1/2015, of 30 March.

[45] Supreme Court Ruling 428/2022 of 19 May, citing the consolidated doctrine throughout previous rulings.

encouraged others – to "murder by slitting their throats", by the use of guns or bombs. For the Supreme Court, the fact that the messages have little echo, due to the number of followers, does not absolve the person commissioning the crime: it is enough that the messages have been spread on the Internet, potentially reaching an uncontrolled number of people.

Undoubtedly, the cases that have stimulated the most comments in the media have been the statements of certain bishops of the Catholic Church who, in the exercise of their magisterial ministry, have criticized certain attitudes that they have judged to be permissive or deviant in matters of sexuality. The Bishop of Alcalá de Henares was accused of homophobia because of a televised homily in 2012 in which he criticized homosexuality as "corrupting the human being" and contrary to the teachings of the Church. In addition, in 2014 he was prosecuted for slander and hate crime for stating that abortion was an execrable crime "comparable to Nazi extermination". For his part, the Archbishop of Valencia was accused of similar crimes by LGBT groups for the content of his homily "In defence and support of families" in which he explained the Christian family model was irreconcilably in conflict, in his opinion, with that advocated by gay movements and radical feminism. The courts rejected the complaints in every instant because they found that the elements constituting a hate crime had not been present: rather, the Archbishop's views consisted of statements that he had uttered in the exercise of his profession and that he had addressed to his faithful, expressing the opinion of the person uttering them, with no intention to insult but only to express the Christian doctrine; nor did they incite hatred or violence[46].

However, this particular crime can indeed be committed by religious representatives or leaders who, following a fundamentalist conception of the precepts of their religion, express or justify mistreatment as a result of personal circumstances. This was the case in the conviction of an Islamic imam who had offended against Article 510 of the Penal Code – combined with the aggravating circumstance of his abuse of his personal authority – he was author of a book titled *Women in Islam*. In one of its chapters the imam, who was then the head of the mosque in Fuengirola and also director of an Islamic centre, wonders if a Muslim man can beat his wife. Taking refuge in the *Sharia*, he justifies it as a means of correcting her and in the face of her stubbornness and disobedience. The husband can give her – says a paragraph of the book – "… blows on her feet and hands… using a thin stick… it is primarily a mat-

[46] Regarding the Bishop of Alcalá, Rulings of the Instruction Court of Alcalá de Henares of July 10, 2012 and December 17, 2015, confirmed by Rulings of the Provincial Court of Madrid of April 30, 2014 and July 3, 2016. Regarding the statements of the Archbishop of Valencia, Ruling of the Court of Instruction of Valencia of June 9, 2016, confirmed by Ruling of the Provincial Court of Valencia of September 12, 2016. *Vid.*, an exposition and commentary, A. López-Sidro, 'La libertad de expresión de la jerarquía eclesiástica y el discurso del odio', (2016) 42 *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado.*

ter of making her suffer psychologically". The imam was duly denounced by several women's associations. The Criminal Court of Barcelona, in its verdict of January 12, 2004, convicted him of the crime of hatred against women by inciting violence based on sex. For the judge, the book represented an authentic manual on mistreatment, which violates the dignity of women and basic human rights such as physical integrity or the prohibition of torture. This cannot be justified, despite the defendant's claims, by the hypothetical allegation that such statements are based on the Koran or the *Sunna* and its doctrine; the fundamental rights that may be violated are superior to his right to manifest his beliefs. In the verdict, the defendant was convicted of the crime of hate speech and the book was ordered to be confiscated.

IX. Genocide and discrimination crimes

Article 607 of the Spanish Penal Code punishes for the crime of genocide those who "with the intention of totally or partially eliminating a national, ethnic, racial or religious group" perpetrate the following acts: kill, sexually attack or injure some of its members, subject the group or any individual of the group to conditions of existence that put their lives in danger or seriously affect their health, carry out displacements of the group or their members, adopt any measures that tend to prevent their way of life or reproduction, or transfer individuals from a group to another one by force.

Likewise, Article 510 also punishes the crime of denying, trivializing or publicly glorifying genocide or crimes against humanity.

Regarding discrimination, the fight against discriminatory treatment against, among other personal circumstances, the beliefs or religion of individuals is protected in different ways in the Criminal Code.

The Spanish Penal Code punishes two forms of behavior, having as a common denominator the infringement of equality, on grounds of, among other reasons, the religious beliefs of persons: discrimination in public and private employment (Article 314) and the denial, on the part of a public service or a professional, of work requested by an individual or association which has a right to such work (Articles 511 and 512). In both cases, the offender is aware of the religious condition of the individual or association and denies employment or work because of such beliefs. Article 510 also establishes punishment for those who provoke discrimination for reasons, among others, of the religion professed, or those who spread slanderous information about them. And Article 515 considers illicit associations, carrying a punishment for those who instigate, lead and cooperate as well as those members who foment discrimination because of the religious beliefs of persons or groups.

As an aggravating circumstance of criminal liability in all crimes, the penalty would be aggravated if the crime is committed for racist, anti-Semitic… or other kinds of discrimination referring, among other circumstances, to the ideology, religion or beliefs of the person (Article 22.4).

X. Concluding remarks

The Spanish Penal Code of 1995, known in journalistic circles as the "Penal Code of democracy", represents a change with respect to the past in the area of the criminal protection of religion. It abolishes the exclusive protection of persons, acts, dogmas and ceremonies of the Catholic religion, while retaining some offences aimed at safeguarding religious feelings and freedom, extending its scope of protection to all beliefs and denominations.

According to the above, the Penal Code protects people's dogmas and beliefs, objects of worship and the peaceful celebration of ceremonies and rites through the crimes of scorn or insult of religious feelings, desecration of objects in places of worship, and disturbance of religious manifestations.

In particular in the case of the first two offences mentioned, scorn and profanation, the criminal regulation requires the exercise of the subjective element of the will to offend (*animus injurandi*). An analysis of the most recent case law confirms the tendency of our courts to acquit those accused of these offences on the grounds of a lack of intention to offend – despite the objective circumstances that have been proven – emphasizing, in order to justify the acquittal, the preponderance of other concurrent motives: criticism, parody, artistic creation….

In the case of the crimes of hate speech and genocide, the limitation of free expression can only be justified – in the opinion of the Constitutional Court – by considering the serious consequences of criminal charges and by the function of this right as an *ultima ratio* in order to preserve essential values and goods in the legal system, when it can be proven that such manifestations seriously affect the protection of the rights of third parties – in other words, whenever they incite, directly or indirectly, violence against or the marginalization of certain groups which, either in the past or at present, are in a position of marked social vulnerability. This brings Spanish case law closer to that of the European Court of Human Rights, as expressed, for example, in the case of *Perinçek v. Switzerland*, of 15 October 2015, and that of *Lenis v. Greece,* of 31 August 2023.

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CENTRAL AND EASTERN EUROPE

LE CADRE JURIDIQUE AUTRICHIEN SUR LES EXPRESSIONS CONCERNANT LA RELIGION

WOLFGANG WIESHAIDER[1]

I. LES GARANTIES CONSTITUTIONNELLES

En Autriche, les droits fondamentaux sont garantis par plusieurs règles. Les catalogues de la Loi fondamentale sur les droits généraux des citoyens de 1867,[2] de la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales (CEDH)[3] ayant valeur constitutionnelle[4] et de la Charte des droits fondamentaux de l'Union européenne (CDFUE)[5] sont complétés par des dispositions supplémentaires des lois constitutionnelles et des stipulations constitutionnelles des Traités de l'État de St. Germain-en-Laye[6] et de Vienne[7]. Ainsi, la liberté de religion est garantie par les articles 14 et 15 de la Loi fondamentale de 1867, l'alinéa 63(2) du Traité de l'État de St. Germain-en-Laye, de l'article 9 de la CEDH et de l'article 10 de la CDFUE.[8] La garantie de la liberté d'expression se trouve dans l'article 13 de la Loi fondamentale de 1867, dans la Décision de l'Assemblée nationale provisoire sur l'abrogation de toute censure,[9] dans l'article 10 de la CEDH et de l'article 11 de la CDFUE.[10] De plus, les libertés des expressions artistique et scientifique sont ancrées dans les

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[2] *Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger für die im Reichsrathe vertretenen Königreiche und Länder,* Reichsgesetzblatt nº 142/1867, modifié en dernier lieu par Bundesgesetzblatt nº 684/1988.

[3] STE nº 005.

[4] Loi constitutionnelle, Bundesgesetzblatt nº 59/1964.

[5] JO C 202/2016, pp. 391–407.

[6] *Staatsvertrag von Saint-Germain-en-Laye,* Staatsgesetzblatt nº 303/1920.

[7] Staatsvertrag betreffend die Wiederherstellung eines unabhängigen und demokratischen Österreich, Bundesgesetzblatt nº 152/1955, corrigé par Bundesgesetzblatt III nº 179/2002.

[8] Voir Walter Berka, Christina Binder et Benjamin Kneihs, *Die Grundrechte. Grund- und Menschenrechte in Österreich* (2e éd., Wien, Verlag Österreich, 2019), pp. 405–423.

[9] *Beschluß der Provisorischen Nationalversammlung du 30 oct 1918,* Staatsgesetzblatt nº 3/1918, modifié en dernier lieu par Staatsgesetzblatt nº 4/1945.

[10] Voir Berka, Binder et Kneihs, *Grundrechte, op. cit.,* pp. 654–700.

articles 17 et 17a de la Loi fondamentale de 1867 et dans l'article 13 de la CDFUE.[11] Ces droits n'ont pas de caractère absolu, peu importe la façon de leur formulation avec ou sans réserve explicite, comme il est le cas pour les articles 17 et 17a de la Loi fondamentale.[12] Au-delà de l'interprétation, surtout systématique, pour identifier le contenu des normes, la relation parmi les droits équivalents garantis par la CEDH d'un côté et en dehors de l'autre côté se précise au moyen de l'article 53 de la CEDH. Ce dernier établit le principe de la norme plus favorable, attribuant à la CEDH la qualité d'un standard minimal qui peut être dépassé par des garanties nationales.[13]

II. Les limitations du droit pénal à la liberté d'expression au regard de la religion

Les paragraphes 188 à 191 du Code pénal[14] ne protègent plus – comme à l'époque du 18e siècle – Dieu ou la religion comme telle, mais la paix religieuse.[15] Cette finalité protectrice est déjà de prime abord confirmée par le titre du huitième chapitre du Code pénal qui se lit comme délits contre la paix religieuse et l'intégrité du cadavre. Ces dispositions découlent de l'obligation pour les États de sauvegarder une atmosphère qui permet le libre exercice de la religion.[16] Ainsi, le paragraphe 188 du Code pénal sanctionne le dénigrement des doctrines religieuses, son paragraphe 189 la perturbation d'une cérémonie religieuse, son paragraphe 190 l'atteinte à l'intégrité du cadavre et son paragraphe 191 la perturbation des obsèques. En ce qui concerne ce dernier, l'aperture spirituelle est particulièrement évidente. Tandis que le droit pénal ancien liait la perturbation des obsèques toujours à une cérémonie religieuse, ce paragraphe 191 sanctionne la perturbation des obsèques profanes de même façon.[17]

En revanche, l'incitation à la haine, sanctionnée par le paragraphe 283 du Code pénal, protège la paix publique en général, comme il le suggère le titre du vingtième chapitre du Code pénal, y compris la paix religieuse.[18] Sont protégés les groupes définis par la race, la couleur de peau, la langue, la religion ou la conception du

[11] *Ibid.,* pp. 700–726.

[12] Anna Gamper dans Arno Kahl, Lamiss Khazkadeh et Sebastian Schmid (dir.), *Kommentar zum Bundesverfassungsrecht. B-VG und Grundrechte* (Wien, Jan Sramek Verlag 2021), Art. 17 StGG, point 12 ; Andreas T. Müller, *ibid.,* Art. 17a StGG, point 11.

[13] Voir Berka, Binder et Kneihs, *Grundrechte,* pp. 21, 408, 417.

[14] *Strafgesetzbuch,* Bundesgesetzblatt nº 60/1974, modifié en dernier lieu par Bundesgesetzblatt I nº 135/2023.

[15] Alice Sadoghi dans Frank Höpfel et Eckart Ratz (dir.), *Wiener Kommentar zum Strafgesetzbuch* (2e éd., Wien, Manz, 1999 ss.), Vor §§ 188–191 StGB, point 2 (1er mars 2020, rdb.at).

[16] *Ibid.,* point 5.

[17] Sadoghi dans Höpfel et Ratz, *Strafgesetzbuch, op. cit.,* § 191 StGB, point 1 (1er mars 2020, rdb.at).

[18] Cf. Farsam Salimi, ‹ Die Verhetzung im Internet – § 283 StGB in der gerichtlichen Praxis ›, (2019) 141 *Juristische Blätter,* pp. 609–622.

monde, la nationalité, l'ascendance ou l'origine ethnique, le sexe, un handicap, l'âge ou l'orientation sexuelle autant que les sociétés religieuses. Par conséquent, les statistiques ne reflètent pas seulement les aspects religieux en ce qui concerne ce paragraphe 283. Pour tous ces délits précités les statistiques montres le nombre suivant des condamnations :[19]

	année											
par. du C. pén.	2023	2022	2021	2020	2019	2018	2017	2016	2015	2014	2013	2012
188	1	1	–	1	3	2	6	4	4	1	–	1
189	1	–	1	2	3	4	–	–	–	1	–	2
190	3	4	3	10	4	6	8	4	13	3	6	9
191	–	–	–	–	–	–	–	–	–	–	–	–
283	22	18	40	30	56	73	135	52	44	30	8	15

Tandis que l'atteinte à l'intégrité du cadavre est souvent commise après et en liaison avec un crime capital, les condamnations plutôt récentes pour dénigrement des doctrines religieuses qui sont publiquement accessibles à cause d'un appel, se réfèrent à des religions différentes, comme à l'islam en 2013[20] et au bouddhisme en 2017[21]. Dans ce dernier cas en particulier, on peut clairement observer le lien général entre ce délit et celui de l'incitation à la haine.[22] On reviendra encore sur ce point.

La diffamation[23] et l'injure[24], réglées par les paragraphes 111 et 115 du Code pénal, ne sont normalement poursuivies que sur demande du blessé aux termes de l'alinéa 117(1) du Code pénal. De plus, l'alinéa 117(2) du Code pénal en exige une demande du supérieur hiérarchique, si ces infractions étaient commises contre un ministre de culte.[25]

La position du droit concernant le dénigrement de la religion a beaucoup changé à travers les décennies passées. Pendant la validité de l'ancien code, dont les origines

[19] <https://www.statistik.at/statistiken/bevoelkerung-und-soziales/kriminalitaet-und-sicherheit/verurteilungs-und-wiederverurteilungsstatistik> (19 mars 2025).

[20] Oberster Gerichtshof, 11 déc. 2013, 15 Os 52/12d, SSt. 2013/53 ; confirmé par Cour EDH, 25 oct. 2018, 38450/12 *(E.S. c/ Autriche),* voir 27 (2018) *Newsletter Menschenrechte,* pp. 459–461.

[21] Oberster Gerichtshof, 15 fév. 2017, 15 Os 82/16x, (2017) 85 *Evidenzblatt der Rechtsmittelentscheidungen,* pp. 519–521.

[22] Voir *infra.*

[23] Heimo Lambauer et Lara Unger dans Otto Triffterer, Christian Rosbaud et Hubert Hinterhofer (dir.), *Salzburger Kommentar zum Strafgesetzbuch* (Wien, LexisNexis, 1992 ss.), § 111 StGB (42e livr., mars 2022).

[24] Lambauer et Unger dans Triffterer, Rosbaud et Hinterhofer, *Salzburger Kommentar, op. cit.,* § 115 StGB (42e livr., mars 2022).

[25] Cf. Thomas Philipp dans Höpfel et Ratz, *Strafgesetzbuch, op. cit.,* § 212, point 6 (27 avr. 2020, rdb.at).

dataient du milieu du 19e siècle,[26] les faits incriminables étaient plus détaillés d'un côté, de l'autre côté seules les sociétés religieuses reconnues par la loi et leurs doctrines étaient protégées.[27] Cette approche littérale fut contestée quand même sur la base de l'alinéa 63(2) du Traité de l'État de Saint-Germain-en-Laye, qui garantit le libre exercice de la religion peu importe si celle-ci soit reconnue par la loi.[28]

De plus, il convient de noter que l'amendement de 2011[29] a élargi le nombre des éléments constitutifs de l'incitation à la haine aux termes du paragraphe 283 du Code pénal, concernant la religion.[30] Cet amendement fut motivé par la décision-cadre 2008/913/JAI sur la lutte contre certaines formes et manifestations de racisme et de xénophobie au moyen du droit pénal[31]. Alors qu'auparavant, seules les sociétés religieuses nationales étaient protégées, l'amendement a étendu la protection à toute organisation religieuse nonobstant son statut juridique.[32] Les autres groupes protégés correspondent à ceux protégés par la directive 2000/43/CE relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de race ou d'origine ethnique[33] et par la directive 2000/78/CE portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail.[34] Une infraction est passible d'une peine d'emprisonnement allant jusqu'à deux ans. Selon les alinéas 283(2–3) du Code pénal, la peine encourue peut aller jusqu'à trois ans d'emprisonnement lorsque l'infraction est commise par le biais de la presse, de la radiodiffusion ou d'autres moyens similaires. Un discours de haine qui provoque une violence physique vis-à-vis un membre d'un groupe protégé, sera puni d'une peine d'emprisonnement de six mois à cinq ans. Une personne qui n'encourt pas de peine plus sévère en vertu des alinéas 283(1–3) du Code pénal, mais qui rend disponible à beaucoup de personnes n'importe quels matériaux concernant des idées encourageant la haine ou la violence contre des groupes protégés ou ses adhérents individuels ou incitant d'autrui à le faire par le biais de la presse, de la radiodiffusion ou d'autres

[26] *Strafgesetz,* Reichsgesetzblatt nº 117/1852 republiée par Amtliche Sammlung nº 2/1945, voir par ex. Inge Gampl, *Österreichisches Staatskirchenrecht* (Wien, New York, Springer, 1971), pp. 373–383.

[27] Gampl, *Staatskirchenrecht, op. cit.,* p. 379.

[28] Rudolf Köstler, ‹ Die religionspolitischen Bestimmungen des Friedensvertrages ›, (1921) 2 *Zeitschrift für öffentliches Recht,* pp. 325–335 (p. 332).

[29] Bundesgesetzblatt I nº 103/2011.

[30] Cf. Herbert Kalb, ‹ Religionsstrafrecht – aktuelle Änderungen ›, dans Brigitte Schinkele, René Kuppe, Stefan Schima, Eva Maria Synek, Jürgen Wallner et Wolfgang Wieshaider (dir.), *Recht – Religion – Kultur. Festschrift für Richard Potz zum 70. Geburtstag* (Wien, Facultas.wuv, 2014), pp. 243–259 (pp. 256–257).

[31] JO L 328/2008, pp. 55–58.

[32] Franz Plöchl dans Höpfel et Ratz, *Strafgesetzbuch, op. cit.,* § 283 StGB, point 7 (1er déc. 2021, rdb.at).

[33] JO L 180/2000, pp. 22–26.

[34] JO L 303/2000, pp. 16–22.

moyens semblables, elle encourt jusqu'à un an de prison ou une amende calculée au prorata de jusqu'à 720 revenus journaliers aux termes de l'alinéa 283(4) du Code pénal. Tandis que selon le paragraphe 69 du Code pénal, la disponibilité publique s'accomplit face à dix personnes,[35] la disponibilité à beaucoup de personnes se réalise avec une trentaine.[36]

Ce n'était que la division 8/4 de la loi relative à des mesures luttant contre la haine sur l'internet[37] qui a modifié les éléments constitutifs de la division 283(1)2 du Code pénal. Ainsi fut insérée la protection des individus appartenant à des groupes protégés contre l'injure dénigrante au public avec l'intention de violer leur dignité.[38] En outre, la même loi modifia le Code de procédure civile[39] pour mettre à disposition une procédure d'urgence spécifique pour les atteintes graves aux droits de la personnalité, violant la dignité humaine, aux termes du paragraphe 549 du Code de procédure civile.[40] Dans ces éléments constitutifs sont compris des composantes au-dessus des individus ; à ce propos, les travaux préparatoires renvoient à des dénigrements et des incitations religieux.[41]

Des limitations spécifiques de la liberté d'expression sont motivées par l'histoire du pays et la lutte contre toute forme de nazisme. À ces fins, le paragraphe 3d de la loi d'interdiction de 1947[42] sanctionne l'incitation publique ou par biais de presse toute forme de résurgences du nazisme d'une peine d'emprisonnement pouvant aller de cinq jusqu'à vingt ans.[43] Son paragraphe 3h punit d'emprisonnement pouvant d'aller d'un an jusqu'à vingt ans quiconque nie, minimise gravement, approuve ou

[35] Robert Jerabek et Richard Ropper dans Höpfel et Ratz, *Strafgesetzbuch, op. cit.,* § 69 StGB, point 2 (20 janv. 2021, rdb.at).

[36] *Ibid.,* point 7 ; Plöchl dans Höpfel et Ratz, *Strafgesetzbuch, op. cit.,* § 283 StGB, points 13 et 14 (1er déc. 2021, rdb.at).

[37] *Hass-im-Netz-Bekämpfungs-Gesetz,* Bundesgesetzblatt I nº 148/2020 ; voir nº 481 *Beilagen zu den stenographischen Protokollen des Nationalrates,* XXVIIe législature, pp. 16–17.

[38] Voir Plöchl dans Höpfel et Ratz, *Strafgesetzbuch, op. cit.,* § 283 StGB, points 21–25 (1er déc. 2021, rdb.at) ; Alexander Tipold, ‹ Hass im Netz und neue Geldwäscherei ›, (2020) 18 Journal für Strafrecht, pp. 445–451 ; Farsam Salimi, ‹ Hass im Netz – Das HiNBG und die Probleme des Straf-, Strafprozess- und Strafanwendungsrechts ›, (2022) 77 *Österreichische Juristenzeitung,* pp. 16–24.

[39] *Zivilprozessordnung,* Reichsgesetzblatt nº 113/1895, modifié en dernier lieu par Bundesgesetzblatt I nº 85/2024.

[40] nº 481 *Beilagen zu den stenographischen Protokollen des Nationalrates,* XXVIIe législature, p. 9 ; voir Caroline Mokrejs-Weinhappel, ‹ Das neue Mandatsverfahren nach § 549 ZPO ›, (2021) 76 Österreichische Juristenzeitung, pp. 53–63.

[41] nº 481 *Beilagen zu den stenographischen Protokollen des Nationalrates,* XXVIIe législature, p. 11.

[42] *Verbotsgesetz 1947,* Staatsgesetzblatt nº 13/1945, modifié en dernier lieu par Bundesgesetzblatt nº 177/2023.

[43] Voir Rudolf Lässig dans Höpfel et Ratz, *Strafgesetzbuch, op. cit.,* § 3d VerbotsG, points 1–5 (1er août 2015, rdb.at).

justifie les crimes nazis par biais de presse, de radio ou autrement publiquement.[44] Les instances strasbourgeoises ont confirmé la nécessité de ces dispositions dans une société démocratique,[45] faisant référence explicite à l'article 17 de la CEDH lequel établit une barrière contre les ennemis de liberté.[46]

Finalement, le délit du génocide n'est pas seulement commis en tuant ou blessant grièvement autrui, mais aussi en infligeant des dommages sévères psychiques,[47] dans l'intention d'exterminer un groupe protégé en tant que tel,[48] comme l'établit le paragraphe 321 du Code pénal. Sont considérés comme les dommages psychiques pertinents ceux qui persistent plus que 24 jours ou qui sont graves comme tels, comme des dépressions sévères ou des troubles post-traumatiques.[49] Sont protégées l'appartenance à une société religieuse, à une race, à un peuple, à une peuplade et à un État de l'un côté et la vie des individus, qui y appartiennent, de l'autre côté.[50] En ce qui concerne le facteur religieux, peu importe si la société soit reconnue ou enregistrée en Autriche. Le fait incriminable sera rempli même concernant une société religieuse étrangère.[51] Le génocide sera puni d'emprisonnement à perpétuité.

III. La jurisprudence récente concernant le dénigrement

Comme déjà indiqué, les décisions plutôt récentes, traitées par la Cour suprême montrent la transition floue de l'incitation à la haine au dénigrement protégeant la paix religieuse.[52] On doit prendre en compte cette proximité quand on analyse la

[44] Voir Lässig dans Höpfel et Ratz, *Strafgesetzbuch,* § 3h VerbotsG, points 1–8 (1er août 2015, rdb.at).

[45] Commission EDH, 12 oct. 1989, 12774/87 *(H., W., P. et K. c/ Autriche) ;* Cour EDH, 1er fév. 2000, 32307/96 *(Schimanek c/ Autriche)*.

[46] Cf. Jochen A. Frowein dans Jochen A. Frowein et Wolfgang Peukert, *Europäische Menschenrechtskonvention* (3e éd., Kehl, N. P. Engel, 2009), Artikel 17, points 1–4 ; Michal Bobek dans Jiří Kmec, David Kosař, Jan Kratochvíl et Michal Bobek, *Evropská úmluva o lidských právech* (Praha, C. H. Beck, 2012), Omezení práv a svobod zaručených v Úmluvě, points 54–75 (pp. 124–131) ; Birgit Daiber dans Jens Meyer-Ladewig, Martin Nettesheim et Stefan von Raumer (dir.), *Europäische Menschenrechtskonvention* (4e éd., Baden-Baden, Nomos, 2017), Artikel 10 EMRK, point 37.

[47] Otto Triffterer dans Triffterer, Rosbaud et Hinterhofer, *Salzburger Kommentar, op. cit.,* § 321 StGB, points 63–66 (6e livr., févr. 2001) ; Christoph Schmetterer dans Höpfel et Ratz, *Strafgesetzbuch, op. cit.,* § 321 StGB, point 43 (20 janv. 2021, rdb.at).

[48] Schmetterer dans Höpfel et Ratz, *Strafgesetzbuch, op. cit.,* § 321 StGB, points 65–75 (20 janv. 2021, rdb.at).

[49] *Ibid.,* point 45 (20 janv. 2021, rdb.at).

[50] *Ibid.,* point 3 (20 janv. 2021, rdb.at).

[51] *Ibid.,* point 14 (20 janv. 2021, rdb.at).

[52] Cf. Hans D. Jarass, *Charta der Grundrechte der EU* (4e éd., München, C. H. Beck, 2021), Art. 10, point 18 ; Christoph Grabenwarter et Katharina Pabel, *Europäische Menschenrechtskonvention* (7e éd., München, C. H. Beck, 2021), § 23, point 38.

jurisprudence pertinente de la Cour EDH[53] qui ne peut jamais refléter l'approche jurisprudentielle entière nationale. Par conséquent, la littérature souligne qu'il faut toujours décider au cas par cas.[54] Ainsi, les délits du dénigrement et de l'incitation à la haine apparaissent plutôt comme apparentés, ayant de gravité plus faible d'un côté et plus sévère de l'autre côté, que des délits complètement différents.

Dans un cas, la prévenue a déclaré lors des séminaires d'un parti politique de droite populiste que Mahomet, le prophète de l'islam, avait des tendances pédophiles.[55] Le parquet de Vienne l'a poursuivi pour incitation à la haine aux termes de l'article 283 du Code pénal. Le tribunal régional finit par la reconnaître coupable de dénigrement de doctrines religieuses sur la base de l'article 188 du Code pénal.[56] La Cour d'appel a confirmé cet arrêt.[57] La Cour suprême, saisie pour examiner une violation de l'article 10 de la CEDH, s'est appuyée sur la jurisprudence pertinente de la Cour EDH[58] et considéra l'ingérence de la condamnation de la prévenue justifiée au regard de l'alinéa 10(2) de la CEDH.[59] Malgré les références jurisprudentielles critiquées en littérature,[60] on peut constater une approche plus subtile et balancée entre les mesures nécessaires pour protéger la paix religieuse et la liberté d'expression. Par conséquent, la Cour EDH confirma cette argumentation en 2018, déduisant qu'il n'avait pas de violation de l'article 10 de la CEDH.[61]

[53] Cf. Lina Papadopoulou, ‹ Prohibition of Religiously Loaded Speech ›, dans Kerstin von der Decken et Angelika Günzel (dir.), *Staat – Religion – Recht. Festschrift für Gerhard Robbers zum 70. Geburtstag* (Baden-Baden, Nomos, 2020), pp. 847–863 (pp. 859–862) ; Grabenwarter et Pabel, *Europäische Menschenrechtskonvention, op. cit.,* § 22, point 137.

[54] Sadoghi dans Höpfel et Ratz, *Strafgesetzbuch, op. cit.,* § 188 StGB, point 20/1 (1er mars 2020, rdb.at) ; Walter Berka, ‹ Was stört den « religiösen Frieden »? ›, (2018) 27 *Newsletter Menschenrechte,* pp. 497–499 ; cf. aussi Marie-Theres Tinnefeld et Thomas Knieper, ‹ Karikaturen im Spiegel digitaler Meinungs-, Presse- und Religionsfreiheit „Quid leges sine moribus?" ›, (2016) 19 *Multimedia und Recht,* pp. 156–161.

[55] Oberster Gerichtshof, 11 déc. 2013, 15 Os 52/12d, SSt. 2013/53.

[56] Landesgericht für Strafsachen Wien, 15 févr. 2011, 112 E Hv 144/10g-30.

[57] Oberlandesgericht Wien, 20 déc. 2011, 22 Bs 145/11a.

[58] Cour EDH, 20 sept. 1994, 13470/87 *(Otto-Preminger-Institut c/ Autriche)* ; Cour EDH, 25 nov. 1996, 17419/90 *(Wingrove c/ Royaume uni)* ; Cour EDH, 13 sept. 2005, 42571/98 *(I. A. c/ Turquie) ;* Cour EDH, 2 mai 2006, 50692/99 *(Aydın Tatlav c/ Turquie) ;* Cour EDH, 31 janv. 2006, 64016/00 *(Giniewski c/ France)*.

[59] Oberster Gerichtshof, 11 déc. 2013, 15 Os 52/12d, SSt. 2013/53.

[60] Cf. Christoph Grabenwarter, ‹ Filmkunst im Spannungsfeld zwischen Freiheit der Meinungsäußerung und Religionsfreiheit ›, 55 (1995) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,* pp. 128–165 ; Berka, Binder et Kneihs, *Grundrechte,* p. 724 ; mais voir aussi Winfried Platzgummer, ‹ Herabwürdigung religiöser Lehren, Meinungsfreiheit und Freiheit der Kunst ›, (1995) 117 *Juristische Blätter,* pp. 137–142 ; Jochen A. Frowein dans Frowein et Peukert, *EMRK-Kommentar,* Artikel 10, point 41.

[61] Cour EDH, 25 oct. 2018, 38450/12 *(E.S. c/ Autriche)* ; Berka, Binder et Kneihs, *Grundrechte, op. cit.,* p. 691.

Un des prévenus d'un autre cas, encore pointé contre l'islam, a renversé du sang de porc sur le terrain d'une mosquée, éclaboussé son minaret et fixé la hure à ce dernier ; lui aussi, il fut condamné pour dénigrement des doctrines religieuses.[62]

Dans d'autres circonstances, la cour pénale de première instance a reconnu le prévenu coupable d'avoir excité à la haine aux termes de l'alinéa 283(2) du Code pénal ; le prévenu a déclaré le bouddhisme une idéologie méprisante pour le genre humain, belliqueuse et cherchant l'hégémonie mondiale, proche de la pédophilie et du nazisme, dont les adhérents se livreraient à des pratiques magiques sexuelles pour l'éveil spirituel.[63] En distribuant des tracts à 1620 foyers, l'action était diffusée au public contre un groupe protégé par l'alinéa 283(1) du Code pénal. En accueillant le recours, la Cour d'appel a reconnu le prévenu coupable d'avoir dénigré le dalaï-lama et la doctrine bouddhiste aux termes du paragraphe 188 du Code pénal et ainsi offensé le public, en exposant que l'acte incriminé n'était pas dirigé directement contre un groupe religieux, mais plutôt contre son chef spirituel et contre la doctrine de la religion.[64] La Cour suprême saisie pour juger une violation prétendue des droits fondamentaux, citant de nouveau la jurisprudence pertinente de la Cour EDH,[65] a souligné qu'une critique quelconque des religions, conforme aux exigences des articles 9 et 10 de la CEDH ne puisse pas réaliser les éléments constitutifs du paragraphe 188 du Code pénal.[66] De nouveau, la Cour a considéré la limitation de la liberté d'expression était en fait nécessaire dans une société démocratique pour protéger la paix religieuse et les sentiments religieux d'autrui. À cet égard, il faudrait ajouter que le prévenu a fait ses déclarations anti-bouddhistes pour soutenir des manifestations contre la construction d'un stoupa en Basse Autriche.[67]

On est donc fondé à conclure que l'approche des cours nationales s'inscrit toujours dans la droite ligne de la jurisprudence de la Cour EDH en matière, même si cette jurisprudence a restreint la marge d'appréciation des États contractants à vue d'œil aux cours des dernières années.[68]

[62] Oberster Gerichtshof, 18 janv. 2022, 14 Os 49/21v.

[63] Landesgericht Krems an der Donau, 13 nov. 2013, 38 Hv 32/13s-20.

[64] Oberlandesgericht Wien, 15 juin 2016, 17 Bs 84/16a.

[65] Cour EDH, 20 sept. 1994, 13470/87 *(Otto-Preminger-Institut c/ Autriche)* ; Cour EDH, 25 nov. 1996, 17419/90 *(Wingrove c/ Royaume uni)* ; Cour EDH, 13 sept. 2005, 42571/98 *(I. A. c/ Turquie)*.

[66] Oberster Gerichtshof, 15 fév. 2017, 15 Os 82/16x, (2017) 85 *Evidenzblatt der Rechtsmittelentscheidungen,* pp. 519–521.

[67] Voir *Kurier,* 5 juill. 2016, p. 21 ; *Der Standard,* 6 juill. 2016, p. 10 ; voir aussi une décision pertinente en matière civile : Oberster Gerichtshof, 13 juin 2019, 4 Ob 201/18i, (2021) 68 *Österreichisches Archiv für Recht & Religion,* pp. 263–270 (commenté par Paul Fitz, *ibid.,* pp. 271–274).

[68] Voir David Kosař dans Kmec, Kosař, Kratochvíl et Bobek, *Evropská úmluva o lidských právech, op. cit.,* čl. 10 EÚLP, point 119 ; Cour EDH, 31 janv. 2006, 64016/00 *(Giniewski c/ France),* § 52–54 ; Cour EDH, 30 janv. 2018, 69317/14 *(Sekmadienis Ltd. c/ Lituanie)*.

LIBERTÉS D'EXPRESSION ET DE RELIGION EN BELGIQUE DEPUIS 2008

LOUIS-LÉON CHRISTIANS[1]

La liberté d'expression est garantie en Belgique par la même disposition constitutionnelle que celle qui garantit la liberté de religion. L'art. 19 prévoit que « La liberté des cultes, celle de leur exercice public, *ainsi que la liberté de manifester ses opinions en toute matière*, sont garanties, sauf la répression des délits commis à l'occasion de l'usage de ces libertés ». Cette disposition est aujourd'hui interprétée à la lumière de la Jurisprudence européenne, y compris dans un versant péjoratif : ainsi, les limitations préventives admises aux al. 2 des art. 9 et 10 CEDH se voient désormais validées en Belgique alors même que l'art. 19 de la Constitution n'autorise qu'une répression pénale a posteriori.

On observera que d'autres dispositions constitutionnelles visent la liberté de religion, avec des conséquences potentielles en matière de liberté d'expression, en termes de liberté négative (art. 20), d'autonomie des cultes (art. 21), de régime de cultes reconnus (art. 181 et art. 24), et de non-discrimination des minorités philosophiques et idéologiques (art. 11)[2].

[1] *University of Louvain La Neuve.*

[2] Art. 11. La jouissance des droits et libertés reconnus aux Belges doit être assurée sans discrimination. A cette fin, la loi et le décret garantissent notamment les droits et libertés des minorités idéologiques et philosophiques.

Art. 20. Nul ne peut être contraint de concourir d'une manière quelconque aux actes et aux cérémonies d'un culte, ni d'en observer les jours de repos.

Art. 21. L'Etat n'a le droit d'intervenir ni dans la nomination ni dans l'installation des ministres d'un culte quelconque, ni de défendre à ceux-ci de correspondre avec leurs supérieurs, et de publier leurs actes, sauf, en ce dernier cas, la responsabilité ordinaire en matière de presse et de publication.

Le mariage civil devra toujours précéder la bénédiction nuptiale, sauf les exceptions à établir par la loi, s'il y a lieu.

Art. 24. § 1. L'enseignement est libre; toute mesure préventive est interdite; la répression des délits n'est réglée que par la loi ou le décret. La communauté [= l'Etat, selon ses institutions régionalisées et

Parmi les limites de la liberté d'expression, on relèvera cinq instruments majeurs, que l'on regroupera en deux catégories, pénale et non pénale :

- outre les normes du code pénal, concernant tant l'expression de tous que diverses hypothèses présentant un lien avec un aspect spécifiquement religieux ;
- des lois particulières concernant le racisme, le négationnisme et l'incitation à la haine ou à la discrimination ;
- d'autres limitations, non pénales, sont liées aux contacts entretenus avec les pouvoirs publics, soit comme agent public, soit comme bénéficiaire d'une subvention publique (comme c'est le cas des cultes reconnus entre autres) ;
- des limitations de droit commun liées au mécanisme de la responsabilité civile délictuelle pour des propos fautifs causant un dommage
- enfin les agences publiques de lutte contre la discrimination, ou d'information à l'égard des dérives sectaires, sont autorisées à prendre une parole publique pour « désapprouver » certains propos qui sans atteindre un seuil pénal, apparaissent néanmoins peu souhaitables.
- On n'examinera pas ici la question des délits de presse, dès lors qu'elle implique une procédure de cours d'assise rarement mobilisée.

On notera d'emblée que le droit belge ne comporte l'équivalent de la loi française du 29 juillet 1881, et notamment sa formulation actuelle. De même, la jurisprudence belge, à la différence de la française, n'a pas limité l'application de la responsabilité

« communuatarisées »] assure le libre choix des parents. La communauté organise un enseignement qui est neutre. La neutralité implique notamment le respect des conceptions philosophiques, idéologiques ou religieuses des parents et des élèves. Les écoles organisées par les pouvoirs publics offrent, jusqu'à la fin de l'obligation scolaire, le choix entre l'enseignement d'une des religions reconnues et celui de la morale non confessionnelle.

§ 2. Si une communauté, en tant que pouvoir organisateur, veut déléguer des compétences à un ou plusieurs organes autonomes, elle ne le pourra que par décret adopté à la majorité des deux tiers des suffrages exprimés.

§ 3. Chacun a droit à l'enseignement dans le respect des libertés et droits fondamentaux. L'accès à l'enseignement est gratuit jusqu'à la fin de l'obligation scolaire. Tous les élèves soumis à l'obligation scolaire ont droit, à charge de la communauté, à une éducation morale ou religieuse.

§ 4. Tous les élèves ou étudiants, parents, membres du personnel et établissements d'enseignement sont égaux devant la loi ou le décret. La loi et le décret prennent en compte les différences objectives, notamment les caractéristiques propres à chaque pouvoir organisateur, qui justifient un traitement approprié.

§ 5. L'organisation, la reconnaissance ou le subventionnement de l'enseignement par la communauté sont réglés par la loi ou le décret.

Art. 181. § 1. Les traitements et pensions des ministres des cultes sont à la charge de l'Etat; les sommes nécessaires pour y faire face sont annuellement portées au budget. § 2. Les traitements et pensions des délégués des organisations reconnues par la loi qui offrent une assistance morale selon une conception philosophique non confessionnelle sont à la charge de l'Etat; les sommes nécessaires pour y faire face sont annuellement portées au budget.

civile en matière de discours haineux ou dommageable. Par ailleurs, aucun délit spécifique de blasphème n'a été érigé en Belgique depuis son indépendance en 1831. De façon générale, il y a peu de contentieux formel en matière d'expression générale, qu'il s'agisse de cas d'expressions agressives envers les religieux, ou d'expressions agressives de religieux à l'encontre d'autres groupes, comme les LGBT par exemple. La plupart des polémiques qui animent la Belgique depuis une trentaine d'année concerne le port du foulard islamique, dans les emplois publics, privés, ou comme usagers des écoles. Aucune règle législative n'a obtenu de majorité politique pour trancher ces contentieux depuis 30 ans. La jurisprudence les traite cas par cas, avec des résultats en sens parfois opposés. Nous ne traiterons pas de ces cas dans le présent rapport, même s'il s'agit bien de contentieux liés à la liberté d'expression des musulmanes. Ces tensions se polarisent en effet moins sur la liberté d'expression que sur la notion de « neutralité », très incertaine en Belgique.

Les contentieux les plus significatifs portent sur les cas d'incitation à l'hostilité instaurés par les législations anti-discriminations de 2003 et surtout 2007, dépassant en cela les seules hypothèses de racisme prévues depuis 1981 et de négationnisme prévues depuis 1995. Ces contentieux portent essentiellement sur des questions liées à l'islam ou à l'orientation sexuelle. D'autres propos qui ont suscité polémiques relèvent de questions bioéthiques, comme en matière d'avortement, d'euthanasie ou pratiques rituelles. Ils concernant alors davantage des groupes chrétiens, aujourd'hui minoritaires dans une Belgique anciennement catholique et devenue très séculière.

I. Législation pénale

A. Le droit commun et des normes pour l'essentiel en vigueur depuis 1867

On ne revient pas ici sur les délits de droit commun en matière d'injure, de diffamation et de calomnie[3]. On examine en revanche les délits spécifiquement liés à une connotation religieuse, dont la plupart datent de 1867, à la suite de la révision du Code pénal français de 1810, en vigueur jusque-là [4]. Si aucun délit de blasphème

[3] L'art. 453 bis du Code pénal (introduit par la loi du 10 mai 2007) prévoit que lorsqu'un des mobiles [des délits d'injure, calomnie ou diffamation] est la haine, le mépris ou l'hostilité à l'égard d'une personne en raison […] de « sa conviction religieuse ou philosophique », « le minimum des peines correctionnelles portées par ces articles peut être doublé ». Peu de contentieux s'est toutefois développé concernant des polémiques religieuses.

[4] Art. 142. Toute personne qui, par des violences ou des **menaces**, aura contraint ou empêché une ou plusieurs personnes d'exercer un culte, d'assister à l'exercice de ce culte, de célébrer certaines fêtes religieuses, d'observer certains jours de repos, et, en conséquence, d'ouvrir ou de fermer leurs ateliers, boutiques ou magasins, et de faire ou de quitter certains travaux, sera punie d'un emprisonnement de huit jours à deux mois et d'une amende de vingt-six francs à deux cents francs.

Art. 143. Ceux qui, par des troubles ou des désordres, auront empêché, retardé ou interrompu les exercices d'un culte qui se pratiquent dans un lieu destiné ou servant habituellement au culte ou dans

n'a jamais été instauré, comme on l'a déjà indiqué, la protection des objets du culte, des ministres du culte et des sépultures est assurée contre tout « outrage » en ce compris par de simples paroles. On soulignera que ces dispositions ne se bornent pas à protéger les religions reconnues, mais bien l'ensemble de tous les cultes de façon indéfinie. En revanche, il subsisterait aujourd'hui certaines incertitudes quant à l'éventuelle extension de cette protection pénale aux philosophies (reconnues ou non). Le projet de code pénal maintient la protection des *objets* au bénéfice des seuls cultes mais l'étend aux « officiants » des philosophies lorsqu'il y va de leur *personne* (comp. art. 308 de la prop. 55 0417/001 ; et l'art. 77 : (…) 4° personne exerçant une fonction sociale : (…) « — un ministre d'un culte ou un officiant lors de cérémonies

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les cérémonies publiques de ce culte, seront punis d'un emprisonnement de huit jours à trois mois et d'une amende de vingt-six francs à cinq cents francs.

Art. 144. Toute personne qui, par faits, **paroles, gestes** ou menaces, aura **outragé les objets** d'un culte, soit dans les lieux destinés ou servant habituellement à son exercice, soit dans des cérémonies publiques de ce culte, sera punie d'un emprisonnement de quinze jours à six mois et d'une amende de vingt-six francs à cinq cents francs.

Art. 145. Sera puni des mêmes peines celui qui, par faits **paroles, gestes** ou menaces, aura **outragé le ministre** d'un culte, dans l'exercice de son ministère. S'il l'a frappé, il sera puni d'un emprisonnement de deux mois à deux ans et d'une amende de cinquante francs à cinq cents francs.

Art. 146. Si les coups ont été cause d'effusion de sang, de blessure ou de maladie, le coupable sera puni d'un emprisonnement de six mois à cinq ans et d'une amende de cent francs à mille francs.

(…)

Art. 228. Toute personne qui aura **publiquement porté un costume,** un uniforme, une décoration, un ruban ou autres insignes d'un ordre qui ne lui appartient pas, sera punie d'une amende de deux cents francs à mille francs.

(…)

Art. 268. Seront punis d'un emprisonnement de huit jours à trois mois et d'une amende de vingt-six francs à cinq cents francs, les ministres d'un culte qui, dans l'exercice de leur ministère, par des **discours prononcés en assemblée publique**, auront directement attaqué le gouvernement, une loi, un arrêté royal ou tout autre acte de l'autorité publique.

(…)

Art. 442quater (2011) § 1er. Quiconque aura, alors qu'il connaissait la situation de faiblesse physique ou psychique d'une personne, altérant gravement la capacité de discernement de cette personne, frauduleusement abusé de cette faiblesse pour conduire cette personne à un acte ou à une abstention portant gravement atteinte à son intégrité physique ou mentale ou à son patrimoine, sera puni d'une peine d'un mois à deux ans d'emprisonnement et d'une amende de cent euros à mille euros ou d'une de ces peines seulement. § 2. Les peines seront un emprisonnement d'un mois à quatre ans et une amende de deux cent euros à deux mille euros ou une de ces peines seulement dans les cas suivants : 1° si l'acte ou l'abstention visé au § 1er résulte **d'une mise en état de sujétion physique ou psychologique** par l'exercice de pressions graves ou réitérées ou de techniques propres à altérer la capacité de discernement; 2° si l'abus visé au § 1er a été commis envers un mineur; (…)

Art. 453. Sera puni d'un emprisonnement d'un mois à un an et d'une amende de vingt-six [euros] à deux cents [euros], quiconque se sera rendu coupable de violation de tombeaux ou de sépulture.

d'une obédience philosophique non confessionnelle », « étant donné qu'ils méritent un même degré de protection » (p. 294).

En toute hypothèse, on dispose toutefois de très peu de jurisprudence. Le seul cas récent a concerné une exposition « Irreligia » de photos et représentations tenues pour outrageantes, notamment de la Vierge dans une église. Cette polémique et la plainte pénale n'ont pas abouti à condamnation dès lors que cette exposition avait été autorisée par le curé de la paroisse dans le cadre d'Europalia Pologne, en l'occurrence contestée par la suite par des catholiques moins tolérants[5].

En sens inverse, l'article 268 du Code pénal sanctionne le ministre du culte qui aura, selon l'interprétation de la doctrine, non pas simplement critiqué, mais *incité à la rebellion* contre une autorité publique ou une règle légale. Le texte a été peu mis en œuvre au XIXe siècle, mais a été mentionné de façon fréquente par le ministre de la Justice depuis les attentats de septembre 2001. La disposition, malgré son absence historique de mise en oeuvre, est donc rappelée comme une mise en garde à l'égard des ministres des cultes, notamment musulmans, dans l'exercice de leur mandat. Dans le cadre de la réforme actuellement en cours du Code pénal, cette disposition sera maintenue mais intégrée à une infraction plus générale dans son champ d'application[6].

[5] Bruxelles, Ch. Mises acc., 15 février 2006, *Irreligia* (inédit) (non-lieu aux organisateurs de l'exposition «Irreligia, morphologie du non-sacré dans l'art du XXe siècle». Cette exposition, donnée notamment dans une église, avait été jugée « blasphématoire » par l'association catholique intégriste «Belgique et Chrétienté» (dont le président Alain Escada est issu de l'extrême droite). Irreligia avait réuni en 2001 et 2002 des oeuvres d'artistes polonais (dans le cadre d'Europalia) critiquant des aspects à leurs yeux trop sévères de la religion catholique. Christ flagellé, vierge Marie sous matelas d'eau, etc., avaient donc irrité les intégristes. Mais les organisateurs, dont un prêtre, défendant la liberté d'expression avaient été blanchis par la chambre du conseil, le 4 novembre dernier. La chambre des mises a dit la même plainte pour blasphème irrecevable, car elle avait été incorrectement introduite). Voy L.-L. CHRISTIANS, « Polémiques religieuses et intentions cachées. Nouvelles sacralités et méta-discrimination en droit contemporain », in DIERKENS Alain, SCHREIBER Jean-Philippe, *Le blasphème : du péché au crime,* in Problèmes d'histoire des religions, Volume 21, Editions de l'Université de Bruxelles, 2011, pp. 107-121.

[6] Projet de code pénal, Art. 493 — L'atteinte méchante à la puissance publique. « L'atteinte méchante à la puissance publique, dans une intention méchante et en public, consiste à: 1° porter atteinte à la force obligatoire de la loi ou des droits ou à l'autorité des institutions constitutionnelles, ou; 2° provoquer directement à la désobéissance à une loi qui menace la sécurité, l'ordre public, la santé publique, les bonnes moeurs, ou l'autorité et l'impartialité du pouvoir judiciaire. » « L'actuel article 268 du Code pénal contient une incrimination séparée pour les ministres d'un culte qui, dans l'exercice de leur ministère, par des discours prononcés en assemblée publique, auront directement attaqué le gouvernement, une loi, un arrêté royal ou tout autre acte de l'autorité publique. Cette incrimination n'est pas reprise ici étant donné qu'elle constitue une violation trop importante de la liberté de culte et de la liberté d'expression1376. De plus, le comportement punissable (comme le fait de prêcher que les lois belges ne sont pas contraignantes lorsqu'elles vont à l'encontre du dogme ou que le gouvernement n'a aucune autorité sur les croyants) est suffisamment sanctionné par la disposition en projet relative à l'atteinte méchante à la puissance publique » (Prop. de loi instaurant un nouveau Code pénal – Livre 1 et Livre 2, Ch. Repr., *Doc. parL,* S.O. 2019, DOC 55 0417/001, sp. p. 725).

Enfin, on notera qu'une loi de 2014[7] est venue instaurer un délit de sexisme, dont on verra qu'il a été mobilisé contre l'attitude d'un militant musulman.

B. De l'absence de vérité d'Etat à la répression de formes implicites d'incitation à la haine

En dehors du Code pénal, la loi anti-racisme de 1981[8], la loi anti-négationnisme de 1995[9] (mod. 2019[10]) et la loi anti-discrimination de 2007[11] consacrent chacune

[7] Loi du 22 mai 2014 tendant à lutter contre le sexisme dans l'espace public et modifiant la loi du 10 mai 2007 tendant à lutter contre la discrimination entre les femmes et les hommes afin de pénaliser l'acte de discrimination : « Art. 2. Pour l'application de la présente loi, le sexisme s'entend de tout geste ou comportement qui, dans les circonstances visées à l'article 444 du Code pénal, a manifestement pour objet d'exprimer un mépris à l'égard d'une personne, en raison de son appartenance sexuelle, ou de la considérer, pour la même raison, comme inférieure ou comme réduite essentiellement à sa dimension sexuelle et qui entraîne une atteinte grave à sa dignité.

Art. 3. Est puni d'un emprisonnement d'un mois à un an et d'une amende de cinquante euros à mille euros, ou de l'une de ces peines seulement, quiconque, adopte un comportement visé à l'article 2. »

[8] Loi du 30 Juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie, Art. 3. La présente loi a pour objectif de créer, dans les matières visées à l'article 5, un cadre général pour lutter contre la discrimination fondée sur la **nationalité, une prétendue race, la couleur de peau, l'ascendance ou l'origine nationale ou ethnique**. « Art. 21. Quiconque, dans l'une des circonstances indiquées à l'article 444 du Code pénal, diffuse des idées fondées sur la supériorité ou la haine raciale, est puni d'un emprisonnement d'un mois à un an et d'une amende de cinquante euros à mille euros, ou de l'une de ces peines seulement. »

[9] Loi du 23 mars 1995 tendant à réprimer la négation, la minimisation, la justification ou l'approbation du génocide commis par le régime national-socialiste allemand pendant la seconde guerre mondiale (M.B. 30 mars 1995), Art. 1er : « Est puni d'un emprisonnement de huit jours à un an et d'une amende de vingt-six à cinq mille francs quiconque, dans l'une des circonstances indiquées à l'article 444 du Code pénal, nie, minimise grossièrement, cherche à justifier ou approuve le génocide commis par le régime national-socialiste allemand pendant la seconde guerre mondiale. Pour l'application de l'alinéa précédent, le terme génocide s'entend au sens de l'article 2 de la Convention internationale du 9 décembre 1948 pour la prévention et la répression du crime de génocide. En cas de récidive, le condamné peut, en outre, être condamné à l'interdiction conformément à l'article 33 du Code pénal ».

[10] Loi du 5 mai 2019 « portant des dispositions diverses en matière pénale et en matière de cultes, et modifiant la loi du 28 mai 2002 relative à l'euthanasie et le Code pénal social » dont l'art. 115 a complété l'article 20 de la loi du 30 juillet 1981 « tendant à réprimer certains actes inspirés par le racisme ou la xénophobie » qui prévoit désormais que « Quiconque, dans l'une des circonstances indiquées à l'article 444 du Code pénal, nie, minimise grossièrement, cherche à justifier ou approuve des faits correspondant à un crime de génocide, à un crime contre l'humanité ou à un crime de guerre tel que visé à l'article 136quater du Code pénal, établis comme tels par une décision définitive rendue par une juridiction internationale, *sachant ou devant savoir que ce comportement risque d'exposer soit une personne, soit un groupe, une communauté ou leurs membres, à la discrimination, à la haine ou à la violence*, en raison de l'un des critères protégés ou de la religion, au sens de l'article 1er, § 3, de la décision-cadre du Conseil de l'Union européenne du 28 novembre 2008 sur la lutte contre certaines formes et manifestations de racisme et de xénophobie au moyen du droit pénal, et ce, même en dehors des domaines visés à l'article 5».

certaines limitations de la liberté d'expression, explicitement ou implicitement liées à la figure de l'incitation à la haine, l'hostilité ou la discrimination.

Au regard de la Cour Constitutionnelle de Belgique[12], comme de celui de la Cour européenne des droits de l'homme, c'est *l'incitation à la haine* envers le peuple Juif qui vient ultimement justifier la prohibition pénale des propos négationnistes ou racistes, et non l'existence d'une « vérité d'Etat »[13] si importante qu'il conviendrait de la protéger pénalement. Cette condamnation contemporaine de l'idée même de « vérité d'Etat » se trouve également au fondement de l'abrogation progressive en Europe de tout délit de blasphème, *qualitate qua* [14].

Le caractère implicite de cette incitation n'empêchera pas la possibilité de l'établir par toutes voies de droit, au gré d'une prise en compte des contextes et des interprétations des différents discours, une fois réunis les autres éléments infractionnels visés par les art. 20 et 21 de la loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie de la loi du 30 juillet 1981 et l'art. 22 de la loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination, en ce compris en matière religieuse.

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[11] Loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination, Art. 3.La présente loi a pour objectif de créer, dans les matières visées à l'article 5, un cadre général pour lutter contre la discrimination fondé sur l**'âge, l'orientation sexuelle, l'état civil, la naissance, la fortune, la conviction religieuse ou philosophique, la conviction politique, la conviction syndicale, la langue, l'état de santé, un handicap, une caractéristique physique ou génétique ou l'origine sociale.**

Art. 22. Est puni d'un emprisonnement d'un mois à un an et d'une amende de cinquante euros à mille euros, ou de l'une de ces peines seulement : 1° quiconque, dans l'une des circonstances visées à l'article 444 du Code pénal, incite à la discrimination à l'égard d'une personne, en raison de l'un des critères protégés, et ce, même en dehors des domaines visés à l'article 5; 2° quiconque, dans l'une des circonstances visées à l'article 444 du Code pénal, incite à la haine ou à la violence à l'égard d'une personne, en raison de l'un des critères protégés, et ce, même en dehors des domaines visés à l'article 5; 3° quiconque, dans l'une des circonstances visées à l'article 444 du Code pénal, incite à la discrimination ou à la ségrégation à l'égard d'un groupe, d'une communauté ou de leurs membres, en raison de l'un des critères protégés, et ce, même en dehors des domaines visés à l'article 5; 4° quiconque, dans l'une des circonstances visées à l'article 444 du Code pénal, incite à la haine ou à la violence à l'égard d'un groupe, d'une communauté ou de leurs membres, en raison de l'un des critères protégés, et ce, même en dehors des domaines visés à l'article 5. »

[12] Voy. not. C. A., n° 45/96, 12 juillet 1996 ; C.C. 12 février 2009, n° 17/2009

[13] K. Bertrams, P.-O. De Broux, « Du négationnisme au devoir de mémoire : l'histoire est-elle prisonnière ou gardienne de la liberté d'expression? », *Rev. dr. U.L.B.,* 2007/1, pp. 75-134.

[14] Voy. les travaux du Conseil de l'Europe, notamment de la Commission pour la Démocratie par le Droit (Commission de Venise), *Blasphemy, Insult and Hatred*, *Finding Answers in a Democratic Society*, Strasbourg, 2010, et la Résolution 1510/2006 de l'Assemblée Parlementaire du Conseil de l'Europe, intitulée, *Liberté d'expression et respect des croyances religieuses.* De façon générale, voy. J. Temperman, A. Koltay (eds), *Blasphemy And Freedom Of Expression Comparative, Theoretical And Historical Reflections After The Charlie Hebdo Massacre*, Cambridge University Press, 2017.

Ce qui doit être interrogé tient dans la jurisprudence à une égale vérification, non discriminatoire, de l'existence éventuelle de cette intention sous-jacente, quelle que soit le discours suspect, au gré de la répartition des critères protégés assurée par les lois mentionnées, dont la religion, visée selon des modalités différentes selon que l'on évoque le négationnisme, le racisme ou l'incitation générale à la haine ou la discrimination.

L'exigence d'une volonté particulière d'inciter à la discrimination, à la ségrégation, à la haine ou à la violence exclut que puissent être incriminés, en l'absence d'une telle incitation, les pamphlets ; et il doit en être de même des plaisanteries, des caricatures, des opinions et de toute expression qui, faute du dol spécial requis, relève de la liberté d'expression garantie.

On examine dans un premier temps la portée en droit belge de la protection spécifique de la mémoire de l'holocauste juif par rapport à d'autres génocides, puis dans un deuxième temps, la possibilité d'étendre cette analyse au traitement plus général de l'incitation à la haine religieuse ou philosophique en droit belge.

i. **Négationnisme de l'holocauste juif : une prohibition à géométrie variable ?**

Instaurée en Belgique et en France, mais dans peu d'autres Etats européens[15], l'infraction ne concernait de 1995 à 2019 que le génocide juif, avant d'être élargie à d'autres généocides reconnus par le droit international. La Cour constitutionnelle indique, en se référant aux travaux préparatoires de la loi de 1995[16], qu'il ne s'agit nullement pour le législateur de confirmer juridiquement ou de garantir pénalement l'existence d'un fait historique qui a frappé le « peuple juif », mais de réprimer ce que la Cour désigne comme la volonté d' « offenser gravement une ou plusieurs catégories d'êtres humains », plus précisément pour la « mémoire des victimes du génocide, pour leurs survivants et en particulier pour le peuple juif lui-même ». La Cour note le danger particulier de discours offensants, qui ne visent nullement à contribuer à un débat (historique) objectif mais se présentent sur un « mode plus subtil et souvent pseudo-scientifique ».

La présomption de cette volonté d'offenser demeure réfragable : « Le juge peut déduire de circonstances particulières l'absence, *in concreto*, de la volonté indiquée

[15] L'Allemagne, la Suisse, les Pays-Bas, le Portugal… : « La Cour constate par ailleurs que l'initiative législative rejoint d'autres initiatives semblables récemment prises et jugées nécessaires par plusieurs pays européens. Le législateur belge peut légitimement redouter que, en l'absence d'une législation similaire, la Belgique ne devienne le refuge du négationnisme. » (B.7.15).

[16] « La loi ne mentionne pas de telles volontés comme un élément constitutif du délit qu'elle institue, mais il apparaît des travaux préparatoires que si le législateur y a renoncé, c'est en considération de l'extrême difficulté de preuve - révélée par diverses expériences en Belgique et à l'étranger - résultant notamment du recours fréquent à des modes d'expression d'apparence scientifique » (pt. B.7.10).

plus haut ». Et la Cour de poursuivre : « La définition que le législateur donne des faits punissables implique qu'un pouvoir d'appréciation soit exercé par le juge pénal qui devra déterminer, dans chaque cas, où cessent le caractère scientifique de la recherche et le souci d'objectivité dans l'information. Un tel pouvoir est nécessaire en raison de la multiplicité et de la subtilité des formes que peut emprunter l'expression des thèses négationnistes » .

A bien lire la jurisprudence de la Cour constitutionnelle[17], il n'y va pas seulement pour le législateur de réprimer une volonté d'offenser « le peuple juif », mais aussi de viser des comportements qui « se sont multipliés ces dernières années, *parallèlement à un retour de courants antidémocratiques et racistes dans la société* ». La Cour prend soin de noter cette réalité plus large, en la rattachant à la catégorie d'abus de droit fixée par l'art. 17 de la Convention européenne.

L'arrière-plan qu'il s'agit de réprimer dans les discours qui nient l'holocauste juif est rapporté à la volonté d'offenser ce « peuple », puis à l'évocation de courants antidémocratiques et racistes, mais pas encore à une volonté individuelle d'incitation à la haine, à la discrimination ou à l'hostilité (selon la formule de l'art. 20 du Pacte de des droits civils et politiques[18]).

Par ailleurs, à la question de savoir si la disposition litigieuse a pu « violer les articles 10 et 11 de la Constitution, en ce que la répression porte exclusivement sur 'le génocide commis par le régime national-socialiste allemand pendant la seconde guerre mondiale', alors que d'autres formes de génocide ne sont pas visées », l'arrêt de la Cour constitutionnelle du 12 juillet 1996 répond assez laconiquement dans l'arrêt rapporté que « le législateur a […] souligné que rien n'empêche que le champ d'application de la loi soit étendu si l'on constate la négation ou la justification tout aussi ».

La Cour constitutionnelle a eu l'occasion de poursuivre cette analyse dans un arrêt du 14 janvier 2021 lorsqu'elle a été précisément saisie de l'élargissement du champ d'application de l'infraction de négationnisme en 2019 [19]. Le texte légal vise désormais le propos négationniste de tout génocide reconnu par une juridiction internationale, pour autant que le locuteur « *sach[e] ou [ait dû] savoir* que ce comportement risque d'exposer soit une personne, soit un groupe, une communauté ou leurs membres, à la discrimination, à la haine ou à la violence ». Par ailleurs, le texte légal inclut explicitement le critère de religion pour délimiter le groupe visé, « la ré-

[17] Voy. F. RINGELHEIM, « Le négationnisme contre la loi », *R.T.D.H.,* 1997, pp. 111 et s ; S. VAN DROOGHENBROECK, « Répression du négationnisme. Commentaire sur C.A. n°45/96 du 12 juillet 1996, Verbeke et Delbouille », in De Schutter, O., Van Drooghenbroeck, S., *Le droit international des droits de l'homme devant le juge national,* Bruxelles, Bruylant, 1999, pp. 587-597 ;

[18] Art. 20.2 « Tout appel à la haine nationale, raciale ou religieuse qui constitue une incitation à la discrimination, à l'hostilité ou à la violence est interdit par la loi »

[19] Cfr le texte cité supra.

férence à la religion étant censée couvrir *au moins* le comportement qui constitue un prétexte pour mener des actions contre un groupe de personnes ou un membre de ce groupe défini par référence à la race, la couleur, l'ascendance ou l'origine nationale ou ethnique ».

Pour la Cour constitutionnelle « tant l'identité ethnique que la réputation d'ancêtres peuvent, dans certaines circonstances, relever de la vie privée et de l'identité d'une personne et, dès lors, du champ d'application de l'article 8 de la Convention européenne des droits de l'homme ». La Cour se réfère notamment à l'arrêt de Grande Chambre de la Cour européenne des droits de l'homme, du 15 octobre 2015, *Perinçek c. Suisse*. Dans cet arrêt majeur, outre le contexte des déclarations négationnistes, la Cour européenne prend en compte un autre facteur qui « est le point de savoir si les propos, correctement interprétés et appréciés dans leur contexte immédiat ou plus général, peuvent passer pour un *appel direct ou indirect à la violence ou pour une justification de la violence, de la haine ou de l'intolérance* (…) et de préciser que « lorsqu'elle examine cette question, la Cour est particulièrement sensible aux propos catégoriques attaquant ou dénigrant des groupes tout entiers, qu'ils soient ethniques, religieux ou autres » (§ 206). La Cour européenne tient également compte de la manière dont les propos ont été formulés et de leur capacité – directe ou indirecte – à nuire (§ 207)[20]. C'est ainsi un ensemble de critères qui se trouvent pris en compte pour mesurer l'intention haineuse et l'efficacité dommageable du discours. Ce faisant, la Cour européenne allait, en l'affaire *Perincek*, estimer que la négation du génocide arménien, ne comportait pas un implicite haineux : « si elle est tout à fait consciente que la communauté arménienne est éminemment sensible à la question sur laquelle le requérant s'est exprimé, la Cour, compte tenu de la portée générale des propos en question, ne voit pas en eux une *forme d'incitation à la haine ou à l'intolérance* » (§ 233)[21].

[20] La Cour cite « par exemple l'affaire *Karataş c. Turquie* ([GC], no 23168/94, §§ 51-52, CEDH 1999-IV), où, parce que les propos avaient été véhiculés par la poésie plutôt que dans les médias, l'ingérence ne pouvait être justifiée par le contexte de sécurité spécial qui caractérisait par ailleurs cette affaire ; l'affaire précitée Féret (§ 76), où les propos figuraient sur des tracts électoraux, ce qui aggravait les conséquences du message discriminatoire et haineux qu'ils diffusaient ; l'affaire précitée Gündüz (§§ 43-44), où les propos avaient été tenus dans le cadre d'un débat télévisé délibérément pluraliste, ce qui atténuait leurs conséquences néfastes ; l'affaire précitée Fáber (§§ 44-45), où le déploiement pacifique d'un drapeau à proximité d'un rassemblement avait eu des conséquences très limitées, voire inexistantes sur le déroulement de ce dernier ; l'affaire précitée Vona (§§ 64-69), où des défilés de style militaire dans des villages à forte population rom avaient de sombres connotations dans le contexte historique hongrois, et l'affaire précitée Vejdeland et autres (§ 56), où les propos avaient été exprimés dans des prospectus distribués dans les casiers d'élèves du secondaire. » (§ 207)

[21] Dans son arrêt du 14 janvier 2021, la Cour constitutionnelle n'a pas eu à entrer à nouveau dans ces considérations dès lors que le critère discuté devant la Cour était l'existence d'une reconnaissance judiciaire internationale de la qualification de génocide.

On retiendra de ces observations que les délits de négationnisme sont examinés au titre d'éléments *sous-jacents* au discours lui-même, et en particulier l'intention d'inciter à la haine ou encore la volonté d'offenser un groupe, autant d'éléments portés par une forme de présomption réfragable et sujets à une analyse contextuelle. Un second enseignement tient à l'inclusion du facteur religieux comme critère protégé, non seulement en matière de répression du négationnisme, mais plus largement en matière d'incitation à la haine, ou encore, comme dans certains droits européens[22], dans la mise en cause des discours « dénigrant des groupes tout entiers, qu'ils soient ethniques, religieux ou autres ». Il reste que seuls les deux premiers délits sont clairement identifiés en droit belge : il n'en est pas de même des formes générales de *dénigrement* visant un collectif religieux.

ii. L'incitation implicite à la haine, l'infériorité d'un groupe humain, le raciste et le blasphémateur

La jurisprudence de la Cour constitutionnelle belge confirme l'extension de la qualification de l'incitation à la haine (à la violence ou à la discrimination), à des formes ***implicites*** d'incitation, tout en demeurant distinctes de simples pamphlets, plaisanteries, caricatures et opinions vives, critiques ou polémiques[23] qui, à défaut du dol spécial requis, relèveraient de la liberté d'expression. Même la présomption d'incitation cryptée, invoquée par le législateur dans l'infraction de négationnisme, demeure susceptible de preuve contraire. C'est à cette lumière que d'autres formes d'incitations implicites peuvent être examinées par la jurisprudence, dès lors que sera rapportée la preuve du dol spécial, selon les termes généraux de l'art. 22 de la loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination, en ce compris en matière religieuse.

Dans le cadre de cette législation, une distinction entre « prétendue race » et une appartenance religieuse n'a pas d'intérêt dès lors que *l'incitation* demeure punissable envers ces deux cibles. Ainsi, le tribunal correctionnel de Bruxelles a-t-il pu estimer en 2021 qu' « en indiquant qu'il y a lieu de « bouter hors de l'Europe » les personnes liées à l'Islam, le prévenu incite à nouveau à la violence une catégorie d'individus, la question pouvant se poser s'il se base en ce sens sur une prétendue race ou sur une conviction religieuse mais n'ayant pas d'intérêt sur le plan légal, ces deux critères

[22] Comp. en droit français, L. Bakir, « Provocation à la haine, à la discrimination ou à la violence à l'égard d'un groupe de personnes à raison de leur religion : le curseur fixé par la Cour de cassation pour qualifier l'infraction », *Revue Europe des droits et libertés,* 2022, n°6, https://www.europedeslibertes.eu/numero/varia-2/.

[23] Cour Const., arrêt du 11 mars 2009, n° 40/2009, B.57.

étant des critères protégés »[24]. La Cour d'appel de Bruxelles, en 2009, avait été confrontée à une publication internet intitulée « La fin du peuple d'Israël : une vérité coranique », qui s'appuyait sur la citation d'un certain nombre de versets du Coran. La Cour d'appel analyse l'intention réelle qui se déploie sous ce texte : « contrairement à ce que soutiennent les prévenus, ce texte n'apparaît nullement comme une compilation de sourates mais comme une incitation personnelle à la haine et à la violence. De plus, les textes religieux anciens (versets du Coran et hadiths) qu'il cite partiellement sont extraits de leur contexte littéraire et historique Ils sont instrumentalisés dans le seul but de faire accroire que le devoir de tout musulman est, à l'heure actuelle, de combattre physiquement les juifs. Ce texte ainsi compris, pas plus que sa diffusion, ne relève de la liberté de religion et des modalités d'expression de ses croyances religieuses »[25]. La doctrine a pu approuver cette décision tout en notant le caractère délicat de l'interprétation des intentions sous-jacentes, et du risque de tri sélectif [26].

[24] Corr. Bruxelles (61e ch.), 13 avril 2021, *A&M,* 2021/2, pp. 270-275. On comparera avec une jurisprudence portant sur des faits antérieurs à 2003. L'enjeu y apparaît clairement entre les mises en cause des populations juives, estimées relever d'une « prétendue race » ou envers des populations musulmanes estimées relever d'une catégorie purement religieuse. Ainsi, dans les poursuites à l'encontre du Père Samuel, et de ses propos selon lesquels « chaque Musulman qui naît est une bombe pour l'Occident », le tribunal correctionnel de Charleroi, statuant le 26 septembre 2008 (inédit), pour des faits accomplis en 2002 soit avant les lois anti-discrimination de 2003 et de 2007, indiquait de « Que quoi qu'il s'en défende, le prévenu nourrit une véritable haine à l'égard de ces musulmans, non pas en tant qu'Hommes, mais en tant qu'ils pratiquent une religion qui selon lui, - et cela ressort de toutes ses déclarations écrites et verbales au dossier - exhorte «à la violence, â l'intolérance, à la haine et au fanatisme'' (…); Qu'une religion n'existe et ne présente le danger prétendu par le prévenu, que par ses adeptes; Que par ses propos répétés et son charisme, le prévenu incite à la haine à l'égard de ces personnes; Que cependant, les musulmans forment un groupe, une communauté religieuse, mais ni une race, ni une ethnie, ceux-ci comptant des Arabes, des Turcs, des Indiens, des personnes ayant la peau noire… et… des Belges… ; Que la religion n'est pas un critère de discrimination que le législateur a retenu au travers de l'article 1er §2. 2 de la loi du 30 juillet 1981 dont la transgression est reprochée au prévenu (cf. *Ann. Parl.* , Chambre, session ordinaire 1980 - 1981, séance du 10 février 1981, p.1191 et suivantes, notamment, p.1210; Loi du 30 juillet 1981, *Pasin*. 1981, p.1264 et suivantes, notamment, pp.1272, 1273, 1281, 1285, 1289, 1290, 1298 et 1299); Que la prévention n'est, en conséquence, pas établie ».

[25] Bruxelles, 23 janvier 2009, *R.T.D.I.,* 2009/4, 105-126, note P.-Fr. Docquir « N'ayons plus peur de la liberté d'expression sur Internet: à propos d'une définition stricte des «discours de haine». La Cour d'appel réforme partiellement le jugement du tribunal correction de Bruxelles du 21 juin 2006 (*J.L.M.B*., 2007, p. 591 ; *A&M,* 2006, p. 491). Dans une autre affaire, concernant un cortège contestant un film américain péjoratif envers le Prophète de l'Islam, et à l'occasion duquel le suspect clamait « Allah wakbar » le tribunal correctionnel de Bruxelles a estimé que « en les exhortant à marcher en criant 'Allah wakbar' et, à tout le moins, à boycotter l'Amérique, il les a incité à haïr l'autre, en l'occurrence tout individu de nationalité américaine et a dépassé le domaine de la liberté d'expression, et ce d'autant plus qu'il ressort du rapport d'intervention que le nommé A. a déclaré que le but était de se rendre à l'ambassade des Etats-Unis » (Corr. Bruxelles, 11 avril 2013, *inédit*, consulté sur unia.be)

[26] Pierre-François Docquir dans un paragraphe de son commentaire cité, intitulé « Le tri sélectif à Strasbourg, opération délicate » indique à juste titre que « la ligne argumentative suivie par la cour

Dans diverses procédures relatives aux « spectacles » de l' « humoriste » Dieudonné, l'analyse de propos tenus sous couvert de caricatures a constitué un des enjeux essentiels. Ainsi, le tribunal correctionnel de Liège a-t-il estimé que la prévention « ne requiert pas nécessairement l'appel à tel ou tel acte de violence ni à un autre acte délictueux dès lors que les atteintes aux personnes commises en injuriant, en ridiculisant ou en diffamant certaines parties de la population et des groupes spécifiques de celle-ci ou l'incitation à la discrimination suffisent pour que la lutte contre le discours raciste prime une liberté d'expression utilisée de manière irresponsable et portant atteinte à la dignité, voire à la sécurité de ces parties ou groupes de la population »[27].

Un débat apparemment distinct a pu retenir l'attention : il concerne l'opposition traditionnelle entre les propos racistes, sanctionnés explicitement par l'art. 21 de la loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie) et les propos blasphémateurs[28], sources de nombreuses polémiques sociales, mais exempts de prohibition pénale en droit belge[29] [30].

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d'appel se maintient en équilibre sur *le fil de funambule* qui sépare deux ambitions contradictoires aujourd'hui solidement établies dans le droit européen de la liberté d'expression ». Voy. aussi D. VOORHOOF, « Ook godsdienst-fundamentalisme maakt aanspraak op expressievrijheid », *De Juristenkrant* 2004, 84, 13; ID. « 'Hate speech', radicalisering en het recht op expressievrijheid - Waarom artikel 17 EVRM (misbruikclausule) geen revival verdient », *A&M,* 2016/1, 4-18.

[27] Corr. Liège, 25 novembre 2015, *J.L.M.B.,* 2016, p. 358, note.

[28] Voy. notamment les analyses du philosophe G. HAARSCHER, « Quelle norme transgresse le blasphémateur ? », in Pascal RICHARD - Jean-Jacques Sueur (eds), *La transgression*, Bruxelles, Bruylant, 2013, pp. 101-119. Comp. en droit positif, L.-L. CHRISTIANS, « Polémiques religieuses et intentions cachées. Nouvelles sacralités et méta-discrimination en droit contemporain », in Dierkens, A., Schreiber, J.-Ph. (dir.), *Le blasphème : du péché au crime*, Editions de l'Université de Bruxelles, Bruxelles, XXI, Problèmes d'Histoire des religions, 2012, pp. 107-121 ; E. CRUYSMANS, « Racisme, blasphème et liberté d'expression - Aperçu de la jurisprudence « anti-hate speech » belge francophone », *A&M*, 2016/1, pp. 71-90 ; J. ENGLEBERT, « La répression des excès de l'expression raciste ou blasphématoire : lorsque l'idéologie prend le pas sur le droit », *A&M*, 2016/1, pp. 37-70 ; M. LEROY, « Le droit au blasphème », in *Liber amicorum Paul Martens. L'humanisme dans la résolution des conflits. Utopie ou réalité ?,* Larcier, 2007, pp. 383 à 393 ; B. MOUFFE, « Le cas délicat de l'humour blasphématoire » in ID., *Le droit à l'humour*, Bruxelles, Éditions Larcier, 2011, pp. 495-529.

[29] La seule infraction proche est prévue l'art. 144 du Code pénal, qui sanctionne l'outrage à un objet du culte : « Toute personne qui, par faits, paroles, gestes ou menaces, aura outragé les objets d'un culte, soit dans les lieux destinés ou servant habituellement à son exercice, soit dans des cérémonies publiques de ce culte, sera punie d'un emprisonnement de quinze jours à six mois et d'une amende de vingt-six euros à cinq cents euros » (maintenu à l'art. 305.3° du projet de nouveau code pénal, *Doc. parl.,* Ch., 55, 2019, 0417/001, p. 955). Voy. Ch.-E. CLESSE, P. DE POOTER, « Les délits relatifs au libre exercice des cultes» [143, 144, 145, 146 CP] , in H-D. Bosly, Chr. De Valkeneer (dir.), *Les infractions - Volume 5 – Les infractions contre l'ordre public*, Larcier, 2012, 217-245, sp. 236-240. Pour un exemple, voy. Cass., 9 novembre 1875, *Pas*., 1876, I, 51 (à propos de la profanation d'une hostie) ; J. SERVAIS, « De l'outrage aux objets ou symboles d'un culte », *Revue de droit belge*, t. I, 1886-1890, pp. 353-360 ; J. NYPELS et J. SERVAIS, *Code pénal belge interprété*, Bruxelles, Bruylant, 1896, p. 441 et s. L'art. 145 du Code pénal réprime quant à lui « celui qui, par faits paroles, gestes ou menaces, aura

Le propos « raciste », implique une atteinte à la dignité des personnes, le blasphème concerne par convention la dépréciation d'une figure divine, bien réelle pour certains, inexistante pour d'autres, mais en tout cas privée de toute relevance et de toute personnalité juridique dans les systèmes juridiques positifs modernes. Ainsi, se distinguent en droit l'affirmation de l'infériorité d'un groupe humain constituant une *prétendue race*, réprimée par le droit pénal, de l'affirmation de l'infériorité d'une *religion*, qui est admise au titre de la liberté d'expression dans la mesure où il s'agirait d'un débat d'idées « capable de favoriser le progrès dans les affaires du genre humain »[31]. Qu'en serait-il si l'intention du locuteur était en revanche de dénier toute dignité humaine aux croyants en cette doctrine ou cette divinité, d'affirmer leur infériorité humaine ? Il n'en résulterait une assimilation au délit de racisme qu'à la condition de voir cette négation rapportée à l'équivalent d'une « prétendue race », selon la qualification de la loi de l'art. 21 de la loi du 30 juillet 1981. La Cour constitutionnelle, saisie de cette question[32], a confirmé que « la répression de la

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outragé le ministre d'un culte, dans l'exercice de son ministère ». D'autres infractions encore ont pu être mobilisées, comme l'outrage public aux bonnes mœurs (art. 383-384 Code pénal) qui a conduit par exemple à poursuivre les auteurs d'une exposition de peintures mêlant la figure du Christ à des activités sexuelles singulières : voy. D. Voorhoof, « De tentoonstelling van picturale kunst en goede zeden. Note sous Gand 2 mai 1988 », *Tijdschrift voor Gentse Rechtspraak,* 4, 1988, pp. 122-126 ; J.-C. Lardinois, B. Mouffe, « Outrage public aux bonnes moeurs et protection des mineurs » in Id. *Droit des artistes*, 1e édition, Bruxelles, Larcier, 2021, pp. 133-180.

[30] Hors champ du droit pénal, on renverra à certaines limitations institutionnelles, liées par exemple à la pédagogie de l'enseignement (voy. la présentation de la nudité du Prophète de l'Islam à des élèves : C. E., 17 mars 2022, *AM D-A c. Commune de Molenbeek,* n° 235229) ; aux cahiers des charges des radio-télévisions publiques (voy. Conseil d'Etat, 15 juin 2006, NV *Vlaamse Radio-televisieomroep c. Vlaamse Regulator voor de Media*, n° 160.106, invalidant Vlaams Raad Radio-televisie, 4 octobre 2000, *De Bruyn c. VRT*), ou plus généralement aux règles de la responsabilité civile (voy. Liège, (réf.), 28 novembre 2001, *Mgr A. Jousten et asbl évêché de Liège c. asbl NOPEDO et asbl religion raélienne de Belgique*, *Journal des tribunaux,* 2002, 308, note A. Cruquenaire, J. Herve, « La responsabilité des intermédiaires de l'internet et les procédures en référé ou comme en référé »).

[31] Selon la formule utilisée de façon récurrente par la jurisprudence de la Cour européenne des droits de l'homme lorsqu'il s'agit d'évaluer la légitimité de certaines formes de discours estimés « blasphématoires », en fonction de leur utilité sociale. Pour la Cour, les provocations discursives constituant de simples « offenses gratuites » ne bénéficient en revanche que d'un régime moindre de protection internationale. Comp. les analyses de G. Haarscher, « Le blasphémateur sous les fourches caudines des juges de Strasbourg. Obs. sous Cour eur. dr. h., arrêt *E.S. c. Autriche*, 25 octobre 2018 », *R.T.D.H.* 2019, pp. 505-517; J. Brauch, Goings, C., « E.S. v. Austria: The Folly of Europe », *Journal of Global Justice and Public Policy*, 5, 2019, pp. 83-106.

[32] Cour Const. 12 février 2009, « Dans la première branche du dixième moyen, les parties requérantes dénoncent la violation du principe d'égalité en ce que la disposition attaquée punit la diffusion d'idées fondées sur la supériorité ou sur la haine raciale, alors qu'il n'est pas interdit de diffuser des idées qui seraient fondées sur une croyance en la supériorité – ou sur une haine à l'égard – de personnes présentant certaines caractéristiques physiques ou génétiques, une conviction religieuse déterminée, une langue déterminée ou d'autres caractéristiques. » (B.7.1.)

diffusion de certaines idées est soumise à des conditions strictes, précisément afin de limiter la restriction de l'exercice des libertés dont la violation a été alléguée à ce qui est considéré comme strictement nécessaire dans une société démocratique. Dans cette perspective, le respect du principe d'égalité et de non-discrimination ne peut avoir pour conséquence que l'exercice de ces libertés doive également être limité en ce qui concerne les idées qui sont fondées sur l*a supériorité ou la haine à l'égard d'individus qui sont porteurs d'autres caractéristiques humaines ou qui ont d'autres convictions* » (B.7.2).

Il reste au surplus que la formule de l'art. 21 de la loi du 30 juillet 1981, qui entend réprimer « la diffusion d'idées fondées sur la supériorité ou la haine raciale », suppose elle-aussi que « pour qu'il y ait infraction, un élément moral spécifique doit être prouvé. Cet élément moral spécifique, qui est inclus dans les termes "diffuser", "haine raciale" et "supériorité raciale" porte plus précisément sur la volonté de diffuser des idées en vue d'attiser la haine à l'égard d'un groupe de personnes ou en vue de justifier la mise en place, à son égard, d'une politique discriminatoire ou ségrégationniste »[33].

Tant le délit de négationnisme que celui de racisme pourraient sembler en porte-à-faux avec l'idée que la liberté d'expression interdit, de principe, l'érection de vérités d'Etat, qu'il s'agisse *d'imposer* une vérité officielle historique, scientifique, religieuse ou de tout autre nature. Si l'absence de délit spécifique de blasphème en droit belge confirme bien l'abandon d'un tel régime juridique de vérités d'Etat, les arrêts sous rubrique sont tout aussi fondamentaux pour comprendre que les évolutions législatives qui effectuent à l'occasion, au moins en première apparence, un tri selon la nature des vérités concernées, n'entendent pas rétablir une politique de vérités publiques, les unes qui seraient à abroger, les autres à protéger.

L'ensemble des dispositifs juridiques mobilisés par la jurisprudence constitutionnelle, ont pour point commun de concentrer toutes les évolutions législatives sur la mise en œuvre d'un type très particulier d'action discursive. Il ne s'agit plus d'y réprimer l'affirmation de contre-vérités, mais pas non plus d'y sanctionner la simple affirmation d'une haine, ou d'une opinion si choquante soit-elle. Il s'agit de sanctionner pénalement la volonté d'un locuteur *d'inciter* des tiers à la haine, à la violence ou la discrimination envers un groupe cible. Si le législateur a pu présumer qu'une telle volonté d'inciter à la haine se dissimulait fréquemment à l'arrière-plan des propos racistes (1981) ou négationnistes (1995), il a élargi en 2003 puis 2007 le délit d'incitation à la haine envers d'autres groupes protégés, en ce inclus cette fois

[33] «. Les propos doivent dès lors avoir une portée méprisante ou haineuse, ce qui exclut de l'interdiction les propos scientifiques et artistiques, et ils doivent exprimer l'infériorité fondamentale d'un groupe » (B.74.5. dans l'arrêt de la Cour Const. du 12 février 2009 et B.70.2.dans l'arrêt de la Cour Const. du 11 mars 2009).

les critères religieux et philosophiques. La répression de ces discours d'incitation à la haine supposent qu'un dol spécial soit établi, mais cette volonté d'incitation pourra être établie par une analyse de l'implicite des discours et de leur contexte. De ce point de vue, autant la seule intention de porter atteinte à une Divinité, ou même aux sentiments des croyants se confirmera *comme non infractionnelle en droit belge*, autant pourra constituer le délit fixé à l'article 21 de la loi du 10 mai 2007 la volonté implicite ou explicite *d'inciter* à la haine envers ces personnes, plutôt que seulement envers leurs doctrines ou leurs croyances.

II. Dispositifs non pénaux

A. Liberté d'expression limitée à l'occasion d'un soutien public financier

Le soutien financier assuré dans le cadre du régime des cultes reconnus est désormais conditionné, dans les communautés locales, par la signature de clauses de loyauté dont les formules varient, entre la garantie du respect de la démocratie par la communauté des fidèles, l'obligation pour les leaders de désavouer les propos excessifs des membres voire d'écarter ceux qui adopteraient des propos ou des attitudes contraires au respect dû aux droits fondamentaux.

Ce type de condition s'était déjà répandu précédemment dans le cadre de subventions publiques ordinaires, selon des formules variées. Les cultes reconnus semblaient en être restés exempts pendant longtemps, au titre même de leur reconnaissance spécifique. Aucun contentieux direct ne s'est déployé sur cette base. En revanche, les pouvoirs publics ont déjà à de nombreuses reprises décidé de l'expulsion de certains imams étrangers en raison de leurs attitudes et de leurs propos, et ont également procédé au retrait de reconnaissance de certaines mosquées, concernées plus transversalement par des propos et des attitudes de radicalisation.

Concernant le régime des cultes reconnus, on notera par exemple que les Gouvernements régionaux requièrent que la communauté cultuelle à reconnaître au sein d'une dénomination préalablement reconnue fournisse diverses déclarations.

Ainsi en Flandre (2005) étaient réclamées deux déclarations écrites relatives au respect de la Constitution et de la Convention européenne des droits de l'homme. La première déclaration doit contenir l'engagement *par la communauté locale* d' « écarter de l'organisation et du fonctionnement de la communauté d'église ou religieuse locale, *des individus* agissant ou **incitant à agir en violation** de la Constitution et de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales » ; la seconde doit contenir *l'engagement de la communauté*, sauf en cas de force majeure, d'une part, à « ne jamais, de quelque façon que ce soit, collaborer à des activités si celles-ci sont contraires à la Constitution et à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales » et, d'autre part, à « *écarter des individus* ou associations des locaux et endroits utilisés par les entités agréées en vertu de l'article 6 et toutes les institutions publiques à personnalité juridique qui

sont établies sur la base du décret, si ces personnes **incitent** ou agissent en violation de la Constitution et de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales ».

En Région wallonne (2017), est exigée des [membres du premier organe de l'établissement chargé de la gestion du temporel des cultes reconnus] dont le ou les Ministres du culte, une déclaration sur l'honneur, dûment signée par chacun d'entre eux et attestant qu'ils s'engagent à : a) respecter la Constitution, la Convention de sauvegarde des droits de l'homme et des libertés fondamentales et l'ensemble des législations existantes; b) ne pas collaborer à des actes contraires à la Constitution, à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales et aux législations existantes; c) déployer les efforts nécessaires à ce que la communauté cultuelle locale dont elles sont membres **ne soit pas associée à des propos** ou à des actes contraires à la Constitution et à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales ».

En Région de Bruxelles-Capitale (2023), l'Ordonnance prévoit que « L'organe représentatif joint (…) les documents suivants : (…) 3° une déclaration écrite de *chaque personne désignée pour faire partie du conseil d'administration* de l'établissement par laquelle elle s'engage à *exclure du conseil* d'administration tout individu qui agirait ou **inciterait à agir** en violation de la Constitution, des lois du peuple belge et de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales ainsi qu'à exclure toute activité **ou littérature** constituant une violation de ces normes (…).

Concernant le régime ordinaire des subventions, on prendra pour exemple la mise en cause d'une subvention d'un organisme privé de planning familial, dont le contenu d'une brochure trimestrielle, à disposition du public, traduisant une attitude fondamentalement négative par rapport à l'avortement, nonobstant la légalisation de cette pratique par la loi du 3 avril 1990, et ceci dans des termes ne laissant pas de place au doute, comparant l'avortement à l'holocauste juif[34]. Le Conseil d'État se réfère aux articles 5 et 20 du décret du Parlement wallon du 18 juillet 1997 relatif aux centres de planning et de consultation familiale et conjugale dont le premier article définit la mission des centres en question, tandis que l'article 20 précise que les « convictions idéologiques, philosophiques et religieuses ainsi que la volonté de la personne prise en charge doivent être respectées ». Les écrits de la brochure, « notamment par leur outrance et leur violence, sont manifestement contraires » à ces dispositions, estime le Conseil d'Etat. Un commentateur s'est interrogé sur la légèreté du raisonnement du Conseil d'Etat : « En premier lieu, on peut se poser la question de savoir si le fait d'exprimer des opinions, même par rapport à des personnes fragiles et en difficulté,

[34] Conseil d'État, 17 octobre 2000, Ligne de Vie.

peut être considéré comme une restriction de la liberté de ces personnes. Nous estimons que cela n'est nullement exclu, mais qu'il ne s'agit pas d'une évidence non plus. Dans ce cadre, le fardeau de la preuve incombe donc à celui qui impose une limitation à la liberté d'expression. Vu dans cette perspective, on ne peut que déplorer le manque d'analyse factuelle dans l'arrêt, tout comme dans la décision attaquée. L'arrêt constate en effet que le bulletin dans lequel les passages incriminés se trouvaient « était à tout le moins laissé à la disposition du public dans la salle d'attente des consultations », mais l'analyse des faits se termine là. La présence d'un écrit peut-elle être considérée comme une forme de pression inacceptable ? »[35]

B. **Liberté d'expression et « mise en garde » par des agences publiques**

Le Centre interfédéral pour l'égalité des chances et la lutte contre la discrimination (UNIA), le Centre d'information et d'avis sur les organisations sectaires nuisibles (CIAOSN), mais aussi sa Cellule de Coordination, ainsi que la Sûreté de l'Etat, diffusent, publiquement pour les deux premières, des évaluations portant sur des attitudes ou des propos individuels ou de groupes. Si la nature publique ou confidentielle des évaluations distinguent les modalités d'action de ces organes, leur caractéristique commune tient à produire des évaluations en deçà de la commission d'infraction. Il y va de suspicion ou de simple constat péjoratif, qui conduisent ces agences à communiquer sur les dérives observées, voire sur les risques suscités par telles attitudes ou tels propos. C'est dès lors dans la communication davantage que dans la sanction que se joue l'autorité et le pouvoir de ces agences, travaillant toutes dès l'émergence de « signes faibles » : de discrimination, de dérives, de radicalisations. Il en résulte un « chilling effect » sur l'exercice de la liberté d'expression, qu'il s'agisse de propos à l'encontre des croyants, ou de propos religieux à l'encontre d'autres groupes.

En 2010, UNIA réagit aux propos d'un Evêque catholique qui comparait l'homosexualité à l'anorexie. Une autorité religieuse pouvait -elle se référer à une justification *anthropologique* plutôt que *théologique* pour appuyer son point de vue sur un sujet précis ? Cette question, particulière, se rapporte à la tendance d'autorités religieuses à faire référence à la science ou l'anthropologie comme justification de second ordre. Face à la mauvaise compréhension des citations de textes sacrés, certaines autorités religieuses optent plutôt pour des références à des arguments séculiers leur permettant d'expliciter leurs points de vue sur des sujets particuliers tels par exemple l'homosexualité, l'avortement, les relations hors-mariage, l'adoption par les couples homosexuels. La difficulté posée par cette tendance n'est autre que la réaction de la société civile qui, refusant ces références, critique les propos qualifiés

[35] F. Judo, Observations sous CE 17 octobre 2000, in LL. Christians, S. Wattier, F. Amez, *Grands arrêts de droit belge des religions et philosophies*, Larcier, 2023.

de discours haineux. La société justifie son refus de références scientifiques ou anthropologiques par le fait qu'agissant de la sorte, le leader religieux quitte son champ de compétence, à savoir la religion, et s'introduit dans un champ qu'elle ne maîtrise pas. Ainsi, lorsque un évêque belge opère une comparaison entre l'homosexualité et l'anorexie durant un débat dominical télévisé, insistant spécifiquement sur la référence anthropologique opérée[36], la réaction immédiate[37] du Centre fédéral pour l'égalité des chances et la lutte contre le racisme est tranchée. Sans hésiter, le Centre estime que ce « discours, amalgamant maladie, perversité et homosexualité, est regrettable, et potentiellement dangereux car il entretient stéréotypes et préjugés non fondés »[38]. Plus encore, le Centre, déplorant les propos de l'Evêque, s'est dit attentif à tout propos public *futur* qui stigmatisera l'homosexualité afin que ceux-ci « n'encouragent pas des *actes de haine* »[39]. Sans jamais conclure, jusqu'à présent, à une réelle incitation à la haine, la violence ou la discrimination dans le chef du désormais archevêque de Malines-Bruxelles, le Centre pour l'égalité des chances précise, dans son rapport annuel 2011, « prendre en considération le caractère répété des *saillies* de Mgr Léonard à l'encontre des homosexuels »[40]. Car c'est bien au « caractère répété de certains propos » tenus par des personnes publiques, caractère « indicatif d'une intention, d'une stratégie incitant à la haine » que déclare être attentif le Centre dont la position est la suivante : « d'une part, les mandataires et responsables publics doivent être particulièrement protégés au titre de la liberté d'expression, car ils

[36] « [L]es personnes homosexuelles sont d'abord pour moi des personnes que je respecte […] et pour lesquelles j'ai la plus grande estime. Ce que j'ai fait une fois ou l'autre, quand on me posait la question, c'est émettre un jugement philosophique, une appréciation philosophique sur une tendance ou sur un comportement mais jamais sur des personnes. Et vous savez avec quelle énergie j'ai protesté quand un organe de presse a transformé mon appréciation philosophique d'un comportement ou d'une tendance en une condamnation des personnes. Et cela, je le refuserai toujours. Mais je pense que nous pouvons avoir *un avis sur la portée anthropologique de la pratique homosexuelle*. […] Je prends une comparaison pour éclairer, comparaison qui ne signifie pas que j'identifie les deux situations. Par exemple, je pense que, *anthropologiquement*, l'anorexie […] est un développement qui n'est pas dans la logique de l'appétit qui cherche à ce qu'on entretienne sa vie. C'est un développement qui n'est pas tout à fait cohérent de l'appétit. Mais jamais je ne vais dire que les anorexiques sont des anormaux, même si le développement de cette tendance de l'appétit n'est pas en cohérence avec ce à quoi sert l'appétit » (Émission *Controverses*, diffusée sur RTL-TVI le 24 janvier 2010, notre accent).

[37] Dès le lundi sur son site internet (http://www.diversite.be/index.php?action=artikel_detail&artikel=332).

[38] Centre pour l'égalité des chances et la lutte contre le racisme, « Réaction aux propos concernant l'homosexualité tenus à Controverse le 24.01.10 », 25 octobre 2010, http://www.diversite.be/index.php?action=artikel_detail&artikel=332.

[39] *Ibidem* (notre accent).

[40] Centre pour l'égalité des chances et la lutte contre le racisme, *Discrimination Diversité. Rapport annuel 2011*, Bruxelles, mai 2012, p. 51, disponible sur www.diversite.be (notre accent). L'on soulignera le vocabulaire employé par le Centre, qui semble tout sauf anodin.

doivent pouvoir prendre des risques dans la formulation de telle ou telle idée. […] Mais d'autre part, comme «professionnels» de la parole publique, ils sont généralement conscients des effets produits par leurs propos. L'autorité morale qui est la leur devrait donc les engager à une plus grande responsabilité »[41]. Étant donné que cela relève du domaine moral et non juridique, le Centre estime que « rester attentif » constitue la seule position acceptable.

C. **Liberté d'expression, religion et responsabilité civile**

Le contentieux s'est particulièrement développé à partir des mises en garde réalisées par des agences publiques, visées au point précédent. Il en va en particulier ainsi des discours émanant du CIAOSN à l'encontre de groupes réputés sectaires, ou de discours de la part de ces derniers à l'encontre d'autres groupes religieux. Il n'est nulle question ici d'incitation à la haine ou à la discrimination, mais de discours tenus pour fautifs et dommageables à l'encontre de la généralité d'une tradition ou d'un groupe. Ainsi, que le CIAOSN estime que la tradition Sahaya Yoga s'enracine dans un antisémitisme fondateur, ou encore que les Raëliens diffusent des pamphlets selon lesquels tous les prêtres catholiques sont pédophiles conduisent à des procédures en responsabilité civile qui viennent tempérer la liberté d'expression. L'excuse de caricature ou d'humour est parfois invoquée, mais ne constitue nullement une immunité absolue.

L' affaire *Evêque de Liège c. asbl Nopedo et asbl raëlienne* mérite d'être rappelée (2001), au titre de sa rareté, mais aussi du raisonnement judiciaire retenu. Un tract et un site internet Raëlien invitaient les parents catholiques à retirer leurs enfants du catéchisme, invoquant par des formules diverses que « presque tous les prêtres catholiques [étaient] pédophiles ». Pour le premier juge d'instance, le qualificatif « presque » relativisait le propos et faisait ainsi preuve de suffisamment de retenue. En revanche, pour la Cour d'appel, statuant en urgence, la limite induite par le « presque » constituait un pur artifice verbal conduisant à diffamer tous et chacun des prêtres de l'Eglise catholique personnellement. Après avoir admis qu' « il est loisible sur base du principe de la liberté d'expression de «combattre» une croyance religieuse quelle qu'elle soit; ce sont les moyens employés qui peuvent prêter à controverse sur leur légitimité" (…) la Cour estime "devoir considérer que les termes employés dans le tract litigieux et sur le site internet paraissent de nature à créer un amalgame préjudiciable à l'honneur des nombreux prêtres catholiques qui poursuivent leur apostolat sans tomber dans la déviance sexuelle de la pédophilie"[42].

[41] *Discrimination Diversité. Rapport annuel 2011*, *op. cit.*, p. 50.

[42] Liège, 28 novembre 2001, *Journal des tribunaux*, 2002, 308, note A. Cruquenaire, J. Herve, «La responsabilité des intermédiaires de l'internet et les procédures en référé ou comme en référé».

A propos d'un avis du Centre fédéral sollicité par la Ville de Gand concernant un groupement « Sahaya Yoga » qui souhaitait louer une salle de la Ville, le juge des référés avait estimé suffisamment prudente la notice du CIAOSN (Civ. Bruxelles (référé), 7 décembre 2005, *S. Yoga Belgie c. Etat belge et CIAOSN*, inédit), à la différence du juge d'appel (Bruxelles, (référé), 12 juin 2006, *S. Yoga c. Etat belge*, RG 205/KR/420, inédit) qui a estimé imprudente la portée attribuée par le Centre à des écrits anciens attribués à la fondatrice spirituelle, Shri Mataji Nirmale Devi, relatifs à l'holocauste juif[43].

D. La Charia sur la voie publique et la protection de la liberté d'expression religieuse

Dans sa fonction d'avis au législateur, le Conseil d'Etat[44] a été saisi d'une proposition de loi « modifiant le Code pénal en vue de punir ceux qui proclament que les préceptes ou les lois d'une religion ou d'une philosophie, en particulier la charia, seront appliqués ou imposés sur la voie publique ».

Le Conseil d'Etat, siégeant en assemblée générale, s'est opposé à une telle proposition, estimant que le seul fait d'annoncer l'application de la Charia relevait de la liberté d'expression. « la liberté de convaincre autrui, sur la voie publique ou dans des lieux publics, de respecter les rites religieux peut être restreinte dans les conditions précitées. De telles restrictions sont concevables à l'égard de manifestations qui perturbent l'ordre public (par exemple l'incitation à l'insurrection ou à la

[43] Pour d'autres cas, Civ. Bruxelles, 16 juin 2022, RG 21/3785/A, inédit, (frappé d'un recours toujours pendant au moment d'écrire ces lignes), sur l'imprudence reprochée avec succès au CIAOSN concernant la communication d'une notice évoquant des lacunes dans les suivis d'abus sexuels au sein des Congrégations des Témoins de Jéhovah, adressée sous forme de recommandation au Parlement, diffusée par dépêche de l'agence Belga, relayée par plusieurs journaux et télévisions puis suivie de diverses perquisitions décidées par le parquet, elles-mêmes médiatisées, mais aboutissant finalement à un non-lieu. Pour le tribunal, « un centre d'études qui se veut objectif et impartial ne peut raisonnablement fonder la plus grande partie de son appréciation sur des coupures de presse ou des reportages télévisuels. Une telle posture défendue par l'Etat belge fait l'impasse sur les vertus de la méthodologie scientifique et inverse les rôles. Un discours scientifique sérieux ne trouve pas sa source dans le discours médiatique dont la fonction est radicalement différente ». Comp. dans le cadre de la même affaire, mais envers un organe de presse, Civ. Bruxelles, 16 novembre 2020, A&M, 2021/1, pp. 140-144 qui estime qu'aucune faute n'était établie tant à l'égard de la journaliste que de son éditeur responsable, dès lors notamment que la journaliste s'était basée sur des sources recoupées et fiables, dont le rapport du CIAOSN ». « Contrairement à ce que soutient l'Etat belge, le devoir de prudence qui s'impose au CIAOSN n'est pas comparable à la déontologie journalistique », confirme la décision du 16 juin 2022. Voy. aussi, Bruxelles, 14 décembre 1998, *A&M,* 2000, p. 452 (absence de faute dans le chef d'une émission de télévision sur la Scientologie) ; Bruxelles, 19 janvier 1999, RG 1998/5110, inédit (révélation de l'identité des membres non due au journaliste) ; Civ. Liège, 12 septembre 2001, *A&M*, 2002, liv. 2, 193 (mention fautive de l'identité de membres d'un groupe).

[44] Avis du Conseil d'Etat n° 57.005/AG du 24 mars 2015.

désobéissance civile), ou à l'égard de manifestations qui portent atteinte à autrui (par exemple par un "prosélytisme abusif", par la contrainte à exercer un culte déterminé, par l'empêchement ou la perturbation d'autres cultes, par le harcèlement, par l'abus de la situation de faiblesse physique ou psychique d'une personne, par l'incitation à la haine, à la violence ou à la discrimination11 ou par le sexisme). dans la mesure où la proposition vise également à interdire de militer en faveur de l'instauration de la sharia ou de proclamer que les citoyens devraient de leur plein gré respecter les préceptes ou les lois d'une religion ou philosophie déterminée, il ne s'agit que de la manifestation d'une conviction religieuse et l'expression d'une opinion qui relèvent en principe de la sphère de protection des articles 9 et 10 de la CEDH. Sur le simple fait de militer en faveur de la sharia, le Conseil d'État rappelle ce que la Cour européenne des droits de l'homme a considéré dans son arrêt du 4 décembre 2003, dans l'affaire *Müslüm Gündüz c. Turquie* (…) »

E. Expression religieuse, incitation et régulation des médias publics

La régulation étatique des médias interdit la diffusion en Belgique de certaines expressions. Ainsi, un décret de la Communauté germanophone du 27 juin 2005 sur les services de médias audiovisuels et les représentations cinématographiques prévoit-il la possibilité pour l'organe décisionnel en la matière de déroger « au principe de la libre retransmission de services de médias audiovisuels non linéaires » pour des raisons d'ordre public dont la lutte contre l'incitation à la haine fondée sur la race, le sexe, l'orientation sexuelle, la religion ou la nationalité et contre les atteintes à la dignité de la personne humaine. En Communauté flamande, les décrets relatifs à la radiodiffusion et à la télévision, coordonnés le 25 janvier 1995 précisent que « les programmes des radiodiffuseurs ne peuvent contenir aucune incitation à la haine pour des raisons de race, de sexe, de religion ou de nationalité » . Il en va de même du Décret de la Communauté française du 27 février 2003 qui prévoit en son art. 9.3° que « La RTBF et les éditeurs de services soumis au présent décret ne peuvent éditer (…) des programmes qui favorisent un courant de pensée, de croyance ou d'opinion constituant une menace pour les libertés fondamentales garanties par la Constitution ou la Convention européenne des droits de l'homme ou visant à abuser de la crédulité du public ».

F. Liberté d'expression et sanctions disciplinaires à l'encontre de professeurs de religion (islamique) de l'enseignement public, face aux caricatures du Prophète

Une autre lieu de liberté d'expression contrôlée est celui des cours de religion reconnue, et notamment des cours de religion islamique. Des polémiques se sont multipliées à la suite de propos tenus par certains professeurs musulmans soit dans le cadre de leur enseignement soit dans des interviews de la télévision publique dans

des reportages sur l'enseignement[45]. Sans qu'il s'agisse d'auteurs de propos haineux ou incitant à la violence, il leur est reproché d'avoir tenu des propos radicaux, par exemple créationnistes, ou encore d'avoir évoqué en termes de péché l'absence de port du foulard par certaines de leurs élèves. Des sanctions disciplinaires ont été prises à leur encontre malgré l'avis opposé d'une chambre de recours scolaire. Le Conseil d'Etat semble rarement remettre en cause de telles sanctions disciplinaires [46]. On notera toutefois que le Conseil d'Etat[47] avait dans un premier temps annulé la sanction prise à l'encontre d'un professeur de religion islamique qui avait pris position relativement aux attentats à Charlie Hebdo, en dénonçant « les exactions faites au nom de l'islam » et « l'appel à une loi contre le blasphème » mais en estimant aussi que « toute dérision qui ne prend pas en compte les sensibilités et les règles de civilité, et qui a pour objet de froisser quiconque en le tournant en dérision, dans le seul souci de jouir du droit, (…) fait de la liberté d'expression un abus ». Une longue procédure[48] a finalement conduit la Cour Européenne à estimer les plaintes du professeur manifestement mal fondées[49].

Conclusions

Le système juridique belge n'a jamais connu de délit de blasphème, mais connaît toujours un délit d'outrage aux *objets* du culte, rarement mis en œuvre. En revanche, l'incitation à la haine et à la discrimination est un délit mobilisé de façon importante dans les polémiques relatives aux discours anti-religieux tout comme au discours des religieux à l'encontre d'autres minorités. Un double enjeu essentiel pour la juris-

[45] On mentionnera aussi l'incertitude des pratiques scolaires quant au port du foulard *par les professeurs de religion islamique*. Les établissements autorisent les professeurs de religion à porter le foulard au sein de leur classe, mais certaines écoles ont tenté d'obliger ces mêmes professeurs à ôter leur foulard dans les couloirs empruntés par eux pour entrer et sortir de l'école. Un règlement de cette sorte a été invalidé par le Conseil d'Etat dans un arrêt du 2 juillet 2009, n° 195044.

[46] Conseil d'Etat, 18 octobre 2011, *Guermit*, n° 215816.

[47] Conseil d'Etat, 25 octobre 2016, *Mahi*, n°236.260: l'arrêt, prenant en compte que le requérant a répondu à ce sujet *: « Mon travail consiste à éveiller les élèves à l'esprit critique. Les élèves lisent beaucoup; sur internet notamment. Ils vont dans les mosquées. Beaucoup de mes étudiants ne partagent pas mes lectures, la grille de lecture que je leur propose. Nous n'analysons pas le cadre religieux de la même manière. J'ai même des étudiants qui ne sont pas musulmans. On travaille sur la réflexion et l'esprit critique»;* en vient à conclure que l'acte attaqué n'établit pas en quoi cette réponse, en tant que système de défense, permet à l'autorité disciplinaire d'estimer que le requérant prend le risque d'amener ses élèves à rejeter tout le système sociétal fondé sur des institutions démocratiques et une presse libre ou qu'il tiendrait devant eux les propos qui font l'objet de la lettre ouverte ».

[48] Voy. Wattier, S. et Xavier, F., « Le déplacement disciplinaire : une sanction proportionnée au manque de réserve d'un professeur de religion », *Journal des tribunaux*, 2020/39, n° 6835, pp. 831-834 ; Persoons, Gabriel. *La liberté d'expression du professeur de religion*. Faculté de droit et de criminologie, Université catholique de Louvain, 2015. Prom. : Christians, Louis-Léon.

[49] Cour EDH 7 juillet 2020, n° 57462/19, *Yacob MAHI contre la Belgique.*

prudence belge semble aujourd'hui d'une part de maîtriser l'extension de la notion d'incitation *implicite* et d'autre part d'en vérifier la nature non discriminatoire de la mise en oeuvre cette extension. Les modalités pénales tout comme non pénales semblent progressivement renforcer une police de la pensée. La tension ne s'y joue pas vraiment entre expression et religion, mais entre religion et sécurité.

THE RELATIONSHIP BETWEEN FREEDOM OF SPEECH AND RELIGION IN BULGARIA

Simeon Groysman[1]

I. Introductory notes on the Public Law Dimensions of the Religious Situation in Bulgaria

This report will present some reflections on the state of free speech in and around the religious sphere in Bulgaria, based on several important general conceptions about the relationship between religious belief, politics and society in the country.

(a) Firstly, Bulgaria has a strong tradition as an Orthodox nation, with deep-rooted ties between the state and the Bulgarian Orthodox Church dating back to the Christianization of the First Bulgarian Kingdom under Byzantine patronage in the IX. century. The Ottoman period of Bulgarian history (1396–1878) and the imposed implementation of the millet system of imperial rule further solidified the role of religion as a national marker, incorporating it as a crucial component of Bulgarian nationalism's programme. In XIX. century recognition of the religious autonomy of an autocephalous church became a part of the vision for political independence. Bulgaria was re-established as a modern state in 1878, and its first Constitution of Tarnovo (1879), declared Eastern Orthodoxy as the 'dominant religion' represented by a national church.

(b) During the communist era (1944–1989), totalitarian authorities sought to diminish the influence of religion on social life. This led to a rapid secularization of public consciousness and paved the way for the current low mass religiosity of the country's population. A significant aspect of this process involved removing religious elements from existing legislation, which, at an early stage, addressed issues relevant to this paper, such as the decriminalization of blasphemy. At the same time, the desire to control religion under socialism found an intersection with the need to maintain

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religious peace in a polyethnic country with a significant Islamic minority. Thus, as early as the 1950s, the modern criminal law protecting against religious hatred and discrimination was established.

(c) Lastly, it is important to note that following the democratic changes in the country since 1989 and the granting of status to Orthodoxy as a 'traditional religion' by the 1991 Constitution, Bulgaria went through a difficult period of consolidating its major religious denominations (including via state actions that have been repeatedly criticised by the ECtHR). The acceptance of the new realities of religious pluralism was a challenging process for both the authorities and society. In the past two decades, there has been a noticeable trend of the main Orthodox Christian and Islamic denominations aligning with state authorities and increasing political utilization of religion for nationalist purposes in the context of the European wave of populism and the polarisation of societies on the issue of "the defence of traditional values".

II. Legal framework of outlining the dimensions of freedom of speech and freedom of religion

1. Constitutional basis

a) *Freedom of speech*

The current Bulgarian constitution was adopted in 1991 in the process of democratization of the country after the dismantling of the Communist system in 1989. The Preamble to the Constitution explicitly declared that '*the allegiance ... to universal human values*' and '*the rights of the individual* [were] *proclaimed as the supreme principle*'. The shift from the regulations of the previous totalitarian era highlighted the significance of freedom of speech and related communication rights in the new constitution.

Art 39 of the Constitution establishes the right to free expression of opinion, while Art 40 adds freedom of the mass media, and Art 41 explicitly declares the right to disseminate information. These fundamental freedoms also correspond to freedoms of artistic and scientific expression, as enshrined in Art 54(2).

The constitutional limitations of these rights are related to standard grounds reflecting the achievements of international human rights law, especially the ECHR. Thus, free speech should not damage the reputation of others or call for a violent change of the constitutionally established order, for the commission of crimes or propagate hate or violence, as provided for in Art 39(2). In the field of mass media, the protection of good morals (boni mores) is added as a ground for possible suspension of a print publication or, for example, a television programme, in accordance with Art 40(2).

It can be pointed out that the drafting of the Bulgarian Constitution in its chapter on human rights in 1991 made active use of the international legal experience, which

later provided the basis for constitutional interpretation in accordance with the main international instruments establishing human rights. Bulgarian Constitutional Court has explicitly made international human rights law an interpretative tool of constitutional jurisprudence, stating that:

> *'*[I]*n adopting these three texts* [regulating various aspects of freedom of expression, Arts 39-41] *and Chapter Two of the Constitution* [on fundamental rights and duties] *in general, ... the constitutional legislator was guided by and adopted... ideas and mechanisms from the then ratified... International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights.*
>
> *This aspiration to adhere to international standards is also evident from the idea that the provisions relating to fundamental rights should also be in line with the then yet unsigned European Convention for the Protection of Human Rights and Fundamental Freedoms* [ECHR]*, as well as from the observation that this section of the Constitution is most directly related to the country's international obligations and to international law.'*[2]

b) ***Freedom of religion***

Freedom of speech in relation to religion must be considered in the context of the established '*inviolable freedom of conscience, freedom of thought and the choice of religion and of religious or atheistic opinions*', as stipulated in Art 37(1). The explicit appearance of the atheist alternative as part of the guarantee of freedom of conscience was not accidental. Thus, the 1991 Constitution engaged in a dialogue with Art 53(1) of the 1971 Constitution, which, by '*providing for freedom of conscience and of religion*,' permitted citizens '*to engage in religious rites*,' but also '*entitled them to conduct anti-religious propaganda*' (though didn`t give the same opportunity for religious propaganda).

The use of '*religious communities and institutions and religious beliefs for political purposes*' is prohibited under Art 13(4). In this regard, it is important to point out that the Bulgarian State not only separates itself from religious institutions and guarantees the freedom of these institutions, but also has expressly undertaken the obligation to help '*maintain tolerance and respect between believers of different faiths, as well as between believers and non-believers*', Art 37(1-2).

In a binding interpretation, the Bulgarian Constitutional Court has had occasion to analyse the key role attributed by the constitutional text to the non-admission of hostility as a ground for restricting freedom of speech:

> *'The restriction against speeches which constitute propagation of hatred is based on the values enshrined in the Constitution, such as tolerance, mutual respect,*

[2] Bulgarian Constitutional Court, Decision No. 7 of 4 Jun 1996, case No. 1/96.

> *and the prohibition to propagate hatred on racial, national, ethnic or religious grounds. This restriction does not deny protection to the diversity of opposing views. The very nature of the right to freely express and disseminate opinions has as its premise the value of competition of ideas and opposition to different points of view.'*[3]

2. Overview of the Bulgarian system for guaranteeing rights by establishing restrictions on freedom of speech in relation to religion

The legal technique of the Bulgarian legislator uses the granting of broad freedoms at the constitutional level, combined with the introduction of explicit prohibitions on certain types of expression, primarily in **(a)** the Law on Radio and Television, **(b)** the Bulgarian Penal Code and **(c)** the Law on Protection against Discrimination. It is common understanding that all freedoms of communication are subject only to the limitations expressly provided for in the law.

a) *Relevant statutory principles of media expression*

A noteworthy aspect unique to Bulgaria is the absence of a 'Press Law' governing the print media's publication. Professionals' reluctance to embrace such legislation stems from memories of historical Press Laws from 1883, 1921, and state-controlled press after 1947, which were associated with censorship. The constitution guarantees the option of confiscating printed works; however, a concrete and enforceable legal procedure has never been established. Instead, authors of printed publications can face sanctions under general criminal law provisions related to insult, defamation, propagation of hatred (see sect. IV.2.), or private law regulations concerning harm to reputation and dignity as torts. Additionally, they may also face repercussions under anti-discrimination legislation for harassment (see sect. VI.). While specific regulations and restrictions on electronic media have been permitted by the Constitutional Court, the same level of detail is lacking in self-regulation acts of media professionals in Bulgaria, such as the Code of Ethics of the Bulgarian Media and the Code of Professional Ethics of the Bulgarian Media.[4]

Art 10 of the Law on Radio and Television declares the inadmissibility of programmes that incite intolerance among citizens, contain pornography, glorify or condone cruelty or violence, or incite hatred based on race, sex, religion, or nationality. These guidelines are reproduced without significant detail in self-regulation acts of media professionals in Bulgaria, such as the competing Code of Ethics of the Bulgar-

[3] *Ibid.*

[4] E. Drumeva, *Constitutional Law* [In Bulgarian] (Sofia, Ciela Publishing House, 2018), p. 728.

ian Media and the Code of Professional Ethics of the Bulgarian Media.[5] The Council for Electronic Media oversees compliance with these requirements and may impose administrative sanctions on media service providers for each violation, with fines ranging from BGN 3,000 to BGN 20,000 (equivalent to EUR 1,540 to EUR 10,250).

Furthermore, liability for individuals disseminating prohibited speech of this nature may be incurred through criminal proceedings or by the specialized administrative jurisdiction that monitors compliance with anti-discrimination legislation. Regarding the media, decisions of the Commission for the Protection against Discrimination serve as the primary means of sanctioning hate speech (see here, subsect. c and below, sect. VI.).

b) *Punishable expression of opinion established in the Criminal law of the country*

The restrictions on freedom of expression in the media primarily affect only a narrower group of professionals, while the general legal provisions governing prohibited speech in Bulgaria are outlined in its Penal Code. This approach presents an inherent ambivalence. Matters concerning the expression of opinions contrary to democratic principles, for instance, are predominantly regulated within the realm of criminal law. As a result, these values are afforded protection through the most severe form of state repression. However, only the most egregious violations can be pursued through criminal proceedings, while numerous lesser offenses that disregard the significance of certain values lie outside the purview of state institutions. For example, propagating hatred through a social media post that disparages a particular religious or ethnic group will most often be considered a 'minor act' with no substantial 'public danger', as Bulgarian criminal law puts it. The express provision of the Penal Code declaring that minor acts should not be considered crimes will therefore prevent the sanctioning of such an act without any other legal remedy to prohibit it, except in specific cases also regulated by anti-discrimination legislation.

In this context, the provisions of the Bulgarian Penal Code, which establish limits on the expression and dissemination of opinions and beliefs, can be systematized in the following way:

(i) According to Art 108(2) it is forbidden **to propagate a fascist or other anti-democratic ideology or a violent change to the social and state system** established by the Constitution. Given the focus of this report, this particular provision of political crime legislation is of significant interest, as a recent case will be examined below where the court classified the act of delivering reli-

[5] The correlation of these acts, followed by different groups of media, is analysed by S. Veleva, Freedom of Speech [In Bulgarian] (Sofia, St. Clement of Ohrid University Press, 2019), p. 159.

gious sermons as espousing an '*other* [distinct from fascism] *anti-democratic ideology*'.

(ii) **Propagating and inciting discrimination, violence or hatred based on race, nationality or ethnicity** is a crime under Bulgarian law according to Art 162(1).

(iii) **Propagating or inciting discrimination, violence or hatred on a *religious* basis** is designated as an independent crime in Art 164(1).

(iv) Relevant to our topic are also **(α)** the criminalized **formation of a political organization on a religious** basis together with **(β) religious propaganda against the state**, regulated in Art 166 of the Code.

(v) As separate types of speech prohibited and prosecuted by criminal law can also be distinguished:
- The **manifest incitement to commit a crime** by giving a speech to a multitude of people through the dissemination of printed works or in any similar manner (Art 320 of the Penal Code);
- The **propagation of war** (Art 407 of the Penal Code);
- The **incitement to war of one country against another** by print, speech, radio or otherwise (Art 408);
- The **public justification, denial or gross belittling of crimes against peace and humanity** (Art 419a).

(vi) A special place in Bulgarian criminal law is taken by the crime of **hooliganism** together with its latent tension with freedom of expression. According to Art 325(1) of the Penal Code hooliganism is *the performance of 'indecent acts that grossly disturb public order and express blatant disrespect for society'*. Given with a most general formulation, this norm is amenable to enforcement by authorities restricting freedom of expression. Thus, publicly speaking obscene words in Bulgaria is prosecuted as hooliganism. This means that, in practice, public blasphemy would most easily and likely be classified as hooliganism, as I will argue in detail below (see subsect. III.4.). At the same time, there are already two cases before the ECHR in Strasbourg, in which Bulgaria was convicted of violating the ECHR, because it imposed punishments for a radical (to a certain extent also artistic) impact on monuments of political significance (Handzhiyski v. Bulgaria[6]; Genov and Sarbinska[7]) qualifying actions of radical expression as hooliganism. For this reason, the arbitrary use of the hooliganism provision must be subjected to careful analysis.

As a significant portion of this report focuses on analysing Bulgarian criminal law, it is essential to include a **general translation note**. Throughout the report, I consistently employ the term 'propagation of hate' to render a Bulgarian phrase that

[6] Appl. No. 10783/14, Judgment delivered on 6 Apr 2021.

[7] Appl. No. 52358/15, Judgment delivered on 31 Nov 2022.

directly translates to '*preaching'* hate. This translation choice is meant to emphasize that certain norms regulate not only crimes of religious people carrying out religious preaching. A 'secular' speech full of hatred against a religious group is also called 'preaching' in the Bulgarian criminal law tradition. This specificity is noteworthy because it was a departure from the Soviet terminology of '*propaganda* of hatred' from which Bulgarian criminal law borrowed in the in the 1950s (see IV.1.). Because of this linguistic specificity, national legal doctrine has even developed a comprehensive idea of 'crimes of preaching', emphasizing some analogies to religious thinking. In these crimes, the perpetrator undertakes a psychological impact through speech. The tradition of criminalizing certain types of 'sermons' can be traced back to the Bulgarian criminal law from the end of the XIX. century and is thus connected to an overall tradition in the country's modern criminal law. In its essence, preaching is associated with 'oral or written dissemination of some ideas, teachings, beliefs in society; propaganda'.[8] At the same time, 'propagation' must be linguistically distinguished from 'incitement' insofar as the latter type of action signifies, for national criminal law theory, not a general call for some type of behaviour, but an immediate psychological motivation for the commission of a specific crime (see examples in section IV.2.a).

c) ***Protection against discrimination as countering hate speech***

In conclusion, the scope of constraints on freedom of expression, encompassing various forms of prohibited speech, may be expanded by taking into account the prohibition of harassment as a form of discrimination specified in anti-discrimination laws. In this respect, authorities will consider discriminatory speech as verbal harassment if it has a degrading content based on

> *'sex, race, nationality, ethnicity, human genome, citizenship, origin,* ***religion or belief****, education, opinion, political affiliation, personal or social status, disability, age, sexual orientation, marital status, property status or other characteristics established by law or international treaty'* (Art 5 in conjunction with Art 4(1) of the Law on Protection against Discrimination).

The described system of regulatory provisions will be analysed sequentially in several main sections. Initially, we should concentrate our interest on the topic of blasphemy as a maker of the legal order's treatment of the limits of free speech in relation to the religious sphere.

[8] See Kr. Manov, 'Preaching as an executive act of crimes under the Bulgarian Penal Code' [In Bulgarian] in Pl. Panayotov, Y. Stoilov, S. Groysman, Kr. Manov (eds.) *Scientific readings on the topic "Law and Religion*". (Sofia, St. Clement of Ohrid University Press, 2021), pp. 360-371.

III. Blasphemy, Religious Hate Speech and Limitations of Freedom of Speech in Religious Contex

Bulgarian criminal law at an early stage abolished the explicit criminalization of **blasphemy**, which did not correspond to the ideological attitudes of the socialist government since 1944. At present, we can find only cases of **desecration**, which we will compare with blasphemy because of the similar legal means of counteraction used in the legal system.

1. Blasphemy as a crime according to the older Bulgarian criminal law

The Penal Law of 1896 stipulated a penalty of one year's imprisonment for 'blaspheming God', but from this early stage it was accepted that blasphemy was only punishable if done in public before an assembly of people or through printed material. In this sense, blasphemy was punished for its potential to stir public spirits rather than as some metaphysical wrong directed against the Divinity. If we look back to the repealed Penal Law of 1896, which established the punishment for blasphemy, we find the following provision of Art 204:

> *'Whoever blasphemes God in the manner set forth in Art 172* [i.e., by open preaching before an assembly, or by disseminating and openly imposing symbols or printed works]*, shall be punished with imprisonment up to one year.'*

This formulation shows great similarity in structure and wording with Art 190 of the Hungarian Penal Law of 1878, which became the basic model for the Bulgarian penal codification of 1896.[9] However, the Bulgarian norm had excluded the element of '*causing public annoyance*',[10] which was present in the Hungarian original. Thus, the severity of the norm has been reinforced – as long as the blasphemous act was publicly directed, it already would be considered a crime, regardless of whether a negative public reaction followed.

When this provision was debated in the National Assembly, the argument in its favour was that '*a punishment should be provided for such people, who may not believe in God; at least they should keep quiet rather than blaspheme*.'[11] The demonstrated article was created as a means of seeking protection for '*the faith which is professed in a country like ours, which to our people is the most sacred thing*.'[12] It was clear

[9] The sources of reception in the drafting are analysed by Dim. Tokushev, *Creation of the New Bulgarian Criminal Law* (1877–1896) [In Bulgarian], (Sofia, Sibi Publishing House Press, 2019), p. 137.

[10] Here I use the German version of the law, which speaks of '*ein öffentliches Ärgernis*' – *Das ungarische Strafgesetzbuch über Verbrechen und Vergehen* (Budapest, Verlag von Moritz Rath, 1878), pp. 47-48.

[11] *Journal of the Eighth Ordinary People's Assembly* (Second Ordinary Session), XLV session, Thursday, 11 Jan. 1896 [In Bulgarian], p. 119.

[12] *Ibid.*

that such words appeal to the Orthodox Faith as '*the faith of our State*', which also had the status of 'dominant religion' by virtue of Art 37 of the Tarnovo Constitution of 1879. This conclusion was confirmed by the creation of a separate norm protecting the other confessions from mockery. Art 206(3) of the Penal Law provided the same penalty of one year in prison for 'defaming any religion not prohibited in the country', i.e., any religion other than Eastern Orthodoxy.

Despite this orientation in defense of Orthodoxy, which had the main norm against blasphemy (Art 204), it was not interpreted by deepening into any theological arguments. In one of the few relevant court cases of the Supreme Court of Cassation of the Kingdom of Bulgaria, we find an example of how the provision was strictly interpreted, even in the presence of a reference to the parliamentary discussion as travaux préparatoires and the potential of the latter to justify the 'Orthodox orientation' of the norm and further use of theological meanings analysing the case. At a gathering on the occasion of a national holiday in the 1930s, a man uttered blasphemous words against the Cross of Christ. Initially, this became the occasion for a charge of blasphemy and a conviction by a lower court based on the understanding that blaspheming the cross was '*tantamount to blaspheming God*.'

The Supreme Court could have used the idea that Art 204 of the Criminal Law protects the Bulgarian Orthodox faith as a whole and further interpreted the provision according to Orthodox theology. One of the prominent Christian teachers, for instance, the Serb Nikolay Velimirovich, a contemporary of these events, wrote that '[t]*he Cross symbolises the cross sufferings of Christ*', '[t]*his holy sign is given power from above until the end of time to drive out all evil and unclean spirits and to keep people from them*', and through the commemoration of this symbol the Church '*reminds Christians of the Lord's sufferings for the human race*.'[13] However, instead of explicitly seeking such arguments or tacitly following them, as the court of first instance did, the Supreme Court of Cassation chose to impose a narrower interpretation of the norm, stating that it does not protect any religious value, but is strictly directed against 'blasphemy'. Any wider interpretation, advocated the Court, would be an unlawful extension of the criminal law. The provision only criminalised blaspheming God and not blaspheming the Cross, which meant that the act was not to be seen as a crime and the accused was acquitted.[14]

[13] Saint Nicholas of Serbia, *Missionary Letters* [Russian translation of the Serbian Original] (Moscow, Publishing House of the Moscow Court of The Holy Trinity-St. Sergius Lavra, 2005), p. 178.

[14] Decision No. 578/1904, Third Criminal Division of the Supreme Court of Cassation.

After the change of political realities in Bulgaria following the Second World the punishment for blasphemy provided for in the Criminal Law of 1896 was abolished by the Bulgarian Criminal Law of 1951.[15]

2. Blasphemy and criminal law in contemporary Bulgaria

Today's Bulgarian criminal law does not sanction blasphemy as a crime against religion, but contains norms that are directed against acts that violate human rights or threaten society on religious grounds. Therefore, one can still examine the question of when a behavior that believers would consider blasphemy would be be considered a criminal offence de lege lata, almost 70 years after the formal decriminalization of blasphemy in 1951. The lack of case law requires a more general consideration of the issue. Below, I comment on the criminal law norms on propagation of religious hatred. However, they are not applicable to blasphemous acts because the perpetrator would thereby attract religious hatred to himself and not towards a victim group. If certain blasphemous words nevertheless seek to propagate hatred against a religious group and to humiliate it, they would be an offence as propagation of hatred under Art 164(1) of the Penal Code (see subsect. IV.2.).

What seems more possible to me is a situation in which blasphemous words spoken in public would be recognised as socially dangerous and therefore punishable, not because they are aimed at hate propaganda, but because in a more general aspect they express public disrespect. This type of conduct is sanctioned by the Bulgarian Penal Code on the basis of the norms on hooliganism according to Art 325(1) of the Penal Code:

> *'Whoever commits indecent acts, grossly disturbing public order and expressing blatant disrespect for society, shall be punished for hooliganism with imprisonment for up to two years or with probation, as well as with public condemnation.'*

Therefore, even from the completely desacralised present position of Bulgarian law we can think of 'blasphemy punished as hooliganism'. We will see below that the provisions on hooliganism are a favourite sanctioning device of the Bulgarian authorities, to which they – not always justified – resort even in more obscure and complex cases. Such an act of "hooligan blasphemy" under Bulgarian law will be present if some indecent acts are committed with a certain religious blasphemous connotation, '*grossly disturbing public order and expressing blatant disrespect for society*.' To the extent that no such cases are found in the case law, it is nevertheless useful to

[15] Promulgated under the title 'Criminal Law' in the State Gazette Izvestiya (Notices), No. 13 of 13 Feb, 1951. The same Act was later supplemented and 'converted' into a comprehensive Penal Code with a corresponding amendment of its title (Izvestiya, No. 12 of 1956).

demonstrate how Bulgarian law also punishes acts of desecration, treating them as a danger to public order in general rather than as a threat for the religious peace.

3. Desecration under Bulgarian criminal law. Analogies with blasphemy and existing approaches to criminal repression

Desecration is the act of committing disrespectful acts against a particular religious space or property that are considered sacrilegious by believers. Criminal law protection against acts of desecration is established by Bulgarian criminal law in the second paragraph of Art 164 of the Penal Code:

> *'Whoever desecrates, destroys or damages a religious temple, a house of prayer, a shrine or a building adjacent thereto, their symbols, graves or tombstones, shall be punished by imprisonment for up to three years or by probation, as well as by a fine from BGN 3,000 to BGN 10,000* [equivalent to EUR 1,540 to EUR 5,125]*.'*

The tradition of criminalizing these acts, with minor differences in wording, can be traced back to the 1896 Penal Law, Art 206(1) and Art 207, although they were 'missing' in the first socialist Penal Code of 1951, adopted at the time of the greatest persecutions against denominations, and therefore against their symbolism and property. The analysis of the current provisions can now, unlike blasphemy, be placed in the context of numerous cases of relevant criminal acts. The desecration of a sacred place is indeed mentioned in the quoted provision as an alternative possibility to its damaging, but this possible distinction does not substantially affect our analysis. Throwing something "unclean" into the temple is clearly stricto sensu desecration, while stoning it rather entails damage. From a religious point of view, however, any such act has the offensive connotation of a religious insult and an assault on the sacred, and legally speaking the reaction of the state authorities in such cases does not show any difference.

A number of cases can be cited in which Bulgarian mosques have been desecrated – by drawing a cross[16], writing insulting inscriptions against Bulgarian Turks, throwing a pig's head.[17] In each of these instances, a hate crime is present, wherein the methods employed bear a resemblance to an abuse of freedom of expression. There

[16] See such a case in Dobrich in 2015 – 'Attempted revenge desecrated the mosque in Dobrich', *Website of the Muslim denomination in Bulgaria*, https://grandmufti.bg/bg/antimyusyulmanski-proyavi-2015/618-opit-za-revanshizam-oskverni-dzhamiyata-v-dobrich.html.

[17] On 18.06.2015 a severed pig's head was hung on the Karadja Pasha Mosque in the town of Gotse Delchev - see the *Declaration* by the local structures of the Movement for Rights and Freedoms, 19 Jun 2015, which expressed dissatisfaction that this type of acts are persistently regarded as simply hooligan acts - 'A pig's head on the minaret of the old mosque in Gotse Delchev at the beginning of the month of Ramadan', *Hronika*, 19 Jun 2015, https://hronika-bg.com/свинска-глава-на-минарето-на-старата-д.

is no dispute in criminal law doctrine that Art 164(2) should be applied in these cases, because the offences are clearly directed against a religious group. However, in numerous cases, law enforcement authorities classify this behavior as hooliganism (rather than as a crime against religions), which is punishable as a criminal offence or, in milder cases, even as an administrative offence.

It has been argued by human rights organizations that the persistent qualification of, for example, the attempted arson of the mosque in the town of Kazanlak as hooliganism is part of a policy of law enforcement not to speak openly about crimes of religious hatred and ethnic tension.[18] In this regard, it is important to point out that the classification of such desecrating acts as hooliganism enables them to be punished as 'minor hooliganism' with administrative sanctions instead of as the crime of desecration, destruction or damage to a religious temple under Art 164(2).

It becomes evident, that hooliganism in the Bulgarian Penal Code has a very broad wording, that can be used to sanction a wide range of actions, including crimes related to religious hatred and radical expression of religious beliefs. In Bulgarian society, the idea of blaming 'hooligans' for a particular problem, as is clear from the quoted article by Emil Cohen, leads to the underestimation of the seriousness of what has been done. The authorities prefer to talk about an episode of rude and unbalanced behaviour rather than a deep social rupture of violence linked to ethnic and religious differences. In all of these cases mentioned here, investigations were led for hooliganism, not for crimes against religion despite the explicit provision of Art 164(2). The perpetrators of the sacrilegious acts have in all cases not been found by the police. Representatives of the Chief Mufti's Office and concerned members of Parliament have expressed a general understanding before media that most often law enforcement authorities prefer to qualify attacks on places of worship as hooliganism '*because it is difficult to prove motives*' of racist and anti-Islamic nature[19].

The facts presented should not be judged as a dismissive attitude, passing over only anti-Islamic acts. Similar events unfolded in 2012 when a young man stoned one of the main icons of Sofia's St. Alexander Nevsky Cathedral – that of Christ, standing to the right of the Royal Doors, separating the sanctuary from the rest of the temple. The damaged icon, a masterpiece of the church, was painted by the famous Russian artist Viktor Vasnetsov (1848–1926). However, it turned out that the security cameras

[18] E. Cohen, 'Who is behind the Pogrom of the Kazanlak Mosque' [In Bulgarian], *Bulgarian Helsinki Committee*, 2 Sept. 2006, https://www.bghelsinki.org/bg/publication/koj-stoi-zad-pogroma-na-kazanlshkata-dzhamiya.

[19] *Missing the point. Lack of adequate investigation of hate crimes in Bulgaria* [In Bulgarian] (Amnesty International, 2015), p. 32. Online access: https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR1500012015BULGARIAN.pdf

were not working, and eyewitnesses explained the incident by the fact that '*the young man had the appearance of a drug addict*', who also was not found to bear a penalty[20].

The Bulgarian authorities have, nevertheless, applied Art 164(2) in cases of disrespect for religion that were not so politically sensitive. Thus, there have been convictions for desecration of graves in the case of breaking tombstones[21], removal of wooden crosses during drunken rampage[22], collection of wooden crosses from a cemetery to be used for firewood.[23] A conviction was also handed down in the case of breaking the windows of a church with stones.[24] A similar case of application of the analysed provision was present in another stoning of the mosque in the town of Kazanlak[25] or of an administrative building adjacent to the mosque in the town of Plovdiv.[26]

We have seen that the state prosecution authorities tend to qualify as 'hooliganism' (ie an attack on public tranquility) acts with obvious religious hate motives, which accordingly threatens religious peace and are therefore more dangerous to society. This greater seriousness of criminal desecration as compared to hooliganism is also established by the more severe penalties provided by the legislature for crimes against religion. Hooligan motives in this regard however are well known to law enforcement, who prefer to use them in the courts rather than go to the proof of the more obscure from their point of view motives of hatred.[27] It is important to note that the lack of investigation into a possible hate motive, including consideration of religious hatred in the context of a particular offence, has been considered by the ECHR as a form of discrimination and a violation of Art 14 under the Convention. This judicial understanding is well illustrated, even in cases against Bulgaria alone (Abdu v. Bulgaria[28], § 44, Nachova and Others v. Bulgaria[29], § 160).

It is worth quoting the words of the Bulgarian prosecutor Sava Petrov that

> '[h]*ate crime is a message crime, it gives a message not only to the specific victim, but also to all carriers of the group characteristic. Therefore, the institutional*

[20] See 'A stone was thrown at the famous icon of Jesus Christ in St. Alexander Nevski (updated)' [In Bulgarian], *Dveri*, 31 May 2012, https://dveri.bg/component/com_content/Itemid,100723/catid,14/id,15207/view,article/.

[21] District Court of Sliven, Verdict No. 140 of 12 July 2017, case No. 203/2017; District Court of Byala Slatina, Verdict No. 1 of 24 Feb 2020, case No. 4/2020.

[22] District Court of Dupnitsa, Verdict No. 52 of 12 May 2016, case No. 108/2015.

[23] District Court of Plovid, Decision No. 178 of 21 Jun 2016, case No. 1257/2016.

[24] District Court of Aytos, Decision No. 91 of 15 Jul 2011, case No. 253/2011.

[25] District Court of Kazanlak, Decision No. 196 of 12 May 2014, case No. 458/2014.

[26] District Court of Plovdiv, Agreement No. 843 of 11 Dec 2015, case No. 8089/2015.

[27] *Missing the point. Lack of adequate investigation of hate crimes in Bulgaria*, pp. 34-35.

[28] Appl. No. 26827/08.

[29] Appl. No. 43577/98 and 43579/98

> *reaction is also a message. We need to make fellow prosecutors not more literate about hate crime, but more sensitive to it.*[30]'

In light of these words, the tendency to underestimate anti-religious actions as "mere hooliganism" is perhaps indicative of the image of a society that is convinced of its own religious tolerance and seeks rather not to notice the accumulating problems of social hatred beneath the surface of the official history of inter-ethnic peace and coexistence.[31]

4. **Interim conclusion**

The description of the current legislation and the factual approaches of the Bulgarian authorities provides grounds for an interim conclusion regarding the contemporary status of blasphemy under Bulgarian law. To the extent that Bulgarian law does not purport to protect certain religious point of view, even though blasphemy is most often egregious and culturally unacceptable, it would not be a crime or any kind of legal offence under Bulgarian law. It is possible, however, that blasphemous acts could be punishable if they are expressed in defacing writing on religious buildings (under Art 164(2) as seen in the previous subsection), for example, or if they are publicly expressed for the purpose of inciting religious hatred (under Art 164(1), see next section). The tendency of the Bulgarian authorities to use the rather abstract formulation of the offence of hooliganism under Art 325 of the Penal Code suggests that the commission of public blasphemy, if it has a certain social resonance, would be prosecuted as hooliganism. The reader might find a similar analogy with the famous case of Pussy Riot in Russia, where the actions of the eponymous musical group were prosecuted as hooliganism (Art 213 of the Russian Penal Code), to later give rise to the introduction of hooliganism offending the feelings of believers as a separate offence, Art 148(1) of the Russian Penal Code. The mentioned text of the Russian legislation declares a separate crime

> [Performing] *public actions expressing blatant disrespect for society and committed for the purpose of offending the religious feelings of believers.*

The history of this notorious provision is, of course, very specific, both because of its political use and because of its emphasis on 'offending feelings' and proving

[30] See L. Fileva, 'How the Prosecution Handles Hate Crimes' [In Bulgarian], *Dnevnik*, 25 Mar 2023, https://www.dnevnik.bg/bulgaria/2023/03/25/4462440_kak_prokuraturata_se_spravia_s_prestupleniiata_ot/

[31] Social researchers share a general consensus that Bulgaria's transition to democracy has been characterised by ethnic peace (here the defining comparison is mainly with the collapse of the former Yugoslavia), while since 2000 there have been complex trends of rising nationalism, xenophobia and racism - see N. Bogomilova, *'Nationalizing' Religion: Contemporary Debates and Practices* (Sofia, Paradigm Publishing House, 2015), pp. 59-66.

it in practice by bringing in witnesses from "non-governmental organizations" with a religious focus.

Despite these peculiarities, I think my analogy is valid. I base this understanding both on the common origins of Bulgarian and Russian norms of hooliganism in socialist law, and the similar post-socialist attribution of the same to broad functions as a "back-up option" for repression and use as a kind of "elastic criminal clause".

IV. ANCTIONING RELIGIOUS HATRED AS A CONTEMPORARY STATE RESPONSE TO OFFENSIVE CONDUCT IN THE RELIGIOUS SPHERE[32]

This section of the report will examine **(a)** criminal provisions restricting free speech to prevent the dissemination of hatred of a religious group and/or hatred on a religious basis, **(b)** the possible religious implications of propagating anti-democratic ideology as one of the anti-state crimes under the Bulgarian Penal Code and some further **(c)** restrictions on the use of religion in the realm of political debate.

1. The criminalization of religious hate speech in 1951 as a 'replacement' for the repealed criminal blasphemy provision

The Criminal Law of 1896 contained only a single provision criminalizing propagation of religious, political and social hatred in general – Article 173(2), which punished a person who:

> *'Incites to enmity or hatred against religious societies (fraternities), ethnicities or particular classes of the population or against the legal establishments of marriage and property*.'

In the post-war context, the 1947 Socialist Constitution amplified the importance of this subject by introducing an explicit provision prohibiting '*any propagation of racial, national or religious hatred*', Art 71(3). This provision became the basis of new criminal legislation relating to the religious sphere. The new socialist legislation, on the one hand, abandoned religious language and no longer spoke of 'blasphemy' and 'mocking God', but retained as a national specificity the existence of an independent section 'Crimes against religions' in the criminal legislation. In the Explanatory Memorandum to the draft Criminal Law, crimes against confessions are considered as 'crimes threatening public order' and not some transcendental values. The fight

[32] As a treatise of general relevance to the subject matter of Sections IV. and V. should be pointed out the monograph of N. Kuzmanova, *Freedom of Religion and Criminal Law* [In Bulgarian] (Sofia, East-West Publishing House, 2022).

against these crimes was represented as part of the endeavor to '*secure the peaceful life of the citizen in a Socialist society*'.[33]

In view of the explicit indication[34] in the legislative draft that the leading source of reception was the Penal Code of the Russian Soviet Socialist Republic of 1926, we can easily trace that the transition from the punishment of blasphemy to the criminalization of religious hatred in Bulgaria took place under the influence of its Art 59(7), which by 1950 (the time of the drafting of the Bulgarian law) stated that:

> *'Propaganda or agitation aimed at stirring up nationalistic or religious enmity or hatred, as well as the dissemination and preservation of literature of this nature, shall be punishable by imprisonment for up to two years.'*

As a result, in Bulgaria the provision punishing blasphemy gained a "replacement" in the new crime of 'propagating religious hatred', Art. 303 of the new Penal law:

> *'Whoever propagates hatred on religious grounds by word, print, act or otherwise, shall be punished by imprisonment for a term not exceeding 3 years and a fine not exceeding 40 Bulgarian levs.'*

This criminal law reform also introduced the punishment for 'propagating racial or national enmity or hatred', Art 272(1) of the 1951 Law. Religion, along with nationality and race, became one of the motives for the use of violence, which was punishable under Art 272(2).

From a formal point of view, it seems that the new norms sought to protect religious beliefs by making incitement to religious hatred punishable. The spirit of the epoch, however, becomes clear from the more overt formulations of national legal science. In its commentary, it explicitly stated that the norms should be seen in the context of the (Soviet) idea of 'fighting against religious obsolescence.' Conducting anti-religious propaganda was not prohibited by law; on the contrary, it '*appeared to be an absolute requirement*' of the times according to the most authoritative treatise on criminal law of the period. Thus, on the one hand, the state '*struggled against religious beliefs*,' but it also '*couldn`t allow discrimination of religious nature*,' because this contradicted social unity.[35]

[33] *Criminal Law. Text, motives, 231st ordinance, decree and subject index* [In Bulgarian] (Sofia, State Publishing House 'Science and Art', 1952), p. 61.

[34] *Ibid.*, p. 49.

[35] See Iv. Nenov, *Criminal Law of the People's Republic of Bulgaria. Special Part* [In Bulgarian]. Vol. II (Sofia, State Publishing House 'Science and Art', 1959), pp. 263-264.

2. The crime of 'propagating or inciting to discrimination, violence or hatred on religious grounds', Art 164(1) of the Penal Code

a) *General analysis of the criminal law provision*

After the criminalization of the 'propagation of hatred on religious grounds' in 1951, the offence was reproduced with this wording in the current Bulgarian Penal Code, adopted in 1968. The provision acquired its modern wording following a series of amendments after 2000, specifying the means of committing the offence, adding incitement as possible criminal act and expanding the scope of the norm by adding discrimination or violence on religious grounds to the initial propagation of hatred.

At present, Art 164(1) has the following form:

> *Whoever propagates or incites to discrimination, violence or hatred on religious grounds through speech, print or other mass media, through electronic information systems or otherwise, shall be punished by imprisonment for up to four years or by probation, as well as by a fine from BGN 5,000 to BGN 10,000* [equivalent to EUR 2,560 to EUR 5,125].

Criminal law doctrine explains **(a) propagation** of discrimination, violence or hatred as act(s) of mental influence aimed at forming negative attitudes towards certain people (religious or non-religious) or towards relevant views. Propagation takes the form of public persuasion of views of religious intolerance[36] (from an anti-religious position or from the position of a particular religion). In this sense, it is important that propagation has an ideological dimension and strive to form a general attitude based on religious hatred or antireligious. It may also take the form of the depiction of relevant symbols carrying the connotation of hatred based on a view of one's own religious superiority or of hatred of a particular religion and its representatives.[37] Propagating is always a public act that must be perceptible to a wide range of people.[38]

At the same time **(b) incitement** to discrimination, violence or hatred is an act aimed at motivating the actual commission of specific crimes, again on an (anti)religious basis. This act may be directed against one or more different persons, simulta-

[36] See Iv. Pushkarova, *Forms of Organised Crime under the Criminal Code of the Republic of Bulgaria* [In Bulgarian] (Sofia, Sofia University Press, 2011), pp. 2019 and next; Iv. Pushkarova, *'Hate Speech'* in *Criminal-Law Protection Against Discrimination* [In Bulgarian] (Sofia, Published by the Commission for Protection Against Discrimination, 2011), pp.103-104. The author argues that propagation in essence is the purposeful dissemination of concepts, evaluations and opinions which have the capacity to invoke value-based responses and are aimed at achieving a reaction of solidarity.

[37] Al. Stoynov, *Criminal Law. Special part Crimes against the rights of citizens* [In Bulgarian]. Second ed. (Sofia, Ciela, 2006), pp. 255-256.

[38] See B. Velchev, Crimes against the Republic [In Bulgarian] (Sofia, Ciela Publishing House, 2014), p. 169.

neously or separately, and – unlike propagation – neither of these persons shares the perpetrator's ideas for action prior to the incitement, nor has the incitement to take place publicly.[39]

This analysis shows that there are **two independent variations of the offence**. Propagating in a general way the ideas of discrimination, violence or hatred on religious grounds OR incitement to specific acts against specific persons expressing discrimination, violence or hatred on religious grounds. In order to distinguish between the two forms of criminal (anti)religious speech, an example of propagation of discrimination can be given as a speech disparaging a particular religious minority. Incitement to discrimination and violence would be present, for example, in a concrete call "to keep minority children out of a specific school" the next day or "to attack their neighborhood". **The method of committing this offence** includes the possibility of using a wide range of means of dissemination – through public speeches, printed production or any means of electronic public communication.

In its interpretation, the Supreme Court of Cassation has drawn the line between reporting facts and propagating hatred. The essence of the offence in question consists in the public disclosure of '*evaluative information* [evaluative statements] *through which views are developed, argued and publicised which by their nature are capable of inciting hostility or hatred*'.[40] Bulgarian jurisprudence in recent years has faced cases of punishment for propagating religious hatred. For example, the translation and distribution of radical Salafi literature and propagation, both in a masjid and on a Facebook profile, of hatred against all those who do not practice Salafism, together with propaganda of religious war using Daesh symbols, were punished under the same provision.[41]

b) *Criticism of the formulation of the norm*

Art 164(1) of the Penal Code has been subject to international criticism.[42] Its provision that punishes '[w]hoever propagates or incites discrimination, violence or hatred *on religious grounds*' could mean both punishing hate speech against a particular religion and its representatives (discrimination, violence and hatred of the victims' religion), as well as propagating or inciting religiously motivated discrimina-

[39] See Iv. Pushkarova, '*Organisation/Group against National Equality and Religious and Political Tolerance'* (2007) 6 *Contemporary Law* [In Bulgarian], pp. 20-31.

[40] Supreme Court of Cassation, First Criminal Division, Decision No. 38 of 25 Apr 2019, case No. 66/2019.

[41] Supreme Court of Cassation, Second Criminal Division, Decision No. 60161 of 11 Apr 2022, case No. 522/2021.

[42] Organization for Security and Co-operation in Europe, 'Opinion on Certain Provisions of the Penal Code of Bulgaria Pertaining to Bias-motivated Crime, "Hate Speech" and Discrimination', 16 Jul 2018, § 58, Online access: https://www.osce.org/odihr/388271.

tion, violence and hatred, motivated by religious beliefs. To schematise the problem, we can distinguish between **(i)** hatred of a particular group because of the religion of its members and **(ii)** hatred of a particular group because of the religious beliefs of the haters. These two types of conduct are different enough, but their mechanical conflation in a single criminal provision does not facilitate a detailed inquiry into the nature and social causes of such acts. I will deepen this description by presenting two famous cases of conviction under Art 164(1). In the first case, there is propaganda of hatred against a particular religion (the case of Dr. Emil Antonov). Secondly, I will consider the important Bulgarian case of 'radical Islam' against Ahmed Musa as an example of hatred propagated on religious grounds.

c) *The case against Dr. Emil Antonov: Nazi propaganda as spreading hatred against Jews and Judaism*

A case can be mentioned in which there was a combination between propagating hatred against Jews as a religious community and propagating fascist ideology as a state-crime under Art 108 of the Penal Code. The perpetrator had published a book entitled '*The Foundations of National Socialism*' in which '[t]*he thesis is consistently advanced that, guided by their religious outlook ... Jews wish to conquer the world by purposefully committing crimes* [and even] *... ritual murder*.' Interesting in this context, is that the verdict itself quoted parts of the book demeaning Christians, and the Christian religion as '*created by Jews and preaching submission*.' From this point of view, although there were also abundant facts of propagating hatred against Christians, they did not become the basis of a criminal charge.

Antonov was found guilty of preaching both '*fascist ideology and violent change of the social and state order established by the Constitution*' and '*hatred on religious grounds ...* [making] *statements about the Jewish ethnic group and its religion that endangered ethnic peace and interfaith harmonyp*.'[43]

d) *The trial against Ahmed Musa as a point of public concern against radical Islamism in Bulgaria*

The trial[44] involving Ahmed Musa and Said Mutlu as the main defendants garnered significant attention in Bulgaria[45] and was colloquially known as '*the trial against the 13 imams for preaching radical Islam*.' These court proceedings sparked public discussions on the perceived 'threat of radical Islam,' while failing to raise sufficient concern about the issue of hate speech. The case unfolded between 2005 and 2010 when a group of Islamic preachers operated in southern Bulgaria, particularly in the town of Pazardzhik, with financial support from a Middle East Foundation.

Bulgarian Courts recognised the commission of the offense of **'propagating religious hatred through speech (Art 164(1) of the Penal Code)'**. This crime involved delivering speeches that propagated religious enmity, '*denial of everything that does*

not conform to the ideology of Salafism' and displaying a '*hostile attitude towards people professing different religions*' during various public talks. Public concern was been raised over the widely publicised words by the media which, according to a secret witness, one of the accused uttered at a wedding gathering: '*Bow down to those who cut heads for their faith*,' *'Bow down to those who plant bombs and kill for their faith*.'

Convictions were also been obtained for the crime of **propagating anti-democratic ideology, in accordance with Art 108 of the Penal Code**. The Bulgarian courts defined the ideology propagated as '*the ideology of the Salafi branch of Islam, expressed in opposition to the principles of democracy, separation of powers, liberalism, statehood, and the rule of law*; [denial of] *basic human rights such as equality of men and women and religious freedom*.' The court of first instance expounded, that the prohibited '[a]*n anti-democratic ideology is one that has been unequivocally and entirely rejected in Europe for its hostility to European values, and such is also the Salafi ideology*.' The court found evidence of propaganda advocating the refusal to participate in elections, promoting a religious court instead of secular courts, boycotting Bulgarian statehood, and advocating for its replacement with a 'caliphate', even through the use of force. In the same sermons, democracy was presented as a '*bad form of government associated with anarchy and misdeeds*.'

Much of the judicial study of Salafi ideology was devoted to sermons about women that allowed their confinement to the home, restriction of their choice of profession, physical violence and sexual abuse. At the same time, it is interesting that these actions were seen only as part of the propagation of an undemocratic ideology, contrary to constitutionally guaranteed equality. Thus, the degrading of women was examined only in relation to the offence of anti-state and anti-constitutional propaganda under Art 108 of the Penal Code, and not in relation to the propagation of discrimination on religious grounds, which is referred to in Art 164(1) of the Code.

Throughout its deliberations, the Bulgarian court consistently compared the propagated Salafism to mainstream Sunni Islam of the Hanafi School in Bulgaria. The latter was depicted as traditional and peaceful, indicating a preference for the latter version to be embraced more widely. In order to justify intolerance as an important characteristic of the offending sermons, the Bulgarian court went into detail describing all customs traditional to Bulgarian Muslims and their rejection of more radical religious teachings:

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[43] Sofia City Court, Decision No. 227 of 4 Jul 2011, case No. 5259/2010.

[44] Unless explicitly stated otherwise, the quoted passages are from the first instance District Court of Pazardzhik, Verdict No. 15 of 19 Mar 2014, case No. 330/2012, which initially established the facts and is subject only to further comments by the higher courts.

[45] See 'Radical Islam case ends with one effective and two suspended sentences' [In Bulgarian], *24 hours*, 19 Mar 2014, https://www.24chasa.bg/bulgaria/article/3728526.

> *'Radical Islam preaches that the Qur'an is a constitution, Sharia is law, and Islam is a state. This is contrary to traditional Islam, respecting institutions and voting in elections, different ethnic groups – Muslims, Roma, Christians*[46] *– freely practising their religion, allowing intermarriage between people of different faiths.'*[47]

Thus, the impression is repeatedly left that it is tolerant to accept what is nationally established, to support the understandings of the established Bulgarian Chief Muftiate, and to reject Salafism not only as undemocratic but also as an 'ideologically imported', foreign for our country. The Chief Mufti of Bulgaria, Dr. Mustafa Haji, appeared as a witness in the case, and the court found occasion to explicitly distinguish the activities of the defendants (most of them employees of the Chief Muftiate) from the direction of the established Islamic denomination in the country. Thus, on the one hand, it was very important for the Bulgarian authorities to distinguish the accused from the multitude of peaceful Muslims in Bulgaria and their traditional faith. On the other hand, however, as we shall see in the next subsection, the trial gave rise to anti-Islamic rhetoric across the nationalist spectrum.

Evgenia Ivanova, a social anthropologist and author of a harshly critical book accusing the authorities of intolerance, populism and politicization of the trial, stressed that prosecutors' closing speeches exacerbated tensions through narratives about Daesh in Iraq and Syria, suggesting connections and potential developments on national soil.[48] This brings us to an interesting detail: the analysis of a particular ideology brings the national cultural context into dialogue with world political events. The latter is especially true when it comes to hate speech, the texture of which is most often evolving in the context of the information flow about international events.

3. Religious preaching as an anti-state crime? Problems related to the concept of 'anti-democratic ideology'

In Bulgarian law, a significant category of restricted speech is the 'propagation of fascist or other anti-democratic ideology,' as defined in Art 108(1) of the Penal Code:

> *'Whoever propagates fascist or other anti-democratic ideology or forcible alteration of the social and state order established by the Constitution of the Republic of Bulgaria shall be punished by imprisonment for up to three years or a fine of up to BGN 5,000* [equivalent to EUR 2,560].'

[46] Indicative of the context at hand is the conflation of ethnic and religious groups even in the judgment itself.

[47] Court of Appeal of Plovdiv (second instance court), Decision No. 9 of 01 Jul 2015, case No. 294/2014.

[48] See E. Ivanova, *Religion as Crime: Bulgaria's Islamic State* [In Bulgarian] (Sofia, New Bulgarian University Press, 2020) pp. 116-117.

The acts described are sanctioned by Bulgarian law as one of the crimes against the Republic (the so called 'anti-state crimes'). Two possible developments follow in relation to our topic:

(a) There may be religious preaching with an orientation against social peace and established institutions. This would be considered by the Bulgarian courts as religious anti-democratic ideology, as we have seen above in the case 'for preaching radical Islam' against Ahmed Musa.

(b) 'Fascist ideology', by which term in Bulgaria are also meant the National Socialist ideas of racist extermination and totalitarian control, in turn can also be seen as anti-religious because of its anti-Semitic character and the persecution of Jews it propagated by nazism.

(c) It is interesting to point out that in Bulgaria the Communist regime has been declared criminal[49], political theory points to the anti-democratic nature of Communist ideology, yet there is no contemporary conceptualization or relevant cases of the propagation of communism and related persecutions against religious institutions. From this point of view, the propagation of Communist ideology will only be a crime if it also includes the propagating of the seizure of power by force or, for example, of 'class war'.

In the two cases mentioned earlier, the speech against non-Muslims or against Jews is itself religious hate speech, but linked to anti-democratic speech (advocating a Sharia state or the creation of an Aryan state without ethnic minorities). In both of these model cases, the Bulgarian authorities have brought criminal charges for both a crime against the Republic under Art 108 and a crime against religion under Art 164 of the Penal Code. Although Bulgarian courts managed to justify why Ahmed Musa's religious sermon should be seen as propagating anti-democratic ideology, political actors from the nationalist spectrum in 2016 (even before the completion of the series of trials) proposed the explicit criminalization of 'preaching radical Islam'. According to this proposal, the preaching of radical Islam should be placed in the Bulgarian Penal Code next to the propagation of fascist or other anti-democratic ideology, even taking the first place in this enumeration. The proposed broad definition of punishable 'radical Islam' included presenting it as an ideology preaching '*the creation of a state based on Sharia*,' the primacy of Islamic norms and their forcible imposition over principles in Bulgarian society, '*the establishment of rules of conduct … contrary to common human values …* [and using] *calls for holy war*.'[50]

[49] In 2000, the *Law Recognising the Communist Regime in Bulgaria as Criminal* came into force. At the same time, it remains entirely declaratory in nature and, despite frequent proposals for change, does not include sanctions for relevant free expression, for example through the use of Communist symbols or denial of the regime's crimes.

[50] See 'Patriots write radical Islam into the Penal Code' [In Bulgarian], *DeFakto*, 08 Apr 2016, https://defakto.bg/2016/04/08/патриотите-записват-радикалния-исля/, Legislative draft proposal

The proposal was met with serious discontent from the Chief Mufti's Office[51], which responded by arguing that Islam was thus being presented not as a religion but as a potentially dangerous political ideology. In the end, the sought amendment was not adopted by the parliament, but it did not cease to be part of the political discourse, with the political party that authored the proposal announcing it again in 2020.[52] Attempting to ban the preaching of radical Islam is problematic in terms of religious equality. By the logic used, should not the state ban "radical" preaching of all religions? Thus would we deny any religiously more radical *religious* point of view or would we condemn any religion prone to *social* radicalism? This type of legislative attempts is also open to criticism in the light of the principle of freedom of religion – if a religious sermon does not become anti-democratic propaganda, does the state have the right to ban and punish it? Contemporary constitutional standards of secularism provide negative answer to that question. Their exploitation for political purposes finds a place in Bulgaria in the context of contemporary 'criminal law populism'[53], where radical legislative proposals are made and sometimes even enacted by the Parliament in order to please public opinion rather than to pursue a coherent criminal policy.

4. Problems of protection against the attacks on the holders of alternative philosophical beliefs

The protection of alternative philosophical beliefs (such as veganism or pacifism) is guaranteed in the case law of the European Court of Human Rights through the establishment of connection between the freedom of conscience and the freedom of religion. The Court famously pointed at Art 9 of the Convention as 'a precious asset for atheists, agnostics, sceptics and the unconcerned' (Kokkinakis v. Greece[54], § 31). At the same time, such philosophical beliefs are still not afforded the same type of

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registered in the Bulgarian Parliament with number 654-01-54 of 07.04.2016, Online access: https://parliament.bg/bills/43/654-01-54.pdf.

[51] 'Statement of the Supreme Muslim Council of the Muslim Denomination' of 13 Dec 2017 [In Bulgarian], Online access: https://parliament.bg/pub/cW/20171222124531Становище%203ИД%20на%20НК%20на%20Сидеров.pdf

[52] 'VMRO again demand criminalization of radical Islam and rights for self-defense' [In Bulgarian], *Lex.bg*, 24 Nov 2020, https://news.lex.bg/pregled-na-pechata/вмро-отново-искат-криминализиране-на/. Legislative draft proposal registered in the Bulgarian Parliament with number 054-04-293 of 23 Nov 2020, Online access: https://www.parliament.bg/bills/44/054-04-293.pdf.

[53] The topic of criminal populism has been commented on by a number of Bulgarian researchers, but the leading work on the subject is Miroslava Manolova's book *Why We Punish?* (Sofia, Ciela Publishing House, 2022), where the populist attitudes of the legislative body are demonstrated on the basis of its policy of steadily increasing punishments in response to socially sensitive crime cases.

[54] Kokkinakis v Greece (1993) 17 EHRR 397.

special protection in contemporary Bulgarian law that is afforded to religious affiliation or political beliefs.

Propagating hatred on religious grounds, as shown above, is a separate offence under Art 164 of the Penal Code. One could think of sanctioning the propagating of hatred towards certain alternative philosophical beliefs if such propagation has a religious motivation (for example, if hatred against a certain alternative way of life is propagated from a standpoint of religious fundamentalism). Religiously and politically motivated violence constitutes a separate offence under Art 162(2) of the Penal Code, but here again motivation based on hatred of the victim's alternative philosophical beliefs would not fall within the criminal law provision under consideration.

Bulgaria has been recommended to extend the scope of protected beliefs to include non-religious beliefs[55]. An expansion of the scope of the criminal law protection under consideration to accept alternative philosophical beliefs as akin to religion on the basis of ECHR jurisprudence would run counter to the understanding of domestic criminal law doctrine in favor of the strict interpretation of criminal law provisions. As the Penal Code does not explicitly provide for the consideration of alternative philosophical beliefs, they cannot be taken into account when punishing crimes. Possible attacks on the rights of such individuals would only be treated as crimes against the personal integrity – e.g., insult, defamation, violation of bodily integrity.

In the absence of relevant case law, only legal doctrine has had the opportunity to note that the protection against religious hate speech under Art 164 of the Penal Code should be extended to those professing atheistic views[56]. Believers believe in God. Atheists don`t. At the same time, such a one-layered opposition between 'believers and atheists' is a legacy of socialist rhetoric and (despite grounding in the wording of the constitution, see above sect. II.1.) does not reflect the more complex philosophical picture of the current social reality.

V. Restrictions on the use of religion in the sphere of free political speech

Another prominent aspect concerning freedom of speech in relation to religious identity lies in the restrictions of the use of religion for political purposes. In the political sphere the law does not only prohibit the propagation of religious hatred, as we have observed thus far, but seeks to set further boundaries, as the instrumentalization of religion for political purposes may give rise to ethnic conflict. This specificity

[55] Organization for Security and Co-operation in Europe, Opinion on Certain Provisions of the Penal Code of Bulgaria Pertaining to Bias-motivated Crime, 'Hate Speech' and Discrimination, 16 July 2018, § 42, 59, Online access: https://www.osce.org/odihr/388271.

[56] K. Kanev, D. Angelova, *Crimes incited by prejudice* [In Bulgarian] (Sofia, Bulgarian Helsinki Committee, 2019), p. 134.

should be understood in the context of the traditional Balkan fusion between religious and ethnic identities.

Since 1991 the democratic Bulgarian state conceptualises itself as a civic nation that does not refer to itself as an ethnic community. In this sense Bulgaria does not explicitly declare itself as a 'state of the Bulgarians', but also prefers not to mention its ethnic minorities at the constitutional level. Such a hint is present only in the wording of Art 36(2) of the Constitution, which guarantees that '[c]*itisens for whom Bulgarian is not their mother tongue shall have the right, along with the compulsory study of the Bulgarian language, to study and use their own language*.' The right of everyone to '*develop their culture in conformity with their ethnicity*' is guaranteed in Art 54(1) of the Constitution combined with a prohibition of the spread of ethnic discrimination and the creation of organizations inciting religious and ethnic hatred. Of particular relevance to us, however, is the provision of Art 11(4), which states:

> *No political party may be formed on ethnic, racial or religious grounds, nor may any party be formed which aims at the forcible seizure of State power.*

The Bulgarian Constitutional Court has explained this prohibition by the inadmissibility of a party '*appealing to limited* [ethnic or religious] *circles of the population and aiming to exercise state power ... to satisfy only ...* [their] *interests*'. For this reason, '*if it is closed to people, values, and ideas within the* [ethnic and religious boundaries] *in question, the political party... appears to be built on a foundation that the Constitution does not permit*.'[57] We find concrete manifestations of this general restriction, placing a barrier between religious speech and political life, in both electoral and criminal legislation.

a) *Religious and linguistic dimensions of the restrictions on free speech in electoral legislation*

The Electoral Code does not allow '*the carrying out of electoral agitation by officials of religious denominations*', Art 182(5). Religious signs and images are not permitted to be part of political agitation materials, Art 183(4). In connection with the aforementioned merger between ethnic and religious, it should also be noted the important rule that the election campaign should be conducted only in Bulgarian, which has become a subject of controversy in connection with the political participation of the Muslim minority in the country. Recently, the ECtHR ruled in Mestan v. Bulgaria[58], finding a violation of freedom of expression by Bulgaria in view of a fine imposed for a speech in Turkish during a political rally in a minority area. This, in the Court's view, was a restriction which disproportionately affected the right to

[57] Bulgarian Constitutional Court, Decision No. 4 of 21 Apr 1992, case No. 1/91.
[58] Appl. 24108/15, Judgement delivered on 2 May 2023.

political participation of, for example, the elderly population, who should have the right to receive information about their political choices in their own language. Thus, the idea that Bulgaria's international treaties uphold the principle of not prohibiting the use of minority languages during the election campaign prevailed over the government's arguments about the specificities of the national political context. The national argument of the logical unity between the prohibition in the Electoral Code, the obligation to learn the Bulgarian language and the constitutional prohibition on the establishment of political parties with an ethnic, religious or racial ideology form a logically coherent whole' (Mestan v. Bulgaria, §§22, 43, 54) was rejected.

I draw this seemingly peripheral detail to the submission because it will help the reader understand the context of the legislation commented on below and the so-called 'Ottoman Party Trial'.

b) *Criminal punishments for political propaganda based on religious grounds*

The criminal dimension of this restriction on ethnic and religious distortion of political debate is found in Art 166 of the Penal Code, which states:

> *Whoever establishes a political organization on a religious basis or whoever, by word, seal, act or otherwise, uses the church or religion for propaganda against the state power or its events, shall be punished by imprisonment for a term not exceeding three years, if not subject to a more severe punishment* [such a more severe punishment would be needed if the acts could also be qualified as anti-state crimes].

The existence of such a provision is associated with the Socialist tradition of Criminal Law[59] and initially reflected suspicion of the Church of counter-revolutionary plans, while later it became part of the regulation of ethnic relations in the country. The ECtHR evaluated this provision in a 2020 decision examining the case of Yordanovi v. Bulgaria[60]. The facts relate to criminal proceedings[61] concerning an attempt to register the Muslim Democratic Union party. In 2009, at an impromptu constituent assembly to establish the party, a vote was taken by simultaneous raising of both hands, which the authorities saw as a reference to an Islamic religious ritual. The party's founding charter stated that its membership was open to anyone who '*accepts Islamic principles of conduct and morality as guiding his or her life*.'

An interesting detail for the present report is that in the background to the founding assembly, the founders of the party had erected a memorial to Muslim and Christian soldiers who died in the Russo-Turkish War of 1877–1878. On the memo-

[59] See N. Kuzmanova, *Freedom of Religion and Criminal Law,* pp. 221-222.

[60] Appeal No. 11157/11, Judgement delivered on 3 Dec 2020.

[61] District Court of Popovo, Verdict of 1 Sep 2010, case No. 128/2010, from which the passages quoted here are taken.

rial were placed an Islamic crescent and a Christian cross (it will be argued at the trial that these were signs of respect for both religions). For Bulgaria, however, this was the Liberation war against the Ottomans and historically there were no monuments to the dead on the Turkish side. For the locals the monument was controversial, Bulgarians criticised it as a '*monument to the unknown Turkish warrior*', Muslims said it incorrectly combined the crescent with the Christian cross, for some it was just a '*senseless and arrogant provocation to peaceful coexisting ethnic groups*.' The monument was eventually destroyed overnight by unidentified persons a few months after its construction. When the attempt to establish a political party attracted public attention, the authorities filed criminal charges for the erection of the monument as well, considering it hooliganism under Art 325 of the Penal Code. The prosecution alleged that by erecting the monument on private property, one of the accused '*by his indecent acts, grossly disturbed public order and expressed blatant disrespect for society*.' The court disagreed with this construction and the charge of hooliganism was dismissed, but directed a verdict of guilty on the charge of forming a party on religious grounds.

In its analysis in Yordanovi v. Bulgaria, the ECtHR concluded that although the sanction under Art 166 of the Penal Code is prescribed by law and pursues a legitimate aim, it is not necessary in a democratic society. Criminal prosecution is a severe form of interference with the freedoms of expression and association, while the State effectively achieves the prohibition of the establishment of religious parties also by not registering them, as was the case of the Muslim Democratic Union (§§ 74-76).

c) *The trial of the 'Ottoman Party'*

In 2010, Ali Yozeirov (also known as Atanas Yordanov, one of the applicants in the Yordanovi v. Bulgaria) started once again a political party registration procedure. The name of the proposed party '*Union for Tolerance, Responsibility, Morality and Alternative Progress*' formed the abbreviation 'OTTOMAN' in Bulgarian. The constituent assembly of the new party was accompanied by protests by Bulgarian nationalists. The actions of the founders of the party demonstrate a desire for a more radical declaration of the right to ethnic self-determination in a way that is rarely demonstrated before the Bulgarian society. Formally the founding documents and goals of the 'Ottoman' party didn`t have an overtly ethnic character. Certain actions, however, which demonstrated (or rather hinted at) the ethnic nature of the party became grounds for the imposition of punishments based on Art 162(1) of the Penal Code (propagation of ethnic hatred) and for propagation of religious hatred based on Art 164(1) of the Penal Code[62].

[62] District Court of Shumen, Verdict No. 30 of 26 Apr 2018, case No. 398/2017.

As elements of criminal behavior exceeding the freedom of political speech and inciting religious hatred, the Bulgarian court – after a rather superficial analysis – has indicated:

(i) The use of the abbreviation 'OTTOMAN' [i.e. Turkish-imperialist], which the defendants in turn claimed was accidental[63];

(ii) The use of a crescent moon in the party flag, whose color combination of yellow and green was deemed by the court to be 'characteristic of Islamic culture and religion';

(iii) The wearing of a fez [i.e. a traditional Ottoman hat] by one of the founders of the party during its organizational meeting. The fez is seen as a symbol of Turkish rule in Bulgaria though its wearing has never been banned in the country. The court didn`t justify why it considered that the fez had certain religious connotations.

(iv) The founding meeting of the party was held on Good Friday in 2010, which was considered largely exaggeratedly a '*flagrant disregard for the Christian religion*';

(v) At the founding of the party, a wreath was placed in front of the monument of a Bulgarian national hero – colonel Konstantin Kavarnaliev (1866–1913). According to the court:

> *'The laying of a wreath on the monument of Colonel Kavarnaliev – a hero of the First and the Second Balkan wars who fought against the Turkish army, accompanied by the performance of the Muslim prayer 'namaz' has an ostentatious and sought-after effect of demonstrating Muslim traditions and disrespecting Christian customs of worship.'*

At the same time, the Bulgarian civil ceremony currently includes a tradition of civil tribute (for example, by laying wreaths). Christian church elements can sometimes be added to it (for example, a memorial service), but this is not mandatory. After all, certain passages of the judgment seem more problematic for religious and ethnic peace, stating that the performance of a Muslim prayer is incompatible with civic respect for a Bulgarian national hero. The wars to which the court refers are seen in official discourse as 'wars of national unification' rather than as 'wars against Turkey' with all the undesirable implications of internal and international tensions. The official national perspective traditionally prefers the idea that all Bulgarian citizens of differ-

[63] For the Bulgarian parties of the last several decades it has been a tradition to look for bright sounding abbreviations forming relevant words such as GERB (coat of arms) or DOST (friend in Turkish, a name chosen by a party targeting the electorate of the respective minority). From this point of view, it would not be an exaggeration to say that at least some of the parties are rather known by their abbreviations, and the specific names may even be to some extent arbitrary, seeking the right 'match' of letters in their abbreviated titles.

ent religions have a common history and a common national cause. The commented decision came into sharp conflict with this well-established thesis.

VI. Relevant anti-discrimination law provisions

The Bulgarian Law on Protection against Discrimination sets religion as one of the grounds on which both less favourable treatment (direct discrimination) and placing at a particular disadvantage resulting from apparently neutral measures (indirect discrimination) are prohibited. A special body, the Commission for Protection against Discrimination, was established by the same law in 2003, in proceedings before which fines for discrimination are imposed. In addition, the Law on Protection against Discrimination provides that in the event of discrimination, an action may be brought before the ordinary courts for the establishment of the alleged violation, its termination and the payment of damages, Art 71(1).

The greater part of this report comments on the relevant provisions of criminal law as the main means of setting limits to freedom of speech in relation to the religious sphere. At the same time, a number of 'everyday' offences in media publications, for example, could remain outside the criminal law sanctioning mechanism. Either due to their lesser public danger or due to disinterest or simply overloaded prosecution work. In this respect, the individuals concerned can only report to the prosecutor's offices to initiate criminal proceedings, without this meaning secure access to a court to consider whether a particular expression of opinion constituted a crime. The mechanism of the Law on Protection against Discrimination, on the contrary, enables any person affected by discrimination to lodge a complaint with the Commission for Protection against Discrimination within three years of the violation.

The following provision of the Law (Art 5) in question, prohibiting hate speech regarded as discriminatory speech, is important for the present analysis:

> *Harassment on the basis of the* [basic discriminatory] *characteristics, sexual harassment, incitement to discrimination, persecution and racial segregation, as well as the construction and maintenance of an architectural environment that impedes the access of persons with disabilities to public places, shall be considered discrimination.*

In this regard, the Bulgarian Commission for Protection against Discrimination has a long-standing practice that the publication of offensive, derogatory, demeaning material about members of a particular community defined according to a discriminatory marker constitutes 'verbal harassment'. This form of discrimination is punishable by fines under the said Law.

The Commission bases its practice on the ECtHR's understanding that the right to express an opinion or belief is a fundamental human right which cannot be absolute. It entails obligations to respect the rights and reputations of others, and if these obligations are breached, the hostile speech expressed may be prohibited and sanctioned

by the State.[64] The concrete dimensions of this protection in the Bulgarian context can be seen in the application of the term 'harassment'. According to the normative definition in para. 1 of the Additional Provisions of the Law on Protection against Discrimination

> *Harassment is any unwanted conduct on the basis of* [discriminatory] *characteristics…, expressed physically, verbally or otherwise, which has the purpose or effect of violating the dignity of a person and creating a hostile, offensive or threatening environment*.

As interpreted by the Commission, a verbal statement (e.g. in the form of a public speech or a printed publication) will constitute harassment if it '*has either the purpose or effect of violating the dignity of a person and creating a hostile, offensive or threatening environment*'. Such harassment includes '*publications, statements and other material that subjectively, falsely and tendentiously misrepresent, imply or incite humiliation or disparagement of a person or group of persons*'[65] on the basis of a discriminatory characteristic including religion.

As mentioned earlier, both discrimination against religious people and discrimination by religious people because of religious motives are possible (see above sect. IV.2.b).

a. *Religion as a source of discrimination*

As an example of the limits of free speech based on religious motives, we can analyse the case of a media publication of a party publication, which points out that a certain political force is fighting for a 'strong Orthodox Bulgaria', and points to the spread of homosexuality as a negative social trend of the pro-European development of the country. The Commission concluded that no verbal harassment has been carried out, belittling people with homosexual inclinations, although homosexuality was placed in the same group of 'godless' phenomena as paedophilia and incest. The Commission accepted that this merely stated that

> *'the view that homosexuality is something alien and wrong from the point of view of Eastern Orthodox morality* [was expressed]. *It is not the publication but this very morality that could be seen as possibly placing homosexual persons in an unfavourable, undesirable and undeserved position.'*[66]

[64] Commission for Protection against Discrimination, Decision No 288 of 21 Dec 2010, case No 235/2009.

[65] Commission for Protection against Discrimination, Decision No 379 of 5 Oct 2016, case No 325/2015.

[66] Commission for Protection against Discrimination, Decision No. 451 of 26 Nov 2015, case No. 170/2015.

It is difficult not to acknowledge that the opinion of the Commission for Protection against Discrimination allows very extreme expressions targeting a specific social group. There is a consensus that the repetition of commonly held religious beliefs should not be construed as hate speech. However, serious risks arise from this approach related to how one determines which religious viewpoint is generally accepted and who determines the alleged 'viewpoint of Eastern Orthodoxy' or of any other religion.

The state guarantees protection from religious discrimination, without interfering with disputes over beliefs within denominations. Thus, in a different case the Commission has held that it lacks jurisdiction to consider the claims of an individual who alleges to be exempt from the clergy because of discrimination based on his beliefs[67] implementing the principle of self-organization of religious denominations in accordance with their own religious traditions.[68]

b. *Religion and religious people as objects of discrimination*

In the absence of clear cases of 'pure' religious hatred sanctioned by anti-discrimination law, numerous examples can be given in which religion is mentioned as a discriminatory attribute along with ethnicity. This link between ethnicity and religion, peculiar to the Balkans, leads the Commission to decisions which generally declare that the harassment carried out is 'ethnic and religious', even without detailed facts about the religious orientation of the ethnically directed offensive statements.[69] Discrimination on general ethno-religious xenophobic grounds is analysed especially in relation to the migrant crisis in Europe and the spread of hate speech against those coming from African countries.[70]

An emblematic case where ethno-religious hatred has been met with punitive action can be cited concerning statements made by a renowned Bulgarian journalist and parliamentarian associated with the nationalist spectrum. In the context of a complaint filed by a Bulgarian woman of Armenian origin, the Sofia District Court concluded that expressions such as '*there should be only Bulgarians in parliament*' and accusations against the corrupt political class for allowing high ethnic criminality

[67] Supreme Administrative Court, Decision No. 8296 of 13 June 2011, case No. 6841/2010.

[68] See B. Dimitrov, R. Stoyanov, *Handbook of Anti-Discrimination Law* [In Bulgarian] (Sofia, Bulgarian Helsinki Committee, 2019), pp. 164.

[69] See for an example Commission for Protection against Discrimination, Decision No. 294 of 12 Jul 2018, case No. 17/2018.

[70] Commission for Protection against Discrimination, Decision No. 288 of 21 Dec 2010, case No 235/2009.

'*not investigated under foreign influence*', resulting in the country being led towards becoming '*a Turkish province* [or] *a Jewish colony*,' constituted hate speech[71].

VII. Recent criminal law reform and legislation against Holocaust denial

Our analysis so far has revealed a relatively mature and stable set of norms governing the prohibition of religious hate speech, along with corresponding penalties for its transgressions. Evidently, the key driving force behind future developments lies in the gradual evolution of jurisprudence and, notably, the shifting stance of law enforcement authorities concerning hate speech offenses. In concluding part of this report, I want to emphasise the presence of two crucial ongoing processes in Bulgaria, which could significantly shape the landscape of hate speech prohibitions. Firstly, there was a recent reform pertaining to legislation against hate speech. Secondly, during the summer of 2023, a notable surge in anti-Semitic occurrences was observed, both on the Internet and within the nation's political sphere. These factors have their impact on where our subject is headed in the future.

If we look at European standards in a comparative perspective, Bulgaria has long lagged behind in providing legal means to combat certain aspects of hate speech. The European Commission has opened a procedure against the country for incorrect transposition of the of European Framework Decision on Combating Racism and Xenophobia (2008/913/JHA)[72]. In this regard, the Commission expressly stated that

> 'Bulgaria has failed to transpose correctly the criminalisation of specific forms of hate speech, which incite violence or hatred, namely the public condoning, denial or gross trivialisation of international crimes and the Holocaust.' [73]

At the end of 2022, the Parliament almost succeeded in introducing corrective amendments to the Penal Code[74], but after the same had been adopted at the first reading, the National Assembly was dissolved. This was an attempt to meet the requirements of the Framework Decision, as has already been done in part by amendments to the legislation in 2009 and 2011.[75] In the summer of 2023 the Parliament adopted a package of criminal law changes including the relevant reform. A key aspect of the

[71] Sofia District court, Decision of 21 Jul 2006, case No 2860/2006.

[72] See Th. Wahl, 'Commission Launches/Continues Infringements Proceedings in Several JHA Matters', *EUCRIM*, 20 Mar 2021 - https://eucrim.eu/news/commission-launchescontinues-infringements-proceedings-in-several-jha-matters/.

[73] See https://ec.europa.eu/commission/presscorner/detail/en/inf_21_441.

[74] See Legislative draft proposal registered in the Bulgarian Parliament with No. 48-202-01-15 of 25 Oct 2022, Online access: https://www.parliament.bg/bg/bills/ID/164389.

[75] See the commentary on these amendments and the criticism of their incompleteness by Prof. Plamen Panayotov, 'The Gaps in Compliance with EU Criminal Law Standards in the Field of Racism and Xenophobia under the Bulgarian Penal Code' [In Bulgarian] (2011) De Jure, Vol. 2, Issue 1, pp. 108-115.

long-delayed changes was the introduction of sexual discrimination as an aggravating motive for many crimes.

As regards the subject of this report, it should be mentioned that a new paragraph was added to Art 164, providing for more severe liability if the desecration '*is carried out for racist or xenophobic motives*', Art 164 (3). Heavier penalty was also introduced for:

> *manifestly inciting to commit a criminal offence by propagating to a large number of people through the dissemination of printed matter or in any similar manner… when committed for racist, xenophobic or sexual orientation motives (Art 320(1) in conjunction with para. 3).*

From this point of view, it seems that the scope of offences which, because of the dimensions of ethno-religious hatred presented in Bulgaria, would also be regarded as xenophobic is now widened, and their boundary with offences against religion would often be difficult to draw.[76]

Thus, in 2023, the idea of criminalizing the Holocaust in Bulgaria was finally realized. This was done without explicitly referring to it, but through a more general two-step strategy:

(i) First, since 2011 Bulgaria has criminalized the belittling of crimes against humanity, and in its latest wording the provision of the relevant Art. 419a(1) of the Penal Code reads as follows:

> *'Whoever publicly justifies, denies or grossly belittles a crime under this chapter* [entitled ‚Crimes against peace and humanity'] *and the act is committed in a manner likely to create a risk of violence or hatred against individuals or groups of people associated by race, colour, religion, descent, national or ethnic origin, shall be punished by imprisonment for one to five years.'*

The specificity here is that a crime against peace and humanity should be justified, denied or belittled while creating a risk of violence or hatred. The norm has never been applied in its previous wording, which is why its detailed analysis has been avoided in Bulgarian criminal law scholarship.

(ii) A The actual step of criminalizing Holocaust denial was taken in the amendments of the summer of 2023 with the addition of the second paragraph of Article 419a, according to which the same punishment is imposed:

> *'*[W]*hen the offence under this Article was committed during and in connection with the National Socialist regime.'*

[76] For argumentation that the concept of xenophobic includes all grounds for discrimination except race, see Iv. Pushkarova, '*Discrimination Motives in Crime Perpetration. Distinction from Hooligan Motives and Personal Motives'* [In Bulgarian] (2011) 5 *Contemporary Law*, pp. 23-41.

Although it is not stated that this is a reference to the 'National Socialist regime in Germany', it is obvious that this is the legal technique by which the punishment of Holocaust denial as one of the crimes against peace and humanity committed during the Third Reich is sought. At the same time, in the very Explanatory memorandum supporting the first legislative proposal for that amendment, the Bulgarian Council of Ministers admited that, '*according to the European Commission… Bulgaria has omitted to refer to the crimes committed by the war criminals of the European Axis countries*'. However, the given new provision refers only to the 'National Socialist regime' and not to the 'crimes of the Axis countries' (of which Bulgaria was one). Turning to the details, we see that the Framework Decision itself speaks of 'publicly condoning, denying or grossly trivializing crimes defined in Art 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945.' The said Art 6 of the Charter was directed against 'the major war criminals of the European Axis countries' and not only against representatives of the National Socialist regime in Germany in the period 1933–1945. While Bulgarian criminal law doctrine has explicitly pointed to the need to adequately transpose these provisions into the Penal Code[77], this is politically problematic due to conflicts over historical memory.

Why did the legislative materials accompanying the bill explicitly limit the relevant Axis crimes to those of the Nazi regime in Germany[78]? Why is the issue not discussed, and the cumbersome phrase '*crimes committed during and in connection with the National Socialist regime*' likely to create problems of judicial interpretation? Here we confront some specific historical dimensions and political stakes of hate speech regulation. In Bulgaria, the memory of the Second World War is still problematic. The country first participated on the side of the Axis and then fought for the Allies. The Communist regime created a mythology in favor of the partisan movement and the subsequent 'People's Court' (an extraordinary tribunal, both against war criminals and collaborators and a means of purging in favor of the new regime). After the democratic changes, the 'pendulum of historical imagination' went to another extreme[79], presenting in a positive light the development of the country in the 1930s, the territorial 'gains' during the war, the refusal to send soldiers to the Eastern Front, and the rescue of Bulgarian Jews who, under public pressure, were not sent to the Death Camps. Such a narrative in turn understates the political atrocities

[77] Pl. Panayotov, 'The Gaps in Compliance with EU Criminal Law Standards in the Field of Racism and Xenophobia under the Bulgarian Penal Code', p. 114.

[78] Legislative draft proposal registered in the Bulgarian Parliament with number 49-353-03-6 of 28.07.2023, Online access: https://parliament.bg/bg/bills/ID/164861.

[79] See the analysis of Stefan Dechev, 'Why the struggle for memory around World War II and Bulgaria continues' [In Bulgarian], *Svobodna Evropa*, 15 Jul 2023, https://www.svobodnaevropa.bg/a/32504892.html.

during an essentially authoritarian monarchical regime, the subsequent collaboration with the Nazis, the introduction of quasi-Nuremberg legislation, and the complicity of the Bulgarian authorities in the Nazi extermination of the Jews of the Bulgarian-occupied territories of Macedonia and Thrace.

In a way that is spectacular for the researcher but problematic for the citizen, the legitimation of contemporary political causes with images from the past makes societies live as if with the battles of the past, taking sides and depriving themselves of the possibility of critical evaluation. From this point of view, any criminal law regulation questioning the ideal image of the Kingdom of Bulgaria seems impossible to be accepted by the Bulgarian Parliament. Let us return specifically to the criminalisation of publicly condoning, denying or grossly trivialising the crimes of the past '*directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin*.' In the Bulgarian context, this would raise precisely the issues of anti-Semitic crimes. The development of the public debate in 2023 shows major problems in making sense of the historical past in this respect as well. In the current year Bulgaria celebrated the 80th anniversary of the Rescue of the Jews from the 'old borders' in 1943, when mass protests led by the Bulgarian Orthodox Church and intellectuals stopped the deportations. In the same year, however, 11,343 people were deported from the 'new territories' occupied by Bulgaria.[80] The official commemorations completely overlooked the second unflattering fact, which was met with discontent by the country's Jewish community. This is indicative of how obscure the memory of the Holocaust is in Bulgaria[81] and could be an obstacle to the application of the new criminal provision.

VIII. Final remarks

In the summer of 2023, in the context of the political confrontation over the war in Ukraine, an increase in anti-Semitism was first mentioned in Bulgarian society. Leaders of a radical nationalist party were investigated for crimes of incitement to discrimination on religious grounds under Art 164(1). Counter-accusations of 'anti-Bulgarian speech' have become part of the political discussion, again raising the

[80] The complete history of the persecution of Bulgarian citizens of Jewish origin in the 'old territories' and of the deportation of Jews from the 'new territories' (who were not granted citizenship after the occupation) is analysed from a legal point of view by Zdr. Krasteva, *Legal Aspects of the State Anti-Jewish Politics in the Kingdome of Bulgaria* (1940-1944) [In Bulgarian] (eBook, Berlin, Ekstaz, 2018), Free access: https://www.academia.edu/36430954/Правни_аспекти_на_държавната_антиеврейска_политика_в_Царство_България_1940_1944_г_Legal_Aspects_of_the_State_Anti_Jewish_Politics_in_the_Kingdome_of_Bulgaria_1940_1944_.

[81] Here I refer the reader again to historian Stefan Dechev and his article 'How the Bulgarian memory of the Holocaust has changed over the years' [In Bulgarian], *Svobodna Evropa*, 04 Feb 2022, https://www.svobodnaevropa.bg/a/31686441.html.

question of the dimensions of hate speech. The main accusation against the Bulgarian politician of Jewish origin became a cynical remark against Orthodoxy, which he allegedly said years ago. His political critics circulated a meme threatening him with a gas chamber and mocking the Holocaust. These issues become particularly acute in a digital environment where any individual can propagate hate, and the targeted use of social media can multiply the effect of such posts. Comparing to other national reports, the reader will likely find this report omits to discuss the dimensions of combating hate speech in the digital environment. However, this is due to the lack of such regulation in Bulgaria, other than the general criminal law norms that are also applicable to online publications. In practice the prosecutor‘s offices does not have the capacity to address the vast number of comments and posts with similar content. This essentially unregulated nature of spontaneous propaganda on the internet has led, for example – again in 2023 – to a public debate about the extent to which Facebook administrators (and not the Bulgarian authorities) are responsible for the problem of fake news and hate speech in Bulgaria. These concrete details of public life lead me to conclude that the demonstrated disregard for some religiously-oriented hate speech combines with social media as a wide area of practical freedom for the dissemination of fake information and hate speech. Legal regulation in this sphere of communication will be very important insofar as our societies of modern technology will continue to be subject to one of their most ancient internal divisions – that along religious and ethnic lines with the resulting challenges of diversity and risks of separation and confrontation.

THE RELATIONSHIP BETWEEN FREEDOM OF SPEECH AND RELIGION IN ESTONIA

Merilin Kiviorg[1]

I. Freedom of Conscience, Religion, and Expression

1.1. The fundamental norms regulating freedom of expression

The Constitution of the Republic of Estonia defines fundamental rights, liberties and duties in its second chapter, immediately after the seven general provisions listed in Chapter 1. The fact that the fundamental rights have such a prominent position reflects on the interpretation of the entire Constitution and testifies that the intention after the collapse of the Soviet occupation was to construct a society that would adhere strongly to the protection of human rights. One of the main principles of the Constitution postulates the equality of Estonian citizens and citizens of foreign states and also stateless persons (§ 9(1)). The Constitution extended fundamental rights to legal persons (e.g., registered religious organisations) insofar as these rights are in accordance with the general aims of legal persons and with the nature of such rights (§ 9(2)).

The relationship between freedom of speech and religion in Estonia is multifaceted. Freedom of expression is protected by §45 of the Estonian Constitution, which sets forth that everyone has the right to freely disseminate ideas, opinions, beliefs and other information by word, print, picture or other means. This right may nevertheless be restricted by law to *protect public order, morals, and the rights and freedoms, health, honour and good name of others*. This right may also be circumscribed by law with respect to public servants employed by the national government and local authorities or in order to protect a state secret, trade secret or information received in confidence which has become known to a public servant by reason of his or her office,

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and to protect the family and private life of others as well as in the interests of the administration of justice. The Constitution also stipulates that there is no censorship.

Freedom of religious expression is also protected by §40 of the Constitution. The Estonian Constitution expressly provides protection for the freedom of religion or belief. Paragraph 40 sets out that:

— *Everyone has freedom of conscience, religion and thought. Everyone may freely belong to churches and religious associations. There is no state church.*
— *Everyone has the freedom to practise his or her religion, both alone and in a community with others, in public or in private, unless this is detrimental to public order, health or morals.*

Paragraph 40 is deemed to protect a wide variety of beliefs and their practices. Analogously to Article 4 of the International Covenant on Civil and Political Rights (ICCPR), even during a state of emergency or a state of war, rights and liberties in §40 of the Constitution may not be restricted. This is stipulated in §130 of the Estonian Constitution. Like the ICCPR, freedom of expression (§45) is not listed as a non-derogable right.

Paragraph 41 on the freedom of belief[2] and §42 on the privacy of one's religion and belief[3] add strength to the commitment to freedom of religion or belief.

The religious freedom guarantee of §40 of the Constitution has to be interpreted in conjunction with the other articles of the Constitution[4] when one is considering the freedom of religion or belief, including freedom of expression in §45.

During its deliberations in the early 1990s the Constitutional Assembly paid significant attention to the UN and European human rights treaties. At almost every session, membership of the UN and the concomitant obligations vis-à-vis human rights were discussed or at least mentioned.[5] The importance of the UN and European human rights treaties in the creation of the Constitution has also been mentioned by the Supreme Court.[6] Thus, the wording of the constitutional provisions was influenced by international instruments, including the UDHR, ICCPR and ECHR. It

[2] §41. *Everyone has the right to remain faithful to his or her opinions and beliefs. No one shall be compelled to change them. Beliefs cannot excuse a violation of the law. No one can be held legally liable because of his or her beliefs.*

[3] §42. *State agencies, municipalities and their officials shall not gather or store information about the beliefs of an Estonian citizen against his or her free will.*

[4] Collective freedom of religion is also protected by Article 47 concerning the right to assembly and by Article 48 concerning the right to association: each provides specific protection for different aspects of religious freedom.

[5] M. Kiviorg, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level in Estonia' in Christof Heyns, Frans Jacobus Viljoen, and Rachel Murray (eds.), *The Impact of the United Nations Human Rights Treaties on the Domestic Level: Twenty Years On* (2nd revised edition, The Netherlands: BRILL, 2024), p. 423.

[6] Supreme Court *en banc* Case no 3-1-3-10-02 (17 March 2003) [21].

is also interesting to mention that, unlike its international counter-parts (Art 10 of the ECHR and Art 19 of the ICCPR), freedom of expression in §45 of the Estonian Constitution, like §40 of the Constitution on freedom of religion or belief does not list national security as a ground for limiting this freedom. This can be understood as a strong message concerning the importance of both rights in Estonian constitutional framework, which is understandable considering that the constitution was adopted in 1992 after the end of Soviet occupation, during which neither of these two rights was protected in practice and according to international human rights standards.

Unlike the structure of the provisions of international instruments, the paragraph on freedom of expression does not include the freedom to hold or form an opinion (*forum internum*). This is protected by §41 of the Constitution, which stipulates that 'Everyone has the right to remain faithful to his or her opinions and beliefs. No one shall be compelled to change them. Beliefs cannot excuse a violation of the law'. It also adds that no one can be held legally liable because of his or her beliefs. Paragraph 41 does not contain limitation clauses. The right to confidentiality of correspondence is also covered by a separate article in the Constitution (§43) as well as the right to receive freely all information disseminated for public use (§44). Paragraph 17 is also relevant in setting forth that: 'No one's honour or good name shall be defamed'. Paragraph 25 assures that everyone has the right to compensation for moral and material damage caused by the unlawful action of any person. Needless to say, everyone whose rights and freedoms are violated has the right of recourse to the courts (§15).

Regarding the constitutional framework governing free speech, it is also important to mention the equality and non-discrimination provision in the Constitution. According to the first sentence of §12 everyone is equal before the law. The second sentence of §12 sets out the principle of non-discrimination, prohibiting discrimination on the basis of nationality, race, colour, sex, language, origin, religion, political or other views, property or social status, or on other grounds.

Paragraph 12(2) also establishes the framework for hate speech, stipulating that 'incitement to ethnic, racial, religious or political hatred, violence or discrimination is prohibited and punishable by law'. [7] On that basis, §151 (Incitement to Hatred) of the Estonian Penal Code (Section on Offences against Civil and Political Rights) prohibits activities which publicly incite hatred, violence or discrimination *inter alia* on the basis of religion and which result in danger to the life, health or property of a person, and will be punishable by a fine or by detention [§151(1)].

As a result of the Russia-Ukraine war, an additional provision (§151[1]) was added to the Penal Code prohibiting publicly exhibiting any symbol relating to an act of aggression, genocide, crime against humanity or commission of a war crime in a manner

[7] Estonian Constitution, Art 12 (2), RT 1992, 26, 349.

that supports or justifies such acts. Needless to say, the Penal Code also deals with crimes of terrorism and crimes against humanity.

Two more provisions need to be flagged up as relevant for the current topic on the intersections of freedom of religion and freedom of speech, namely, §154 (violation of freedom of religion), which prohibits 'any activity that knowingly interferes, without legal grounds, with the acknowledgement or declaration of religious beliefs or the absence thereof, or the exercise of religion or religious rites'). The chapter on 'Offences against Political and Civil Rights' also has a specific section dealing with offences against equality. Article 152 of the Penal Code declares the penalty for the violation of equality: 'Unlawful restriction of the rights of a person or granting of unlawful preferences to a person on the basis of his or her nationality, race, colour, sex, language, origin, religion, sexual orientation, and political opinion, financial or social status is punishable by a fine or by detention.' The same action, if committed at least twice or if significant damage is caused to the rights or interests of another person protected by law or to public interests, is punishable by a pecuniary punishment or up to one year of imprisonment. Since 2015, a legal person can also be punished for acts laid down in Article 152.[8]

Estonia can be said to follow a monistic approach to the relationship between international and municipal law. Thus, the right to freedom of expression and freedom of religion are also protected by international law. Paragraph 3 of the Estonian Constitution stipulates that universally recognized principles and standards of international law shall be an inseparable part of the Estonian legal system. They are superior in force to national legislation and binding for legislative, administrative and judicial powers. It should be noted that §3 incorporates both international customary norms and general principles of law into the Estonian legal system. The international treaties (ratified by Parliament) are incorporated into the Estonian legal system by §123(2) of the Constitution, which states that if Estonian legal acts or other legal instruments contradict foreign treaties ratified by the *Riigikogu* (Parliament), the provisions of the foreign treaty shall be applied. Estonia is a party to most European and universal human rights instruments[9] and a member of many international organizations, including the United Nations, the Council of Europe and the Organization for Security and Cooperation in Europe (OSCE), and has ratified key conventions protecting freedom of religion or belief.

Estonia joined the European Union on 1 May 2004 and thus, EU law is relevant regarding freedom of expression in Estonia. However, the European Commission

[8] M. Kiviorg, Law and Religion in Estonia (3rd edition, Kluwer Law International, 2021).

[9] *Inter alia*, the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), International Covenant on Civil and Political Rights (1966), and International Convention on the Elimination of All Forms of Racial Discrimination (1965).

brought infringement proceedings against Estonia in 2020 when it found that the country's Penal Code did not fully comply with the Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law.[10] The following subchapters will explore in more detail some of these issues as they occur in the intersection of freedom of religion or belief and freedom of expression in Estonia.

1.2. **Blasphemy, Religious Insults and Hate Speech**

The independent Republic of Estonia emerged in the aftermath of World War I (1914–1918), when it broke away from the Russian empire. On 19 November 1918, the Provisional Government of the Republic of Estonia decided, with regard to the transitional period, to keep all previous laws in force within the territory of Estonia that were in effect within the former united Governorates of Estonia and Northern Livonia prior to the Bolshevik coup of October 1917.[11]

Thus, the young Estonian Republic inherited the Russian criminal code, which did not comply with modern development and understandings of criminal law and policy in Europe. Hence, it required substantial reform. At the session on 29 July 2021 the call of the Estonian Parliament for adoption of the Russian 1903 Penal Law (Ugolovnoe uloženie) to meet the conditions of the Estonian state marked the start of the criminal reform.[12] This was also needed so that it could be taken into account that the first Estonian Constitution (ratified in June 1920)[13] was influenced by the liberal thinking prevalent in Europe after World War I. The 1920 Constitution emphasized the principle of a state based on the rule of law. One of its essential components was the acknowledgement of the fundamental rights of the person. As a result, it became one of the most democratic constitutions in Europe at that time.

[10] ERR, 'Hate speech law will not come up for second reading before spring' 21 Dec 2023 <https://news.err.ee/1609201735/hate-speech-law-will-not-come-up-for-second-reading-before-spring> (accessed 1 Jun 2024); See also Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

[11] P. Pikamäe, 'Eesti karistusõigus: XX sajandi reformidest Euroopa Liidu karistusõiguse sünnini' (Kriminaalpoliitika konverents 2013) < https://www.riigikohus.ee/sites/default/files/elfinder/dokumendid/ettekanne_konverents_okt_2013-2.pdf> (accessed 1 June 2024).

[12] G. Ambach, 'Karl Saarmanni fenomen Eesti Vabariigi esimeses kriminaalfeformis' in Georg Ambach, Tanel Kalmet, Meelis Eerik (toim.) Konverentsi „Eesti karistusõiguse arenguteed omariikluse oludes" (Tallinn: Akadeemia Nord Toimetised, 2005), p. 6.

[13] Estonian Constitution, RT 1920, 113/114, 243. The Constitution came into force on 21 Dec. 1920. In 1933 the Constitution was substantially changed to the extent that it started to be called 1933 Constitution. Legally speaking, the 1920 Constitution was simply amended, and the amendments entered into force on 24 Jan. 1934. R. Narits *et al*., 'Sissejuhatus' in Ü Madise jt (toim), *Eesti Vabariigi põhiseadus*. *Kommenteeritud väljaanne* (Tallinn: Juura, 2017); M Luts-Sootak H Siimets-Gross, Eesti õiguse 100 aastat (Post Factum, 2019) 19.

The significant difference that also determined the approach taken to religion in the criminal law was the fact that Russian empire had a state church that was explicitly taken out of the Estonian Constitution, which stated that 'there is no state religion'. The Estonian Criminal Code developed in the 1920s and enacted in 1935 did not include a section on crimes against religion, meaning that crimes targeting religion were decriminalized. However, it would be wrong to assume that this was a revolutionary change, as the reforms of 1905 and 1906 in the Russian empire, and later the legal acts of the Russian Provisional Government, and the sovereign legal acts preceding the Estonian constitution, had already set the stage.[14] Kalmet points out that the decriminalization of religious crimes, incurring a lengthy process in Imperial Russia and continuously in Estonia, signified a shift of values – many deeds considered religious crimes in older acts, were still considered to be criminal in nature in the later ones, but were no longer dealt with as religious crimes (for example, the destruction of (church) property or the desecration of graves).[15]

Religion was still mentioned in some of the provisions: disorder during a religious service, as stated in § 254, section 3, and offending religious feelings, as stated in § 507. The last paragraph stipulated that 'A person guilty of deliberately publicly *insulting religious feelings of a person* belonging to a religious association registered in the Republic of Estonia, by insolently defaming God or the religious association shall be punished by: arrest for not more than six months or a fine of not more than five hundred *kroons*.'[16] However, one can see that the definition of the crime was directed towards the protection of the individual's feelings and the protection of public order, rather than religion per se.

Although the 1930s saw significant political changes in Estonia, characterized by the centralization of the state administration, the concentration of power, a decline in democracy and the expansion of state control, it did not influence as such the approach to excluding 'blasphemy' or 'insult to religion' from the criminal law. The period from 1934–1939 is commonly called 'the era of silence'. In 1934 the Churches and Religious Societies Act was enacted, not by Parliament but by a decree of the State Elder (President).[17] This Act established different legal treatment for churches and for other religious societies, and it set out special provisions for the churches

[14] T. Kalmet, 'Karistusnorm ja normi norm (religioonikuritegude dekriminaliseerimise tähendus)' in Georg Ambach, Tanel Kalmet, Meelis Eerik (eds.), p. 21-22.

[15] *Ibid.,* p. 22.

[16] *Süüdlast selles, et ta tahtlikult avalikult haavas Eesti Vabariigis registreeritud usutunnistuslikku ühingusse kuuluva isiku usutunnet Jumala või usutunnistusliku ühingu jultunud teotamisega, karistatakse: arestiga mitte üle kuue kuu või rahatrahviga mitte üle viiesaja krooni. Kriminaalseadustik – Riigikogu poolt 26.03.1929.a vastuvõetud* 396 < https://estmark.org/uncategorized/kriminaalseadustik-1929/ > (accessed 1 July 2024).

[17] RT 1934, 107, 840.

in general. The 1934 Act also appeared to impose the idea of 'one creed, one religious association'. There is no recorded evidence of serious religious persecution or discrimination in the 1920s. However, in 1935, mirroring attitudes in some other European countries at the time, the Estonian government prohibited the activities of Jehovah's Witnesses as being a threat to Estonia's internal and foreign policy/security. There is no evidence of equivalent discrimination against other religious communities during the first independence period, even though a large number of Christian communities, Jewish and Muslim communities had established their organizations between 1918 and 1940.

There have also been no provisions in Estonian legislation on 'blasphemy' or 'insult to religion' since the restoration of independence in 1991. In that sense Estonia follows the opinion expressed in the UN Human Rights Committees General Comment no 34 stating that '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'.[18]

As noted, hate speech is regulated by Estonian Penal Code. According to the Penal Code activities which publicly incite hatred, violence or discrimination on the basis of religion and which result in danger to the life, health or property of a person are punishable by a fine or by detention (§151(1)). In certain circumstances such behaviour may result in more severe punishment. This crime can also be attributable to a legal person, for example, to a religious community, which can be fined. It is noticeable that the threshold for a speech to be qualified as a hate speech is very high. Hence, there have been no major court cases related to hate speech, including on the grounds of religion.

The narrow scope of the provision has, over the years, been criticised by multiple international human rights monitoring bodies (e.g., by the UN Human Rights Committee in 2019 in its concluding observations on Estonia) and by the European Union.[19] In the Human Rights Committees' view the Penal Code does not provide comprehensive protection against hate speech and hate crimes, largely due to, *inter alia*, the light penalties and the high threshold for the offence of incitement to hatred, violence or discrimination requiring 'danger to the life, health or property' of the

[18] UN Human Rights Committee, 'General Comment 34: Article 19: Freedoms of Opinion and Expression ', UN Doc CCPR/C/GC/34, adopted at its 102nd session, Geneva, 11–29 July 2011, 12.09.2011.

[19] J. Värk, 'ERR Brüsselis: Eesti pole koos Rumeeniaga ainsana EL-is vihakõnet kriminaliseerinud', *ERR,* 16 Nov 2020 <https://www.err.ee/1159784/err-brusselis-eesti-pole-koos-rumeeniaga-ainsana-el-is-vihakonet-kriminaliseerinud>. Estonia has not transposed the Council Framework Decision 2008/913/JHA of 28 Nov 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

victim.[20] The state provided its reasons in the latest report to the CERD Committee in 2019. This report emphasises the value of the right to freedom of speech in Estonian society. It explains the preference for settling such disputes through civil law measures (including in the court),[21] as finding an adequate balance between free speech and other rights may otherwise be difficult.[22] The report reiterates that accusations can be brought to court by anyone whose rights have been infringed. This points to the understanding that a broad definition of hate speech in criminal law may have a chilling effect on freedom of speech.[23] However, the truth is that, so far, it has been almost impossible to prosecute any hateful speech under this penal code provision. This means that this provision is quite dysfunctional. This has also been a reason why some of these offences have been subsumed whenever possible under other provisions of the penal code, for example, under breaches of public order.

The European Commission has launched infringement proceedings against Estonia for not fully criminalizing hate speech as required by European Union rules on combating certain forms of expressions of racism and xenophobia by means of criminal law.[24] The European Commission brought infringement proceedings against Estonia in 2020 as it considered that the country's Penal Code did not go far enough in regulating hate speech.[25] Like the various UN monitoring bodies, the European Commission is of the opinion that Estonia has not adequately criminalized public incitement to violence or hatred, nor has it provided sufficient penalties for such offenses.[26] Additionally, Estonia has not ensured that racist and xenophobic motivations are considered to constitute aggravating circumstances in the context of crimes.[27] These proceedings are part of the EU's broader efforts to ensure that all member states comply with the 2008 Framework Decision on combating racism and xenophobia by means of criminal law. Estonia, along with Romania, has been identified as not meeting these requirements.[28]

[20] HRCtee, Concluding Observations, Estonia, UN Doc CCPR/C/EST/CO/4 (18 Apr 2019), par 12.

[21] Some of this type of case have also been referred to the ECtHR. See, e.g., *Tammer v Estonia,* App no 41205/98 (ECHR, 4 Apr 2001) and *Delfi v Estonia,* App no 64569/09 (ECHR, GC, 16 June 2015).

[22] National Report, CERD, Estonia, UN Doc CERD/C/EST/12-13 (15 Oct 2019) par 106.

[23] M. Kiviorg, 'The Impact of the United Nations Human Rights Treaties'.

[24] ERR, 'European Commission launches infringement proceedings against Estonia' 10 2020 < https://news.err.ee/1159938/estonia-one-of-two-eu-countries-not-to-criminalize-hate-speech>

[25] ERR, 'Hate speech law will not come up for second reading before spring' 21 Dec. 2023 <https://news.err.ee/1609201735/hate-speech-law-will-not-come-up-for-second-reading-before-spring> (accessed 1 Jun. 2024).

[26] ERR, 'European Commission launches infringement proceedings against Estonia'.

[27] *Ibid.*

[28] ERR, 'Estonia one of two EU countries not to criminalize hate speech' < https://news.err.ee/1159938/estonia-one-of-two-eu-countries-not-to-criminalize-hate-speech> (accessed 1 July 2024).

However, several attempts have been made to modify the provisions laid down in the penal code. For example, in 2013 the draft amendments to the Penal Code envisaged broadening the applicability of criminal liability for incitement to hatred. According to this draft act, hate speech did not necessarily have to result in danger to the life, health or property of a person. The proposed amendments (the broadening of the scope of the provision) caused an intense negative response from the Estonian Council of Churches. The Council feared that any religious speech from the pulpit or otherwise concerning objection to abortion or homosexuality could have been termed as a hate crime. There was no reaction to the law by Islamic or Jewish communities.[29] Eventually the disputed amendments were not included among those that came into force on 1 January 2015.[30] However, the debates are still ongoing. Only recently, in 2023, another attempt was made to change the provision. The debates are ongoing.

There are no provisions in the Penal Code specifically concerned with the 'defamation' of religion or religious person. As noted earlier, §17 of the Estonian Constitution establishes that no one's honour or good name should be defamed. The provision does not proscribe criminalisation of that activity. In Estonia, criminal proceedings can be initiated only against someone who has insulted or disseminated defamatory expressions against a representative of state authority, the court or a judge, or against a person enjoying international protection. Defamation against private persons is not punished under the Penal Code in Estonia. Previous (1992) Criminal Code had a provision on defamation (§129).[31] Drafters of the new law were of the opinion that defamation is sufficiently covered by other provisions which deal with specific circumstances.

With respect to private persons, defamation cases can be dealt with under civil law. Paragraph 1046 of the Law of Obligations Act (Unlawfulness of damaging personality rights) sets forth that 'the defamation of a person, *inter alia* by passing undue value judgement, by the unjustified use of the name or image of the person, or by breaching the inviolability of the private life or another personality right of the person is unlawful unless otherwise provided by law. Upon the establishment of unlawfulness, the type of violation, the reason and motive for the violation and the gravity of the violation relative to the aim pursued thereby shall be taken into consideration'.[32] The law also provides a mechanism for compensation.

[29] M. Kiviorg, *Law and Religion in Estonia.*

[30] The current Penal Code (*Karistusseadustik*) was adopted on 6 June 2001 and came into force on 1 September 2002. It repealed the earlier code, which had been in force since 1 June 1992. In 2012 the Ministry of Justice initiated major amendments/revisions of the Penal Code. The amendments came into force on 1 January 2015.

[31] Kriminaalkoodeks.– RT 1992, 20, 288.

[32] Law of Obligations Act[1].– RT I, 04.07.2024, 17.

1.3. **Context of Public Debate**

In addition to the debate on hate speech that was mentioned earlier, in the context of the Russian-Ukrainian war, the statements of Patriarch Kirill in support of the war have caused a fierce debate centred on war propaganda and the existence of the Russian Orthodox Church in Estonia. This debate resulted in a parliamentary declaration in 2024 condemning the Russian aggression and also the Russian Orthodox Church (ROC) as a tool and promoter of this aggression. The statement was sparked by the 'Present and Future of the Russian World' adopted by the World Russian People's Council (established under the auspices of the ROC and led by the Moscow patriarch) describing the war of aggression in Ukraine as a holy war both against Ukraine and the entire West, and also viewing a wider expanse of territories than the former Russian Empire as part of the Russian Federation's sphere of influence.

The Estonian Parliament has initiated a process aimed at declaring the Moscow Patriarchate an organisation supporting military aggression on the basis that the Estonian state has the obligation to protect the Estonian population from the effects of a terrorist regime.[33] Due to the complexity of the issue, and the ongoing public and legal debate, this issue cannot be treated here in full length.

In recent years different media outlets have published opinion pieces by members of the far-right Conservative People's Party (EKRE) of Estonia and using anti-immigration rhetoric and Islamophobic statements. For example, in one opinion piece, Jaak Madison promised to focus on 'curbing the spread of terrorism and Islam.'[34] In another article, Martin Helme spoke out against multiculturalism, using France and Sweden as cautionary examples for the spread of Islam.[35] However, most of the media coverage on Islam or Muslims has focused on incidents in other countries, usually in a neutral way though occasionally using extreme examples of crimes committed by Muslims in a sensationalist manner, for example, 'DIE, DIE, DIE! Yelled a Refugee

[33] Ministry of Interior, 'Declaring the Moscow Patriarchate an institution supporting military aggression' < https://siseministeerium.ee/en/declaring-moscow-patriarchate-institution-supporting-military-aggression> (accessed 12 May 2024); Riigikogu, Riigikogu avaldus „Moskva patriarhaadi kuulutamisest Venemaa Föderatsiooni sõjalist agressiooni toetavaks institutsioo ooniks" 420 AE, 6 May 2024 < https://www.riigikogu.ee/tegevus/eelnoud/eelnou/a63612bd-e8b4-4649-a0c7-38f852c7c34b/riigikogu-avaldus-moskva-patriarhaadi-kuulutamisest-venemaa-foderatsiooni-sojalist-agressiooni-toetavaks-institutsiooniks/> (accessed 12 May 2024).

[34] K. Leibold, 'Jaak Madison: rahvuskonservatiivid kui uus tegus jõud Euroopas', *ERR*, 21 May 2019, <https://www.err. ee/943716/jaak-madison-rahvuskonservatiivid-kui-uus-tegus-joud-euroopas>.

[35] 'Rahandusminister Martin Helme Soome väljaandele: Eestis käib kultuurimarksistlik rünnak rahva vaimu vastu', *Lõunaeestlane*, 11 May 2019 <https://lounaeestlane.ee/rahandusminister-martin-helme-soome-valjaandele-eestis-kaib-kultuurimarksistlik-runnak-rahva-vaimu-vastu/>.

While Stabbing the Child of His Helper.'[36] No court cases have arisen from the above statements. Islam and Islamophobia have been a matter of ongoing public debate that has also been channelled into political attempts to restrict religious expression by prohibiting the wearing of religious symbols. In 2015 the Ministry of Justice initiated a proposal to amend both the Penal Code and the Law Enforcement Act.[37] According to the proposal, the main aim was to set rules and send a clear message to foreigners about Estonian values. The proposed changes also related to wearing religious garb.[38] One of the aims of this amendment was to introduce a complete ban on face coverings. The law primarily targeted Muslim women who wore burkas or niqabs. The initiative found insufficient support.[39] However, the debate on religious garb, although currently overshadowed by debates regarding the Russian Orthodox Church, is still ongoing, especially in the context of the educational environment.[40]

II. Blasphemy, Religious Hate Speech, and Limitations of Freedom of Speech in a Religious Context

In addition to the above-mentioned concerns of some religious organisations regarding broadening the scope of the hate speech provisions in the Penal Code, international and transnational developments in the anti-discrimination law have become increasingly challenging for religious communities. However, the effects of the interplay between anti-discrimination legislation, collective freedom of religion or belief and freedom of expression in Estonia remain to be seen. Currently there is no case law in relation to this matter.

Although there have been no court cases yet, there has been one incident involving an application of the Equal Treatment Act[41] with regard to religious communities. In 2010 the Estonian Evangelical Lutheran Church decided to exclude a minister from the ranks of the priesthood who had openly expressed his views in support of gays and had become a board member of the association for Gay Christians. The incident fuelled some internal discussions in the church but also attracted public attention. The minister turned to the Gender and Equal Treatment Commissioner to investigate

[36] 'SURE! SURE! SURE!' karjus oma abistaja last pussitanud põgenik', *Õhtuleht*, 18 June 2019 <https://www. ohtuleht.ee/967397/sure-sure-sure-karjus-oma-abistaja-last-pussitanud-pogenik>.

[37] RT I, 22 March 2011, 4.

[38] Justiitsministeerium, 'Karistusseadustiku ja korrakaitseseaduse muutmise seaduse eelnõu väljatöötamise kavatsus', 24 Nov 2015.

[39] For further detail, see M. Kiviorg, 'Islam and Human Rights in Estonia' in Lina Papadopoulou (ed.), *Islam and Human Rights in the European Union* (Granada: Editorial Comares, 2022), p. 154 and M. Kiviorg, 'Islam ja riik' in Helen Haas, Elo Süld (ed.) *Islam, islamid ja Eesti* (Tartu: Tartu Ülikooli kirjastus, 2024, forthcoming).

[40] M. Kiviorg, 'Usuvabadus avalikus ja erakoolis' (2025) *Juridica* (forthcoming).

[41] Equal Treatment Act.– RT I, 22.10.2021, 11.

the matter. The post of Gender Equality and Equal Treatment Commissioner has been established to monitor compliance with the requirements of the Gender Equality Act and the Equal Treatment Act. Some church members were furious about the enquiries and demanded the resignation of the Commissioner for violating church autonomy.[42] In its official response the consistory of the EELC explained that the minister's sexual orientation was not as such the ground for his dismissal but rather the fact that he broke his oath by not following and obeying internal regulations of the church – including its 2009 declaration on homosexuality).[43] No legal action was taken by the church or the Commissioner. An analogous incident occurred regarding a female priest of the EELC expressing her support for same-sex unions in a television talk show. The Archbishop of the EELC subsequently expressed his disapproval. He noted that the priest expressed an opinion that was contrary to the church's official position.[44] However, times had moved on since the first incident in 2011. Although there were calls for her dismissal, nothing came of it. In 2021, she was cautioned again but not dismissed.[45] It needs to be noted that the Estonian Equal Treatment Act does not prejudice the right of religious communities to require individuals working for them to act in good faith and with loyalty to the organization's ethos (§10(3)).

Conclusion

The intersection between religious freedom and freedom of speech in Estonia is, indeed, multifaceted. The legal framework is determined not only by domestic legal provisions but also by international and European obligations. Estonia does not follow international and European commitments regarding hate speech in all respects. Hate speech and war propaganda have been debated fiercely, and in recent years the expressions of the Islamic faith have also gained attention. The results of these public and legal debates still remain to be seen. There is only a limited amount of case law to provide additional good guidance on the intersections of free speech and religious freedom.

[42] 'EELK praost nõuab võrdõiguslikkuse voliniku ametist lahkumist', *Delfi,* 7 Nov. 2011.

[43] 'EELK selgitas soovolinikule, miks tagandati üks vaimulik ametist' Meie Kirik, 11 Oct. 2011.

[44] H. Mihelson, 'Risti koguduse õpetaja kaitses kooseluseadust, peapiiskop on nördinud', *Postimees*, 5 Oct. 2017, https://www.postimees.ee/4266051/risti-koguduse-opetaja-kaitses-kooseluseadust-peapiiskop-on-nordinud, 30 Jan. 2021. M. Kiviorg, P, Roosma, '§ 40 - 41' (freedom of religion and conscience) in *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne*. Viies, täiendatud väljaanne (5th edn, Commentaries to Estonian Constitution), ed. Ü. Madise *et al*. Tallinn: Juura, 2020.

[45] A. Ladva, 'Risti koguduse õpetaja Annika Laats sai abielu kohta öeldu eest piiskopilt noomida', *Õhtuleht*, 15 Jan. 2021.

FREEDOM OF SPEECH AND RELIGION IN HUNGARY

BALÁZS SCHANDA[1]

Under the European Convention on Human Rights the balance between concurring rights may have similar outcomes in various European countries. Blasphemy is not criminalized, but personality rights are protected and a serious attack on the religious identity of an individual could constitute a violation of personality rights. There is an ongoing shift from criminal persecution towards civil litigation to react on provoking manifestations.

I. FREEDOM OF CONSCIENCE, RELIGION, AND EXPRESSION

1. The fundamental norms regulating freedom of expression

The Fundamental Law (Constitution) of Hungary provides for the freedom of expression

> „Article IX
>
> (1) Everyone shall have the right to freedom of expression.
>
> (2) Hungary shall recognize and protect the freedom and diversity of the press, and shall ensure the conditions for the free dissemination of information necessary for the formation of democratic public opinion.
>
> (3) In the interests of the appropriate provision of information as necessary during the electoral campaign period for the formation of democratic public opinion, political advertisements may only be published in media services free of charge, under the conditions guaranteeing equal opportunities, laid down in a cardinal Act.
>
> (4) The right to freedom of expression may not be exercised with the aim of violating the human dignity of others.
>
> (5) The right to freedom of expression may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Persons belonging to such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates their community, invoking the violation of their human dignity, as provided for by an Act."

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The 2011 Constitution attempted to place more emphasis on the protection of human dignity of individuals and the dignity of members of various communities against abuses of the freedom of expression. The Constitutional Court has established an extensive jurisprudence on the margins of freedom of expression. The dignity of others as well as the dignity of persons belonging to, *inter alia*, a religious community enjoys constitutional protection against excesses of expressions. The main lines of jurisprudence exist in conformity with those of the European Court of Human Rights.

The *Media* shall respect the constitutional order and shall not incite to hatred against minorities, churches, or religious communities. Programmes violating religious convictions can be transmitted only after the broadcast of warning.[2]

2. Freedom of Religious Expression and Hate Speech

a) *Criminal Law and Religious Conviction*

The present Hungarian legal system does not offer God any protection. However, human dignity, which, for someone who believes in God, is inseparable from faith, is protected.[3] Profanity and blasphemy are seen as forms of verbal or non-verbal abuses against believers. As regards their effect, they can be considered similar to the desecration of an object otherwise enjoying spiritual reverence (e.g., the Eucharist). The question is whether freedom of religion and the protection of the dignity/religious feelings of others can be a legal basis for restricting the freedom of others to express their opinions, and hence what tools the State has at its disposal for promoting peace in society. The 2015 terrorist attack on the headquarters of the satirical weekly Charlie Hebdo in Paris has shown that finding the right balance in the protection of competing rights is an ongoing challenge.[4]

Blasphemy – when it causes public scandal – used to be a criminal offence under the first criminal code (1878).[5] The provision, however, was abolished in the early years of the communist regime. In the present day, there is no offence resembling blasphemy (although the protection of national symbols may resemble blasphemy. in that where in the past the sacred was protected, now it is the state[6]). Neither God, nor religion enjoys protection derived from criminal legislation. What criminal law protects is the freedom of religion, the right of a person to hold a conviction, and re-

[2] Act CLXXXV/2010. § 14.

[3] B. Török, 'Can religions or religious people be protected against blasphemy?' in András Koltay (ed.), *Media Freedom and Regulation in the New Media World*, CompLex Wolters Kluwer, Budapest, 2014, pp. 509-531.

[4] J. Temperman and A. Koltay (eds.), Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre (Cambridge University Press 2017).

[5] Act V/1878. § 190.

[6] Act C/2012. § 344.

ligious communities as such. Freedom of expression is restricted by the penalization of any incitement to hatred: whoever incites to hatred in public against the Hungarian nation, any national group (ethnic or racial), or certain groups of the population is guilty of a misdemeanor punishable by imprisonment for up to three years.[7] An incitement to hatred expressed towards a religious community (or a non-religious or anti-religious community) would fall under this provision. The religious sentiments of the population, or certain groups of the population, however, enjoy no protection under criminal law. Since 1992, a mere *defamation* no longer qualifies as a criminal offence as the Constitutional Court has found that this would be a disproportionate limitation of the freedom of expression.[8].

In the present day, criminal law approaches the problem not from the aspect of God, but from the personal side: by criminalizing any conduct that by means of violence or threats hinders the freedom to practise religion (Section 215 of Act C of 2012), it protects not religion per se but freedom of worship; by making hate speech illegal, it protects human dignity. The law on misdemeanors also protects the objects of religious devotion and those used for religious rites, while it can also criminalize any public scandals caused in places used for worship (Section 188 of Act II of 2012). Today's laws treat the issue not by deliberating over blasphemy but rather by protecting religious feelings and sensitivities: the object of protection is not the transcendent but an especially sensitive part of human dignity. Although freedom of expression occupies a prominent place amongst fundamental rights, it may well be justifiable to impose certain restrictions to ensure the protection of human dignity. In this case, it is not freedom of speech but human dignity that is placed in juxtaposition to freedom of religion (abuse and contempt in themselves do not restrict the freedom of the persons involved in practising their religion). Human dignity suffers a serious violation if religious beliefs are subjected to verbal or pictorial aggression. Dignity is also violated if the aggression is aimed not at the person but at the person's religion or an object that the person holds sacred.

b) *Civil Law and Religious Conviction*

Present law aims at protecting the religious feelings of citizens, primarily to protect their dignity. As the criminal persecution of hate speech crimes has proven to be ineffective and criminal sanctions should be reserved to the most outrageous cases, the new Civil Code of Hungary (2013) has opened up the possibility of a civil lawsuit for violations of dignity:

[7] Act C/2012. § 332.
[8] Decision 30/1992. (V. 26.) AB.

> Act V/2013 (Civil Code) Section 2:54 (5) "Any member of the community may enforce their personality rights within a thirty-day term of preclusion from the occurrence of a legal injury that was committed with great publicity in relation to some essential trait of their personality, their belonging to the Hungarian nation or some national, ethnic, racial or religious community, and is grossly offensive to the community or unduly insulting in its manner of expression. With the exception of relinquishing the material gain obtained through the violation of rights, any member of the community may enforce any sanctions in the event of a violation of personal rights."

Civil litigation is possible if someone (a member of a certain group) is seriously offended. Although freedom of expression occupies a prominent place amongst fundamental rights, it may be justifiable to impose certain restrictions on the protection of human dignity. In this case, it is not freedom of religion but human dignity that will concur with freedom of speech. Freedom of religion is not in fact curtailed by being offended, but human dignity suffers a serious violation if religious beliefs of an individual are subjected to verbal or pictorial aggression. The same scenario occurs if the aggression is not aimed at the person but at the person's religion or an object that the person holds sacred.

The protection of the dignity members of a faith community can be a legitimate reason to impose limitations on free speech. Religious content as such, however, cannot be banned from critical expression, especially when it does not relate to a public discourse. On the one hand, the target of criticism has to be the subject of scrutiny. If religion is the target, criticism may also hit those who have not been party to the public discourse. Offending them cannot be considered a legitimate collateral damage of public debate. On the other hand, public figures – including representatives of religious communities – have to bear criticism, even if criticism relates to their religious conviction.

Equal treatment with regard to religion is protected by a special administrative procedure, but no criminal offences are foreseen for discrimination based on religion.

In compliance with the *Genocide Convention*, genocide is penalized. In addition to national, ethnic, and racial groups, religious groups are protected against crimes aimed at the extermination of the group.[9]

'*Violation of the Freedom of Conscience and Religion*' was incorporated into the Criminal Code in 1990. According to that provision:

> Whoever
> a. restricts another person by violence or by threats to his/her freedom of conscience,

[9] Act C/2012. § 124.

b. prevents another person from freely exercising his/her religion by violence or by threats, commits a crime, and is punishable by imprisonment extending to three years.[10]

This is certainly not the type of crime that happens frequently. In one case, when a procession was disrupted by a driver forcing believers to let his car pass along the road, the criminal offence of the 'violation of the Freedom of Conscience and Religion' was applied.[11]

The *abuse* of someone because of his or her actual or assumed membership of a national, ethnic, race, or religious group is punishable by five years' imprisonment.[12] However, it is difficult to prove that a person was attacked because of his or her membership of a religious group.

The 'Violation of the Right of Worship' is penalized as a misdemeanor. According to this, 'Whoever causes a public scandal in a church or on premises designated for the purposes of religious ceremonies or desecrates the object of religious worship or an object used for conducting the ceremonies on or outside the premises designated for the purposes of ceremonies'[13] may be subject to this law. In a sense, this provision protects the institution: the religious community itself, and not merely the beliefs and feelings of the individual members or those of the community.

In the case of thefts, the punishment will be is elevated when an object of minor value is stolen that has been designated for worship, or is a religious or consecrated one, or has been stolen from a consecrated property. Punishment in this case is as if an object of a considerable value had been stolen.[14]

Following disturbing developments in criminality, including a rise in violence against church buildings and churchmen, *clergymen* were recognized as persons 'pursuing public tasks',[15] which means qualified punishment for the perpetrator of murder and robbery against clergymen, as well as punishment of those attacking the person who has been pursuing a public task (relating to his public task). In this respect, the clergy enjoys a status equal to that of teachers, medical staff, public transport workers or firefighters.

[10] Act C/2012. § 215.
[11] BH 1999.292.
[12] Act C/2012. § 216.
[13] Act II/2012 § 199.
[14] Act C/2012 § 370.
[15] Act C/2012 § 459 (1) 12 d).

II. Blasphemy and Art – Ecclesiastical Objects, Symbols, and their Protection Preamble

1. Religious heritage

The Christian and Jewish cultural and historical heritage is rich and visible in Hungary. The number of Muslims and the social significance of Islam are more limited, although some religious monuments from the time of the Ottoman occupation (16-17th centuries) have been preserved, sometimes (re)converted into Christian places of worship. Religious feelings are generally respected. In the case of legal restrictions to free expression, including artistic expression, simply the infringement of religious feelings would, however, not be sufficient. In Hungary there has thus far been no terrorist attack motivated by religious beliefs or targeting religious objects, but vandalism occasionally happens, since cemeteries are often unfrequented places and may become the playgrounds of adolescents.

Art in church buildings and also the performing arts at churches or synagogues would undoubtedly qualify as issues of church autonomy. Generational conflicts may occur with regard to church music or decorations but these are more questions of taste (with some theological relevance) and certainly do not reach the level of blasphemy. Liturgy prevails over heritage protection – "*versus populum*" altars were installed in Catholic churches, irrespective of the rules of heritage protection.

2. Blasphemy (?) *vs.* free speech

In early 2021the Constitutional Court reached decisions in two remarkable cases. What they had in common was that the litigants regarded their own dignity as violated by offensive images and hence they initiated civil litigation using the above-mentioned new instrument of the Civil Code. In both cases, the petitioners were individual Catholics who started litigation in the lower courts and continued it as far as the third court case. Since they have received no remedy at the Curia (Supreme Court), they have gone on to file constitutional complaints.

a) *Provoking performance*

The start of one of the cases consisted of a performance in front of the Polish Embassy in Budapest. An activist clothed like a Catholic bishop distributed abortion pills as if it were a communion service.[16] The petitioners claimed to be offended by the performance, which they said mocked the most holy instrument of their belief. The demonstrators were protesting against the tightening of the Polish abortion law

[16] Decision No. 7/2021. (II. 19.) AB; Images from the performance can be seen at: https://images.app.goo.gl/yiv6yqfDRwuBPsY69.

and its support by the Catholic Church, and in the course of the demonstration the performance imitated the Eucharist by one of the activists placing white pills taken from in a bag labelled "abortion pill" on the tongue of each of the other two participants, accompanied by the words "Body of Christ". The performance was later published on the internet to make them available to the general public. In their action the plaintiffs asked the court to declare that, through their affiliation with the Catholic religious community, which was an essential feature of their personality, their human dignity and their right to practise their religion freely had been violated by the defendants. The Budapest-Capital Metropolitan Court acting in the first case dismissed the action; at the second case the regional court quashed the verdict in the initial case. Finally, the Curia, in its verdict closing the review proceedings, upheld the verdict of the first case and quashed the regional court's decision. The plaintiffs then turned to the Constitutional Court. In their petition, they asked for a declaration that the Curia's verdict ran counter to the Fundamental Law and hence they were requesting its annulment on the grounds that the court's and the Curia's verdicts contradicted the provisions of the Fundamental Law stating that the exercise of freedom of expression should not be aimed at offending the dignity or the religious community of others. The Constitutional Court found that the verdict delivered by the Curia and the Budapest-Capital Regional Court in the subject-matter of offending the Catholic community were in conflict with the Fundamental Law and therefore rescinded them.

In its decision, the Constitutional Court declared that the challenged verdict acknowledged that the petitioners had been offended via their religious community. At the same time, they accepted the offensive communication as a constitutionally protected expression of opinion, without examining the actual content of the specific conduct actually complained about or its contribution to the discussion of a public affair. Consequently, the courts hearing the case could not have examined with due diligence whether or not the communication at issue was intended to offend the community concerned. With regard to the claimed offensive communication, the courts stated that members of the religious community were offended by the provocation but had to tolerate this in the same way as public figures have to tolerate criticism. The Curia (Supreme Court) stated that the dignity of the petitioners' religious community was in fact undermined by the demonstrators' exercise of freedom of expression, but members of the religious community have to endure this as a consequence of the public statements of the Church on abortion. The Constitutional Court found unanimously that the challenged court decisions were in conflict with the Fundamental Law and therefore rescinded them. This now opens up the possibility of a new court procedure that will be tasked with finding a new balance between compelling rights. Thus, offending a community will not be considered a constitutional issue, whereas offending the dignity of (members of) a community can impose limits on free speech (24).

b) ***Political caricature – or ridiculing the nativity scene?***

The Constitutional Court also ruled on the case of the Christmas 2014 issue of the HVG weekly, whose cover page consisted of a revamped version of the painting Adoration of the Shepherds, by Gerard van Honthorst.[17] The faces of leading politicians replaced the faces of the original characters, and a pile of gold coins replaced the image of the infant Jesus.[18] The petitioner claimed that the picture offended the Catholic community. After having lost at all of the court cases she filed a constitutional complaint arguing that her human dignity and freedom of religion had been violated. She has claimed that her fundamental right to have the symbols and liturgy of her religion respected and to practice her religion in an undisturbed manner within the space of the community had been violated because the Curia and the proceeding courts had accepted without criticism the defendant's argument that the communication that had been complained about was aimed at criticizing the politicians concerned and had no anti-religious purpose. The petitioner therefore turned to the Constitutional Court to seek a declaration that the Curia's verdict was in conflict with the Fundamental Law. Although the figures pictured in the caricature were not portrayed in a degrading way, the cover page could still offend Christians – but this provocation remained limited. It had to be noted that the given type of caricature is only effective if the Christian symbolic is understood.

In the opinion of the Constitutional Court, the courts that acted in the basic proceedings had correctly recognized that the main issue to be assessed was the purpose of the communication, that is, as the question of primary importance. In addition, by examining the front page in question, the Curia also stated on the one hand that the image was not aimed at offending Christians and did not convey a negative evaluation of believers. The figures in the picture were not displayed in a degrading manner. The Court was able to identify the specific political opinion conveyed by the authors, and the form of expression of this political opinion was not found to be arbitrary or unjustified in relation to the content of the opinion.[19] The Christian symbolism in this case functioned as the vehicle of the message but the target was the attitude of the political elite. In consequence, the Constitutional Court rejected the constitutional complaint by nine votes to five. Dissenters argued that the image in fact constituted an infringement of the dignity of believers and hence ignored the commitment of the Fundamental Law to the Christian legacy.

[17] The original of the painting (1622) can be seen in the Wallraf Richartz Museum in Cologne.

[18] Decision No. 6/2021. (II. 19.) AB; The controversial image can be found at: https://images.app.goo.gl/zHr7utGJMvLa67UR7.

[19] For case summaries in English (also used in the present note): https://hunconcourt.hu/kozlemeny/the-expression-of-opinion-is-free-the-dividing-line-is-the-protection-of-human-dignity.

When they become engaged in public discourse, the representatives of religious communities (e.g., bishops) have to endure criticism like all other parties to public debates. The central difference between the two cases is not that in one case politicians were targeted, while in the other it had been (Polish) bishops, but that t mocking the Eucharist was regarded, by some, as far more offensive than the non-degrading portrayal of the figures of the nativity scene. Mocking the Eucharist also offends fellow believers, whereas the cover page primarily targeted politicians. The basic message of the cases is that freedom of expression deserves protection as long as it does not jeopardize the human dignity of others. The dignity of the community and the dignity of members of the community seem to remain interlinked.

According to Article R) paragraph 4 of the Fundamental Law of Hungary, '… [t]he protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State'. The Fundamental Law does not commit the Hungarian State to adopting the Christian religion nor even to Christian culture in general, but it provides for the freedom of religion and belief of all faiths. In this way the state remains neutral with regard to religion, but it expressly controls the protection of the culture of Hungary as a Christian culture. The aim of the constitutional legislator was undoubtedly to grant the identity of the nation a stronger emphasis and protection. In addition, the preamble to the Fundamental Law refers to the 'Christian heritage' of the nation. Religions – the dignity of people of various faiths – deserve equal protection, and it makes a difference whether the target of the provocation relates to a religious minority or to a mainstream religion. The cultural tradition of the country enjoys constitutional protection but, paradoxically, this cultural background also renders provocations more possible unless the public is able to understand the message of a provocation.

c) *Offending the faithful*

This is the logical line of reasoning behind the personality law dispute over the caricature that targeted the national chief medical officer – herself a devout Catholic. The caricature depicted a crucifix and pointed to Jesus, assigning the words "his underlying disease led to hanging" to the mouth of the medical officer (translating the cartoon caption is difficult: "hanging" and "being addicted to" can be expressed in Hungarian using same word. The chief medical officer repeatedly stressed that the victims of the pandemic also suffered from other serious illnesses, i.e., they had "underlying" diseases, while in the case of Jesus this underlying disease was the act of hanging (on the cross). In this instance, the litigant was an individual Catholic believer, and certainly not the chief medical officer. The courts found that the subject of the mockery was not religion itself but government communications concerning the pandemic. However, the cartoon also linked this political criticism to Jesus's death on the cross and this could offend people of faith. This element offending religious sensibilities was therefore regarded as self-serving restricted in its function.[20]

The protection of the dignity of the members of a faith community can be a legitimate reason for imposing limitations on free speech. Critical expression can also have or target religious content, especially when it relates to an instance of public discourse. On the one hand, the target of criticism has to be a subject of public scrutiny. If religion itself is the target, the criticism may also impose on those who have not been party to the public discourse and, when the criticism passes beyond a certain limit, the members of a faith community should not have to tolerate provocations. Offending them cannot be considered a legitimate "collateral damage" of public debate, but, on the other hand, public figures – including representatives of religious communities – have to bear criticism, even if criticism relates to their religious conviction.

[20] Decision 3488/2022. (XII. 20.) AB. The chief medical officer in the picture has to tolerate public criticism. But the caricature can be found offensive for believers who did not participate in the public debate over government policies during the pandemic. Thus, making fun of the Redeemer was self-serving restricted in its function. The controversial image can be seen here: https://papaigabor.wordpress.com/2020/04/27/kronikus/.

THE RELATIONSHIP BETWEEN FREEDOM OF SPEECH AND RELIGION IN GERMANY

GERHARD ROBBERS[1]

I. FREEDOM OF RELIGION AND FREEDOM OF SPEECH

(1) The German constitution, the Basic Law, provides freedom of religion or belief and freedom of speech in two separate provisions which follow one another: freedom of religion or belief first and then freedom of speech.

Article 4 para. 1 and 2 of the Basic Law reads:

> [Freedom of faith and conscience]
>
> (1) Freedom of faith and of conscience and freedom to profess a religious or philosophical creed shall be inviolable.
>
> (2) The undisturbed practice of religion shall be guaranteed.

Article 5 of the Basic Law provides:

> [Freedom of expression, arts, and sciences]
>
> (1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.
>
> (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons and in the right to personal honour.
>
> (3) Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.

Both provisions rest on an equal footing, and the sequence of the provisions as stated does not signify the pre-eminence of the first or the second provision. This follows from the general rule of the principle of the unity of the constitution. This

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also means that freedom of speech is not regarded as the most valuable or preeminent freedom. Competing fundamental rights have to be balanced in terms of their impact from one case to another.

(2) Freedom of religion is not simply a part of freedom of speech but also protects the right to act in accordance with one's religious beliefs. Freedom of speech protects the right to have and to express an opinion but not to protect a right to act according to one's opinion. Moreover, the limitations on the right to freedom of religion or belief and the limitations on freedom of speech differ. Freedom of speech may be limited by general laws, while freedom of religion or belief may be limited only by interests positively specified in the constitution itself.

(3) The provisions referred to below protect the fundamental right of freedom of religion or belief. They limit the fundamental right to freedom of speech, and court cases are numerous. However, there is no specific case which could be regarded as a landmark decision.

II. Blasphemy

Religion enjoys considerable protection in German criminal law. However, protected is not the honour of a God or any other divine being, nor are the religious feelings of other persons. The object of protection is the public peace. Thus the laws are not blasphemy laws in a narrow sense: they should rather be regarded as peace-keeping laws.

A problem seems to be that the object of protection, the public peace, is regarded as being public peace only in Germany. Recent developments show, however, that criticism of a religion may be seen as completely acceptable in Europe but be regarded as gross defamation in other parts of the world. As a result of the technical means of the Internet, criticism of this kind may cause great disturbance of the public peace in another part of the world. This problem has yet to be solved, and it is still scarcely recognised by most people as an actual problem.

(1) The revilement of religious faiths and religious and ideological communities is a crime. Whoever publicly or by disseminating material reviles the religion or ideology of others in a manner suited to causing a disturbance of the public peace incurse a penalty of imprisonment for a term not exceeding three years, or a fine (Section 166 para. 1 of the Criminal Code). Religious institutions are equally protected: Whoever publicly or by disseminating material reviles a church or other religious or ideological community in Germany or its institutions or customs in a manner suited to causing a disturbance of the public peace incurs the same penalty (Section 166 para 2 of the Criminal Code).

(2) According to Section 167 of the Criminal Code, disturbance of the practice of religion is a crime. Whoever intentionally and seriously disturbs a religious service or an act of religious worship of a church or other religious community in Germany

incurs a penalty of imprisonment for a term not exceeding three years or a fine. The same penalty applies to a person who commits defamatory mischief in a place which is dedicated to religious worship of such a religious community. The ceremonies of an ideological community in Germany are regarded as equivalent to a religious service.

(3) Funerals are protected regardless of whether they take place in a religious ceremony. Whoever intentionally or knowingly disturbs a funeral incurs a penalty of imprisonment for a term not exceeding three years, or a fine (Section 167a of the Criminal Code).

(4) In addition, according to Section 168 of the Criminal Code, disturbance of the peace of dead persons is also a crime. Whoever, without being authorised to do so, takes the body or parts of the body of a deceased person, of a dead foetus or parts thereof, or the ashes of a deceased person from the custody of the person entitled thereto, or whoever commits defamatory mischief on them, incurs a penalty of imprisonment for a term not exceeding three years, or a fine. Whoever destroys or damages the place where a body is laid out, a burial site or a public memorial for the dead, or whoever commits defamatory mischief on them, incurs the same penalty. Attempt to commit any such act is punishable.

III. Hate Speech

Hate speech is punishable under Section 130 paras. 1 and 2 of the Criminal Code, under the heading 'Incitement of masses':

(1) Whoever in a manner suited to causing disturbance of the public peace incites hatred against a religious group, against sections of the population or individuals on account of their belonging to that group or section of the population, or calls for violent or arbitrary measures against them incur a penalty of imprisonment for a term of between three months and five years. The same penalty applies to a person who violates the human dignity of others by insulting, maliciously maligning, or defaming a religious group, section of the population, or individuals on account of their belonging to such a group or section of the population.

(2) Whoever disseminates material, or makes it available to the public, or offers, supplies, or makes available to a person under 18 of age material which incites hatred against a religious group or sections of the population or individuals on account of their belonging to such a group or section of the population is liable to imprisonment for a term not exceeding three years, or a fine.

(3) The same applies to a person who calls for violent or arbitrary measures against one of such persons or bodies of such persons. It also applies to anyone who attacks the human dignity of one of such persons or bodies of such persons by insulting, maliciously maligning, or defaming them.

(4) This also applies to any person who produces, purchases, supplies, stocks, offers, advertises, or undertakes to import or export any such material in order to use it

in a manner suited to causing a disturbance of the public peace, incites hatred against a religious group, against sections of the population or individuals on account of their belonging to that group or section of the population, or calls for violent or arbitrary measures against them, incurs a penalty of imprisonment for a term of between three months and five years, or to facilitate such use by another person.

IV. Denial of the Holocaust

The denial of the murder of the Jews by Germany under National Socialism, but also of other segments of the population in Europe, such as the Roma and the Sinti, is punishable under Section 130 paras. 3 and 4 of the Criminal Code:

(1) Whoever publicly or in a meeting approves of, denies, or downplays an act committed under the rule of National Socialism of the kind indicated in Section 6 (1) of the Code of Crimes against International Law (genocide) in a manner likely suited to causing a disturbance of the public peace incurs a penalty of imprisonment for a term not exceeding five years, or a fine. In addition, whoever publicly or in a meeting disturbs the public peace in a manner which violates the dignity of the victims by approving of, glorifying or justifying National Socialist tyranny and arbitrary rule incurs a penalty of imprisonment for a term not exceeding three years, or a fine.

An attempt to commit such crime will also be punishable in certain cases.

> Section 6 of the Code of Crimes against International Law reads:
> Genocide
> (1) Whoever with the intent of destroying as such, in whole or in part a religious group
> 1. kills a member of the group,
> 2. causes serious bodily or mental harm to a member of the group, especially of the kind referred to in Section 226 of the Criminal Code,
> 3. inflicts on the group conditions of life calculated to bring about their physical destruction in whole or in part,
> 4. imposes measures intended to prevent births within the group,
> 5. forcibly transfers a child of the group to another group shall be punished with imprisonment for life.

(2) In addition, deeds of this nature are frequently accompanied by defilement of the memory of dead persons. This is punishable under Section 189 of the Criminal Code: whoever defiles the memory of a deceased person incurs a penalty of imprisonment for a term not exceeding two years, or a fine.

V. Art works that insult a religion (Symbols of God or the Prophet etc.)

There are no special provisions relating to art works that insult a religion other than the general provisions of insult, defamation, etc. However, when examining the illegality of the act, the importance of freedom of arts must be taken into due account.

VI. Freedom of arts and religion

There are no special provisions relating to art works that insult a religion other than the general provisions of insult, defamation, etc. However, when the potential illegality of an act is under investigation, the importance of the freedom of the arts must be taken into due account.

VII. Freedom of sciences and religion

There are no special provisions relating to the sciences, including teaching that insults a religion, other than the general provisions of insult, defamation, etc. However, when the potential illegality of an act is under investigation, the importance of the freedom of the arts must be taken into due account.

FREEDOM OF CONSCIENCE, RELIGION, AND EXPRESSION IN LATVIA

Ringolds Balodis / Edvīns Danovskis [1]

1. The fundamental norms regulating freedom of expression

The important role played by freedom of speech and freedom of religion in the legal system of the Republic of Latvia is generally recognised. Freedom of speech or freedom of expression is enshrined in Article 100 of the Latvian Constitution (*Satversme*): "Everyone has the right to freedom of expression, which includes the right to freely receive, keep and distribute information and to express his or her views. Censorship is prohibited." The religion/church is mentioned in Article 99, which declares: "Everyone has the right to freedom of thought, conscience and religion. The Church shall be separate from the State." Both provisions were included in the Constitution in 1998, when the document was supplemented with a new section on human rights. In 2013 a new preamble to the Constitution was adopted containing "Christian values" (Preamble, 5th paragraph).[2] Although the mentioned concept theoretically counts as one of the core elements of Latvian identity, in reality, however, this is not the case at all. While discussing this norm in parliament, a member of parliament has noted that "The whole of Europe has been greatly influenced by Christian values. It is not exclusive but it does consist, among other things, of Christian values. And if we consider our nation to be a European nation, then it is clear that our society also

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[2] "Since ancient times the identity of Latvia in the European cultural space has been shaped by Latvian and Liv traditions, Latvian folk wisdom, the Latvian language, universal human and Christian values. Loyalty to Latvia, the Latvian language as the only official language, freedom, equality, solidarity, justice, honesty, work ethic and family are the foundations of a cohesive society. Each individual takes care of him- or herself, including also relatives and the common good of society by acting responsibly toward other people, future generations, the environment and nature" (Section 5 of the Preamble Constitution of the Republic of Latvia).

has Christian values. I hope they are at least noticeable, if not more so."[3] Both in the annotation of the constitutional amendment bill and in the plenary session of the Latvian Parliament (Saeima), it was emphasised that "Christian values" should not be seen as strengthening the role of the church in the Latvian state.

The Constitutional Court (*Satversmes tiesa*) has concluded that the initial historical task of human rights can be seen within the context of the right to freedom of speech: –namely, to protect a person against unjustified state interference in the sphere of his or her freedom. Similarly, as in Article 99 of the Constitution, the rights defined in Article 100 of the Constitution are rights protecting individuals.[4] Naturally, the right to freedom of speech is not absolute, and it does not mean permissiveness.[5] However, restricting freedom of expression should not become a routine practice of states. Fundamental rights can be restricted only in the cases specified in the Constitution and in compliance with the principle of proportionality. More specific criteria for justifying the limitation of the rights contained in Article 100 of the Constitution, especially the need for limitations, are reflected in judicial practice, where the right to freedom of expression is contrasted with the exercise of a number of other fundamental rights. Hence, in the next subsection, two categories of such cases will be discussed in greater detail: firstly, the conflict between the right to freedom of speech and the protection of personal honour and dignity; and, secondly, the balancing of freedom of speech with the prohibition of inciting hatred and discrimination.[6] The Constitutional Court has concluded that freedom of expression – in addition to its traditional manifestations, such as speech, diversity of opinion in the media, participation in demonstrations and other events – also includes various forms of artistic expression, such as writing, painting, music, and also other combined expressions of freedom of expression, including the use of symbols.[7] It should be added here that the protection of symbols is also extremely important in the context of religious freedom since the expression of religious belief includes the practice of cults, the performance of religious and ritual ceremonies, the preaching of teachings, and also the use of religious objects.[8]

[3] *Latvijas Republikas Satversmes komentāri. Ievads. I nodaļa. Vispārējie noteikumi* [Commentary of the Constitution of the Republic of Latvia. The Preamble Chapter I. General rules]. Rīga: Latvijas Vēstnesis, 2017, p. 132.

[4] The Constitutional Court's Judgement of 15 July 2015 in case No. 2015-01-01, para. 11.2.;11.3.

[5] The Constitutional Court's Judgement of 18 March 2011 in case No. 2010-50-03, para. 7.1.; The Constitutional Court's Judgement of 29 October 2003 in case No. 2003-05-01, para. 22.

[6] Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības. [Commentary of the Constitution of the Republic of Latvia. The Fundamental Human Rights]. Rīga: Latvijas Vēstnesis, 2011, p. 363 – 364.

[7] The Constitutional Court's Judgement of 15 July 2015 in case No. 2015-01-01, para. 11.14.

[8] The Constitutional Court's Judgement of 18 March 2011 in case No. 2010-50-03, para. 7.2.

The clause on religious freedom that is included in Article 99 of the Constitution includes the freedom to freely believe or disbelieve, and to practise or not practise a faith, thus resulting in the separate notions of "positive" and "negative" religious freedom. The right to withdraw from religious education and the right to alternative education do not need to be *expressis verbis* in the basic law of the state but result automatically from this positive and negative breakdown of religious freedom. The right to protection (e.g., of the symbols) of one's own religion (religious belief) can be as widely interpreted as the right to the performance of religious rituals.[9] The first sentence of Article 99 lists three freedoms: (1) freedom of opinion, (2) freedom of conscience, and (3) freedom of religious conviction. These freedoms provide common rights for individuals with certain religious beliefs and also for those with free-standing philosophical views of the world or with atheistic and agnostic beliefs.

2. Freedom of Religious Expression and Hate Speech

In the past, Latvia's leading researchers in the field of religion Valdis Tēraudkalns and Solveiga Krūmiņa-Koņkova argued[10] that the concept of "hate speech" should be used rather than of the concept of "religious sensibilities" used until then in Latvia. By this, they were referring to spoken or written calls for violence, to the unjustified limitation of the rights of individuals or groups, and also well as to offensive or humiliating speech that foments hatred. The experts felt, and feel, that these are offences which affect not only the area of religion but also such factors as ethnic origin, skin colour and sexual orientation.

If until 2014 it could be assumed, when determining criminal liability for offending religious feelings, that Article 150 of the Criminal Law also provided for the prohibition of blasphemy, then since 2014 the Criminal Law has no longer not provide for any criminal offence that would include criminal liability for blasphemy. With the 2014 amendments to the Criminal Law, liability for activities that promote religious hatred is provided for in Articles 78 and 150 of the Criminal Law. Article 78 of the Criminal Law provides for criminal liability "for actions aimed at inciting national, ethnic, racial or religious hatred or discord". In addition, Article 150 of the Criminal Law provides for criminal liability "for an action aimed at inciting hatred or discord, depending on the person's gender, age, disability or any other characteristics, if significant damage is caused by it." Article 78 of the Criminal Law is included in the Criminal Law section "Crimes against humanity, peace, war crimes, genocide", and Article 150 of the Criminal Law, which contains the section "Criminal offences

[9] Balodis R. 'Latvia' in G.Robbers, W. Cole Durham, D. Thayer (eds.), *The Encyclopaedia of Law and Religion*. Brill | Nijhoff Germany 2016, p. 219.

[10] Krūmiņa-Koņkova, S. and V. Tēraudkalns, *Reliģiskā dažādība Latvijā* (Religious Diversity in Latvia). Rīga: Klints (2007), p. 89.

against the basic rights and fundamental freedoms of an individual ". Considering that both norms of the Criminal Law provide for criminal liability for actions aimed at inciting religious hatred, this approach has been criticised in expert legal assessments: "Given that hate speech causes equally significant damage, regardless of whether the hate speech is directed at a person or because of the ethnic affiliation of groups of persons or because of sexual orientation, there is no discernible justification why protection against hate speech should be defined in terms of two separate components of the criminal offence." [11]

It must be said that, currently,[12] no specific punishment for blasphemy is provided for in law. However, Article 48, Part One, Clause 14 of the Criminal Law provides that religion is an equivalent circumstance aggravating liability as any racist, national and ethnic motive. Nevertheless, the rrecommendation of the Parliamentary Assembly of the Council of Europe (PACE) to the effect that "blasphemy, as an insult to a religion, should not be deemed a criminal offence" has been implemented in the national legislation.

[11] Dupate K., *Naida noziegumi un naida runa. Starptautiskie standarti un Latvijas tiesiskais regulējums un prakse*. (Hate crimes and hate speech. International standards and Latvian legal regulation and practice.)

Rīga: Latvijas Universitātes Akadēmiskais apgāds, 2023, p. 97. Available: https://www.apgads.lu.lv/fileadmin/user_upload/lu_portal/apgads/izdevumi/2023/Naida_noziegumi.pdf

[12] The original version of the Criminal Law (Criminal Law. Available: https://likumi.lv/ta/en/en/id/88966-criminal-law) adopted in 1998 was contained two articles that were directed against actions threatening religious sentiments: Articles 150 and 151 of the Criminal Law. Article 150 of the Criminal Law "Violation of the equality of persons depending on the attitude of these persons towards religion" stipulated: "On the direct or indirect restriction of the rights of persons, the creation of any advantages for persons depending on the attitude of these persons towards religion, with the exception of activities in the institutions of religious denominations, as well as on the religious hurting feelings or inciting hatred due to the attitude of these persons towards religion or atheism". On the other hand, Article 151 of the Criminal Law "Disturbance of religious rituals" provided for criminal liability for "intentionally disturbing religious rituals, if they do not violate the law and are not related to violation of personal rights". With the amendments to the Criminal Law of June 21, 2007, the first part of Article 150 of the Criminal Law was expressed in the following wording: "on offending the religious feelings of persons or inciting hatred due to the attitude of these persons towards religion or atheism". The purpose of these amendments was to implement Directive 2000/43/EC of the Council of the European Union of 29 June 2000, which introduces the principle of equal treatment for persons regardless of race or ethnicity. On the other hand, with the amendments of December 13, 2012, Article 151 was excluded from the Criminal Law. (Annotation of the project of the normative act "Amendments to the Criminal Law".

https://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/0/2628F5F4D3097316C2257228003423BB?OpenDocument)

3. Blasphemy, Religious Hate Speech, and Limitations of Freedom of Speech in a Religious Context

First, consideration must be given to blasphemy and it normative regulation in Latvia. The legal obligation of the state is to protect the individual's freedom of religion and to prevent infringement of this right. With respect to legal transactions (including contracts), Article 1415 of the Civil Law of Latvia prescribes that "unsanctioned and indecent activities, if their aim is contrary to religion, law or good morals, or are aimed at evading the law,, cannot be the subject matter of a legal transaction, and any such transaction is null and void."[13] Here, it should be added immediately that there has been no court practice or public discussion to this effect in Latvia, but the previously mentioned norm was developed and adopted at the beginning of the last century. The Civil Code of the Republic of Latvia was adopted in 1937 but was renewed with the restoration of Latvian statehood in 1993. If the court were to start analysing this norm nowadays, there is a high probability that it would decide that blasphemy against religion is not appreciable at all, although it is a violation of rights. Naturally, this is only an assumption but it is quite likely that this would be so.[14]

Secondly, Article 4, Clause 1 of the Law on Religious Organisations prohibits directly or indirectly offending the religious feelings of the population: "Direct or indirect restriction of the rights of the population or creation of advantages for the population, as well as offending feelings or raising hatred due to their attitude towards religion, is prohibited. Persons guilty of violating this provision shall be prosecuted in accordance with the procedures established by law.''

Refusal to criminalise blasphemy in 2014 was not only in compliance with the recommendations of the Council of Europe, but it is also assuredly related to the reduction of the role played by churches in society. In the 1990s, when Latvia regained its independence after the Soviet occupation, the role of the church grew considerably. However, over time, the attitude of politicians began to change. There are many reasons for this, the discussion of which would require a separate study, but one of the most visible reasons is the weakness of the traditional churches in Latvia. This weakness is connected with the churches' inability to successfully lobby for legisla-

[13] The Latvian Civil Law (Section 1415) Direct or indirect infringement of people's religious sensibilities is also prohibited in Section 4 of the Latvian Law on Religious Organisations.

[14] According to Latvian legal doctrine, only those transactions whose purpose is illegal interference in the activities of religious organisations, which blaspheme religion or which limit the contractual partner's freedom of religious belief can be recognised as hostile to religion. Nowadays, the condition of not changing one's faith is also recognised as illegal. However, it should be noted that non-compliance with religion as an independent basis for the invalidity of transactions provided for by the law is redundant, because transactions contrary to religion, depending on their specific manifestations, are simultaneously contrary to the law or good morals. (Balodis K., *Ievads Civiltiesībās*. (Introduction to Civil Law.) Rīga: Zvaigzne ABC, 2007. 231.lpp.)

tive initiatives and their consequent weak influence on the minds of believers. There are no officially reliable data that would make it possible to say with confidence that the number of believers in churches is in decline because no reliable records exist of believers and members of the various religious denominations in Latvia. However, we can clearly see an irreversible process of secularisation. Under the constitutional slogan "But the Church is separate from the state", the religious organisations of the state are being gradually dismissed from deciding on its regulatory legal norms. Discussion of church–state relations is no longer not at the top of the political agenda, nor was it in 2011, when the President of Latvia, Andris Bērziņš (2011–2015), chose to step away from the established practice of previous presidents – Guntis Ulmanis (1993–1999), Vaira Vīķe – Freiberga (1999 – 2007), Valdis Zatlers (2007 – 2011) – of receiving a blessing in a church from the leaders of the traditional denominations. Thus, it was announced in the programme of events for the inauguration of President Andris Bērziņš on 8 July 2011) that, unlike his predecessors, he would not be going to a church to swear the solemn presidential oath. This, then, was a clear signal that the Latvian government is secular not only "on paper" but also in its highest public official formalities.[15] Subsequent presidents have followed his example and none of them (Raimonds Vējonis (2015–2019), Egils Levits (2019–2023), Edgars Rinkēvičs (2023– the present), hasdecided to take the inaugural oath in a church.

It is obvious that the Churches have not had their own lobby in parliament for a long time, and there is no mechanism to protect their interests against liberalising state policies. Examples that confirm this are not only the 2014 amendments to the Criminal Law but also the changes made to media laws. Thus, in 2010 the Latvian Parliament changed the law that regulates television and radio by removing the ban on offending believers' "religious feelings"[16] in advertisements. The aforementioned wording of the law also included a prohibition on blasphemy. This has been is replaced by the requirement that the supervisory authorities ensure that religious hatred is not incited within the territory of Latvia. For the sake of objectivity, it should be noted that religion is the only factor. The law now stipulates that there should be no incitement of hatred on the basis of race, gender, nationality, ethnicity or religion.[17]

With regard to the media, it should be said that the ban on publishing and broadcasting information that propagates religious intolerance is still in place. Such a prohibition is contained in Article 7 of the Law on the Press and Other Means of

[15] Balodis R. 'The mutual roles played by religion and the state in Latvia' in B. Schanda (ed.), *The Mutual Roles of Religion and State in Europe*. Proceedings of the 24rd Congress of the European Consortium for Church and State Research, Pázmány Péter Catholic University, Budapest 8-11 November 2012.

[16] Article 20. Radio un televīzijas likums (Radio and Television Law) [nav spēkā] Latvijas Vēstnesis, 137, 08.09.1995. https://likumi.lv/ta/id/36673/redakcijas-datums/2010/01/01

[17] Article 21.[3] . Elektronisko plašsaziņas līdzekļu likums (Electronic Media Act) Latvijas Vēstnesis, 118, 28 July 2010. https://likumi.lv/ta/id/214039

Public Information. [18] Another reference, this time to the Latvian Advertising Law,[19] Article 4, Part 2 of which states that it is prohibited in advertising to "express discrimination against people based on their race, skin colour, gender, age, religious, political or other beliefs, national or social origin, financial status or due to other circumstances". This particular law prohibits advertisements from "using the influence of fear or superstition," but whether or not that would in any way protect someone from blasphemy is more a matter of context. The legislature does not draw a clear line in its understanding of hate speech as a motive based on race, national or ethnic origin, religion or belief, sexual orientation or disability or other similar grounds.

4. Blasphemy and Defamation of Religion

Blasphemy is often associated with the desecration of religious symbols in churches and cemeteries. There is no separate regulatory framework that would provide for the punishment in the case of desecration of religious symbols in cemeteries or churches. However, if any religious symbols were to be desecrated in these places, then the Criminal Law has norms that can be applied. Let us consider first the situation with cemeteries. Article 228 of the Criminal Law of the Republic of Latvia is concerned with the desecration of a grave, a funeral urn, or a buried or unburied corpse. The anticipated punishment is a prison sentence of up to five years, community service, or a fine equal to 100 times the offender's minimum monthly wage. The motivation for such criminal offences, including motivation that is based on religion, is not taken into consideration in this regard. Religion is not addressed specifically in this section of the law but it is clear that if the offence involves, for example, Satanism or hooliganism (damaging crosses, for instance), then the offences will be classified in accordance with Article 228. The same is true when people desecrate gravesites by means of antisemitic symbols. It has to be added that if desecration of a grave[20] occurs repeatedly or has been committed by a group of individuals on the basis of a previous agreement between them, the punishment can be far more severe – eight years in prison or a fine equal to 150 times the perpetrators' minimum monthly wage. If the offence relates to the theft of a monument, a funeral urn, or any other object that

[18] Likums "Par presi un citiem masu informācijas līdzekļiem" (The press and other means of mass information Law) Latvijas Republikas Augstākās Padomes un Valdības Ziņotājs, 5/6, 14 February 1991. https://likumi.lv/ta/id/64879

[19] Reklāmas likums (Advertising law) Latvijas Vēstnesis, 7, 10 January 2000. https://likumi.lv/ta/id/163

[20] See Balodis, R. 'Staat und Kirche in Lettland' (State and Church in Latvia) in Gerhard Robbers, (ed.) *Staat und Kirche in der Europäischen Union* (State and Church in the European Union), 2nd ed. Baden-Baden: Nomos Verlagsgesellschaft (2005), pp. 279-310.

is on or inside a grave or a funeral urn, Article 228.3 of the Criminal Law predicts a prison sentence of 3-10 years, with or without confiscation of property.

On the other hand, if we are talking about blasphemy that has occurred in a church, then it follows that the buildings belong to a specific legal entity, i.e., a religious organisation. In this case, penalties already exist for damaging property. Article 185 of the Criminal Law provides criminal liability for "the intentional destruction or damage of someone else's property" This will be punishable by deprivation of liberty for a period of up to two years or by temporary deprivation of liberty for a shorter period, or by probationary supervision, or by community service, or by a fine. Part two of the same article provides criminal liability "or the intentional destruction or damage of someone else's property, if it has been done by arson or in another generally dangerous way, or if it was done on a large scale, or if it resulted in the death of a person or caused other serious consequences arising from the negligence of the guilty party; this will be punishable by deprivation of liberty for a period of up to ten years and probationary supervision for a period of up to three years, or without the latter." Article 185 of the Criminal Law has been the grounds, for example, for initiating criminal proceedings against vandalism in the Old Saint Gertrude Lutheran Church in Riga. On 23July 2023, which was a Sunday, a man smashed cult utensils in the church and scattered sand. The motives for the attack were unclear but the priest of the church felt that it was an act of hatred against the Christian faith.[21]

Blasphemy is a relatively rare phenomenon in Latvia but a retrospective overview reveals individual cases that have occurred at different points in time. Latvian statehood can be divided into two periods, the first during the Soviet occupation (1918–1940), while the second resumed with the restoration of independence in 1990. Punishment of blasphemy was established in Latvia and was in force until the Soviet occupation. According the passing of Latvian Punitive Law (1933) Article 300, anyone who offended against the religious beliefs of members of a religious community in Latvia by engaging in blasphemy or denigrating a religious organisation in any other way could be sentenced to prison. An incident was recorded in the town of Talsi, where a bartender was punished in accordance with Section 300 for putting up a sign in his tavern which read "May God bless your entry when you are thirsty and your exit once you have paid." A two-year prison sentence was imposed on a man who published an anti-religious brochure under the title "The Evangelical Christ and His Teachings."[22] In April 1934 Elza Drille, the senior editor of a magazine called *Free Thinker* (Brīvdomātājs), was charged with "denigrating Holy Communion".

[21] Criminal proceedings have been initiated for vandalism at St. Gertrude's Church. https://www.lsm.lv/raksts/zinas/latvija/24.07.2023-sakts-kriminalprocess-par-vandalismu-gertrudes-baznica.a517548/

[22] Pipirs, A. *Pretkristīgā propaganda un viņas veicinātāji Latvijā* (Anti-Christian Propaganda and Its Promoters in Latvia). Rīga (1932), pp. 3-4.

Her alleged crime was that she had published an article about the historical origins of the historical ritual. The article did not associate Holy Communion with the blood of Christ but, in a heretical manner, it attempted to attribute it to ancient cannibalism. In February 1935, Drille spent two weeks at the Riga Central Prison for having published the article.[23] It is clear, of course, that the blasphemous article was simply published at the wrong time. This was a period during which the authoritarian regime was preparing to take power and what happened to Drille was an example of how the regime sought to frighten possible dissidents. There is evidence that 25 people were convicted during 1938 of offences related to religion .[24] A curiosity in this regard relates to a man identified only as Fricis K, who ended up receiving what seems to have been a disproportionately harsh punishment. During an evening service at the Orthodox Cathedral in Riga in April 1938, the inebriated man refused to kiss a cross that had been presented to him by the priest. His response was to tell the priest that "when the nation is dark, it kisses the hands of the bearded ones." The Riga Regional Court imposed a suspended one-month sentence. However, the Latvian Prosecutor's Office, appealed against the punishment. In the appeal, a deputy prosecutor argued that "criminal offences against the religious sensibilities and religious cults of members of society not only touch upon the interests of individual persons or known religious organisations but also reduce respect towards religion itself and may weaken the foundations of national life if these criminal offences do not draw a sufficiently strict response." The court took this view into account and sent the unlucky blasphemer to prison for five months.[25]

During the period of the Soviet Union and Nazi Germany occupation several acts of blasphemy have taken place. During their occupation of Latvia (1941–1944), the Nazis destroyed most of the synagogues in the country, although the main Riga Synagogue (Vecrīga, in Peitavas Street) survived. The Jewish holy place was preserved largely because close to the synagogue a house was occupied by a high-ranking general of the German army. However, although the synagogue was saved from being burnt down, it was saved only by an act of blasphemy – a horse stable was installed in the Jewish temple. The communists were not far behind the Nazis. The story of a Jēkabpils city Jewish congregation testifies to the attitude of the communists. In their time, the communist regime was not kind to the Jews, either. For example, at the "request" of a Jewish congregation, the synagogue in Jēkabpils was transformed into a workers' dormitory. The official version of the regime was, of course, that this was because of the housing crisis. Bearing in mind the atheism of the Soviet gov-

[23] Balēvics, Z. *Baznīca un Valsts buržuāziskajā Latvijā* (Church and State in Bourgeois Latvia). Rīga: Latvijas Valsts Izdevniecība (1964), p. 112.

[24] *Ibid*.

[25] *Ibid*.

ernment, we can list many other cases, such as the experiences of the Evangelical Lutheran Church in the Latvian district of Gulbene, whose church was converted into a warehouse for empty beer bottles. The church tower was demolished by means of a tractor and ropes, and then the bell from the church tower was broken up and taken for recycling along with other scrap metal. The church organ was destroyed and removed, while the rest of the fixtures in the sacred space were ripped out and thrown on the rubbish dump.[26] The Riga Orthodox Cathedral of the Nativity of Christ, which is one of the most significant Orthodox church buildings in Latvia, was closed by the Soviet authorities in 1963, ordering the crosses to be cut down and the bells removed, except for the two largest ones, which were bricked up. The church was converted into the "House of Knowledge", mezzanine covers were created and a planetarium was installed in the dome. On one of the side altar rooms there was a cafe, which was aptly called "God's Ear".

There have been a number of cases where blasphemy has been invoked in Latvia, but whether it has happened is another matter. For example, in 1997, the chief rabbi of Latvia appealed to the Ministry of Justice with a protest about the registration of the religious organisation "Jewish Messianic Congregation "Yeshua"" because the words "Jews", "rabbi", "synagogue", etc., which the organisation used in its founding documents, "deeply offended the traditions, customs and national self-esteem of the Jewish people". These terms are the sole priority of the Jewish nation and any other use is blasphemous. The judgment of the Israeli Supreme Court was added as a justification for the protest. The incident ended peacefully because the new church, not wanting open conflict, avoided mentioning the controversial words in its statutes and was registered as a religious organisation.[27]

5. From Blasphemy to the Prohibition of Hate Speech

Although the Supreme Court has twice published studies on hate speech, [28] they mostly contain theoretical descriptions of hate speech, combined with an analysis of the wording of criminal divisions contained in the Criminal Law. As identified in a study published in 2023, in 2011–2021, 41 verdicts were passed with respect to the

[26] Balodis R, 'Baznīcu tiesības' (The Church Law). Rīga: Reliģijas Brīvības Asociācija, 2002. p. 151-152.

[27] Balodis R, 'Valsts un Baznīca'. (State and Church). Rīga: Nordik, 2000, p. 446-449.

[28] Tiesu prakse kriminālllietās par nacionālā, etniskā un rasu naida izraisīšanu. (Supreme court Criminal cases on inciting national, ethnic and racial hatred) Rīga: Latvijas Republikas Augstākā tiesa, 2012. Available: https://www.at.gov.lv/files/uploads/files/docs/petijumi/Apkopojums%20naida%20kurinasana.doc; Naida runa un vārda brīvība. (Supreme court Hate speech and freedom of expression) par Krimināllikuma 74.1, 78., 150.pantu). Rīga: Latvijas Republikas Augstākā tiesa, 2018. Available at: https://www.at.gov.lv/files/uploads/files/6_Judikatura/Tiesu_prakses_apkopojumi/2018/Naida%20runa%20un%20varda%20briviba_Apkopojums_2018,_22 _10_2018.doc

criminal offence defined in Article 78 of the Criminal Law, along with 5 verdicts for the crime defined in Article 150.[29] However, none of the cases mentioned could be considered as having caused a public debate.

The Criminal Law criminalises not blasphemy but acts aimed at inciting religious hatred, including hate speech. If an offence has been committed of a kind not punishable in itself under the article that provides for criminal liability for hate speech (Articles 78 and 150 of the Criminal Law) but which corresponds to the characteristics of another crime and was committed as a result of racist, national, ethnic or religious motives or social hatred, then these circumstances are, in accordance with Article 48, Part One, Clause 14 of the Criminal Law, a circumstance that aggravates criminal liability. In Latvian court practice, there is only one judgment in which a person has been convicted of hate speech originating from religious motives (hostile statements on the Internet against Muslims). [30] It is also worth mentioning that there is only one case in court practice in which the court has considered the aggravating circumstance provided for in Article 48 of the Criminal Law. [31] Although religious hatred as the aim or motive of a crime is found only extremely rarely in Latvian judicial practice, this situation is probably due to the fact that "hate crimes are poorly recognised in Latvia and are not considered a socially and politically important priority. First of all, it is related to both a high tolerance for violence in general and the local social and cultural context, which forces us to look at many self-evident issues at the European level – race, sexual orientation, etc. etc. – in a perspective specific to Latvia. Often offenses that would be interpreted as hate crimes in the European context are perceived as a social norm in Latvia, which is evidenced by a high level of intolerance towards various signs existing in society." [32]

[29] Dupate K. Naida noziegumi un naida runa. Starptautiskie standarti un Latvijas tiesiskais regulējums un prakse. (Hate crimes and hate speech. International standards and Latvian legal regulation and practice.)

Rīga: Latvijas Universitātes Akadēmiskais apgāds, 2023, p. 109. Available at: https://www.apgads.lu.lv/fileadmin/user_upload/lu_portal/apgads/izdevumi/2023/Naida_noziegumi.pdf

[30] Judgment of the Riga District Court of 18 October 2016 in case No. K33-0525-16/9. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/287483.pdf

[31] Dupate K, *Naida noziegumi un naida runa. Starptautiskie standarti un Latvijas tiesiskais regulējums un prakse*. (Hate crimes and hate speech. International standards and Latvian legal regulation and practice.)

Rīga: Latvijas Universitātes Akadēmiskais apgāds, 2023, p. 109. Available: https://www.apgads.lu.lv/fileadmin/user_upload/lu_portal/apgads/izdevumi/2023/Naida_noziegumi.pdf

[32] *Ibid.*, p.114.

6. Discrimination in relation to religion.

Latvia is a member state of the European Union (EU) and in its legal system it has therefore implemented the general principle of equality. Latvia is a member state of the European Union (EU) and in consequence it has implemented the general principle of equality. Latvia proclaimed its independence in 1990 and joined the UN International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Both Covenants expressis verbis prohibit religious discrimination. Another significant step was the signing of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention became applicable in Latvia on 27 June 1997 and as of that date the praxis of European Court of Human Rights became obligatory for Latvia). In 1998 the Constitution of Latvia was amended by Chapter VIII (Fundamental Human Rights) in which Article 91 defines human rights as legal equality and the principle of non-discrimination [91. All human beings in Latvia shall be equal before the law and the courts. Human rights shall be realised without discrimination of any kind.] According to Article 89 of the Constitution the state shall recognise and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia. This means that, in cases where there is doubt about the actual contents of the Constitution, it shall be interpreted as possible in accordance with international human rights law interpretation. On November 12, 2000 Latvia signed supplementary protocol 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides for the establishment of a prohibition on discrimination as a separate right. The second sentence of Article 91 of the Constitution of Latvia has to be interpreted as **"classic" non-discrimination** (despite the ambiguous formulation of Article 91). It prohibits different treatment based on particular restricted – categories. Levits has pointed out that in the course of its discussion of the rule of equality, the parliamentary commission which prepared Chapter 8 talked about prohibited criteria such as "age" and "sexual orientation" but not about "religion". Although the commission decided not to be confined by any specific criteria, thus leaving the interpretation to actual practice, it is clear that the will of the legislature was to determine the historic 12 prohibited criteria of Article 91 of the Constitution [race, ethnicity, gender, age, language, party affiliation, political belief, religion, world belief, social status, financial status, service status and other similar circumstances], and, citing "other similar circumstances," leave matters open for future development.[33]

[33] Balodis R., Danovskis E. 'Religion and Discrimination Law in Latvia' in Mark Hill (ed.), *Religion and Discrimination Law in the European Union*. Proceedings of the 23th Congress of the European Consortium for Church and State St. Stephen's House. University of Oxford, 29 September – 2 October 2011. Balodis R., 'Religion in Public Education – Latvian Experience' in Gerhard Robbers (ed.), *Religion in Public Education*. Proceedings of the Conference Trier, 11 – 14 November 2010, p. 211.

Article 149.[1] of the Criminal Law provides for criminal liability in the case of "discrimination on the basis of racial, national, ethnic or religious affiliation or for violating the prohibition of other types of discrimination, if this causes significant damage". The main point of this article stipulates "imprisonment for a period of up to one year or with temporary deprivation of liberty, or probation supervision, or community service, or a fine". Although the wording of the norm is very broad, until now there has been no case in Latvian court practice where a conviction might have been made on the basis of this article. [34]

Causing a disturbance of religious rites as a criminal offence was provided for in Article 150 of the Criminal Law, although since 2012 this article has been once again excluded.

Criminal liability with respect to desecration of a grave or a corpse is provided for in Article 228 of the Criminal Law ("For a person who commits desecration of graves, funerary urns or interred or uninterred corpses, the applicable punishment is the deprivation of liberty for a period of up to one year or temporary deprivation of liberty, or probationary supervision, or community service, or fine.").

7. Other crimes that may be related to the religious factor

In theory, religious hatred can be a motive for several criminal offences under Criminal Law, including the criminal offences listed in Chapter IX.[1] of the Criminal Law "Criminal Offences Related to Terrorism". In the context of topics Auch as the Holocaust and how the Criminal law deals with war crimes and crimes against humanity it should be noted firstly that Paragraph 14 of the first part of Article 48 of the Criminal Law stipulates that it will also be regarded as an aggravating circumstance if a criminal offence is committed as a result of racist, national, ethnic or religious motives or social hatred. Moreover, Article 74.[1] defines criminal liability with respect to "a person who commits public glorification of genocide, crime against humanity, crime against peace or war crime or who commits public glorification, denial, acquittal or gross trivialisation of actual genocide, crimes against humanity, crimes against peace, or war crimes, including genocide, crimes against humanity, crimes against peace or war crimes against the Republic of Latvia and its inhabitants committed by the U.S.S.R. or Nazi Germany". In the judicial practice of Latvia there have been only three judgments in which a person has been convicted according to Article 74.[1] of the Criminal Law. [35] In one of the cases a person posted a comment about a video

[34] Dupate K., *Naida noziegumi un naida runa. Starptautiskie standarti un Latvijas tiesiskais regulējums un prakse*. (Hate crimes and hate speech. International standards and Latvian legal regulation and practice.) Rīga: Latvijas Universitātes Akadēmiskais apgāds, 2023, p. 98. Available: https://www.apgads.lu.lv/fileadmin/user_upload/lu_portal/apgads/izdevumi/2023/Naida_noziegumi.pdf

[35] *Ibid.*, p. 109.

on a website, stating that "from the point of view of the USSR, the deportations were not only justifiable but too liberal." [36]

If we are thinking in terms of the preparation of genocide and conspiracy to commit genocide, which are defined as punishable under Latvian national legislation, then Articles 70 and 71[1] of the Criminal Law state the following:

Section 71. Genocide

For a person who commits genocide, that is, commits intentional acts for the purpose of destruction in whole or in part of any group of persons identifiable as such by nationality, ethnic origin, race, or a defined religion, by killing members of the group, inflicting upon them physical injuries hazardous to life or health or causing them to become mentally ill, intentionally causing conditions of life for such people to result in their physical destruction in whole or in part, utilising measures the purpose of which is to prevent the birth of children in such group, or transferring children on a compulsory basis from one group of persons into another, the applicable punishment is life imprisonment or deprivation of liberty for a period of three and up to twenty years.

Section 71.[1] Invitation to Commit Genocide

For a person who commits public invitation to genocide, the applicable punishment will be the deprivation of liberty for a period of up to eight years.

Since Article 71 of the Criminal Law provides for a particularly serious crime, according to the third part of Article 15 of the Criminal Law, criminal liability can also be found in the case of the preparation of such a crime."

[36] Judgment of the Court of Riga Sity Latgale's Suburb District Court of 23 May, 2013 in case No.11840005812. Cited from: Liholaja V. Krimināllikuma 74.[1] panta komentārs. In: Krastiņš U., Liholaja V. Krimināllikuma komentāri. Otrā daļa (IX-XVII nodaļa). Trešais papildinātais izdevums. Rīga: Tiesu namu aģentūra, 2022, p. 40.

THE RELATION BETWEEN FREEDOM OF SPEECH AND RELIGION IN LITHUANIA

Dalia Vitkauskaitė-Meurice

1. Fundamental norms regulating freedom of religion

Restored in 1918, the Republic of Lithuania embraced in its constitution the regulation of freedom of belief that had been inspired by the Statutes of the Grand Duchy of Lithuania that were adopted, respectively, in 1529, 1566 and 1588. Despite differences in the statehood models proposed, the drafters of the early constitutions of the Republic were in search of the best model of separation of powers that could be adopted by the Republic of Lithuania. Within the period of 1919-1938 the constitutional models of state varied from a parliamentary to a presidential model, but the regulation of freedom of religion or belief remained almost identical in all of the various Constitutions.

This regulatory similarity was largely influenced by the post-First World War Lithuanian desire to join the League of Nations. Hence, in 1922 Lithuania signed a unilateral Declaration Concerning the Protection of Minorities in Lithuania, and by doing so it had fulfilled the requirements of admission to the League of Nations. By signing this Declaration, Lithuania recognised that if articles of this Declaration affect persons' belonging to racial, religious or linguistic minorities, these matters were to be declared as constituting obligations of international concern.

Notwithstanding the existence of the background norms protecting freedom of speech and belief in the Constitutions, there was no special law in the Republic of Lithuania that could regulate the juridical status of religious minorities until 1940. The Constitutions had recognised "existing religious organisations" (later, the Churches acknowledged by the State), i.e., churches legitimised by law dating back to the former Russian Empire (Roman Catholic, Evangelical, Russian Orthodox, Jewish and Muslim), but no procedure was established for the registration of new religious communities[1].

[1] Annotated Legal Documents on Islam in Europe: Lithuania. Compiled and Annotated by Vitkauskaite-Meurice, D. Brill Academic Pub; Annotated edition (6 April 2017).

Such legitimisation became relevant in 1995, when the Law on Religious Communities and Associations came into force after the re-establishment of Lithuanian statehood in 1991. The Constitution of the Republic of Lithuania (1992) set up the general legal framework for securing individual freedom of expression (Article 25[2]) and religious freedom (Article 26[3]) on the one hand and introducing the limitations of such rights (Article 27[4] and Article 28[5]) on the other. Later adopted *lex specialis* expanded the constitutional provisions of Article 43 by setting up a blueprint for relations between the State and religious communities. It established rules for the recognition and registration of religious communities, their property rights, charitable status, benevolent, economic and publishing activities, taxation, legal regulation of work and social welfare and social insurance issues[6].

With its becoming a member of the United Nations, the Council of Europe, OSCE and the EU, the Republic of Lithuania has assumed international obligations by having ratified the International Covenant on Civil and Political Rights (1991), the

[2] Article 25 of the Constitution of the Republic of Lithuania reads as follows: "Everyone shall have the right to have his or her own convictions and freely express them. No one must be hindered from seeking, receiving, or imparting information and ideas. The freedom to express convictions, as well as to receive and impart information, may not be limited otherwise than by law when this is necessary to protect human health, honour or dignity, private life, or morals, or to defend the constitutional order. The freedom to express convictions and to impart information shall be incompatible with criminal actions – incitement to national, racial, religious, or social hatred, incitement to violence or to discrimination, as well as defamation and disinformation." Available at: https:// lrkt.lt/en/about-the-court/legal-information/ the -constitution/192. Lietuvos Respublikos Konstitucija. Valstybės žinios, 1992, No. 33-1014.

[3] Article 26 of the Constitution of the Republic of Lithuania specifically focuses on religion: "Freedom of thought, conscience, and religion shall not be restricted. Everyone shall have the right to freely choose any religion or belief and, either alone or with others, in private or in public, to profess his or her religion, to perform religious ceremonies, as well as to practise and teach his or her belief. No one may compel another person or be compelled to choose or profess any religion or belief. The freedom to profess and spread religion or belief may not be limited otherwise than by law and only when this is necessary to guarantee the security of society, public order, the health or morals of people, or other basic rights or freedoms of the person."

[4] Freedom of thought, conscience and religion shall not be restricted. Everyone shall have the right to freely choose any religion or belief and, either alone or in community with others, in public or private, to manifest his religion or faith in worship, observance, practice or teaching. No one may coerce another person or be subject to coercion to choose or manifest any religion or belief. Freedom to manifest and spread his religion or belief may be subject only to limitations as are prescribed by law and only when this is necessary to guarantee public security, public order, health and morals, or for the protection of fundamental rights and freedoms of the person. Parents and legal guardians shall, without restrictions, take care of the religious and moral education of their own children and wards in accordance with their own convictions.

[5] A person's opinions, manifested religion or belief may not serve as a justification for the commission of a criminal offence or for failure to execute the law.

[6] Lietuvos Respublikos religinių bendruomenių ir bendrijų įstatymas. Valstybės žinios, 1995, No. 89-1985. Available at: I-1057 Lietuvos Respublikos religinių bendruomenių ir bendrijų įstatymas (lrs.lt).

International Covenant on Economic, Social and Cultural Rights (1991), the European Convention on Human Rights and Fundamental Freedoms (1995), the Framework Convention for the Protection of National Minorities (1995) and the European Charter of Human Rights. These international human rights conventions and the European Union *aquis* play a very important role in establishing human rights standards and securing the freedom of religion and freedom of speech in the domestic context.

2. Contemporary Constitutional Provisions

The wording of neither the Constitution of the Republic of Lithuania nor other national law defines the meaning of the freedom of religion or belief. The only reference to the meaning of this right can be found in international human rights documents that are also considered to be part of national legislation due to their ratification. In a search for the meaning of this freedom it is important to refer to General Comment No. 22 of the UN Human Rights Committee, which concluded that Article 18 of the ICCPR protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. A similar understanding of the universal norm was developed at the regional level, i.e., in the jurisprudence of the ECtHR in the Kokkinakis judgment[7]. The Kokkinakis judgment demonstrates that the protection of Article 9 extends to a wide range of convictions and philosophies not limited to religious belief. However, a belief must "attain a certain level of cogency, seriousness, cohesion and importance". A belief need not include religious convictions, and the fact that it is not so qualified will not deprive it of the protection afforded to freedom of religion. Although the same entitlements apply to freedom of religion and freedom of belief, and both freedoms are subject to an identical set of limitations, the concept of "religion" informs the meaning attributed to "belief". Given the conceptual difficulties, many jurisdictions seek to avoid having to determine the exact meaning of "religion"[8].

The complexity of the definition of the term "religion" was also referred to in a decision of the Supreme Administrative Court of Lithuania which admitted that it is beyond the competences of governmental institutions to attribute a certain doctrine to any religion. The Supreme Administrative Court held that "there is no legal regulation that would allow a certain doctrine to qualify as a religion, also there is no legally authorised body that would be authorised to provide such qualification. That is an issue for religious studies" (in Lithuanian "Įstatyminio reglamentavimo, kuris

[7] European Court of Human Rights. Case of Kokkinakis v. Greece. Available at: https://hudoc.echr.coe.int/eng?i=001-57827.

[8] Annotated Legal Documents on Islam in Europe: Lithuania. Compiled and Annotated by Vitkauskaite-Meurice, D. Brill Academic Pub; Annotated edition (6 April 2017).

leistų kvalifikuoti tam tikrą doktriną kaip religiją, neegzistuoja, kaip nėra ir įstatymu įgalioto subjekto pateikti tokį vertinimą. Tai yra religijotyros mokslo klausimas")[9].

In the view of the Constitutional Court, freedom of thought, conscience and religion becomes a matter of legal regulation only to the extent that an individual expresses his thoughts or religion in his actions. As long as he has a religion or faith, this is an inviolable sphere of his private life. This may not be restricted in any way; however, the state has a duty to ensure that no one encroaches on the spiritual convictions of an individual, i.e., that no one interferes with his inborn right to choose a religion acceptable to him or not to choose any, to change his chosen religion or to abandon it. The state may not establish mandatory requirements that a person indicate his faith or his approach as regards matters of religion. Also, it has a duty to ensure that a believer or a non-believer, either alone or with others, can make use of the freedom of thought, conscience and religion guaranteed to him in such a way that the rights and freedoms of other people are not violated[10].

Similarly, the Constitution of the Republic of Lithuania allows permissible deviations from the liberties set up in Constitution, i.e., the imposition of limitations is permissible only when that is necessary to guarantee the security of society, public order, health and morals. The violation of this freedom brings with it certain sanctions. The Constitutional provisions impose the obligation to respect this freedom on several addressees. The first group is those who aim to interfere with exercising this freedom, such as racist or nationalistic groups[11]. The second group of addressees consists of

[9] *Ibid.*

[10] Lietuvos Respublikos Konstitucinis Teismas. Nutarimas dėl Lietuvos Respublikos švietimo įstatymo 1 straipsnio 5 punkto, 10 straipsnio 3 ir 4 dalių, 15 straipsnio 1 dalies, 20 straipsnio, 21 straipsnio 2 punkto, 32 straipsnio 2 dalies, 34 straipsnio 2, 3 ir 4 dalių, 35 straipsnio 2 ir 5 punktų, 37 straipsnio 2 punkto ir 38 straipsnio 2 ir 3 punktų atitikimo Lietuvos Respublikos Konstitucijai. Vilnius, 2000 m. birželio 13 d. Byla Nr. 23/98

[11] On 18 April 2014, Vilnius County Court in the case of Q.N. and G.M. vs Lithuanian State for the first time in Lithuanian jurisprudence acknowledged the improper application of refugee law. Among other human rights violations made by Lithuanian institutions, the applicants complained about violation of the freedom of religion. Two minors were imprisoned for crossing the state border illegally. Lithuanian state institutions violated the Convention on the Rights of the Child by putting the minors into a prison with adults. In prison the applicants complained that while they were praying, other prisoners were showing pornographic films, shouting "Al-Qaida" and mocking their prayers while prison guards did not intervene to prevent such behaviour. In addition, the applicants complained that due to their religion they could not eat pork, so they did not eat meat dishes at all. The Court confirmed the violation of the UN Convention on the Rights of the Child and the Refugee Convention, and stated that the applicants had suffered improper treatment because of their nationality, religion and age. Their religious feelings were hurt frequently and food specifics were ignored; they were placed together with adults despite their age, all of which caused moral damage. The applicants were entitled to material compensation from the state that amounted to 10,700 Litas for Q.N. and 11,200 Litas for G.M. (circa 3,100 Euros and 3,250 Euros). The Court also recognised that the arrest and sentencing of G.M. were illegal according to the

religious organisations or churches themselves in order to ensure that the activities of religious organisations are in conformity with the laws. With regard to those different groups of addressees the legislation varies from the provisions of the Criminal Code to the special regulation established in the Law on Religious Communities.

The provisions of the Criminal Code of the Republic of Lithuania are applicable to those who violate this freedom. The Code prohibits discrimination based on nationality, race, origin, religion or other grouping (Article 169), as well as incitement to commit a crime based on similar grounds (Article 170). Article 171 of the Criminal Code prohibits physical or verbal interference in the performance of religious practices and provides for criminal sanctions that vary from fines to imprisonment for up to three years.

Articles 27 and 28 of the Constitution of the Republic of Lithuania spell out the limitation to freedom of expression: "Convictions, practised religion, or belief may not serve as a justification for a crime or failure to observe laws." (Article 27); "While implementing his or her rights and exercising his or her freedoms, everyone must observe the Constitution and laws of the Republic of Lithuania and must not restrict the rights and freedoms of other people."

The Constitutional Court, in its ruling of 10 March 1998, stated that "any limitation on the freedom of expression and information must always be conceived as a measure of exceptional nature. The exceptional nature of the limitation means that one may not interpret the constitutionally established possible grounds for limitation by expanding them. The necessity criterion as consolidated therein presupposes that

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Penal Code of the Republic of Lithuania (Article 291, Paragraph 1). The same year the Equal Opportunities Ombudsman received a complaint from a mother of the Baptist faith whose son was studying at public school. The mother complained that during a mathematics lesson a Roman Catholic priest came to invite the children and their parents to register for the confirmation sacrament in a church. Although there was no violation established, the Ombudsman recommended avoiding the situation which could amount to discrimination against children on the basis of their religious convictions. Also, complain by Equal Opportunities Ombudsman was received in 2014 complaining about a violation of the rights of non-believers. The essence of the complaint was related to the ceremony of the handing out of school leaving certificates (A level diplomas) organised by a public educational establishment. The applicant complained that for several years the ceremony had been conducted in a local church after an hour-long long mass. The Equal Opportunities Ombudsman found a violation of the law and issued a recommendation that such ceremony be organised in a location that had no religious affiliation. Similarly, in 2014 a member of the International Society for Krishna Consciousness approached the Equal Opportunities Ombudsman with a complaint against Vilnius Tourist Information Centre (VTIC). The applicant complained about the VTIC's refusal to include the event organised by it in the list of recommended events. VTIC explained that it provides information exclusively about cultural events, while the latter event was described as a religious event by the Society itself. The Equal Opportunities Ombudsman did not find a violation of a freedom or belief in this case.

in every instance the nature and extent of the limitation must be in conformity with the objective sought (requirement for a balance)."[12]

In its ruling of 13 June 2000 the Court reasoned that "Interpreting the provisions of Article 26 of the Constitution in a systemic manner, it should be noted that the freedom of thought, conscience and religion is inseparable from the other human rights and freedoms entrenched in the Constitution: the right to have one's own convictions and freely express them, freedom to seek, obtain and disseminate information and ideas (Article 25 §§ 1 and 2), … freedom of culture, science, research and teaching (Article 42 § 1), as well as the other human rights and freedoms enshrined in the Constitution." And that "Freedom of [thought, conscience and religion] establishes ideological, cultural and political pluralism. No views or ideology may be declared mandatory and thrust on an individual, that is to say the person who freely forms and expresses his or her own views and who is a member of an open, democratic, and civil society. This is an innate human freedom. The State must be neutral in matters of conviction, it does not have any right to establish a mandatory system of views."[13]

In consequence, the Public Information Law of the Republic of Lithuania sets forth principles of information. The principles are based on freedom of expression, but in response, the public media, journalists and other related persons must show respect to freedom of conscience and religion. It is forbidden to disseminate information spreading or inciting hatred, mockery, contempt, incitement of discrimination, violence, or physical confrontation with a group of people or a person belonging to it on account of their age, gender, sexual orientation, ethnicity, race, nationality, citizenship, language, origin, social status, disability, or on the basis of faith, belief, opinion or religion. It is the duty of mass media providers not to spread biased information about religion, nor may such information discriminate against other religions. Mass media providers are under obligation to present religious organisations and their views clearly so that people are not misled.[14] The Public Information Law of the Republic of Lithuania has established the requirements for advertising and commercial audio-visual messages and prohibits the display of those that discriminate or encourage discrimination based (among other grounds) on faith, beliefs, views or religion.

[12] Lietuvos Respublikos Konstitucinio Teismo 1998 m. kovo 10 d. nutarimas dėl valdininku atsistatydinimo. Available at: Paieška - Lietuvos Respublikos Konstitucinis Teismas (lrkt.lt).

[13] Lietuvos Respublikos Konstitucinis Teismas. Nutarimas dėl Lietuvos Respublikos švietimo įstatymo 1 straipsnio 5 punkto, 10 straipsnio 3 ir 4 dalių, 15 straipsnio 1 dalies, 20 straipsnio, 21 straipsnio 2 punkto, 32 straipsnio 2 dalies, 34 straipsnio 2, 3 ir 4 dalių, 35 straipsnio 2 ir 5 punktų, 37 straipsnio 2 punkto ir 38 straipsnio 2 ir 3 punktų atitikimo Lietuvos Respublikos Konstitucijai, 2000 m. birželio 13 d. Available at: https://lrkt.lt/lt/teismo-aktai/paieska/135/ta341/content.

[14] Lietuvos Respublikos visuomenes informavimo istatymas. Valstybės žinios, 1996-07-26, Nr. 71-1706. Available at: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.29884/asr.

Moreover, television advertisements, trailers or teleshopping may not be inserted into broadcast of religious rites and programmes of a religious nature. The monitoring of implementation of the law is entrusted to the Inspector of Journalists' Ethics.[15]

The Law on Advertising also contains sections relating to freedom of expression in the actual form of advertising. For instance, Article 4 § 2 (General Requirements for Advertising) provides the limitations of advertising. It states that advertising will be banned if, among other things, it "violates public morals", "degrades human honour and dignity", "incites national, racial, religious, gender-based or social hatred or discrimination, or if it defames or spreads disinformation", promotes force or aggression, or attempts to cause panic", promotes behaviour which presents a threat to health, security, and environment", "abuses superstitions, people's trust, their lack of experience or knowledge", or "expresses contempt for the religious symbols of religious communities registered in Lithuania."[16]

The Lithuanian legal system permits the establishment of respective soft law regulations to set up ethical standards for professional behaviour. The Lithuanian journalists are bound to the Code of Ethics[17] in providing information to the public. The professional non-compliance may be complained about to the Commission of Ethics, which draws up decisions on behalf of the Association of Ethics in the Provision of Information to the Public (hereinafter referred to as the "Association"). The Association is a self-regulatory body of public information producers, disseminators, journalists and other participants in the media sector, which seeks to ensure compliance with the provisions of the Code of Ethics in Providing Information to the Public (hereinafter referred to as the "Code"), foster the principles of ethics in the provision of information to the public in public information activities, and raise public awareness in the evaluation of public information processes and in the use of public information.

The Code of Advertising Ethics that was adopted by the Lithuanian Advertising Agency adopts recommendations to journalists and media. The Code reminds the media that advertising must be lawful, accurate and fair. Advertising must not breach or ignore laws which are in force. Advertising must not include statements or visuals degrading human dignity, offending religious feelings or political convictions, or promoting behaviour which is dangerous to health and/or the environment. All advertising must be prepared with social responsibility and conform to the general requirements of fair competition, applicable to any business. Advertising must not mislead or harm the consumer or abuse consumers' trust or their lack of experience

[15] *Ibid.*

[16] Lietuvos Respublikos reklamos įstatymas. Valstybės žinios, 2000 m. liepos 31 d., Nr. 64-1937.

[17] Lietuvos žurnalistų ir leidėjų etikos kodeksas, Vilnius, 2005. Available at: www.lrs.lt/apps3/1/2386_fdqousdy.pdf.

and/or knowledge. Advertising must not erode consumers' trust in advertising in general. Advertising must be clearly recognisable and distinguished from other information.[18] The Code also draws attention to decency; therefore, advertising must not breach society's ethical norms. No advertising may breach the requirements of good taste, decency and respect for human dignity. Advertising is not contrary to this Code if it appears offensive to some people. However, advertisers are recommended to avoid careless words or visuals which may offend many people. Some advertisements, although conforming to the usual ethical norms, are considered unpleasant because they express a viewpoint on issues on which society's opinion is not uniform. In such instances, the advertiser must have regard for social sensitivity because otherwise he or she risks losing his or her good reputation, and the advertised product may therefore suffer. […].[19] Lastly, advertising must not offend the feelings of religious people and/or discredit philosophical convictions.

On 17 January 2024 the Supreme Administrative Court of Lithuania acting as an appeal instance has adopted the decision and referred to the provisions of the latter Code stating that journalist should be able to discern which information may be made public and decided that the applicant did not reassure such duty.[20] Supreme Administrative Court of Lithuania further noted that the publication accurately quoted epithets uttered in a public court session which are recognized as having been extremely insulting, and the public is interested in receiving objective information. Based on the jurisprudence of the European Court of Human Rights, the case also emphasized that freedom of expression is not absolute: the persons using it (both journalists and other persons) must behave honestly towards the "addressee of the information", seek to provide accurate and reliable information, and adhere to ethical norms.[21]

3. Freedom of Religious Expression and Hate Speech

European Commission Staff working document (2023 Rule of Law Report) recognises that since 2022 Lithuania has invested extra effort into embracing the rule of law and paving the way for a more independent media. The legal framework for media pluralism and freedom in Lithuania guarantees the fundamental right of freedom of expression and the right to information. Following public discussions, legislation

[18] Lietuvos žurnalistų ir leidėjų etikos kodeksas, Vilnius, 2005. Available at: www.lrs.lt/apps3/1/2386_fdqousdy.pdf.

[19] *Ibid.*

[20] Lietuvos vyriausias administracinis teismas. Administracinė byla Nr. eA-271-968/2024. Available at: ttps://www.lvat.lt/naujienos/isnagrineta-byla-del-zurnalisto-pareigos-viesinti-etiska-informacija/1253.

[21] https://www.lvat.lt/naujienos/isnagrineta-byla-del-zurnalisto-pareigos-viesinti-etiska-informacija/1253.

was adopted to improve the effectiveness and impartiality of media self-regulatory bodies. As of 2023, public institutions and bodies have been obliged to make public on their websites information about the funds they have used for state advertising. Several measures have been taken to improve journalists' access to information held by public authorities and other bodies. The professional environment for journalists is largely safe in Lithuania, and both the public authorities and the media have taken several measures to improve the safety of journalists and their protection against abusive lawsuits.[22]

The Report acknowledges significant progress in Lithuania in continuing to improve the practice of granting access to official documents, in particular by making sure that the grounds for rejection of disclosure requests are not used to unduly limit access, including by journalists, by taking into account the general European standards on access to official documents. The legal framework concerning the regulator for audio-visual media services has been revised to expand its tasks and to clarify its independence requirements[23].

The legal framework for media pluralism and freedom in Lithuania guarantees the fundamental right of freedom of expression and the right to information. Following public discussions, legislation to improve the effectiveness and impartiality of media self-regulatory bodies has been adopted. To enhance the transparency of media ownership, the Ministry of Culture has continued to develop the publicly available Information System of Producers and Disseminators of Public Information. The transparency of state advertising expenditure has also been improved, and a reform of media funding has been launched. The public service broadcaster continues to operate independently under a robust legal framework.[24]

[22] European Commission Staff working document (2023 Rule of Law Report Country Chapter on the rule of law situation in Lithuania accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 5.7.2023 (SWD(2023) 815 final [https://commission.europa.eu/document/download/e2b3bd30-c85e-49fb-bcba-c37543fe41a2_en?filename=35_1_52617_coun_chap_lithuania_en.pdf].

[23] *Ibid.*

[24] European Commission Staff working document (2023 Rule of Law Report Country Chapter on the rule of law situation in Lithuania accompanying the document Communicatio from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 5 July 2023 (SWD(2023) 815 final [https://commission.europa.eu/document/download/e2b3bd30-c85e-49fb-bcba-c37543fe41a2_en?filename=35_1_52617_coun_chap_lithuania_en.pdf].

4. Context of Public Debate

Hate speech is already punishable in Lithuania. For example, offenders may spend up to three years in prison for inciting hate, discrimination or violence, and public expressions of hatred can cost up to a year in jail[25]. In February 2020 the Lithuanian Ministry of the Interior established a working group to promote an effective response to hate crimes and hate speech. The working group consists of representatives of seven national authorities and eleven civil society organizations, and it plans to propose measures to strengthen the effectiveness of efforts to address hate crime and hate speech, monitor the implementation of the international obligations, consider relevant legislation, and prepare annual reports on the situation of hate crimes and hate speech in Lithuania.[26] A more detailed examination of the legal development will be discussed in subsequent sections, below.

National developments

In 2022 amendments were made to the Criminal Code to include skin colour and ethnic origin amongst the other protected characteristics[27]. The same year 140 police officers participated in five training sessions in the "Strengthening of Intercultural Competences in the Fight Against Hate Crimes", organized by the Human Rights Monitoring Institute with the support of Lithuanian and international experts and representatives of victimized communities. During the training, attention was paid to learning about different communities (Muslim, Roma, and Jewish communities, and communities of immigrants from the Middle East and Africa), linking this knowledge to the recognition and investigation of hate crimes.

Also in 2022, thirty-one judges participated in an eight-hour training event on "Hate crimes: legal and psychological aspects". Training topics included the concept and recognition of hate crimes; recognizing and distinguishing between hate speech and hate crime; court practice in dealing with hate crime and hate speech offences; the practice of the European Court of Human Rights and national courts; the criminal

[25] Jasaityte, K. How to Change People's Hearts: Tackling Hate Speech in Lithuania**.** Available at: https://eeagrants.org/news/hatefree-lithuanian-norwegian-collab-changing-hearts-0.

[26] OSCE. Hate Crime Report: Lithuania. Available at: https:// hatecrime.osce.org/lithuania.

[27] Currently, the Criminal Code of Lithuania (as last amended on 28 April 2022) lists aggravating circumstances to include […] the act has been committed in order to express hatred towards a group of persons or a person belonging thereto on grounds of age, sex, sexual orientation, disability, race, colour, nationality, language, descent, ethnic origin, social status, religion, convictions or views (Art. 60). Murder that is committed in order to express hatred towards a group of persons or a person belonging thereto on grounds of age, sex, sexual orientation, disability, race, colour, nationality, language, descent, ethnic origin, social status, religion, convictions or views is punished by a custodial sentence for a term of eight up to twenty years or by a life custodial sentence (Art.129 of Criminal Code).

process for these types of criminal cases; the impact of hate crimes and hate speech on victims and victimized communities; the needs of hate crime victims; and communicating with hate crime victims. In addition, Lithuania benefited from increasing the capacity of prosecutors and judges to address hate crime.[28]

Compared to 2018, when seven crimes were recorded, the number in 2022 grew to 34 crimes recorded by the police. Nevertheless, ODIHR observes the low numbers of officially recorded hate crimes. Amongst those recorded, the most targeted group is the LGBTIQ+ community[29], while officially recorded hate crimes on the grounds of religion, conviction or views remain very few.[30]

[28] OSCE. Hate Crime Report: Lithuania. Available at: https:// hatecrime.osce.org/lithuania.

[29] Some alleged hate crime cases have reached and were dealt with by the ECTHR. The European Court of Human Rights in its recent case-law of the alleged violation of the Article 13 (*Case of Valaitis V. Lithuania* (Application no. 39375/19) has confirmed that, since delivery of the judgment in *Beizaras and Levickas,* Lithuania no longer displays the discrepancy that the Court identified in that judgment and has, therefore, discontinued its investigation into homophobic comments on the Internet. The ECtHR has recognised that the present case does not disclose any prejudicial attitude by the authorities taking account of the Court's case-law. Regarding the principle that the primary responsibility for protecting the rights set out in the Convention lies with the domestic authorities, and also the joint responsibility of the State Parties and the Court in securing those rights, the Court found that the domestic authorities in the *Valaitis* case "drew the necessary conclusions" from the judgment in *Beizaras and Levickas* and, by applying the domestic law in the light of the principles as formulated by the Court in that judgment, "addressed the cause of the Convention violation" […] Therefore, the applicant's complaint, under Article 13 of the Convention, that the Lithuanian authorities did not take positive measures to protect homosexual persons, including the applicant, from hate speech was found to constitute no violation of the Article 13.

[30] Instead, applicants complain on the grounds of discrimination to the Equal Opportunities Ombudsman. The provisions of the Constitution are implemented through the Law on Equal Opportunities, which aims at establishing the equality of persons and placing a prohibition on the restriction of human rights and providing privileges on the basis of gender, race, nationality, language, origin, social status, faith, beliefs or views. In consequence, the Ombudsman is entitled to receive any complaints claiming alleged discrimination related to faith, beliefs or views, religion or references to the provisions of the Law on Religious Communities and Societies of the Republic of Lithuania. Lithuanian society in the past was indifferent to the exact nature of a claimed violation, but the Equal Opportunities Ombudsman has noted significant progress between 2018-2019 in applicants' claims regarding faith and religion. If in 2018 applicants equated religion with faith, and not separating faith from discrimination on the basis of religion, in 2019 a trend was observed that religion is considered "independent", separate from faith, as a possible ground for discrimination. When claiming possible discrimination on the basis of beliefs or views, most applicants did not emphasize the exact nature of their views or beliefs that had led to the occurrence of potentially discriminatory behaviour directed against them. Some applicants claimed that this behaviour was provoked by their opinion or merely by a certain phrase. A number of applicants stated that the position expressed in their research paper or publication on a particular issue reflected their beliefs or views. The concepts contained in beliefs or attitudes are not defined in the Equal Opportunities Act but are based on the interpretations of these terms as presented in the legal literature: beliefs are certain views and attitudes formed in the process of observation and cognition. Beliefs can be political, religious, economic, aesthetic, cultural, etc. i.e., they reflect the views of people about the phenomena of social and state life, etc., formed in the environment of a certain ideology, culture, morality, ethics

5. Blasphemy, Religious Hate Speech, and Limitations of Freedom of Speech in Religious Contexts

The limits imposed on the freedom to express convictions as well as freedom of thought are defined in the Constitution of the Republic of Lithuania. The Constitutional provisions state that the freedom to express convictions may not be limited otherwise than by law when this is necessary to protect human health, honour or dignity, private life, or morals, or to defend the constitutional order, similarly the freedom to profess and spread religion or belief may not be limited otherwise than by law and only when this is necessary to guarantee the security of society, public order, the health or morals of people, or other basic rights or freedoms of the person. Article 27 of the Constitution recalls that convictions, practised religion, or belief may not serve as a justification for a crime or a failure to observe laws, while Article 28 reminds individuals that, while their implementing their rights and exercising their freedoms, they must still observe the Constitution and laws of the Republic of Lithuania and must not impair the rights and freedoms of other people.

The Law on Advertising further develops its content by defining the milestones set by the Constitution. Article 2 of the Law on Advertising defines advertising as information, transmitted in any form and through any means, which is related to economic, commercial, financial or professional activity and encourages people to obtain goods or use services. Article 3 sets forth the Principles of Advertising and requires that advertising must be decent, accurate and clearly recognisable. On the

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and moral norms. The Constitutional Court practice emphasizes that in a social, everyday sense, "views and beliefs" can be understood as any opinion about any phenomenon in life, but in a legal sense the label "views and beliefs" (as described in the disposition of Article 169 of the Criminal Code of the Republic of Lithuania) has a much narrower meaning and is intended and permits the reference to a specific person within any group that is united and distinguished from other groups by having its own discrete set of views and beliefs. An individual's views and beliefs are part of a person's private life, in the same way as an individual's lifestyle, marital status, living environment, relationships with other people, habits, etc. (Decision of the Constitutional Court of the Republic of Lithuania of 29 December 2004). Hence, a person's beliefs, like their views, may be political, religious, economic, aesthetic, or cultural, but they are always a person's private matter, the content of which is not regulated or controlled by the state. In 2023, the Office received 9 complaints concerning alleged discrimination on the basis of faith, religion, beliefs or views. For this reason, complaints and appeals are discussed in tandem, since the situations are often intertwined (especially on the grounds of faith and religion), and the persons making the appeal often refer to them together. The dynamics of complaints and investigations initiated by the Controller in 2023 were very similar to those recorded in previous years. The year 2021 stands out a little, since the Office received a higher number of complaints about mandatory and recommended vaccines for the coronavirus. In 2023 there were also fewer many appeals in other forms regarding faith, religion or beliefs and views.

other hand, the list of General requirements for Advertising introduces the conditions under which advertising must be banned.[31]

5.1. **Blasphemy and Defamation of Religion**

Legal developments

Despite minor complaints received by the respective Lithuanian institutions, national and international courts have considered cases reflecting the thin line between the freedom of expression versus the feelings of believers.

Presented in the following paragraphs, below, are several cases that have been widely discussed in Lithuania, receiving considerable attention in the national media. The case in question described below was eventually considered at the ECtHR after all national remedies had been exhausted.

"Sekmadienis" Case

The object of complaint consisted of posters that were publicly displayed in the streets of Lithuanian cities. These posters showed a woman and a man posing, respectively, as the Virgin Mary and Jesus Christ and wearing fashionable clothes. The images of the models included religious symbols. The posters were designed in a way that was strongly reminiscent of traditional portrayals of those figures. The woman had a halo and was wearing a cross and holding a rosary. At the bottom of the poster the inscription read "Oh Dear Mary, what a dress!" [other slogans on similar posters stated "Jesus, what a pair of pants you have!" or "Jesus Mary, what are you wearing]!"

Despite the absence of jurisprudence directly related to violations of the freedom of religion, the Supreme Administrative Court of Lithuania, which acts as a final court of appeal, has reached an important decision concerning the use of religious

[31] Lietuvos Respublikos reklamos įstatymas. Valstybės žinios, 2000m. liepos 31, Nr. 64-1937. According to the provisions of the law, the advertisement must be banned if:

1) it violates public morals;
2) it degrades human honour and dignity;
3) it incites national, racial, religious, gender-based or social hatred or discrimination, or if it defames or spreads disinformation;
4) it promotes force or aggression, or attempts to cause panic;
5) it promotes behaviour which presents a threat to health, security, and environment;
6) it abuses superstitions, people's trust, their lack of experience or knowledge;
7) without a person's consent it mentions his or her first and last name, opinion, information about his or her private or social life, or property, or uses his or her picture;
8) it uses special means and technologies affecting the subconscious;
9) it violates intellectual property rights to creations of literature, art, science, or related rights;
10) it expresses contempt for religious symbols of religious communities registered in Lithuania (as of 16 May 2013).

symbols in advertising. On 25 April 2014, the panel of judges, basing their judgment on the Law of Advertising, accepted that the improper use of religious symbols in advertising may hurt the religious feelings of believers and violate public morals. The Supreme Administrative Court of Lithuania confirmed the decision of the Vilnius Administrative Court which decided that there had been a violation and confirmed that this violation was against public morals and hurt the feelings of believers. The Court recognised that these posters could also be understood as hurting human dignity and the honour of members of Lithuanian society:

> *"The entirety of the evidence in the present case gives grounds to conclude that the advertisements displayed by [the applicant company] are clearly contrary to public morals, because religion, as a certain type of world view, unavoidably contributes to the moral development of the society; symbols of a religious nature occupy a significant place in the system of spiritual values of individuals and the society, and their inappropriate use demeans them [and] is contrary to universally accepted moral and ethical norms. The form of advertising [chosen by the applicant company] does not conform to good morals and to the principles of respecting the values of the Christian faith and its sacred symbols, and [the advertisements] therefore breach Article 4 § 2 (1) of the Law on Advertising*."[32]

The Supreme Administrative Court had rejected the appeal and the argument placed before the Court "that there are no objective grounds to find that the advertisements offended the feelings of religious people", and has justified its judgments by citing the reference to almost a hundred individuals who had submitted complaints to Lithuanian Bishops Conference about the advertisers.[33]

The applicant' s company filed the complaint to the ECtHR (application no. 69317/14) against the Republic of Lithuania on 20 October 2014. The applicant's limited liability company "Sekmadienis Ltd.") had claimed that there had been interference with its right to freedom of expression, contrary to Article 10 of the Convention,

[32] Lietuvos Vyriausiojo administracinio teismo 2014 m. balandžio 25 d. nutartis. Available at: http://Liteko.Teismai.Lt/VIESASPRENDIMUPAIESKA/TEKSTAS.ASPX?ID=6158A9E5-C637-446B-B674-B4E4EE2D0E67.

[33] The Administrative Court has pointed out that "it was not possible to discern throughout Europe a uniform conception of the significance of religion in society and that even within a single country such conceptions might vary; for that reason it was not possible to arrive at a comprehensive definition of what constituted a permissible interference with the exercise of the right to freedom of expression where such expression was directed against the religious feelings of others, and a certain margin of appreciation was therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference. The Supreme Administrative Court considered that the panel which had adopted the decision of 25 April 2014 had taken into account the fact that Catholicism was the religion of a very big part of the Lithuanian population and that the use of its most important symbols in the advertisements, which distorted their meaning, offended the feelings of religious people.

on account of the fact that it had been fined for publishing advertisements deemed to be contrary to public morals.

After viewing the advertisements, the ECtHR recognised that they did not incite hatred on the stated grounds nor were they offensive or profane or attacking a religion in an unwarranted or abusive manner. The ECtHR criticized the legal reasoning provided by the national courts as insufficient for claiming that the reference to religious symbols in the advertisements was offensive. It also observed that none of the authorities addressed the applicant company's argument that the names of Jesus and Mary in the advertisements had been used not as religious references but as emotional interjections common in spoken Lithuanian, thereby creating a comic effect.[34] In addition, the Court criticized the decision of the State Consumer Rights Protection Authority (hereinafter – SCRPA), which national courts fully embraced without giving further consideration to pointing out that the SCRPA decision did not even examine what that lifestyle was and how the advertisements were promoting it, nor why a lifestyle which is "incompatible with the principles of a religious person" would necessarily be incompatible with public morals. Having said that, the ECtHR pointed out that "[…] freedom of expression also extends to ideas which offend, shock or disturb. It also reiterates that in a pluralist democratic society those who choose to exercise the freedom to manifest their religion cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith." For the reasons stated above, the Court has ruled that the domestic authorities failed to strike a fair balance between, on the one hand, the protection of public morals and the rights of religious people and, on the other hand, the applicant company's right to freedom of expression, by giving the preference to protect the feelings of religious people rather than adequately taking into account the applicant's right to freedom of expression[35].

The ECtHR finally points out that, although the Government has argued that the advertisements were considered offensive by a majority of Lithuanians sharing the Christian faith, "In the Court's view, it cannot be assumed that everyone who has indicated that he or she belongs to the Christian faith would necessarily consider the advertisements offensive, and the Government have not provided any evidence to the contrary. Nonetheless, even assuming that the majority of the Lithuanian population were indeed to find the advertisements offensive, the Court reiterates that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group's rights to, inter alia, freedom of expression

[34] European Court of Human Rights. Case of Sekmadienis Ltd. v. Lithuania. Available at: https://hudoc.echr.coe.int/fre?i=001-180506.

[35] *Ibid.,* para 83.

would become merely theoretical rather than practical and effective as required by the Convention […][36].

"Zero live show" CASE

Another case that was also invoked by the national courts and eventually hearings were held in the Supreme Court of Lithuania was the "*Zero live show*" case[37]. The circumstances of the case were as follows. A group of actors disguised themselves in liturgical clothing and also that of the Pope and went into a village church on 15 August 2018 during mass on the Day of Mary's Assumption. The actors were performing a scenario that had been worked out between them in advance. The performers' entry into the church had been planned to occur during the rosary prayer and the hearing of confessions. The performers stood in the middle of the church and in the Polish language loudly exhorted the believers to go on 11 October 2018 to a "Zero Show" event to be held in the Siemens Arena (Vilnius); while doing so, the performers offered and distributed "joints" (rolled marijuana cigarettes).

This "performance" was based on the actions, dialogues and dress code of a priest. Subsequently, it was claimed that the performance had disturbed the ongoing religious ceremony by means of insolent actions. The Court of First Instance discontinued the case of the grounds of Article 34 of the Criminal Code and freed the accused performers of criminal liability by declaring the performance to be "of minor relevance due to the extent of the damage incurred". Reacting to the Prosecutor's request, the Court of Appeal re-opened the case on the basis of Article 171 of the Criminal Code[38]. The decision of the Court of Appeal was then taken as far as the Supreme Court of the Republic of Lithuania, where the applicants complained that the previous instances wrongly applied Article 171 of the Criminal Code which, according to the applicants, would support their claim that their actions were causing no harm to such an extent as to qualify as a misdemeanour. All of the accused claimed that the performance was merely an act of freedom of expression and was not performed in an aggressive or morally unacceptable way nor aimed at disrupting services, ceremonies or celebrations held by a religious community.

In stating its verdict decision, the Supreme Court referred to Articles 26 and 43 of the Constitution, and Article 9 of the ECHR Bilateral treaty between the Republic of Lithuania and the Vatican. The Court pointed out that Article 171 is defined as a

[36] *Ibid.,* para 82.

[37] https://www.lat.lt/data/public/uploads/2021/05/lat_aktuali_praktika_balandis_2021.pdf

[38] https://m.kauno.diena.lt/naujienos/vilnius/nusikaltimai-ir-nelaimes/teismas-skelbs-sprendima-zero-live-show-reklamos-byloje-956445.

misdemeanour[39] and therefore responsibility arises but is not limited to the use of taboo words, the performance of defiant actions, uttering threats, taunting or other indecent actions, nor did it disrupt church services or other ceremonies or celebrations held by a religious community or society recognised by the State.

The Supreme Court emphasised the importance of Assumption Day for believers (the Roman Catholics living in this region) and pointed out that in that particular geographical region religious traditions were deep. Moreover, celebration of this day by the local population is also associated with their national identity, thus making this issue more sensitive and ensuring their right to perform religious rites. The Supreme Court pointed out that all of accused were highly educated and, therefore, could have easily come to a realisation that such a performance could well violate the norms of behaviour accepted by society[40].

The Supreme Court, acting in this instance of appeal, also noted that the actions performed in the church by those found guilty should be considered self-expression – in terms of content, it was an advertisement for a commercial performance event, but the actual implementation of the desired advertisement, taking into account the chosen time and place, also violated the constitutional rights of other people. Three performers were sentenced not for self-expression itself or for its idea, which included the chosen form and method of expression, but for the violation of public order, which disrupted religious ceremonies and rites. The court emphasized that the disruption of religious rites and celebrations is prohibited by law – Article 171 of the Criminal Code of the Republic of Lithuania, designated liability for act and thus ensured the constitutional right of every person to choose freely any religion or belief, either singly or collectively, as enshrined in Article 26 of the Constitution of the Republic of Lithuania, thus professing religion either privately or publicly, performing religious rites, practising faith and teaching it.[41]

[39] Available at: Law on the Approval and Entry into Force of the Criminal Code. https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=rivwzvpvg&documentId=a84fa232877611e5bca4ce385a9b7048&category=TAD.

[40] LAT paliko galioti apkaltinamąjį nuosprendį byloje dėl „Zero Live Show“ reklamos Turgelių bažnyčioje | Lietuvos Aukščiausiasis Teismas. Available at: https://www.lat.lt/naujienos/lat-paliko-galioti-apkaltinamaji-nuosprendi -byloje-del-zero-live-show-reklamos-turgeliu-baznycioje/1070.

[41] Lietuvos Aukščiausiojo Teismo 2021 m. balandžio 27 d. nutartis baudžiamojoje byloje Nr. 2K-56-511/2021, available at: https://www.lat.lt/data/public/uploads/2022/03/metinis-pranesimas-final-su-virseliu.pdf.

Alternative to military service case

The 2022 Chamber judgment[42] in the case of Teliatnikov v. Lithuania (application no. 51914/19) by the European Court of Human Rights unanimously agreed that there had been a violation of Article 9 (freedom of thought, conscience and religion) of the European Convention on Human Rights. The case concerned a Mr Teliatnikov's request for an exemption from military service and his application for civilian service on the basis of his religious beliefs as a Jehovah's Witness minister. The Court found, in particular, that the Lithuanian system of conscription failed to strike a balance between the needs of society as a whole and those of conscientious objectors, and that civilian service contained merely a veneer of difference because it remained within the realm of military structures. The Court ultimately maintained that the failure to respect the applicant's conscientious objection had not been "necessary in a democratic society".

The ECtHR has also tackled the ruling of the Constitutional Court of the Republic of Lithuania, e.g., its ruling of 4 July 2017 regarding the compatibility of certain provisions of the Law on Conscription with the Constitution, where the Constitutional Court declared Article 3 § 1 (7) of the Law on Conscription (according to the wording of 23 June 2011), to be in conflict with Articles 29 and 139 § 2 of the Constitution. The proceedings concerned the Vilnius Regional Administrative Court's request to investigate whether the aforementioned provision of the Law on Conscription, insofar as priests of only the religious communities and associations considered traditional in Lithuania and recognised by the State were exempted from mandatory military service, was in conflict with Article 29 of the Constitution.

The Constitutional Court of the Republic of Lithuania maintained that[43]:

> "In accordance with Article 139 § 2 of the Constitution, a law may establish only such conditions for exemption from the constitutional duty of citizens to perform military service or alternative national defence service as are related to objective circumstances on account of which the citizens cannot perform this duty … [B]eing a minister of a religious community or association (that is, having a certain social status relating to the professed religion) is not related to any such circumstances on account of which citizens would be objectively unable to perform the duty in question and which could constitutionally justify their exemption from this duty, especially in view of the fact that, under the Constitution, persons who are unable to perform military service owing to their religious or other convictions have

[42] European Court of Human Rights. Teliatnikov v Lithuania. Application no. 51914/19. Available at https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-217607%22].

[43] The Constitutional Court of the Republic of Lithuania in the Name of the Republic of Lithuania Ruling on the Compliance of the Provision of the Republic of Lithuania's Law on National Conscription with the Constitution of the Republic of Lithuania, 4 July 2017, No Kt9-N7/2017. Available at: https://lrkt.lt/en/court-acts/search/170/ta1748/content.

> the right to perform alternative national defence service instead of military service, as well as the fact that the fulfilment of the constitutional duty to perform military or alternative national defence service may be deferred for important reasons.
>
> Consequently, under Article 139 § 2 of the Constitution, having the status of a minister of a church or religious organisation does not provide a basis for exempting a person from his constitutional duty as a citizen to perform military or alternative national defence service.[44]

Regarding alternative civilian service, the European Court of Human Rights held that that was not a real alternative as it was part of the military superstructure, with draftees referred to as "military conscripts" throughout the regulations, and therefore Lithuania needed to establish alternatives outside the military command structures. The ECtHR has recognised […] that the system in Lithuania failed to strike a fair balance between the interests of society and those of the applicant who has deeply and genuinely held beliefs.[45]

5.2. **From Blasphemy to the Prohibition of Hate Speech**

Recent developments in the Lithuanian mass media include the new requirement of a sign-in before online comments will be published – this as one of the means to fight against hate crimes. The Criminal Code does not foresee sanctions, particularly for blasphemy, although the Criminal Code does contain Article 171 addressing Disturbance of Religious Ceremonies or Religious Celebrations and imposing either community service or a fine or restriction of liberty for individuals who, through the use of taboo words, perform defiant actions, make threats, taunt or similar indecorous actions, disrupting the services or other ceremonies or celebrations held by a religious community or society recognised by the State. Article 170-1 prohibits the creation

[44] In the same ruling the Constitutional Court has also concluded that: "By this ruling …[T]he Constitutional Court pointed out that … convictions, practised religion, or belief may not serve as a justification for … failure to observe laws … and, while implementing his or her rights and exercising his or her freedoms, everyone must observe the Constitution and laws and must not restrict the rights and freedoms of other people … Among other things, this means that, on the grounds of his or her convictions, practised religion, or belief, no one may refuse to fulfil constitutionally established duties, inter alia, the duty of a citizen to perform military or alternative national defence service, or demand the exemption from these duties.[…] The Constitutional Court also noted that, under Article 139 § 2 of the Constitution, the legislature may provide for the possibility of deferring the fulfilment of the constitutional duty of citizens to perform military or alternative national defence service in cases where the citizen is temporarily unable to perform this service owing to the important reasons specified in the law or the important interests of the person, family, or society which might be injured if such service were not deferred at a given time. Once the reasons for deferring service are no longer applicable, the citizen must perform military or alternative national defence service."

[45] European Court of Human Rights. Case of Teliatnikov v. Lithuania (Application no. 51914/19). Available at [https://hudoc.echr.coe.int/fre?i=001-217607].

of activities by groups and organisations intending to discriminate against a group of persons or to incite against it[46].

Article 169 of the Criminal Code of the Republic of Lithuania publicises the elements of prohibition of discrimination on the grounds of nationality, race, sex, descent, religion or belonging to other groups, and prohibits the carrying out of actions aimed at preventing, on the basis of sex, sexual orientation, race, nationality, language, descent, social status, religion, convictions or views, a group of persons or a person belonging thereto to participate on a par with other persons in political, economic, social, cultural, labour or other activities or at restricting the rights and freedoms of such a group of persons or of the person belonging thereto.

Chapter XXV (Crimes and Misdemeanours against a person's equal rights and freedom of conscience) of the Criminal Code prohibits the disturbance of religious ceremonies or religious celebrations. It is forbidden to use taboo words, carry out defiant actions, make threats, taunt or perform other indecent actions that might disrupt the services or other ceremonies or celebrations held by a religious community or society recognised by the State.

Chapter XLV of the Criminal Code (Crimes and Misdemeanours against the memory of the deceased) prohibits the desecration of the remains of the deceased, show contempt for the memory of the deceased, or desecrate a grave or any other place of public respect. Article 312 concerns desecration motivated by racist, nationalist or religious factors.[47]

Article 170 of the Criminal Code of the Republic of Lithuania states the prohibition of any incitement against any national, racial, ethnic, religious or other group of persons by setting the sanctions for a person who, for the purposes of distribution, produces, acquires, sends, transports or stores the items ridiculing, expressing contempt for, urging hatred of or inciting discrimination against a group of persons or a person belonging thereto on grounds of sex, sexual orientation, race, nationality, language, descent, social status, religion, convictions or views or inciting violence, a physical violent treatment of such a group of persons or the person belonging thereto or distributes them.

[46] Republic of Lithuania Law on the approval and entry into force of the Criminal Code. Available at: https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=rivwzvpvg&documentId=a84fa232877611e5bca4ce385a9b7048&category=TAD.

[47] Article 312 Desecration of a Grave or Another Place of Public Respect.

1. A person who destroys or otherwise desecrates a grave or destroys a monument or desecrates another place of public respect shall be punished by community service or by restriction of liberty or by arrest or by a custodial sentence for a term of up to one year.
2. A person who carries out acts of vandalism in a cemetery or another place of public respect or desecrates a grave or another place of public respect for racist, nationalist or religious reasons shall be punished by community service or by a fine or by a custodial service for a term of up to three years.

6. Challenging Dominant Paradigms

In 2021 the Republic of Lithuania found itself in a difficult situation in searching for the best balance between respect for human rights and any threat to national security. Hybrid war on the Lithuanian–Belarusian or Belarusian–Polish borders in the form of a massive influx of people through different points of uncontrolled entry to Lithuanian territory, paved the way for MPs to declare a state of emergency or a state of war as a result of a mass influx of aliens and to restrict certain human rights.

The preamble to the draft Resolution "On countering hybrid aggression" emphasized the commitment of the Republic of Lithuania to …protect the external border of the European Union and NATO from illegal migration flows*, only a small part of which are bona fide refugees (underlined by author*) and which might become a cover for persons with terrorist and criminal activities to enter the countries of the European Union and NATO interfaces". The preamble itself indicated MPs concern and their presumption that illegal immigrants coming mainly from Syria, Iraq and Afghanistan *a priori* were terrorists.

Article 5 of the latter resolution also states: „Seeing that foreigners from third countries who have illegally crossed the border of the Republic of Lithuania and do not have identity documents (with the exception of women with children, pregnant women, the disabled and children under 16 years of age), *until proven otherwise*, *are treated as possible active participants in the ongoing hybrid attack* (author's emphasis). Depending on the extent of the threat of aggression, other conditions including detention, protection or taking into custody should be applied to them, determined by the decision of the Government of the Republic of Lithuania". As a result of these measures a number of illegal immigrants have been imprisoned in detention centres with only limited rights to move within the space belonging to the detention centre even after completion of national procedures determining their status in the Republic of Lithuania. This kind of practice was mentioned in numerous cases brought against the Ministry of the Interior, eventually reaching the Constitutional Court with the presumption that Article 20 (the liberty of individuals) of the Constitution had been violated.

In 2023 the Constitutional Court of the Republic of Lithuania pronounced its verdict regarding violation of Article 20 [48] and also on detention practices that were

[48] The Constitutional Court has repeatedly stated, it is possible to restrict the implementation of constitutional human rights and freedoms according to the Constitution, if the following conditions are met: it is done by law; restrictions are necessary in a democratic society in order to protect the rights and freedoms of other persons and the values enshrined in the Constitution, as well as constitutionally important goals; limitations do not negate the nature and essence of rights and freedoms; the constitutional principle of proportionality is observed; the legal regulation limiting the rights and freedoms of a person must be such that it provides the prerequisites for assessing the individual situation of each

used in 2021[49]. The Court has explicitly addressed the scope of Article 20 of the Constitution as well as the provisions of the Law on the Legal Status of Aliens. In Constitutional Court's decision (no. KT53-A-N6/2023) the Court has also questioned the practices of the Ministry of the Interior[50].

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person as much as possible and, taking into account all relevant circumstances, the specific measures that limit the rights of that person to be applied accordingly.

[49] The Law on the Legal Status of Aliens was referred to in order to justify that all asylum seekers would be accommodated in designated places without being granted the right to move freely within the territory of the Republic of Lithuania.

[50] In this ruling the Constitutional Court interpreted the provisions of Article 20 of the Constitution and noted that they implied protection not only against arbitrary detention or arrest but also against any other unlawful restriction or deprivation of the liberty of a person, including any such unlawful restriction or deprivation of the liberty of a person by means of which the person's freedom of movement is significantly limited, for example, in a certain limited and closed territory. The Court has admitted that according to Article 20 of the Constitution, where it is necessary to limit the liberty of a person on the grounds and in accordance with the procedure laid down in laws, provision must be made for the possibility of verifying the lawfulness and reasonableness of such a limitation before a court. The Constitutional Court has also denoted that "the liberty and physical inviolability of a person are inseparable from human dignity. Whenever the liberty of a person is coercively restricted by means of decisions or actions of another person or of public authorities, even when such a restriction on the liberty of the person pursues a legitimate objective, human dignity is disturbed. Therefore, the measures limiting the liberty of a person must in all cases be aimed at ensuring that they are compatible with respect for human dignity." The Court interpreting Articles 144 and 145 of the Constitution, and the limitation of the rights of the individual when a state of emergency is claimed to be facing threats, inter alia, to the social peace cannot in itself constitute a basis for limiting other constitutional rights or freedoms of a person that are not specified in those provisions of the Constitution, including the inviolability of the liberty of a person, as enshrined in Article 20 of the Constitution. However, according to the Constitution, inter alia, Article 20 thereof, the liberty of a person may be limited (where such a limitation is subject to the conditions, arising from the Constitution, for the limitation of the rights and freedoms of a person), inter alia, in order to protect the constitutional order of the state, as well as in the interests of public order and national defence and security. When seeking the above-mentioned objectives, the liberty of a person, which is guaranteed in Article 20 of the Constitution, must not be limited or restricted on general grounds (such as on the sole ground that a state of emergency has been declared due to a threat to the constitutional system or social peace in the state) without assessing the actual threat posed by a person to the values protected by the Constitution, which would require that the liberty of the person should be limited. A general threat to public order or to internal security arising from a mass influx of nationals of third countries cannot serve as a basis for the detention of asylum seekers without explaining the impact of such a measure on maintaining public order and safeguarding internal security. A threat to national security or public order may justify the detention of an asylum seeker or the extension of his or her detention only if his or her personal conduct poses a real, present, and sufficiently serious threat to a fundamental interest of society or to the internal or external security of the Member State concerned. The Constitutional Court held that the legal regulation impugned by the petitioner was established in order to pursue the legitimate and constitutionally justified objective – to ensure public order, to protect the state border, and to control the increased flow of aliens crossing the Lithuanian border during an extraordinary situation, a state of emergency, or a state of war. This measure restricting the liberty of a person was entrenched in the law and applied on the grounds and in accordance with the procedure

At the same time, it was also noted that neither the impugned paragraph 6 of Article 5 (wording of 13 July 2021) of the Law on the Legal Status of Aliens nor other provisions of that law provided for the possibility of applying alternative measures less restrictive of the freedom of movement of asylum seekers instead of applying one of the most stringent measures restricting the liberty of a person, i.e., temporary accommodation (which could last for up to six months) of asylum seekers in designated places without granting them the right to move freely within the territory of the Republic of Lithuania (where that measure, depending on the circumstances of its application and the duration of its application, could amount to detention), despite the fact that, under the grounds laid down by the Law on the Legal Status of Aliens for detaining an alien in the circumstances specified in that law, measures alternative to detention that were less restrictive of freedom of movement (such as the accommodation of aliens in the designated territory without applying limitations on freedom of movement, their periodic visits to a designated authority, etc.) could be applied instead of detention.[51]

Thus, as maintained by the Constitutional Court, when applying, in accordance with the impugned legal regulation, the same measure to all asylum seekers, i.e., temporary accommodation in designated places without granting them the right to move within the territory of the Republic of Lithuania, no preconditions were created for an individual assessment of each person's situation, among others, of the real threat posed by him or her to values protected by the Constitution, the interests of the state and society, which were intended to be protected by such a legal regulation, and no preconditions were created for the application of alternative measures that were less restrictive of the liberty of a person, which may have been applicable in the case of his or her detention. The mere fact that an extraordinary situation or a state of emergency has been declared in the state as a result of a mass influx of aliens cannot in itself serve as a basis for applying in all cases the most stringent measure to all asylum seekers limiting their liberty, without assessing their individual situation and specific circumstances, the specific threat they pose to the values protected by the Constitution, to the interests of the state and society, where that measure, as mentioned above, because of its duration and nature, may be treated as detention.[52]

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laid down by law. In order to achieve these objectives, the legislature could establish a legal regulation restricting the liberty of a person on the grounds and in accordance with the procedure laid down by law. Available at: Lietuvos Respublikos Konstitucinio teismo nutarimas Dėl Lietuvos Respublikos įstatymo „Dėl užsieniečių teisinės padėties" nuostatų atitikties Lietuvos Respublikos Konstitucijai, nr. KT53-A-N6/2023. [https://e-seimasx.lrs.lt/portal/legalAct/lt/TAD/ 3a998312056c11eeb489c7d891071d0a?jfwid=qiphokfkw]].

[51] *Ibid.*

[52] In addition, the Constitutional Court stressed that, under paragraph 6 of Article 5 of the Law on the Legal Status of Aliens, aliens who had submitted asylum applications were temporarily (accord-

To sum up the situation, the Constitution Court has reminded the Ministry of Interior about the importance of European Union law and international human rights standards that must be faced and that imposed restrictions cannot be justified by a state of emergency.

7. Crimes Against International Law – Denial of Genocide (Holocaust) and Crimes against Humanity

The Criminal Code includes a Special Part (Chapter XV, Crimes Against Humanity and War Crimes) covering crimes such as the treatment of persons prohibited under international law, causing bodily harm to, torture or other inhuman treatment of persons protected under international humanitarian law or violation of protection of their property, destruction of protected objects, plunder, destruction of or causing damage to national valuable properties. The Criminal Code also covers the prohibition of discrimination [53].

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ing to paragraph 8 of that article, up to six months) accommodated in the designated places without being granted the right to move within the territory of the Republic of Lithuania in the absence of any decision of the relevant competent authority, but solely on the basis of the fact that the asylum seekers were in the Republic of Lithuania and their applications for asylum had not yet been examined on the merits. Thus, the legal regulation laid down in paragraph 6 of Article 5 of the Law on the Legal Status of Aliens, in the absence of any decision of the competent administrative authority on the basis of which asylum seekers were subject to the measure restricting the liberty of a person, which was among the most restrictive ones, did not guarantee the right of asylum seekers to verify before a court the validity and lawfulness of the measure applied against them. In view of this, the Constitutional Court held that, although the legislature pursued legitimate objectives and therefore could establish such a legal regulation restricting the liberty of a person, in this case it did not comply with the requirement arising from the Constitution not to restrict the rights of a person beyond what is necessary for the attainment of a legitimate objective and, in deciding on the application of a measure limiting the liberty of a person, to assess the individual situation of each person as far as possible and to individualise the specific applicable measures limiting the liberty of a person. In addition, in establishing such a legal regulation, the legislature did not comply with the requirement, arising from Article 20 of the Constitution, to limit, if necessary, the liberty of a person on the grounds and in accordance with the procedure laid down in laws, and to provide for the possibility of verifying before a court the lawfulness and validity of such a limitation. Lietuvos Respublikos Konstitucinio teismo nutarimas Dėl Lietuvos Respublikos įstatymo „Dėl užsieniečių teisinės padėties“ nuostatų atitikties Lietuvos Respublikos Konstitucijai, nr. KT53-A-N6/2023. Available at: https://e-seimasx.lrs.lt/portal/legalAct/lt/TAD/ 3a998312056c11eeb489c7d891071d0a?jfwid=qiphokfkw.

[53] Article 169. Discrimination on Grounds of Nationality, Race, Sex, Descent, Religion or Belonging to Other Groups.

A person who carries out actions aimed at hindering, on grounds of sex, sexual orientation, race, nationality, language, descent, social status, religion, convictions or views, a group of persons or a person belonging thereto participation on a par with other persons in political, economic, social, cultural, labour or other activities or restricting the rights and freedoms of such a group of persons or of the person

The Criminal Code of the Republic of Lithuania criminalises the Crime of Genocide in Article 99 of the Code under the title of the book Crimes against Humanity and War Crimes. The crime of genocide includes the same intent as genocide convention (seeking to physically destroy, in whole or in part), […] however the targeted groups are broader than in the Genocide convention and include not only any national, ethnic, racial, religious, but also social and political group. The Code also extends elements of crime in comparison to those listed in Genocide Convention and adds "their deportation or otherwise inflicting on them the conditions of life bringing about the death of all or a part of them".

Article 21 of the Criminal Code identifies the gravity of commission of a crime. The element of a crime includes the adaptation of means and instruments, the development of an action plan, the engagement of accomplices, or other intentional creations of conditions facilitating the commission of the crime. The Criminal Code can also holds any person liable even for the preparation of the commission of a serious or grave crime. Liability for committing the crime of genocide will have retroactive effect.

8. Blasphemy and Art – Ecclesiastical Objects, Symbols, and their Protection

Allegedly improper use of religious symbols emerged in 2013 and attracted the attention of diplomats from Muslim-majority countries. The "Olympic Casino" gaming house located in the centre of Vilnius faced serious criticism due to its use of mosque silhouettes on its external windows. This criticism came not only from the local Tatar community and Turks, but also from diplomatic sources, particularly the embassies of Turkey and Azerbaijan. Shocked by the cultural ignorance demonstrated by local businessmen, the Baltic Turkish Culture Academy ("Balturka") director expressed his disapproval of the use of religious symbols such as images of religious buildings in places such as casinos and bars. "These buildings should not be associated with religion in the first place," Halil Ibrahim Ak stated. Similar concern was expressed by the local Tatar community. The representative of the Tatar community confirmed that this image hurt religious feelings, particularly because of the existing prohibition imposed on such games in Islamic societies. The Chairman of the Union of Tatar Communities, A. Jakubauskas, expressed his concern that the silhouette of a mosque misled the population and subconsciously evoked the impression of a link between a house of worship and the casino. For their part, the diplomats also raised this issue with a number of local politicians dealing with inter-parliamentary groups in Lithuania and Muslim majority countries. Despite the questionable violation of

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belonging thereto shall be punished by community service or by a fine or by restriction of liberty or by arrest or by a custodial sentence for a term of up to three years.

the freedom of religion, the owners of the "Olympic Casino" voluntarily removed the images of a mosque from the windows of the Casino.[54]

The *Sekmadienis* case previously described in this article could also have been considered a similar example, if posters that associate a woman and a man portrayed on posters could be considered as a work of art. On the other hand, freedom of expression would still be contested. However, apart those cases that were explicitly discussed in the report, there were no other publicly raised complaints that could have been associated with the misuse of religious symbols in art in any form of blasphemy.

Summary

To sum up, the National Report identifies significant changes in the understanding of the content of freedom of thought, conscience and religion. In 2019 the shift in understanding that religion should be considered to be "independent", separate from faith as a possible basis for discrimination, was recorded in the form of the complaints received by the Ombudsman for Equal Opportunities. Meanwhile, prior to 2018 religion was identified as a form of faith. Changes in the nature of the complaints show that the applicants were becoming more aware of the content of freedom. The limits of freedom of expression and religious freedom (including the feelings of believers) were tested on several occasions, with various national instances finally reaching either the Supreme Court of Lithuania or the European Court of Human Rights. On numerous occasions the Constitutional Court was approached with requests for it to deliberate on the actual content of freedom. The applicants were active in defending their rights in the local courts and, in consequence, their complaints and the verdicts reached were given a new boost for legislators to adjust the legal basis accordingly.

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FREEDOM OF SPEECH AND RELIGION IN ROMANIA

EMANUEL TĂVALĂ[1]

I. FREEDOM OF CONSCIENCE, RELIGION, AND EXPRESSION

1.1. The fundamental norms regulating freedom of expression

Freedom of expression is one of the oldest freedoms of citizenship, a traditional freedom, known either by this name or by the names of its aspects: freedom of speech, freedom of the press, etc.

In both Romanian doctrine and that of other nations it has been shown that the legal content of this freedom is defined by public expression.[2] It has also quite rightly been pointed out that communicating ideas and opinions means being able to develop a personal thought, a freely chosen opinion, in all areas; in this sense, freedom of expression is the sine qua non of a genuine pluralist democracy.

The right to freedom of expression is enshrined in Romanian law as a subjective right regulated by Article 30 para. (1) of the Romanian Constitution (revised) which states that: "Freedom of expression of thoughts, opinions or beliefs and freedom of creations of any kind, whether by speech, writing, images, sounds or other means of communication in public, are inviolable" and Art. 70 para. (1) of the Civil Code which states: "Everyone has the right to free expression".

At the same time, the Constitution states that freedom of expression may not harm the dignity, honour or private life of the individual or the right to one's own image. It also prohibits: defamation of the country and the nation; incitement to a war of aggression, national, racial, class or religious hatred; incitement to discrimination, territorial separatism or public violence; obscene expressions contrary to public decency.

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[2] I. Muraru, S. Tănăsescu, *Drept constituţional şi instituţii politice,* ed. a XII-a, Ed. All Beck, Bucureşti, 2005, p.181-182.

It should be noted that Article 31 stipulates that the public and private media are obliged to ensure that the public is correctly informed.

The law makes no distinction between online and offline media. Therefore, the above rules apply to persons whether they communicate face-to-face, via television, printed newspapers, by telephone or via the Internet. It also makes no difference whether they communicate verbally, in writing, through gestures, or through drawings. Nor does it matter whether the communication is only between two people, at a gathering of several people, or even if it is a silent protest.

Bearing in mind the above issues, we should consider the following:

— we can participate in public life with an interest in the community to which we belong; this means that we can seek information about institutions and authorities, we can obtain information from various sources in order to select the most credible one, we can criticise the way in which elected representatives make decisions or the way in which institutions operate;
— we can criticise, but the issues raised must be real, not invented; even the press (which enjoys the greatest degree of freedom of expression and is even permitted a degree of exaggeration) is obliged to inform the public correctly;
— we can distribute information on the internet to or about someone, but we must avoid: insulting (mocking, swearing); slandering (i.e., telling lies about someone, attracting the contempt of others); threatening or blackmailing, since the perpetrator will risk criminal prosecution; distributing photos or recordings inside someone's home without that person's consent.

Violations of the rules on free expression attract various forms of sanction. For example:

— if a person makes a noise in the street at night, he will be fined by the police for disturbing the peace;
— if a pupil whispers the correct answer to another pupil in class, he will be disciplined by the head teacher;
— if a judge comments publicly on the cases he is dealing with, he will be disciplined by the Superior Council of Magistrates;
— if a soldier discloses the secret plans of a military camp, he will be punished by imprisonment;
— if a person, in a trial, is heard as an eye witness or as a hearsay witness and misleads the law enforcement agency, then he will be punished with imprisonment for 'perjury';
— if a person is accused in a television broadcast and is not asked for his or her opinion, the National Audiovisual Council will issue a warning, fine or even suspend the right to broadcast for a period of time;
— if a person publishes a book in which they copy what someone else has written before them and does not quote the author, they will be punished with imprisonment for "plagiarism" and will pay monetary compensation to the real author;

— if someone distributes photos or videos depicting aspects of sexual life involving a minor, they are committing the offence of "child pornography" and will risk imprisonment;
— if discriminatory statements are made about certain categories of people (Roma, homosexuals, Hungarians, etc.) then the National Council for Combating Discrimination will impose a fine;
— if a pupil humiliates or offends another pupil or a teacher, the judge will order the victim to pay a sum of money called "moral damages";
— if a teacher insults or threatens a pupil, he or she will be punished by the judge for the offence of "abusive behaviour";
— if a law enforcement officer is threatened, the offence is an "insult".

In addition to the Constitution, freedom of expression is regulated by the Civil Code, Article 70, and is a fundamental right. However, it is not only freedom of expression that is qualified as such but also all the other rights of personality – the right to dignity, honour, reputation, the right to one's own image, the right to privacy, the right to physical and mental integrity of the person, etc. Controversies and lawsuits over freedom of expression abound in Romania today. They demonstrate the close links between freedom of expression and democracy. When called upon to make a ruling, the Romanian courts proceed to complex arbitrations.

As far as the active subject of this right is concerned, the existence of the right to free expression is not subject to any condition other than the individual status of its holder. Thus, naturally, all natural persons are active subjects of this right. But what is the situation with regard to legal persons? We pose this question this because, in the past, the Constitutional Court, in a decision – which was contradicted by the judges of the Strasbourg Court – held that: "(…) in relation to the alleged violation of the provisions (…) of Article 30 para. (1) and para. (2), it must be held that they are contained in Title II of the Constitution – fundamental rights, freedoms and duties – which concerns citizens and not legal persons".[3] Instead, the European Court has pointed out that the phrase "any person" used in the text of Article 10 of the European Convention refers to any subject of law, whether a natural person or a legal person.

The right to freedom of expression, as a right of personality, remains contestable for everyone in the sense that it is enforceable against third parties, and this enforceability is absolute. But the power contained in this right can only be exercised against a passive subject whose legal identity will be determined by the infringement of the right; from this point of view this right is comparable to the right of ownership.

[3] C.C. decision No. 188/2005, published in M.Of. No. 582/6 July 2005.

- **Which kind of views of life it is possible to incorporate into freedom of expression? Are there any restrictions? The European Court of Human Rights has underlined the importance of open debate about subjects of public interest that require the protection of offensive (hate) speech and of the inevitable personal animosity that may follow. In the view of the ECtHR, the search for truth, objectivity and rigour does not require an absolute proof of truth. Value judgements can be protected if they have a sufficient factual basis.**

The right to free expression is perceived as inviolable as a result of its constitutional regulation. In this respect, it has been stressed in the doctrine that freedom of expression must be declared inviolable, since the principle, and all other provisions of Article 30 must be interpreted in order to respect this principle.[4] As regards the subject matter of the right to freedom of expression, as reflected in Article 10 of the Convention, it encompasses freedom of opinion and freedom to receive or impart information or ideas.

Freedom of opinion. This component of the freedom of expression testifies to the idea that every person must be able to express his or her opinions and views without fear of any kind. This is the classic form of freedom of expression that lies at the starting-point of this major guarantee, since the plurality of individual opinions is the very source of freedom of expression.

Freedom to receive or communicate information or ideas. The topic of this second prerogative of freedom of expression overlaps with that of the right to privacy, since it concerns any information but also because it confers the power to search for and communicate (disclose) information. This conclusion is reached by analysing the powers granted by Article 30(2) of the EC Treaty. (2) to (4) of the Constitution and Article 10 § 1 of the Convention, in particular to journalists, the main beneficiaries of this fundamental freedom. Thus, Art. 30 para. (2) of the Constitution prohibits censorship of any kind, para. (3) allows the press to establish publications, and para. (4) imposes the rule that no publication may be suppressed; this could conflict, by its harshness, with the idea of respect for human freedom.

While the press must not overstep certain limits, particularly in relation to the reputation and rights of others, i.e., the need to prevent the disclosure of confidential information, it is nevertheless incumbent on it to communicate information and ideas on matters of general interest in order to fulfil its obligations and responsibilities;

[4] Pentru amănunte S. Răduleţ, *Limitele libertăţii de exprimare în jurisprudenţa Curţii Constituţionale,* în Pandectele Române, No. 8/2011, p. 119.

journalistic freedom also implies the possibility of resorting to a certain amount of exaggeration, even provocation.[5]

Beyond the fact that freedom of investigation seems to be co-substantial with freedom of communication, with respect for professional and ethical rules, it is indirectly guaranteed by the secrecy of journalistic sources, a guarantee which is a "cornerstone of press freedom".

It should also be noted that freedom of expression extends to the publication of photographs and also includes artistic freedom.

Fundamentally, however, freedom of expression is a freedom whose proclamation is inevitably accompanied by limitations: no one can doubt that the press cannot unfairly tarnish a person's honour, reputation or privacy. However, in relation to the other right of the personality and subject to certain requirements imposed by law, the exercise of the right to freedom of expression may appear to limit them. We will focus our attention on these statements by attempting to analyse the notion of a limit to personality rights (A); the conflict between the right to privacy and the right to free expression (B) and the resolution of this conflict in case law (C).

The possibility of limiting the rights of personality is provided for in the Civil Code, for each of the rights regulated, with reference to Article 75, which states, in a generic way: (1) "The infringements of the rights provided for in this section shall not constitute a violation of the rights provided for in this section if they are permitted by law or by the international conventions and covenants on human rights to which Romania is a party"; (2) "The exercise of constitutional rights and freedoms in good faith and in compliance with the international covenants and conventions to which Romania is a party shall not constitute a violation of the rights provided for in this section of the Civil Code". From the wording of the text it can be concluded that it imposes two categories of limits on the rights of personality: a) limits permitted by law, international conventions or covenants (first paragraph); b) limits arising from the exercise of similar rights of others (second paragraph).

On the other hand, these limitations are governed by the provisions of the second paragraph. (6) and para. (7) of Art. 30 of the Constitution, but also of Art. 10 § 2 of the European Convention, cited above.

It follows from the interpretation of Article 75 of the Civil Code that there are three categories of limits or causes which would justify the exclusion of the unlawfulness of the infringement of personal rights, namely: the law, the overriding interest and the consent of the person injured. The second category of justifying grounds (overriding interest) raises the question of the right to free expression, which cannot be absolute.

[5] For details, see I. Muraru, S. Tănăsescu, *op. cit.,* p. 82.

As a rule, the interest invoked by any person who has infringed the right must outweigh the interest of the victim of the infringement in order to be qualified as overriding and for his/her act not to be penalised.[6]

- Is there a soft law in the regulation of the freedom of expression and practices which may have a certain significance even in court in situations involving interpretation of freedom of expression provisions?

The Audiovisual Law (Law no.504/2002) in Romania regulates the aspects related to the audiovisual events concerning freedom of expression and all the issues arising from it. The National Audiovisual Council was set up to ensure an audiovisual market based on freedom of expression, pluralism and free competition. At the same time, the NAC ensures that radio and TV broadcasters comply with the rules on correct information, privacy, human dignity and the protection of minors. (1) The broadcasting and retransmission of programme services shall ensure political and social pluralism, cultural, linguistic and religious diversity, information, education and entertainment of the public, while respecting fundamental human rights and freedoms. (2) All audiovisual media service providers shall be obliged to ensure objective information of the public through the correct presentation of facts and events and to foster the free formation of opinions. (3) The responsibility for the content of broadcast programme services, including audiovisual commercial communications, shall lie with the audiovisual media service provider under the law.

1.2. **Freedom of Religious Expression and Hate Speech**

In Romania hate speech is an offence that is dealt with in Art. 369 of the Criminal Code, which takes over the content of Art. 317 of the 1969 Criminal Code, with some modifications. In the material element, the term instigation has been replaced by incitement. Discrimination and hatred have also been added as an essential element related to incitement (removing an inconsistency in the old law, where the offence was marginally called incitement to discrimination and the material element was incitement to hatred; this does not broaden the scope of the offence to include incitement to discrimination, which was also punishable under the previous offence, even though it was only specified in the name of the offence, not in its definition). It has been specified, as an essential requirement of the material element, that it – incitement

[6] It has been pointed out that in the nomenclature of economic injuries, in the main European countries, the European classification of non-economic injuries (CEA-AREDOC) includes: 1. harm to bodily integrity; 2. physical pain; 3. harm to the quality and enjoyment of life (leisure injury); 4. harm to specific leisure activities; 5. aesthetic injury; 6. sexual injury (I. Turcu, *Noul Cod civil. Legea nr.287/2009. Comentarii şi explicaţii,* Ed. C.H.Beck, Bucureşti, 2011, p. 518).

to hatred/discrimination – must be addressed to the public. By public is meant an indeterminate number of persons; if the incitement is addressed to a specific person or persons, there is no offence under Article 369 of the Criminal Code, but individual, singular or plural incitement, as a form of participation, insofar as its conditions are met (Explanations IV, ed. I, 1972, p. 701). While in the case of the offence of public incitement (Article 368 of the Criminal Code) the public is incited to commit offences, in the case of the offence of incitement to hatred or discrimination the public incitement does not concern offences.

Law 170/2022, published in the Official Gazette No. 548/2022, amends Article 369 of the Criminal Code as follows: "Incitement of the public, by any means, to violence, hatred or discrimination against a category of persons or against a person on the grounds that he/she belongs to a certain category of persons defined on the basis of race, nationality, ethnicity, language, religion, gender, sexual orientation, opinion or political affiliation, wealth, social origin, age, disability, chronic non-contagious disease or HIV/AIDS infection, considered by the perpetrator to be causes of inferiority of a person in relation to others, shall be punished by imprisonment from 6 months to 3 years or a fine." Prior to the second passage through Parliament, the content of the provision was: "Incitement of the public, by any means, to violence, hatred or discrimination against a category of persons or against a person on the grounds that he/she belongs to a certain category of persons shall be punished by imprisonment for a term of 6 months to 3 years or a fine". Previously, Article 369 of the Criminal Code stated that only incitement to hatred and discrimination by any means against a category of persons was considered a crime. The complaint of unconstitutionality was submitted by the President of the country, complaining that there were no explicit criteria for this category of persons, and not only general ones. The same was held by the judges of the Constitutional Court in Decision 561/2021, stating that the new provision needs to have discriminatory criteria for the existence of the offence of incitement. The Court found that Parliament had limited itself "to completing the scope of dangers with regard to the active subject of the offence of inciting the public (by adding violence) and the scope of the passive subjects of the offence (by adding the person belonging to a certain category/group), without, however, circumscribing the existence of the material element of the offence of incitement to violence, hatred or discrimination to certain criteria, and therefore without expressly circumscribing the grounds on which violence, hatred or discrimination may be based". The provisions concerned with incitement to hatred and discrimination of a group appear in the European Decision 2008/913/JHA, which was transposed into national law in November 2010. At that time, the Romanian authorities announced the full transposition of the decision but, in reality, the provisions of the European legal act were incompletely transposed. The European Commission, which for this reason has issued warnings to Romania on several occasions, has cited a number of shortcomings that still exist in the fact that national criminal law criminalises public incitement to violence or

hatred against a group of people, without expressly referring to incitement against a member of that group.

The main regulation of hate speech in Romanian law is found in Government Ordinance 137/2000, which contains several articles that may be applicable to this phenomenon. Thus, according to Article 2, discrimination is a "distinction, exclusion, restriction or preference" which "has the purpose or effect of restricting, eliminating the recognition, use or exercise, on an equal footing, of human rights and fundamental freedoms or rights recognised by law, in the political, economic, social and cultural fields or in any other field of public life". The criteria protected by law are "race, nationality, ethnicity, language, religion, social category, beliefs, gender, sexual orientation, age, disability, chronic non-contagious disease, HIV infection, membership of a disadvantaged group". The list is not exhaustive and ends with the phrase "and any other criterion". One of the ways in which the offence of discrimination can be committed is harassment, defined as "any conduct on grounds of race, nationality, ethnicity, language, religion, social category, belief, gender, sexual orientation, membership of a disadvantaged group, age, disability, refugee or asylum seeker status or any other ground which results in an intimidating, hostile, degrading or offensive environment" for the person concerned. The most important regulation of hate speech is found in Article 15 of the Ordinance, which provides for criminal liability for "any behaviour manifested in public, having the character of nationalist-semitic propaganda, of incitement to racial or national hatred, or that behaviour which has as its purpose or aims the violation of dignity or the creation of an atmosphere of intimidation", hostile, degrading, humiliating or offensive, directed against a person, a group of persons or a community and related to their membership of a particular race, nationality, ethnicity, religion, social or disadvantaged group or their beliefs, sex or sexual orientation. "

A highly important aspect of the wording of the article is that the passive subject of the offence of discrimination by hate speech can be "a person, a group, or a community". This exhaustive enumeration makes it possible to punish a broad spectrum of behaviour and statements, such as speech based on stereotypes or invective against a community.

Another relevant aspect is that the conduct must be in public, while mere discriminatory behaviour does not constitute the grounds of a criminal offence. Although the protection criteria listed in Article 15 are much fewer than those in Article 2 of the Ordinance, in practice the CNCD has not considered the list to be exhaustive, as the violation of a person's dignity on the basis of other criteria (e.g., family situation) is a ground for identifying an offence.

In addition to Ordinance 137/2000, hate speech is sanctioned in various specific forms in other regulations. For example, the glorification of fascist regimes or of persons convicted of crimes against humanity, as well as explicit denial of the Holocaust, are all sanctioned by Government Emergency Ordinance 31/2002, amended

by Law 217/2015. The main change made in 2015 by Law 217, referred to in the press as the "anti-legionary law", is the express inclusion of the term "Legionism" or "Legionary" in the sphere of expressly prohibited manifestations. The old form of the law only provided for the prohibition of "fascist" organisations, leaving open the debate as to whether or not "Legionnaireism" was a form of fascism. Law 217/2005 also expressly mentions the Romanian Holocaust (as a phenomenon different from that which occurred elsewhere in Europe) and prohibits its denial.

Specific regulations to combat hate speech can also be found in the Audiovisual Law (Law 504/2002) and in the Audiovisual Content Regulation Code, promoted by CNA Decision 220/2011. Thus, according to Article 40 of the Audiovisual Law, "it is prohibited to broadcast programmes containing any form of incitement to hatred on grounds of race, religion, nationality, gender or sexual orientation". This provision is made explicit in the Code of Regulation of Audiovisual Content which, in Article 47, prohibits "the broadcasting in audiovisual programmes of any form of anti-Semitic or xenophobic manifestations" as well as "any discrimination on grounds of race, religion, nationality, sex, sexual orientation or ethnicity". Also, according to Art 6 (d) of Law 148/2000, which regulates advertising activity, "advertising which: d) includes discrimination based on race, sex, language, origin, social origin, ethnic identity or nationality is prohibited".

1.3. **Context of Public Debate**

The National Council for Combating Discrimination (CNCD) is an administrative-jurisdictional body established by OG 137/2000 and H.G. no. 1194/200153. Its duties include "investigating, establishing and sanctioning acts of discrimination", and its decisions have the same force as a report of a contravention. The procedure before the Council is similar to that before a court. This procedure is governed by Order No 144 of the President of the CNCD of 11 April 2008, which states that the principles on which it is based are: transparency, speed, adversarial nature, guarantee of the right of defence, protection of personal data and availability.

A number of Council decisions in the period 2005-2015 concerned acts of hate speech, the vast majority of which were directed against Roma. In one case, the following statement was analysed, made during the Chess-Mat show on OTV: "Our first ambassadors are those who are in conflict with the law […] our image is made precisely by these representatives who are not so well seen here either […]. Our pride in being Romanian, in having produced some achievements, is also shattered because of some of the people who represent us and who go there with the pride that their passport says ROM. Many gypsies […]are a disgrace […] if we consider the crime statistics, because of their lack of education, because of the environment they live in, crime is X-times higher amongst this ethnic group". The CNCD Board of Directors found that the statement could be classified under the articles that punish the crea-

tion of a hostile and degrading atmosphere with respect to a particular community or a group of persons, namely Art. 2(1) and 2(3) and Art. 19 of the old form of the Ordinance, now Art. 2(1) and (4) and Art. 15, because of the association made of the Roma community with crime and the use of terms such as "theft" and "fraud". It was also considered relevant that crime was higher in the Roma community, although there were no statistics to prove it.

A similar argument is also used in CNCD Decision 93/2005, which analyses the statement: 'And this is how our minors, and especially Roma minors, end up begging in the markets of civilised cities in the Western world or being given into prostitution. This explains why parents, unaware that school is no longer of any use, withdraw their children from school after they turn 14 and send them abroad to work. The Roma protect them from both points of view: they don't go to school because they don't behave, and as far as work is concerned, it consists of begging in the metropolises of Europe, where they create the image of being Romanian." The incriminating fragment was published in the daily Șciti Buzoiană newspaper.

The Council's board of directors condemned this as an offence and imposed a warning. The reasoning for this decision was based on the idea that the offending statement was an association between the image of the Roma community and immoral and illegal activities, resulting in the creation of a humiliating and degrading atmosphere.

The number of cases that have been prosecuted under the offence of incitement to hatred or discrimination (Article 369 of the New Criminal Code) or its previous variants (Instigation to discrimination (Article 317 of the Criminal Code after 2006) and Nationalist-Soviet propaganda (Article 317 of the Criminal Code before 2006) and the number of criminal cases prosecuted under the offences of GEO 31/2002 on the prohibition of fascist, legionary, racist or xenophobic organisations, symbols and acts and the promotion of the cult of persons guilty of crimes of genocide against humanity and war crimes is very low, which gives a limited insight into how the legal provisions might be applied in practice. However, the very fact that there are very few prosecutions of cases registered under this offence shows that the offence of incitement to hatred or discrimination (and its previous variants) and the offences of GEO 31/2002 are difficult for the judiciary to apply in practice. The prosecution of individuals for these offences is ex officio, i.e., at the discretion of the prosecutor. The prosecutor makes an initial selection of the cases that could be defined in terms of the offence in question, making an initial interpretation and application of the legal definition.

It should be noted that since the entry into force of the new legal definition provided for in Article 369 of the new Criminal Code (Incitement to hatred or discrimination), no verdict has been handed down by any court in Romania ruling on whether or not this article applies.

II. Blasphemy, Religious Hate Speech and Limitations of Freedom of Speech in Religious Context

Blasphemy is not specifically regulated in Romania. It should be recalled that given the country's religious specificity, hate speech on religious grounds may be rare and is perceived to be organised or orchestrated by humanist associations but with little impact on the general population.

The amendment of Government Emergency Ordinance No 31/2002 on the prohibition of fascist, legionary, racist or xenophobic organisations, symbols and acts and the promotion of the cult of persons guilty of committing crimes of genocide, crimes against humanity and war crimes, brought by Law No 217/2015, has provoked an avalanche of reactions and emotions in Romanian society. The public stances, which have often started from a relatively limited understanding of the legal provisions, end up becoming worryingly radical.

Government Emergency Ordinance No 31/2002 has as its declared aim, according to Article 1, the prevention of incitement to national, racial or religious hatred, discrimination and the commission of crimes of genocide, crimes against humanity and war crimes.

In principle, the act restricts the rights of individuals (right of free association, right of free expression), and the State's interference is justified as long as it is necessary to prevent the violation of the fundamental rights and freedoms of others and respect for the memory of victims of particularly serious crimes, and to maintain the order of the rule of law.

The 1936 Penal Code does not criminalise crimes against humanity, war crimes or genocide as such. With the Armistice signed on 12 September 1944, Romania assumed the obligation to prosecute war criminals and to dissolve fascist and pro-Nazi organisations.

In this context, the task of prosecuting and punishing persons guilty of committing war crimes or crimes against humanity on Romanian territory or under Romanian administration fell to the Romanian authorities.

The lack of codification of war crimes and crimes against humanity was specific to the historical period in question, both at international level and at the level of national jurisdictions, with liability being determined by reference to laws adopted after the date of the crime.

With all these historical developments in the current Romanian legislation (Law 217/2015), the act of promoting, in public, the cult of persons guilty of committing crimes of genocide, crimes against humanity or war crimes, as well as the act of promoting, in public, fascist, legionary, racist or xenophobic ideas, concepts or doctrines, within the meaning of Article 2 lit. a), is considered to be a crime.

2.1. **Blasphemy and Defamation of Religion**

In Romania, genocide is regulated by Article 438 of the Criminal Code and is part of the chapter on crimes of genocide and crimes against humanity. Genocide is defined as: (1) The commission, with the aim of destroying, in whole or in part, a national, ethnic, racial or religious group, of one of the following acts:

(a) killing members of the group;
(b) harming the physical or mental integrity of members of the group;
(c) subjecting the group to conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures to prevent births within the group;
(e) forcibly transferring children belonging to one group to another group,

shall be punishable by life imprisonment or 15 to 25 years' imprisonment and disqualification.

(2) If the acts referred to in paragraph 1 are committed (1) are committed in time of war, the penalty shall be life imprisonment.
(3) Conspiracy to commit genocide shall be punishable by imprisonment for a term of five to ten years and disqualification from exercising certain rights.
(4) Incitement to commit the crime of genocide committed directly in public shall be punishable by imprisonment for a term of 2 to 7 years and disqualification from exercising certain rights.

- **Naming major law cases involving Denial of Genocide (Holocaust)**

In order to emphasize the importance of Holocaust awareness in Romania's history, the Government has a special representative for the Promotion of Memory Policies, Combating Anti-Semitism and Xenophobia. The best-known and most recent case involving jurisprudence in this field is that of a former lieutenant colonel in the Romanian Intelligence Service, Zărnescu, who published a book about the Holocaust in 2016. Zărănescu's conviction is the first in the field, the first time a person has been convicted in Romania of Holocaust denial. The decision can be appealed within 10 days.

Holocaust denial – including that in Romania – is criminalised by Emergency Ordinance 31/2002, ratified by the Romanian Parliament by Law 107/2006 and amended by Law 217/2015.

Article 6 of GEO 31/2002 states: "(1) The denial, contestation, approval, justification or obvious minimization, by any means, in public, of the Holocaust or its effects is punishable by imprisonment from 6 months to 3 years or a fine."

Zărănescu was eventually sentenced to one-and-a-half years' suspended imprisonment for the offence. The first conviction in Romania for denying the Holocaust has been a very strong message from the Judiciary, a strong call to respect the law, it is a test that justice is finally working after numerous such cases, investigated by the

Prosecutor's Office, that had previously ended with no result. It is, at the same time, an important alarm signal to state institutions that anti-Semitism is still present and that it must be combatted firmly with the aid of all of the existing institutional instruments. Holocaust denial and anti-Semitism are not a problem solely for the Jewish community but for society as a whole. Motivated by prejudice, by hatred, these acts of Holocaust denial actually call into question human rights principles such as non-discrimination and the right to dignity.

Legislation exists in Romania whereby the Holocaust record in Romania can no longer be denied. There is old legislation. Romania was, unfortunately, according to the Elie Wiesel Report, the second harshest state after Nazi Germany, with its 400 000 victims destroyed under state responsibility. Romania had extermination camps before Nazi Germany, in Transnistria. These details can be found in the extant evidence: documents, historical testimonies. At the Holocaust Museum in Washington, Romania has its own well-defined corner, showing us the horrors that occurred here. More than 300,000 Jews and more than 25,000 Roma were victims of the racial policies that Romania applied at that time. The moment you promote hatred, saying that what happened is not true and that it was a conspiracy, which is what the author says many times, from that moment, as a result of your statements, you will have to pay according to the law.

III. Freedom of Expression, Digitalisation and Fundamental Rights Protection Online

As we have discussed from the outset, freedom of expression online has been the subject of legal debates in the early 2000s. Given Romania's recent history with censorship, which was state policy during the communist regime, we can now say, like Ivan Krastez[7], that the irony is that the death of censorship has led us to post-truth politics, i.e., the media revolution, in parallel with the abolition of censorship, has led us to the emergence of post-truth politics, where factual truth no longer matters in the formation of public opinion. What matters in this respect is the appeal to emotion and personal conviction. The social media bubble supports both emotion and personal belief because it is hard to form other beliefs when the internet only delivers what you want to hear.

As for the exercise of freedom of expression online, indeed, without distinction, this too is guaranteed and subject to constitutional limitations. The explanation lies in the final sentence of Article 30(1), according to which the medium of communication (speech) is not an obstacle to the exercise of freedom of expression.

[7] Ivan Krastev, *"Viitoruri ale majorității"*, eseu inclus în volumul colectiv *"Marea regresie. De ce trăim un moment istoric"*, Ed. Art, 2017, pag. 112.

It is obvious that by virtue of the right to free expression, which is essential in a democratic society, everyone is free to express their opinions, ideas and experiences regarding a particular situation or person.

However, when the limits of the right to free expression are exceeded by violating the rights of another person – the right to privacy, the right to harm dignity, honour, image, reputation – the courts may be called upon to sanction this deviation.

National and international case law has established a number of criteria to be taken into account when assessing whether the limits of freedom of expression have been exceeded. Thus, account is taken of the quality and position of the person criticised, the form/style of the critical message, the context, the public interest in the subject under discussion, good faith, the relationship between judgements of opinion and factual situations and the degree of exaggeration.

The court will determine, on a case-by-case basis, whether or not the statements made in the public arena exceed the limits of the right to free expression.

In a civil judgment delivered by the Court of Oradea on 16 February 2021, it was maintained that a post on a social network does not exceed the limits of freedom of expression as it expresses the personal experience of the defendant in relation to the plaintiff, as he perceived it. "In the light of this personal situation, the defendant has both the right and the freedom to express, even in public, his personal views on the relationship between them and the applicant, even if the defendant's personal perceptions are contested by the applicant".

The legal basis on which compensation is sought for the damage caused is tort liability, governed by Article 1349 of the Civil Code, which is supplemented by Article 252 et seq. Civil Code.

IV. Blasphemy and Art – Ecclesiastical Objects, Symbols, and their Protection

Originally, blasphemy meant mocking the gods in a communication couched in concrete rather than abstract language. Compared to the arts or to everyday language, the theory is rather serious about life: it does not laugh, weep or loathe, it is unblushing and unblushing contemplation. That is why even atheism, insofar as it was theoretical, was not considered properly blasphemous, even if it was punished. It belonged to the discourse of the arts – literature, first and foremost – to mock the gods, because only literature has the discursive means to eroticize them: concreteness and distortion. In the same way, blasphemy originally meant, especially among the Greeks, direct impiety at the deities, at sacredness. Later, Christianity extended the identification of blasphemy to heretical formulations. And Islam considered not only the ironies directed at Allah blasphemous but also those directed at Mohammed, who is only the prophet of the god. By extension, the various secular cultures have considered blasphemous the mocking of those meanings considered sacred, and modern legislation has changed accordingly: while the ancient Jews punished blasphemy by stoning

and the pre-modern Christian states, identifying with the faith, often punished it by death, after the French Revolution blasphemy ceased to be legally punished in the Western states. Art, however, remained blasphemous. The artistic heresies – the avant-garde, beginning with Impressionism – seemed blasphemous to the "religion of art". Certain literary-artistic ways of treating sexuality, starting with the Marquis de Sade, were also blasphemous. But the demands both of art itself and of society on art have become very permissive in Western cultures. In recent times, blasphemy has seemed to become the preserve of the clash of civilisations, as in the case of the *Satanic Verses* (in which the author, although Islamic, was self-situated in Western cultural circles) earlier, and the anti-Islamic charges more recently. We might first note that these blasphemous valorisations of products from within a culture by another culture, outside the area, are due to the generalisation or, more precisely, the globalisation of communication. It is also the result of communication between cultures where the dialectic of the sacred and the profane, as Eliade puts it, operates at different speeds. It is therefore natural that a culture, such as Western culture in general, which seems to have lost its sense of blasphemy, should not feel the ironic discourse of the arts or the media devoted to the meanings of other cultures, which are more like religions than cultures. But has our culture lost its sense for any kind of blasphemy? Should current Western civilization not sacralize anything at all? After all, in the "totally unhinged" culture of post-modernity on the road to globalisation, new taboos seem to be making themselves felt. The sacredness of the world we live in seems to revolve around life and to idolize the body, and our taboos have changed accordingly. In this context, blasphemy takes the form of questioning someone's right to exist, be it an individual (deficiencies of various kinds), nations or races. The consequence is that differences of race, nationality and even gender can only be questioned in one discursive sense: that of challenging them. The following test seems to me to be instructive: wouldn't we feel it blasphemous for a Muslim to deny the Holocaust? Some countries even punish such an attitude by law, just as Christian countries did in the past with their mockery and disregard of God. The place of literary-artistic religious blasphemy has been adopted into our culture by a theoretical and secularised blasphemy!

b) ***Which kind of art is most suitable for the churches and what is the artist's freedom of expression?***

In Romania there has been no debate on this subject, the aspects of Christian art being clearly presented by Byzantine ordinances (in the case of the Orthodox Church). Everything is realised as having as its basis the work of the Hieromonk Dionysius of Furna (sometimes also called the Agrafiot), who was an important Greek iconographer who lived in the 18th century. He is known today for his book *Manual of Painting* or *The Painter's Manual*. This book is known to us as *The Erminia of Byzantine Painting*.

The Erminia of Byzantine Painting, by the Hieromonk Dionysius of Furna, is considered to be the most complete, systematic and frequently published of all of the painters' erminia. The book is a compilation of older works, which was compiled between 1730–1734, when he was on Mount Athos. The work has been translated into Romanian several times, most recently in 1979. The first part gives technical instructions about the tools and materials used in painting (colours, oils, varnishes, gold, etc.) and presents different painting techniques (mural, wood, canvas, oil, etc.).

In the second part, painters are shown how to paint certain subjects, holy faces or iconographic scenes. It begins with those from the Old Testament: the angelic hosts, the patriarchs, the prophets, the righteous, and the main moments in biblical history.

The book continues with scenes and holy images from the New Testament. It begins with the feasts, miracles and sufferings of the Saviour, Jesus Christ, continues with the iconography of the Mother of God and the various categories of saints (the Apostles, hierarchs, deacons, martyrs, saints and hermits, etc.), showing how the individual faces of each of them should be painted.

The iconographic part of Dionysius in Furna's *Hermenei*a concludes with the chapter "How Churches are Painted", which indicates the holy scenes to be painted on each wall of the church (the iconographic program or typology), taking into account the different types of churches: churches with and without a steeple, churches with cross vaults or single vault, etc.

The church spaces open to more modern art are those of the fortified evangelical churches (but we should not imagine that these exhibitions or concerts force the classical note specific to these spaces).

In 2023 there was a big debate in Romanian society because of a contemporary art exhibition titled *Nymphs and Zombies*, which was granted public funds for it to be realised. In this exhibition there were sacrilege presentations of Jesus Christ or of Mother of God (who is smoking and is wearing jeans, for example). There were protests in front of the place where the exhibition was staged, but there is still no proposed law to govern this kind of exhibition. This theme is, however, only sporadically encountered in Romanian society, expressed by provocative exhibitions or manifestations of sexual minority communities.

FREEDOM OF SPEECH AND RELIGION – SLOVAK REPUBLIC

Michaela Moravčíková[1]

Introduction

The issue of values, traditions, religion and the nature of human life and its protection has increasingly become the subject matter of discourse, especially prior to parliamentary or presidential elections. We frequently hear discussions that place contemporary Slovakia at a crossroads of civilisation.[2] This is undoubtedly related both to Russia's ongoing war against Ukraine, which is happening in a neighbouring state, but also to the increasingly heated struggle between right-wing-conservative and left-progressive political entities, which are competing for the favour of the electorate by means of ever-intensifying speeches and political programmes. The mosaic is completed by secularization dynamics in the development of the religious-demographic situation and also, to a lesser extent, by migration influences.

The most recent population census in the Slovak Republic (i.e., after the Velvet Divorce of the Czech and Slovak Federative Republic) was held in 2021. Membership of the Roman Catholic Church was reported by 55.8 per cent of the population, or 3.04 million inhabitants. The second largest group consisted of people with no religious affiliation (23.8 per cent), or 1.3 million, while the undocumented comprised 6.5 per cent. Membership of the Lutheran Church of the Augsburg Confession in Slovakia was reported by 5 per cent of the population, and of the Greek-Catholic confession by 4 per cent. For the Roman Catholic Church over the past ten years the decline had been roughly 6 per cent. The "no denomination" group had grown the most, by 10 per cent from the 2011 census. The Lutheran Church of the Augsburg Confession had

[1] *Trnava University.*

[2] Duel Horecký vs. VašečkaSme na civilizačnej križovatke, školstvo musí byť top prioritou, Postoj. 17 September 2023https://www.postoj.sk/137960/sme-na-civilizacnej-krizovatke-skolstvo-musi-byt-top-prioritou-video-text// (accessed 19 December 2023).

numbered 316,000 believers in the previous census and thus the decrease since the previous census had been some 29,000 believers (0.5 per cent). Ten years previously, 1,934 people in Slovakia declared Islam as their faith, while by 2021 3,862 people now claimed Islam to be their religion. The number of people identifying with Buddhism has also risen – from 2,530 people to the current 6,722. Hinduism was reported by 255 people in the 2011 census and by 975 in the latest census. The number of people claiming the Jewish religion as their faith had increased by only eight people – from 1,991 to the current 1,999.[3] These changes result from secularisation but also, at the same time, from desecularising tendencies, depending on the individual social groups and reflected facts, but also as a reflection of the operation of churches and religious societies as organizations, and also on the influences of both religious and non-religious institutions and elites in Slovakian society.

I. Freedom of Conscience, Religion and Expression

According to the Constitution, the Slovak Republic is a sovereign, democratic State governed by the rule of law. It is not linked to any ideology or religion.[4] The Preamble itself alludes to the country's civilisational and cultural framework, including the national and also the civic principle:

> *„We, the Slovak nation, bearing in mind the political and cultural heritage of our ancestors and the centuries of experience from the struggles for national existence and our own statehood, mindful of the spiritual heritage of Cyril and Methodius and the historical legacy of Great Moravia, recognizing the natural right of nations to self-determination, together with members of national minorities and ethnic groups living within the territory of the Slovak Republic, in the interest of lasting peaceful cooperation with other democratic states, seeking the application of the democratic form of government, guarantees a free life and the development of spiritual culture and economic prosperity.“*[5]

According to Article 24 of the Constitution, freedoms of thought, conscience, religious creed and faith are all guaranteed. This right also encompasses the possibility of changing one's religious creed or faith. Everyone also has the right to live with no religious creed. Everyone has the right to publicly express his or her thoughts. Everyone has the right to freely express religion, or faith alone or together with others, privately or publicly, by means of religious services and religious acts,

[3] Štatistický úrad Slovenskej republiky. Sčítanie obyvateľov, domov a bytov 2021. Štruktúra obyvateľov podľa náboženského vyznania v SR k 1. 1. 2021., 31. May 2022 <https://www.scitanie.sk/obyvatelia/zakladne-vysledky/struktura-obyvatelstva-podla-nabozenskeho-vyznania/SR/SK0/SR/> (accessed 19 December 2023).

[4] Constitution of the Slovak Republic, Chapter One, Part One, Basic Provisions, Article 1(1).

[5] Constitution of the Slovak Republic, Preamble.

by observing religious rites, or by participating in the teachings thereof. Churches and religious communities administer their own affairs; in particular, they constitute their own bodies, appoint their clergymen, organize the teaching of religion, and establish religious orders and other church institutions independently of any state bodies. The conditions for the exercising of the rights mentioned above may be limited by law only if such a measure is necessary in a democratic society to protect public order, health, morals, or the rights and freedoms of others. The Constitution names, but does not define, these fundamental freedoms. For this, we are dependent on the legal and other areas of expertise. Generalizing, freedom of thought applies to the mental activity of every person insofar as the object of that activity is thinking. Freedom of conscience presents the consciousness of one's moral responsibility for one's conduct, the internal evaluation of one's thoughts, feelings, actions, etc., in conformity with learned moral standards and also the satisfaction or dissatisfaction related to that evaluation. Freedom of belief represents the possibility of conviction, of inner certainty about the truth, rightness and existence of something. Freedom of religion signifies an individual's free relationship to any church or religious society.[6]

The Charter of Fundamental Rights and Freedoms and Act No. 308/1991 Coll. on Freedom of Religious Belief and the Status of Churches and Religious Societies, as amended, are the factual basis for the declaration of these freedoms by the Constitution. International treaties, European Union law, and treaties with the churches and religious societies that the Slovak Republic has concluded cannot be overlooked. Within this context we should mention the various international treaties with the Holy See and the multilateral treaties with the eleven registered churches and religious societies. These not only guarantee freedom of conscience and religion but two of them also contain a commitment to conclude further specific treaties on the possibility of exercising conscientious objection.

1.1. **The Fundamental Norms regulating Freedom of Expression**

Freedom of expression is guaranteed by the Constitution of the Slovak Republic in Article 26, which is part of Section Three of the Constitution and deals with political rights. In the first four paragraphs of this article of the Slovak Constitution we read that (1) Freedom of speech and the right to information are guaranteed; (2) Everyone has the right to express his or her views in word, writing, print, picture, or by other means as well as the right to freely seek out, receive, and spread ideas and information without regard for state borders. The issuing of the press is not subject

[6] M. Čeplíková, 'Sloboda vyznania a svedomia a Ústava Slovenskej republiky" in Moravčíková Michaela and Valová Eleonóra (eds) *Ročenka Ústavu pre vzťahy štátu a cirkví 2005.* (Bratislava: Ústav pre vzťahy štátu a cirkví, 2006). p. 124.

to procedures of approval. Enterprise in the fields of radio and television may be subject to the granting of approval by the state; the conditions would be laid down by law; (3) Censorship is prohibited; (4) Freedom of speech and the right to seek out and disseminate information may be restricted by law if such a measure is deemed necessary in a democratic society to protect the rights and freedoms of others, state security, public order, or public health and morals.[7] In addition, in the Slovak Republic the matter is also regulated by the European Convention on Human Rights which has been valid within the Slovak Republic since 1 January 1993 (Articles 10, 14), and by the International Covenant on Civil and Political Rights, applicable within the Slovak Republic since 1 January 1993 (Articles 19, 20). In drafting government documents, account is taken of General Policy Recommendation No 15 on combating hate speech (European Commission against Racism and Intolerance, 8 December 2015) and Recommendation No R (97) 20 of the Committee of Ministers of the Council of Europe of 30 October 1997.

1.2. **Freedom of Religion and Hate Speech**

Hate speech may consist of a publicly disseminated written, verbal, graphic, audio or audiovisual expression that incites, spreads, promotes, or justifies hatred against individuals or groups of persons because of their gender, nationality, language, religion, race, ethnicity, colour, origin, sexual orientation, physical disability or other similar characteristic. It most frequently takes the form of defamation, the public dissemination of statements, images or videos with offensive, grossly defamatory content against a group of persons, any incitement to hatred, and/or the public dissemination of statements, images, videos, appeals inciting hatred and violence against certain groups of persons. Hate speech is punishable under Slovak legislation since it interferes with the right to protection of the dignity of the persons against whom it is directed.

The Slovak Criminal Act, Act No. 300/2005 Coll., contains two key sections. Firstly, Section 423 Defamation of nation, race and beliefs: (1) Whoever publicly defames (a) a nation, its language, a race or an ethnic group, or (b) an individual or a group of persons on account of their membership of a race, nation, nationality, colour, ethnic group, descent, religion or their lack of religion, shall be punished by imprisonment for a term of one to three years.

Section 424 Incitement to national, racial and ethnic hatred: (1) Whoever threatens an individual or a group of persons because of their belonging to a race, nation, nationality, colour, ethnic group, descent, or because of their religion, if the pretext for the threat is the commission of a crime, the restriction of their rights and freedoms,

[7] Constitution of the Slovak Republic, Chapter One, Part Three, Political Rights, Article 26.

or whoever has carried out such a restriction, or whoever incites the restriction of the rights and freedoms of a nation, nationality, race or ethnic group, shall be punished by imprisonment for up to three years. (2) As in paragraph (1), whoever conspires or assembles to commit the act referred to in paragraph (1) shall be punished. (3) The offender shall be punished by imprisonment for a term of two years to six years if he/she commits the act referred to in paragraph (1) or (2): (a) in conjunction with a foreign power or a foreign official, (b) in public, (c) for a particular motive, (d) as a public official, (e) as a member of an extremist group, or (f) in a crisis situation. Such manifestations are closely related to certain ideological positions or theories on which they are based. These theories deny the equality of human beings in dignity and rights and seek, based on various constructs supported by quasi-scientific, ideological or religious reasons, to enforce the restriction of the rights of a certain group of persons, or their exclusion from certain spheres of society.

Section 422(d) of the Criminal Code provides that anyone who publicly denies, questions, approves or attempts to justify the Holocaust, the crimes of a regime based on fascist ideology, the crimes of a regime based on communist ideology or the crimes of any other similar movement which, by means of violence, the threat of violence or the threat of other grave harm, aims at the suppression of the fundamental rights and freedoms of persons, shall be liable to a term of imprisonment of between six months and three years. In addition, the production of extremist materials, the dissemination of extremist materials and the possession of extremist materials are also punishable.[8]

In its programme statement the Government of the Slovak Republic clearly declared that it would fight against any manifestations of extremism, racism, intolerance, xenophobia, anti-Semitism and aggressive nationalism. The Ministry of the Interior is the main responsible entity in this area and proposes and implements many activities in this field. The most important strategic document in this area that defines the roles of the various actors is the Counter-Extremism Concept, which is regularly evaluated and updated. The Committee for the Prevention and Elimination of Racism, Xenophobia, Anti-Semitism and Other Forms of Intolerance operates within the Council of the Government of the Slovak Republic for Human Rights, National Minorities and Gender Equality, which is the main advisory body to the Government of the Slovak Republic in these areas. The Ministry of the Interior also has a Working Group for the assessment of hate speech on the Internet and a working group focused on systematic communication and coordination of entities dealing with anti-Semitism in the Slovak Republic.[9] Most of the ongoing disputes in the Slovak Republic have been primar-

[8] Act No. 300/2005 Coll.

[9] *Ministerstvo vnútra slovenskej republiky*, <https://www.minv.sk/?pracovne-skupiny-vyboru/> (accessed 5 January 2024) (accessed 4 January 2024).

ily about antisemitism, questioning of the Holocaust and a specific reflection of the Slovak wartime State, Hitler's construct of 1939-1945.

Since the crime of blasphemy was not part of the Slovak legal system even before 2007, the country did not have to proceed to radical changes after the adoption of the Council of Europe Recommendation 1805.

1.3. **Context of Public Debate**

Unquestionably, one of the most significant cases is the case of Klein v. Slovakia.[10] The case of Klein v. Slovak Republic was heard by the European Court of Human Rights and the Court's decision was published on 31 October 2006. The Court held that there had been a violation of the Convention on Human Rights by the Slovak Republic. In 1997, the journalist Martin Klein published a pamphlet in the weekly Domino Effect called *Sitting Falcon on a Maple Tree, Larry Flynt and the Seven Slaps to the Hypocrite*. In that article, he criticized a television appearance by the Catholic Archbishop, Monsignor Jan Sokol, who protested about the poster advertising Miloš Forman's film "The People vs. Larry Flynt" and against the distribution of the film itself. The incriminating poster depicted the lead, Woody Harrelson, crucified in a woman's lap with an American flag around his waist. In the pamphlet, Martin Klein sharply attacked Msgr. Sokol and accused him of having collaborated with the communist secret service. Klein was subsequently sued for defamation of race, nation, and beliefs by the Catholic organizations the Community of Cyril and Methodius in Prievidza and the Bernolák Society in Bratislava. The plaintiff objected to two disputed sentences: *"This Primate of the First Christian Church does not even have as much honour in him as the bandmaster of the last gypsy band would have in the fiddlestick! I don't understand at all why decent Catholics don't resign from an organization headed by such a monster."* The article was also ambiguous and contained sexual innuendo (e.g., the word "jerk" and the claim that the archbishop had had sex with his own mother). In June 2000, the Košice I District Court found Klein guilty of the offence of defamation of the nation, race and beliefs and sentenced him to a fine of 15,000 Slovak koruna, with an alternative sentence of one month's imprisonment (in case Mr Klein failed to pay the fine). In January 2001 the Regional Court in Košice upheld the first instance judgment. Having exhausted all legal remedies, Martin Klein appealed to the European Court of Human Rights. In Klein v. Slovak Republic, the Court ruled that the decision was not "necessary in a democratic society", as the article did not directly attack the Roman Catholic Church, but the person of Msgr. Jan Sokol. The Court therefore held that the Slovak Republic had violated Article 10 of

[10] Case of Klein v. Slovakia, *European Court of Human Rights* < https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-77753%22]}> (accessed 9 January 2024).

the Convention and awarded Klein €6,000 in compensation for non-pecuniary damage and €5,210 in costs and expenses. The remainder of his claims were dismissed.

The more recent cases are mainly related to the rise of right-wing political groups and their activities in the media space. On 9 December 2022, the Specialized Prosecution Service indicted Marian Magat, a former Ľudová strana Naše Slovensko[11] political party candidate labelled by the media as a far-right extremist and admirer of Adolf Hitler, for "extensive and long-term extremist criminal activity," which carries a maximum sentence of eight years in prison. The National Criminal Agency arrested Magat in January and charged him with more than 40 counts of extremism. These included founding, supporting, and promoting a movement suppressing basic rights and freedoms, producing and disseminating extremist materials, collecting Nazi paraphernalia, and promoting Holocaust denial in a book, "Jewocracy", that he had published in 2020. On February 16, the Supreme Court rejected Magat's appeal against an earlier decision of the Specialized Criminal Court, which had placed him in pretrial custody. The Specialized Criminal Court subsequently extended his custody from August until February 2023. In a related case, Magat had instructed his girlfriend to post the antisemitic book online for free as a gift to his fans; authorities filed extremism charges against both Magat and his girlfriend in relation to that case. Both cases are pending. Judgment is expected in August 2024 at the earliest.

On 5 April 2022, the Supreme Court found the Ľudová strana Naše Slovensko political party chairman Kotleba guilty of extremism and sentenced him to a six-month suspended sentence and 18 months' probation. The court, however, overruled an earlier verdict of the Specialized Criminal Court, which had sentenced Kotleba to four years and four months in prison for "founding, supporting, and promoting a movement suppressing basic rights and freedoms" in relation to a 2017 charitable ceremony featuring neo-Nazi symbols. The Supreme Court convicted him of the lesser crime of "expressing sympathies for a movement suppressing basic rights and freedoms." The April verdict was final and could not be appealed, and, because of the criminal conviction, Kotleba automatically lost his parliamentary seat. In response to calls by representatives of the ruling coalition to dissolve the LSNS, claiming that Kotleba's conviction was proof of the extremist and unconstitutional nature of the party itself, Prosecutor General Maros Žilinka announced in August that he would not attempt to ban the party. According to Žilinka, the Ľudová strana Naše Slovensko political party was too weak to pose an imminent risk to democracy and had low public support.

In October, the Specialized Criminal Court in Banska Bystrica convicted Jan Pastuszek of extremism. Pastuszek, who unsuccessfully ran on the Ľudová strana Naše Slovensko political party ticket in the 2020 parliamentary elections, was a par-

[11] People's Party Our Slovakia.

liamentary assistant to Republika party MP Milan Mazurek. Confirming its judgment from August, which Pastuszek appealed, the court gave him a three-year suspended sentence and three years' probation for selling t-shirts depicting the Slovak fascist state president Jozef Tiso. The court also ordered Pastuszek to pay a €3,000 fine for a website affiliated with the Republika party called "Kulturblog"[12] which experts said produced extremist content and where Pastuszek sold his t-shirts. Pastuszek announced he would appeal the verdict in the Supreme Court. In September, the Office of the Prosecutor General filed a criminal complaint against the village council of Varin for naming a street after the Slovak fascist state president Tiso in 2011, an act the prosecutor said violated the law banning the naming of streets after representatives of the Slovak fascist regime of 1939-1945. Against the prosecutor's earlier recommendation, in July village councillors refused for the second time to change the controversial street name, voting instead to hold a local referendum on the matter, which took place on 29 October. In the referendum, a majority of the 47 percent of participating voters rejected renaming the street, but because the necessary 50 percent voter turnout had not occurred, the referendum was declared invalid. At year's end, the case before the Supreme Administrative Court remained pending. The National Criminal Agency had previously pressed charges against 10 of 11 local councillors for expressing sympathies with a movement aimed at suppressing fundamental rights and freedoms after they refused during a municipal council meeting held in August 2021 to vote in favour of changing the name; the special prosecutor dismissed the charges in the following January.

In March 2023 a court in Banska Bystrica sentenced Sheila Szmerekova, who had made herself visible on the internet with hate speeches, in a video by urinating on a Koran and burning it, to three years in prison for extremism and the crime of making dangerous threats against Muslims. The Islamic Foundation in Slovakia stated that the conviction constituted the first in Slovakia involving a hate crime against Muslims. In June 2023 the mayor of Bratislava met for the first time since assuming office in 2018 with representatives of the Muslim community, which had remained unable to register as a religious group because of the threshold requirement and was instead registered as a civic association, to discuss hate crimes against the community, its inability to establish a mosque, and issues concerning burial grounds. During the meeting, the mayor expressed his commitment to supporting all vulnerable communities.

Unfortunately, government officials and MPs from both the government coalition and opposition parties continued to make anti-Muslim statements. In messaging ahead of the September parliamentary election, leaders from across the political spectrum engaged in rhetoric portraying undocumented migrants, predominantly from Muslim-

[12] *Kulturblog* <https://www.kulturblog.sk/>.

majority countries, as a serious and imminent threat to security and public order, calling them criminals and terrorists. Representatives and supporters of the Ľudová strana Naše Slovensko political party and of the Republika party continued to make statements widely considered to be antisemitic and to be glorifying the World War II Nazi-collaborator fascist government. In February, parliament failed to pass a law requiring municipalities to rename streets named after representatives of the World War II Nazi-collaborator fascist and communist regimes. The chairman of the Central Union of Jewish Religious Communities expressed disappointment over the failure to pass the law and called on MPs who had voted against or abstained not to attend Holocaust commemoration events in the future. In November the government eliminated the position of government plenipotentiary for freedom of religion or belief, stating that the role was no longer "justified and effective."

In April 2023, a court convicted a man of extremism and online stalking motivated by antisemitism and sentenced him to a suspended five-year prison sentence. The Muslim community continued to report anti-Muslim hate speech on social media, which it mostly attributed to inflammatory public statements by politicians, particularly in the run-up to the September parliamentary elections, and negative portrayals of Islam and Muslims in the media. A member of the Muslim community criticized as xenophobic rhetoric the accusation on social media that Arabs collectively supported violence following the October 2023 Hamas terrorist attack on Israel. Organizations that media outlets described as far right continued to publish material on and to commemorate the Second World War Nazi-allied Slovak state and to praise its leaders. Social media analysts and the National Criminal Agency noted an uptick in antisemitic rhetoric on social media in the wake of the Israel-Hamas conflict. Research published in April 2023 by the Open Society Foundation suggested that while the level of awareness of the Holocaust had increased and support for the wartime regime had decreased since 2013, one third of respondents reported having encountered Holocaust denial, particularly on the Internet and in social media, and one quarter said it was time to stop commemorating the Holocaust.[13] In addition to the above-mentioned topics, reservations were repeatedly voiced about the strict conditions for obtaining the registration of churches and religious societies. These comments were echoed by ambassadors, especially those from the USA and Indonesia.

[13] "The Ľudák Slovak Republic of 1939–1945 and the Holocaust in the collective memory of Slovak society / Comparative Research Report 2023 – 2013", *Nadácia otvorenej spoločnosti*, < https://osf.sk/wp-content/uploads/2023/11/Survey-holocaust-2023-EN.pdf> (accessed 16 January 224).

Prezentácia výsledkov komparatívneho výskumu za roky 2013 a 2023, *Nadácia otvorenej spoločnosti,* <https://osf.sk/wp-content/uploads/2023/03/holokaut-prezentacia.pdf> (accessed 16 January 224).

II. Blasphemy, Religious Hate Speech, and Limitations of Freedom of Speech in Religious Contexts

The Slovak Constitution does not work with the concept of blasphemy. Here we are referred to the penal code. Nevertheless, defamation and hate speech against religion and religious leaders do occur. As mentioned above, the most frequent targets are Jews and Muslims, but also Christians and members of other religions. We can outline several levels of the issue under study. First, there is the aforementioned questioning of the Holocaust, primitive anti-Semitism, and the defence of Tiso's wartime state. No less intense today is the effort to stir up hatred against foreigners, immigrants and refugees, which is a frequently used political pre-election strategy by which the leaders of non-systemic parties impact the baser instincts of their potential voters. Islam and Muslims are being targeted here. The Islamic Foundation in Slovakia reports that, of all news stories in Slovakia in 2022, more than 70 per cent were negative.[14] Another level is the ongoing culture war between liberal-progressives and conservatives. Here, minorities, especially sexual minorities, the right of women to terminate a pregnancy, issues of transition, sex education, the handling of stem cells, and the question of euthanasia can be expected to be raised. The assumption of a difficult search for compromises is that this consists of quite a different approach of each of the entities involved in the debate. For the Christian-conservative part of the population, these are values related to faith in God. Attacks on them are reflected as attacks on religious values and religion itself. Other actors in the debate largely prefer the view of civilisational development and democratic approach, where the opinion of the majority decides.

2.1. Blasphemy and Defamation of Religion

As has already been mentioned, the Slovak Criminal Code provides that whoever publicly defames (a) a nation, its language, a race or an ethnic group, or (b) a group of persons or an individual because of their real or assumed membership of a race, nation, nationality, ethnic group, because of their real or assumed origin, colour, religion or because they are non-religious shall be punished by imprisonment for one to three years. Imprisonment for two to five years shall be imposed if the offender who commits the act referred to in paragraph 1 (a) is a member of an extremist group, (b) is a public official, or (c) does so for a special motive.

In March 2022 Parliament adopted resolution formally condemning the deportation of Slovak Jews to Nazi concentration camps by the Slovak fascist state and apolo-

[14] "Slovak Republic 2022 International Religious Freedom Report", <https://sk.usembassy.gov/wp-content/uploads/sites/193/Slovakia-International-Religious-Freedom-Report-2022.pdf> (accessed 5 January 2024).

gized to members of the Jewish community. Experts on antisemitism criticised the leader of the political party Obyčajní ľudia a nezávislé osobnosti and Finance Minister for trivialising the Holocaust by repeatedly equating media criticism of his person to blaming the Jewish population for everything that went wrong in the 1930s.[15]

2.2. **From Blasphemy to the Prohibition of Hate Speech**

With regard to blasphemy, the earliest sources that we can refer to come from the Great Moravian[16] period. The Zakon Sudnyi Liudem (Law for Judging the People" or Court Law for the People) is the oldest preserved Slavic legal text. It originated from Byzantine law and was written in Old Church Slavonic in the late ninth or early tenth century.[17] Firstly, the code deals with people who had not embraced Christianity by setting penalties for those who make pagan sacrifices or swear oaths. The penalty imposed was that: "Every village in which pagan sacrifices or oaths are made shall be handed over to the temple of God with all the property belonging to the lords of that village. Those who perform sacrifices and swear oaths are to be sold with all their possessions and the proceeds are to be given to the poor." [18]

Another source is the Cyril and Methodius Nomocanon. This consists of a collection of ecclesiastical ordinances and profane laws, written in Old Slavonic and relating to the Church. The origins of the Code dated back to before the year 880, translated from Greek and edited in its final form by the elder of the Thessalonian brothers, the Slavic divine St. Methodius. In form and language it is related to Zakon sudnyj liudem, which in legal practice at that time formed the civil component of this collection. Nomocanon mentions the trampling and slandering of God's creation.[19] Blasphemy can be found in Constantine's prayer[20] and cursing and blaspheming the saints in the Ordinances of the Holy Fathers.[21]

[15] SITA, ‚Urobili ste zo mňa Žida 21. storočia, narieka Matovič. Inštitút ľudských práv žiada ospravedlnenie", *Startitup*, 13 June 2022, < https://www.startitup.sk/urobili-ste-zo-mna-zida-21-storocia-narieka-matovic-institut-ludskych-prav-ziada-ospravedlnenie/> (accessed 22 December 2023).

[16] Magna Moravia, a West Slavic state existing between 833 and the beginning of the 10th century. Its central territory corresponded to present-day Moravia and Slovakia, together with neighbouring northern and central Hungary. It was the first ever major Slavic state. The authorship is attributed to St Methodius. Some theories say that the document originated in Bulgaria or Russia.

[17] The oldest (short) version contains thirty chapters consisting primarily of penal law adapted from the Ecloga. Parts of this version are literal translations of the source.

[18] Zákon Sudnyj Ljudem – úplné znění. Lípa slovanská, <https://lipaslovanska.cz/zakon-sudnyj-ljudem-uplne-zneni/> (accessed 12 February 2024).

[19] Nomocanon, 29.

[20] P. Žigo and M. Kučera, *Na písme zostalo: Dokumenty Veľkej Moravy* (1st edn, Bratislava, Perfekt, 2012) p. 96.

[21] E. Pauliny, *Slovesnosť a kultúrny jazyk Veľkej Moravy*(1st edn, Bratislava, Slovenské vydavateľstvo krásnej literatúry, 1964) p. 248.

The territory of Slovakia later came under the Austro-Hungarian monarchy. In Hungary, under Criminal Law No. 5 of 1867, Title IX, entitled Crimes against Religion and Free Exercise of Religion, paragraph 190 provided that "Whoever causes public outrage by using derogatory expressions against God, forcibly interferes with the observance of a state-recognized religion, or disturbs it, commits a misdemeanour and is punishable by imprisonment of not more than one year and a fine".[22] The provision refers to section 171. The conditions are fulfilled if this is done in some assembly verbally, or in writing, printed document, picture, and calls for a crime or offence.[23]

During the First Czechoslovak Republic[24] a large number of laws from the monarchy were reciprocated. They were also characterised by the fact that they largely incorporated the previous customary law. The Penal Code of 27 May 1852, No. 117, contains section 112, which is concerned with disturbance of religion. In addition to the public disgrace that this law attributes to all those who disrupt the practice of religion in a disrespectful manner, such persons were also liable to a penalty of imprisonment of between one and five years. Section 123 makes such an activity an offence. In the case of major malice, the offender could be punished with imprisonment for a term not exceeding ten years. The severity of the punishment was determined by objective fact – whether there was a general danger, outrage or other facts. The facts of this crime do not consist merely in denying the existence of God, a deity, or a Saviour. There also had to have been a blasphemous denial of God. According to this law, blasphemy consisted of disrespect, contempt, or ridicule.[25]

During the Second World War the Slovak state,[26] headed by the Catholic priest Jozef Tiso, was characterised by collaboration with fascist Germany, combined with a strong anti-Jewish accent. As early as 23 January 1939, the Slovak autonomous government established a commission (the so-called Sidorov komitét) to draft the first anti-Jewish legislation. The last meeting of the commission took place on 5 March 1939 and a draft of the first anti-Jewish law was presented to the ministerial council and was scheduled for urgent discussion. Jozef Tiso also referred to the work of this commission in his speech at the founding of the Slovak state, when he told the popula-

[22] M. Takáč and P. Záturecký, *Československé trestné hmotné právo platné na Slovensku* (1st edn, Bratislava, Právnická jednota, 1948) p. 44-45.

[23] M. Laclavíková and A. Švecová, Pramene práva na území Slovenska II. 1790 – 1918 (1st edn, Bratislava, Veda, 2012) p. 539.

[24] The First Czecho-Slovak Republic is the traditional name for the period of Czecho-Slovak history from the declaration of independence from Austria-Hungary on 28 October 1918 to the occupation of the Sudetenland by Germany on 1 October 1938 based on the Munich Agreement. The following period until the dissolution of Czechoslovakia in March 1939 is referred to as the Second Republic.

[25] F. Bednář, *Sbírka zákonů a nařízení ve věcech náboženských a cirkevních* (Praha, Husova čs. Evangelická fakulta bohoslovecká, 1929) p. 365.

[26] 1939-1945.

tion that the government had already prepared a draft solution to the Jewish question, but the events of the previous few days had prevented its adoption. This was followed by the aryanisation of the property of the Jewish population, their resettlement, and finally their deportation from the territory of Slovakia to Nazi German camps on the territory of Poland. The Jewish Code no. 198/1941[27] dating from 9 September 1941 was a government regulation which, unlike laws, was not subject to the approval of Parliament and the President. It was the most extensive piece of legislation issued between 1939 and 1945. The Code was largely a copy of the German anti-Jewish laws. Jews were defined in both ethnic and religious terms. Persons meeting the definition of a Jew were deprived of several basic rights, and of all of their immovable and some movable property, and were subject to a "work obligation." According to a decree of 18 September 1941, from the age of six they were obliged to wear a six-pointed yellow star. The President of the Republic had the right to sign exemptions, and previous exemptions issued by him remained in force.

On 8 September 2021 the Government of the Slovak Republic officially apologised for the Jewish Code. The statement said, among other things, that "The Government of the Slovak Republic today feels a moral obligation to publicly express its sorrow for the crimes committed by the state power of the time, especially for the adoption on 9 September 1941 of a shameful decree restricting the fundamental human rights and freedoms of citizens of Jewish origin". The ministers of the then government expressed their conviction that only a pluralistic democratic society was capable of truly guaranteeing respect for human and civil rights, and they understood the adopted declaration as a commitment of a free and democratic Slovakia that legislation must never again be abused to justify the murder of citizens. In the declaration the ministers also paid tribute to those who resisted the persecution of their fellow Jews at the risk of losing their own freedom or life.[28]

The Constitution no. 100/1960 coll. of the Czechoslovak Socialist Republic[29] formally guaranteed religious freedom. Art. 32 provides that (1) Freedom of religion shall be guaranteed. Everyone may profess any religious belief, or be without religion, even to the exercise of religious observance, if this is not contrary to the law. (2) Religious faith or belief cannot be a reason for denying someone the performance of a civic duty imposed on him/her by law. In practice, the communist authorities

[27] Nariadenie zo dňa 9. septembra 1941 o právnom postavení Židov (Ordinance of 9 September 1941 on the legal status of the Jews). *Ústav pamäti národa,* https://www.upn.gov.sk/data/pdf/vlada_198-1941.pdf (accessed 16 January 2024).

[28] Slovenská vláda sa ospravedlnila za vojnový Židovský kódex*, Denník N*, https://dennikn.sk/minuta/2529047/ (accessed 16 January 2024).

[29] 11 July 1960 - 29 March 1990.

persecuted all authentic forms of religious life. The defamation of religion – the opiate of the masses – was in fact part of official communist doctrine.

III. Freedom of Expression, Digitalisation, and the Protection of Fundamental Rights Online

With respect to freedom of expression, digitalisation, and the protection of fundamental rights online, a particular legal framework was created by Act No 211/2000 Coll. concerning free access to information and the amendment and supplementation of certain acts (Freedom of Information Act, 17 May 2000). This Act regulates the conditions, procedure and scope of free access to information. It also regulates the Protection of Personal Identity and Personal Data (Section 9). This Act also provides for the recognition of an Offence in the area of right of access to information, so that an offence is committed by a person who knowingly issues and publishes false or incomplete information, who violates an obligation specified by this Act, or who, by issuing a decision or issuing an order or other measure, causes a violation of the right of access to information. The offence shall be punishable by a financial penalty and a ban of up to two years.

IV. Blasphemy and Art – Ecclesiastical Objects and Symbols and their Protection

Slovak art has a rich tradition that often engages with themes of religion, identity, and social commentary, making it a fertile ground for discussions surrounding blasphemy. Slovak artists, like those in many cultures, have navigated historically the tension between religious themes and personal expression. This includes the use of religious imagery in ways that challenge or critique traditional beliefs. There have been instances in recent years where contemporary Slovak art has sparked debates about blasphemy, especially in the context of issues such as nationalism, church authority, and personal freedom. Artists may use provocative imagery to question the role of religion in society. Some Slovak artists known for their controversial works include Andy Warhol-inspired figures who challenge religious iconography, or those who blend traditional Slovak motifs with modern themes that can be regarded as irreverent. The response to perceived blasphemy in art can vary widely, with some praising the boldness of artists and others calling for censorship. This reflects broader societal attitudes toward freedom of expression and the role of the church in public life.

In recent times, Jozef Kollár[30] has exhibited his works, especially in Bratislava. Kollar is known for his provocative pieces that criticise the Catholic Church and

[30] This should not be confused with Jozef Kollár (1899–1982), the great Slovak interwar landscape painter from Banská Štiavnica, who created hundreds of works that not only reflect the time in which he lived but are also timeless.

explore themes of faith and doubt. His works often challenge traditional religious iconography. The "Blasphemy" exhibition at the Slovak National Gallery stirred up controversy by featuring works that addressed religious themes and questioned established beliefs. Some pieces were seen as offensive by religious communities. Contemporary Slovak street artists have also created murals that incorporate religious imagery in subversive ways, prompting discussions about the boundaries of respect and artistic expression. In general, it can be said that the term blasphemy is also very popular among Slovak artists and is often incorporated in the name given to exhibitions, performances and festivals.

Vandalism is also part of the issue. There have been reports of vandalism in some churches, where crosses and other religious symbols have been defaced or destroyed. These acts sometimes reflect broader social tensions or anti-religious sentiments. In some areas in 2018, churches faced numerous acts of vandalism, including the defacement of crosses and statues. In one notable case, a church in eastern Slovakia had its doors damaged, resulting in the cost of repairs exceeding several thousand euros. Throughout the past decade a number of churches have reported damage to altars, stained glass windows, and religious icons. The cost of repairing this damage can range from hundreds to thousands of euros, depending on the extent of the vandalism. In various instances, individuals have faced legal action for acts of vandalism, especially when such acts are deemed to have incited hatred or to have violated laws protecting religious sentiments. These cases can lead to fines or the imposition of community service.

In this context, mention should also be made of the legal regime governing the inviolability of sacred places. The Basic Treaty between the Slovak Republic and the Holy See[31] provides in Article 5, (2) The Slovak Republic for guarantees of the inviolability of sacred places that have designated for the performance of religious acts in accordance with canon law. By the inviolability of a sacred place, the Contracting Parties understand the protection of that place, including the prevention of its use for purposes other than those for which it has been designated in accordance with canon law and for the prevention of any violation of its dignity. (3) For compelling reasons sacred places, with the consent of the Catholic Church, may exceptionally be used for other purposes that are not contrary to the sacredness of these places. (4) An exception to the rule of inviolability of sacred places shall be permitted if it is necessary in connection with imminent danger to life and health, safety or property, and if it is not possible to obtain the prior consent of the Catholic Church. In such cases, the Slovak Republic may ensure that the necessary and appropriate measures are taken at the sacred places to preserve their sacred character to the greatest extent possible.

[31] Basic Treaty between the Slovak Republic and the Holy See, No 326/2001 coll.

Almost identical provisions are contained in the Treaty between the Slovak Republic and eleven registered churches and religious societies[32] Article 5 provides that (2) The Slovak Republic guarantees the inviolability of sacred places as well as temples which, according to the internal regulations of registered churches and religious societies, are intended for the performance of religious acts. By the inviolability of a sacred place, the Contracting Parties understand the protection of this place consisting in the prevention of its use for purposes other than those for which it is intended, the prevention of the violation of its dignity, and the right of registered churches and religious societies to grant an exemption for the use of this place for other purposes. (3) An exception to the rule of inviolability of sacred places shall be allowed where necessary in connection with an imminent threat to life, health or safety of property and where the prior consent of the registered church or religious society cannot be obtained. In such cases, the Slovak Republic may ensure that the necessary and appropriate measures are taken at the sacred places to preserve as far as possible their sacred character and to affect as little as possible the rights and legitimate interests of persons who are present at the sacred places with the consent of the registered church or religious society.

In conclusion, we can say that the presence of sacral symbols in everyday life is a natural fact of Slovak reality. The double cross is part of the state emblem, the state flag, the state seal, and the standards of the president. Almost every stamp of any state or public institution contains a red (gules) shield, in early Gothic style, charged with a silver (argent) double cross standing on the middle peak of a dark blue mountain consisting of three peaks. In addition, the "Slovak" one euro coin has such a double cross on its reverse side, and also on the outer cover of Slovak passports. In addition to the traditional reverence for religious symbols and objects, perhaps these overt symbols contribute to the relative lack of concern about their protection.

[32] Treaty between the Slovak Republic and registered churches and religious societies, No 250/2002 coll.

THE RELATIONSHIP BETWEEN FREEDOM OF SPEECH AND RELIGION IN POLAND

Lidia K. Jaskuła / Piotr Stanisz[1]

I. Freedom of Conscience, Religion, and Expression

The legislative model of freedom of expression in Poland is in line with international standards. In the Constitution of the Republic of Poland of 2 April 1997[2] the fundamental norm that regulates it is contained in Article 54, according to which '[t]he freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone', and 'preventive censorship of the means of social communication and the licensing of the press shall be prohibited.' On the other hand, the Constitution allows for the licensing of radio and television activities. Directly related to freedom of expression are also the constitutional provisions on the freedom of the press (Article 14), right to obtain information (Article 61) and freedom of artistic creation and scientific research, and freedom to teach and enjoy the products of culture (Article 73).

Freedom of expression (freedom to express opinions, and obtain and disseminate information) is not absolute and its exercise may be restricted. The above-mentioned constitutional provisions are developed on the level of statutory law, including the Press Law Act of 26 January 1984 (PLA),[3] the Broadcasting Act of 29 December 1992 (BA),[4] the Civil Code of 23 April 1964 (CC),[5] or the Access to Public Information Act of 6 September 2001.[6]

Of note is the fact that, in accordance with Article 18(2) BA, radio and television broadcasts 'should respect the religious convictions of the audience, in particular, the Christian system of values.' This provision has been interpreted by the Polish

[1] *The John Paul II Catholic University of Lublin.*

[2] *Dziennik Ustaw* 1997, no. 78, item 483 (as amended).

[3] *Dziennik Ustaw* 2018, item 1914.

[4] *Dziennik Ustaw* 2022, item 1722.

[5] *Dziennik Ustaw* 2023, item 1610.

[6] *Dziennik Ustaw* 2022, item 902.

Constitutional Court,[7] which stated that it should be interpreted as a prohibition on offending religious feelings and that its content coincides with the scope of protection of personal rights established in Article 23 CC and the prohibition on offending religious feelings set out in (then) Article 198 of the Penal Code of 1969.[8] According to the Constitutional Court, a broadcast that is incompatible with the Christian system of values violates Article 18(2) BA if it simultaneously offends the religious feelings of the audience, regardless of their religion. The Court also assessed the conformity of this provision with the Polish Constitution and did not found any incompatibility. The Court found in particular that the analysed provision complies with the principle of a democratic state of law and the principle of equality, as it concerns the protection of religious feelings regardless of religion. In the opinion of the Constitutional Court, the term 'Christian values,' used by the legislator, is not to be identified with religion but with the universal ethical principles of Mediterranean culture.[9]

If a breach of the prohibition referred to above is found, the Chairman of the National Broadcasting Council (Krajowa Rada Radiofonii i Telewizji – Poland's broadcasting regulatory authority), imposes a mandatory penalty on the broadcaster (Article 53 BA). In 2019–2022, no such penalty was imposed.[10]

In 2021 the Freedom of Speech in Online Social Networks Bill was prepared by the Ministry of Justice but it did not gain broader support and was not put to the vote.[11] Among other things, it aimed at creating conditions for online social networks to respect the freedom of expression, including the expression of religious, philosophical and ideological beliefs. The bill received much criticism as it imposed numerous duties on service providers that are impossible to fulfil in practice and whose implementation is secured by heavy penalties. At the same time, the entities subject to the duties were deprived of some procedural guarantees at the stage of both administrative and judicial proceedings. Critical views on the bill were made by the President of the Office of Competition and Consumer Protection, the President of the Personal Data Protection Office, the Chairman of the National Broadcasting Council and the Commissioner for Human Rights.[12]

[7] Resolution of the Constitutional Court of 2 March 1994 (W 3/93), in *Orzecznictwo Trybunału Konstytucyjnego* 1994, no.1, item 17.

[8] *Dziennik Ustaw* 1969, no. 13, item 94.

[9] Judgment of the Constitutional Court of 7 June 1994 (K 17/93), in *Orzecznictwo Trybunału Konstytucyjnego* 1994, no. 1, item 11.

[10] See the reports on the activities of the National Broadcasting Council: <https://www.gov.pl/web/krrit/sprawozdania-z-dzialalnosci-krrit2> (accessed 27 Feb. 2024).

[11] The last version is dated 18 March 2023. See <https://legislacja.rcl.gov.pl/projekt/12351757> (accessed 27 Feb. 2024).

[12] For a discussion of the bill, see L. K. Jaskuła, 'Kompatybilność rozwiązań legislacyjnych dotyczących dezinformacji na temat epidemii COVID-19 proponowanych na poziomie europejskim i krajowym w Polsce' in Jerzy Jaskiernia and Kamil Spryszak (eds), *System ochrony praw człowieka*

Open debate on matters of public importance is protected by freedom of expression laws, including those which provide for the right to criticism. The Press Law stipulates that the right of citizens to engage in social criticism in public is actualised by the press (Article 1), and therefore free media enable the exercise of this right. The task of criticism is to increase knowledge and awareness rather than to mete out justice.[13] Its boundaries under civil law are marked by the provisions protecting personality rights (Article 23 CC) and, under Penal Code of 6 June 1997 (PC),[14] the provisions imposing penalties for defamation (Article 212 PC) and insult (Article 216 PC). Press criticism must be reliable and in accordance with the principles of social coexistence (Article 41 PLA). Satire and caricature adequately benefit from legal protection of press criticism.[15] Whether the limits of permissible criticism have been exceeded in a particular case is a matter to be determined by the courts. According to well-established case law, the legality of press criticism is conditional upon the fairness of such action and its compliance with the principles of social coexistence and, in this situation, the motives of the person disseminating an assessment or opinion are relevant.[16] Commenting on the limits of permissible criticism, the Constitutional Court stressed that '[t]he purposefulness of imposing criminal penalties on insult (…) is justified by the need to eliminate from public life the use of hate speech as a substitute for substantive criticism.'[17]

In media activities, there is a growing role for self-regulatory acts which, as standards of professional ethics and not as common law, bind the entities that choose to comply with them. These regulations (codes of ethics, codes of conduct, good practices), however, can be taken into account in the application of the law – if the

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pierwszej generacji wobec nowych wyzwań cywilizacyjnych (Toruń, Wydawnictwo Adam Marszałek, 2023), pp. 666–670.

[13] J. Sobczak, *Prawo prasowe. Komentarz* (Warszawa, Wolters Kluwer 2008), pp. 275–276.

[14] *Dziennik Ustaw* 2024, item 17.

[15] 'Satirical expression should be reliable and in accordance with the rules of social coexistence. However, satire is assessed differently from, for example, a reporting comment'. (…) The level of its freedom is an indicator of democratic freedoms. Satire may be malicious, mocking (judgment of the Court of Appeal in Kraków of 4 Feb. 2021, I ACa 1125/20; Lex no. 3192625). 'There are no grounds for assuming that the satirical nature of a work, as it were, automatically excludes the unlawfulness of the author's action, with the sole reservation that the limits of freedom of expression should be set here broadly. By overstepping the boundaries that define the legality of criticism (satire), a journalist risks being held liable for violating another's legally protected personality rights. Satire is therefore also subject to assessment from the point of view of the principles of social co-existence and reliability'(judgment of the Supreme Court of 25 March 2019, I CSK 25/18; Lex no. 2639894). 'Not every satire or caricature is protected by law. (…) In fact, a satire or caricature must serve the purposes referred to in Article 41 of the Press Law' (judgment of the Supreme Court of 27 January 2006, III CSK 89/05; Lex no. 209293).

[16] Cf. the judgment of the Supreme Court of 26 August 2009 (I CSK 528/08), Lex no. 1211189.

[17] Judgment of the Constitutional Court of 11 Oct. 2006 (P 3/06), in *Orzecznictwo Trybunału Konstytucyjnego* 2006, no. 9, item 121.

provisions of the law refers to them. For example, according to the Press Law, a journalist is under an obligation to act in accordance with professional ethics and principles of social coexistence (Article 10 PLA); the Chairperson of the National Broadcasting Council may require a media service provider to present information necessary to control its compliance with self-regulatory acts binding on it; in the event of a failure to provide information or if unreliable information is provided, a fine may be imposed on the person in charge of the media service provider's activities (Article 54(2) in conjunction with Article 10(2) BA). The fact that legal provisions refer to the norms of professional codes of ethics reflects the structural links between the law and morality and, in such a situation, the norms of professional codes of ethics, taken into account in the application of the law, determine the final form of a judicial or administrative decision.[18]

Public debate in Poland is becoming radicalised. This also includes some comments from Catholic hierarchs. Archbishop Marek Jędraszewski, Metropolitan of Kraków, was sued in a personal rights case for using the phrase 'rainbow plague' in his homily. The court of the first instance dismissed the claim, finding it 'natural for a hierarch of the Catholic Church to condemn ideologies that contradict (…) the assumptions and teachings of the spiritual community at the head of which he stands, being in addition particularly mandated to do so by virtue of his function.'[19] The court of second instance did not agree with this stance and held that the words of the defendant were offensive and that the Concordat does not give the right to offend people with whose views representatives of the Catholic Church do not agree. However, the appeal was not upheld, on formal grounds (I ACa 217/21).[20]

II. Blasphemy, Religious Hate Speech, and Limitations of Freedom of Speech in a Religious Context

Amongst the offences against freedom of conscience and religion (chapter XXIV PC) there is the offence of offending religious feelings (Article 196).[21] It was introduced into the Polish legal order (in a slightly different linguistic form) by the

[18] Cf. A. Breczko, M. Poniatowicz, 'Rola kodeksów etyki zawodowej (ze szczególnym uwzględnieniem zawodów ekonomicznych)', in Andrzej F. Bocian (ed.) *Ekonomia – polityka – etyka*, vol. II (Białystok, Wydawnictwo Uniwersytetu w Białymstoku, 2005), p. 160.

[19] Judgment of the Regional Court in Kraków of 8 December 2020 (I C 1357/19), Lex no. 3425376.

[20] Judgment of the Court of Appeal in Kraków of 27 October 2022 (I ACa 217/21), Lex no. 3658540.

[21] For a general characterization of the offences against freedom of conscience and religion defined in the 1997 Penal Code, see M. Rynkowski, 'Religion and Criminal Law: Poland', in M. Kotiranta and N. Doe (eds.), *Religion and Criminal Law – Religion et droit penal* (Leuven – Paris – Walpole, MA, Peeters, 2013), pp. 206–210.

decree of 5 August 1949 (see Article 5)[22] and can be seen as replacing the offence of blasphemy provided by Article 172 of the Penal Code of 1932 (in which the criminal sanction was imposed on everyone who "blasphemes against God in public").[23] The offence of offending religious feelings was also included in the Penal Code of 1969 (Article 198).

According to Article 196 PC, 'whoever offends the religious feelings of other persons by insulting in public an object of religious worship or a place dedicated to the public celebration of religious rites is liable to a fine, restriction of liberty and imprisonment of up to two years'.[24] In the opinion of the Constitutional Court (judgment of 6 October 2015, SK 54/13[25]) and the Supreme Court (resolution of 29 October 2012, I KZP 12/12[26]), the protected values are religious feelings. What is important, in these courts' view, is that the legal protection of religious feelings results directly from the constitutional (and conventional) guarantees of freedom of conscience and religion. As stated by the Supreme Court in the resolution of 29 October 2012, 'there is no doubt that religious feelings constitute an integral part of religious freedom' (similarly: the Constitutional Court in its judgment of 7 June 1994, K 17/93[27]). However, more justified is the opinion of some scholars that Article 196 PC protects not so much religious feelings as such but rather 'the freedom to adopt and profess a particular religion in freedom from insulting conduct toward objects or places with which the content of the religion is closely connected.'[28]

For the occurrence of the offence there must be an effect of someone's religious feelings being hurt. It needs to happen in a specific way, namely by insulting in public an object of religious worship or a place dedicated to public performance of religious rites. And an insult occurs when specific behaviour (speech, gestures, etc.) – according to the prevailing socio-cultural norms and universally accepted standards – con-

[22] The Decree on the protection of freedom of conscience and religion, *Dziennik Ustaw* 1949, no. 45, item 334. The title of the decree was aptly characterized by Andrzej Wąsek as 'truly Orwelian,' as it contained several provisions establishing offences with severe punishment, whose aim was to repress religious activities. See A. Wąsek, 'Przestępstwa przeciwko przekonaniom religijnym de lege lata i de lege ferenda' (1995) 7 *Państwo i Prawo*, p. 27.

[23] *Dziennik Ustaw* 1932, no. 60, item 571.

[24] The text pertaining to the protection of freedom of conscience and religion in Polish penal law is based on P. Stanisz, *Religion and Law in Poland* (Alphen aan den Rijn, Wolters Kluwer, 2023), pp. 126–129.

[25] *Orzecznictwo Trybunału Konstytucyjnego* 2015, no. 9, item 142,

[26] *Orzecznictwo Sądów Polskich* 2013, no. 2, item 19.

[27] *Orzecznictwo Trybunału Konstytucyjnego* 1994, item 11.

[28] K. Wiak and Z. Gądzik, 'Interference with an object of religious worship as a sign of the crime of offending religious feelings in Polish law' (2022) 25 *Studia z Prawa Wyznaniowego*, p. 51; W. Janyga, *Przestępstwo obrazy uczuć religijnych w polskim prawie karnym w świetle współczesnego pojmowania wolności sumienia i wyznania* (Warszawa, Wydawnictwo Sejmowe, 2010), p. 592.

stitutes an expression of contempt. As follows from the wording of Article 196, its protection 'does not cover the feelings of nonbelievers.'[29]

As for the notion of 'an object of religious worship,' as used in the analysed provision, it is generally accepted that any material object closely connected with worship can be qualified as such (e.g., a crucifix, statue or image of a person considered to be divine or sacred). What is disputed, however, is whether this notion should be extended to God understood personally (apart from any material image), venerated persons (e.g., Mary – the Mother of God, Buddha, Mohammed), rituals and even religious dogmas. The prevailing view is that it would be unjustified to limit the protection solely to material objects, because an outrage of divine or sacred persons offends religious feelings to a much greater extent than in the case of some material objects connected with worship. A broader interpretation of the concept of 'object of religious worship' also cannot be excluded from a linguistic point of view.[30]

There are no doubts as to the 'place dedicated to the public celebration of religious rites'. It applies to places which are used for religious purposes, not only on a permanent basis (churches, synagogues, etc.) but also temporarily (e.g., the altar-stations of the *Corpus Christi* procession).

According to the resolution of the Supreme Court of 29 October 2012, cited above, the offence in question can be committed not only with the direct intent (when the perpetrator desires to achieve an effect referred to in Article 196 PC) but also with the so-called *dolus eventualis.* The offence is thus committed even if the perpetrator only predicts the possibility of offending other people's religious feelings by insulting an object or place of religious worship and still accepts it.

In the Polish Parliament several amendment proposals to Article 196 PC have been presented in recent years. Significantly, they have dealt both with the elimination or limitation of the penal law protection of religious feelings and with its strengthening.[31]

In the judgment of 6 April 2004 (I CK 484/03)[32] the Supreme Court found that religious feelings should be also counted among personality rights (protected under

[29] Wiak and Gądzik, 'Interference with an object', p. 53.

[30] *See* Wiak and Gądzik, 'Interference with an object', pp. 51–54; Janyga, *Przestępstwo obrazy uczuć religijnych*, pp. 214–220.

[31] More recently (in 2022) a civic draft law was submitted to the Sejm, assuming the introduction of two new offences (which would replace the offence of offending religious feelings): public defamation or mockery of a legally recognized church or other religious organization, its dogmas, or rites, and public insult of an object of religious worship or a place dedicated to the public performance of religious rites. *See* <https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?id=D7D4359DE7E4066FC12588F00038B6B8> (accessed 27 February 2024); Wiak and Gądzik, 'Interference with an object', p. 46.

[32] *Orzecznictwo Sądu Najwyższego. Izba Cywilna* 2005, no. 4, item 69.

Article 23 CC).[33] Religious feelings are not actually mentioned among personality rights enumerated in Article 23 CC (although it does mention freedom of conscience). However, the list of personality rights included in this provision is not exhaustive.

According to Article 24 CC, if a personality right is under threat due to some action, it may be required that this action should be abandoned unless it is not unlawful. In the case of the infringement of a personality right, the suffering party may demand that its effects be removed, in particular by making a relevant statement in an appropriate form. It is also possible to claim monetary compensation or payment of a specific amount of money for a designated social purpose.

The catalogue of offences against freedom of conscience and religion from Chapter XXIV PC is supplemented by religious discrimination (Article 194), malicious interference with public performance of a religious act (Article 195 § 1) and malicious interference with funerals, mourning ceremonies or rites (Article 195 § 2). In accordance with Article 194 PC, liable to a penalty is 'any person who restricts the rights vested in another person because of their religious affiliation or lack thereof.'

Article 195 § 1 PC provides for the liability of a person who 'maliciously interferes with the public performance of a religious act by a church or other religious organization with a regulated legal status.' In this case, what is protected is the right of believers to undisturbed participation in religious practices and ceremonies according to the rules of their religion. The liability applies when a person purposefully disturbs the normal course of religious activities, that is, makes them difficult or impossible to perform. The term 'religious act' used by the legislator covers a wide range of religious activities. Naturally, what is prohibited is any form of behaviour consisting primarily in obstructing religious activities performed collectively, such as church services or processions. However, the provision in question also protects individual religious acts as long as they are performed in public (e.g., saying prayers by a roadside cross). The necessary condition for the occurrence of the offence is the regulated legal status of a religious organization whose religious act is disturbed. A necessary element for the offence to occur is also the maliciousness of the perpetrator's behaviour, which may be characterized by insistence or demonstrates contempt and disrespect.[34]

[33] The judgment of the Supreme Court concerned a publication insulting Pope John Paul II, which appeared in one of the daily newspapers. The publication hurt the feelings of one of the priests who had close ties of reverence and friendship with the Pope. The Supreme Court found that the plaintiff had 'a personality right in the form of religious feelings and at the same time friendship with the Pope as the supreme authority of faith and morals', and that this personality right had been violated. As a result, the Supreme Court ordered the defendants (i.e., the author and the publisher) to publish a statement of apology to the plaintiff for the content of the article.

[34] S. Hypś, 'Rozdział XXIV. Przestępstwa przeciwko wolności sumienia i wyznania', in A. Grześkowiak and K. Wiak (eds), *Kodeks karny. Komentarz* (Warszawa, C. H. Beck, 2021), pp. 1162–1172.

Malicious interference with funerals, mourning ceremonies or rites constitutes a separate type of offence (Article 195 § 2 PC). In this case, the protection includes a burial (or cremation) of human remains and accompanying ceremonies. They are not required to be performed publicly (though, in reality, this is so in the majority of cases) and can be both religious and secular.

In the Penal Code of 1997 there are also other provisions in which freedom of conscience and religion is protected indirectly. Three of them are collected in Chapter XVI PC ('Offences Against Peace and Humanity and War Crimes'). Article 118 (genocide) provides for the criminal liability of a person who 'acting with an intent to destroy, in full or in part, any national, ethnic, racial, political or religious group or a group with a particular worldview, commits murder or causes a serious detriment to the health of a person belonging to such a group,' as well as a person who, with the intent specified above, 'creates, for persons belonging to such a group, the living conditions bringing the threat of biological destruction, applies the means aimed to prevent births within this group, or forcibly removes children from persons belonging there.' Article 118a PC defines a crime of assault on the population, which is committed by a person engaged in criminal behaviour (such as, in particular, murder, torture, or rape) when participating in an assault directed against a particular group of people (selected, for example, on the basis of the criterion of religion). Moreover, the use of violence or unlawful threats towards a group of people or an individual because of their religious affiliation or lack of religious beliefs, and also incitement to such an act, is a criminal offence under Article 119 PC. In the case of the first two crimes, the most severe punishment is prescribed (up to twenty-five years of imprisonment), and whoever commits the offence specified in Article 119 PC shall be punished with imprisonment of three months to five years.

Moreover, Article 256 § 1 PC penalizes incitement to hatred based on, for instance, religious differences. Incitement to hatred based on national, ethnic and race differences or differences resulting from the lack of religious affiliation is treated in the same way, while violation of personal inviolability or insulting an individual person or a group of people because of their national, ethnic, racial or religious affiliation or lack of religious beliefs, constitutes a criminal offence under Article 257 PC.

III. Freedom of Expression, Digitalisation, and Fundamental Rights Protection Online

The Polish Constitution does not distinguish between types of speech, but they can be interpreted from the content of the laws regulating specific issues. Freedom of expression covers all modes of communication.

Digitalisation is a process relating to freedom of expression and freedom of religion and, depending on how it is used, can bring either benefits or threats – it makes religious practice possible to a certain (incomplete) extent (during the pandemic, for

the sick and the elderly), it provides new tools for teaching and evangelisation (e.g., The Audio Bible Super Production,[35] the channels of clergy and religious orders in the social media; online editions of Catholic newspapers, the phenomenon of Radio Maryja and TV Trwam), fundraising for religious purposes (through online collections – donors are not only members of the parish community but everyone who wants to support a given cause) and supports the realisation of the right to receive religious help where they are, without the need to be present in one place at one time.

Using digitisation in an inappropriate way (e.g., abusing freedom of expression in the name of realising freedom of religion, as illustrated by the online activities of Rev. Michał Woźnicki) or in a way that is considered inappropriate by church authorities and results in bans on speaking in the media[36] (for example, for Rev. Adam Boniecki, Rev. Wojciech Lemański, Rev. Tadeusz Isakowicz-Zaleski) is a pitfall. An attempt to settle this situation within the Catholic Church is the 'General Decree of the Polish Bishops' Conference on the media appearances of clergy, members of institutes of consecrated life, societies of apostolic life and certain lay people,' which came into force on 20 April 2023.[37]

Although no measures dedicated to hate speech on the Internet have been adopted so far in Polish national legislation, it is possible to use the provisions regulating press proceedings, the provisions of the Civil Code concerning the protection of personality rights and the provisions of the Penal Code concerning insult, defamation or incitement to hatred as the basis for combating hate speech online. The instrument for removing hate speech from the online space is the N&T procedure ('notice and takedown'), regulated in Article 14 of the Electronic Services Act of 18 July 2002.[38] However, it is commonly recognised that an effective fight against hate speech is only possible at the level of international regulations.[39]

IV. Blasphemy and Art – Ecclesiastical Objects, Symbols, and their Protection

The main problem pertaining to the relation between freedom of artistic expression and the penal-law protection of religious feelings is the question of the so-called justification of art, i.e., a circumstance which – according to some scholars – excludes the unlawfulness of a performance that offends religious feelings because of its artistic character. Public debate is focused on the protection of the religious feelings

[35] *See* <https://bibliaaudio.pl/> (accessed 27 Feb. 2024).

[36] Cf. M. Burzyk, 'Polscy księża wyklęci' (2019) 2/765 *Znak*, pp. 6–15.

[37] *Akta Konferencji Episkopatu Polski* 2023, no. 35.

[38] *Dziennik Ustawa* 2020, item 344.

[39] In this regard *see*, e.g., the Regulation of the European Parliament and of the Council on the Digital Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC.

of Christians because all louder incidents of this kind concerned Christian symbols, doctrine or objects of religious veneration. Incidents pertaining to the religious feelings of Muslims are not yet widely known in Poland.

The case of artistic installation by Dorota Nieznalska (titled *Pasja – The Passion*) has served as a kind of precedent in democratic Poland (since 1989). Her installation, displayed in one of the Gdańsk galleries in 2001, showed a broad metal cross, presented against the background of a man practising in a gym and projected on the wall, with a photo of male genitals in the central part of the cross. As several persons (two deputies to the Sejm included) notified the prosecutor that their religious feelings had been offended, the artist was accused under Article 196 PC. In the judgment of the District Court of Gdańsk of 18 July 2003 Nieznalska was found guilty of offending religious feelings and sentenced to six months' restriction of liberty (consisting in 20 hours' work for social purposes a month). However, the artist effectively appealed against this judgment and was found innocent in the final judgment of the Regional Court of 11 March 2010. In the opinion of the Regional Court, Nieznalska did not act with the intent to offend religious feelings of other persons, which is necessary for the occurrence of the offence defined in Article 196 PC.[40]

A similarly liberal approach in applying Article 196 PC has been shown by courts in several other cases. Penal responsibility was not held, e.g., by a musician who tore the Bible during a concert, spicing the performance up with vulgar comments. Although the Supreme Court stated in this case that 'an artistic form or scientific purpose of an insulting act does not exclude criminal liability for offending religious feelings or insulting an object of religious worship publicly,' in this court's view there was no offence if the perpetrator commits an insulting act only in the presence of people who voluntarily accept being exposed to content or behaviours that might lead to offending religious feelings (ruling of 5 March 2015, III KK 274/14).[41] The offence of offending religious feelings was also not found in a case regarding activists who in 2019 hung posters showing the Virgin Mary with a rainbow halo as a response to the design of the Christ's grave during the Easter triduum of 2019 in one of the Płock churches, where 'gender' and 'LGBT' were included in the catalogue of sins enumerated in the proximity of the grave (judgment of the Regional Court in Płock of 12 January 2022).[42]

[40] *See* A. Ploszka, 'Wolność artystyczna vs swoboda sumienia i wyznania. O sądowym ważeniu wartości konstytucyjnych na przykładzie sprawy Doroty Nieznaleskiej', in D. Bychawska-Siniarska and D. Głowacka (eds.), *Swoboda wypowiedzi w działalności artystycznej* (Warszawa, Helsińska Fundacja Praw Człowieka, 2014), pp. 213–224; K. Ciuklin-Sarnocińska, 'Zakres swobody wypowiedzi artystycznej w świetle prawa karnego' (2019) 44 *Studia Prawnoustrojowe*, pp. 25–27.

[41] *Orzecznictwo Sądu Najwyższego. Izba Karna i Wojskowa* 2015, no. 9, item 72.

[42] S*ee* <https://www.rp.pl/prawo-karne/art19284511-zapadl-prawomocny-wyrok-ws-matki-bozej-z-teczowa-aureola> (accessed 27 February 2024).

Among more publicized cases only one concluded with a conviction (a fine of 5,000 PLN – about 1,150 euros; see the judgment of the Regional Court in Warsaw of 18 June 2012, X Ka 496/12). It concerned Dorota Rabczewska, a Polish pop singer, who, answering a question regarding the Bible in a published interview, referred to 'all those guys who wrote those incredible [biblical] stories' as 'wasted from drinking wine and smoking some weed' (napruci winem i palący jakieś zioła). In the judgment of 6 October 2015 (SK 54/13), the Constitutional Court – analysing the case brought by the same applicant – found that there was no incompatibility between Article 196 PC and the indicated constitutional standards (Article 42(1) in conjunction with Article 2, Article 53(1) in conjunction with Article 54(1), and Article 54(1) in conjunction with Article 31(3) CRP). The Court stated, inter alia that 'the insulting of an object of religious worship deliberately offends the religious feelings of other people and thus also, like other forms of insult, harms their personal dignity,' and that 'in a democratic State, which is the common good of all citizens, public debate, in which everyone is guaranteed freedom of expression also in the religious sphere, should take place in a civilised and cultural manner, without any detriment to human and civil rights and freedoms.' In consequence, 'the punishment of the offence of offending religious feelings by insulting in public an object of religious worship is, from the point of view of Article 31(3) of the Constitution, a necessary restriction on the constitutional freedom of expression protected by Article 54(1) of the Constitution and thus the measures applied are necessary for the protection of the interests to which they are connected. In a democratic State, it is necessary to restrict freedom of expression that insults or offends the religious feelings of others.'[43]

However, the European Court of Human Rights, in its judgment of 15 September 2022 (*Rabczewska v. Poland*, Appl. No. 8257/13), stating that the Applicant's conviction for offending religious feelings amounted to a violation of Article 10 of the Convention, indirectly criticised Article 196 PC. The Strasbourg Court noted that the provision in question did not contain an additional criterion that the punishable insult to an object of religious veneration (and the consequent offence to religious feelings) should threaten public order (see especially § 62). The request for a referral to the Grand Chamber by the Polish Government was rejected in January 2023.

[43] *Orzecznictwo Trybunału Konstytucyjnego* 2015–A, no. 9, item 142. The translation made after the judgment of the European Court of Human Rights of 15 September 2022 (App. no. 8257/13) *Rabczewska v. Poland* (§ 19).

NORTHERN EUROPE

DENMARK'S UNEASY RELATIONSHIP WITH FREEDOM OF EXPRESSION AND RELIGION

Niels Valdemar Vinding[1]

Introduction: Denmark's uneasy relationship with freedom of expression and religion

Freedom of expression is a substantial and fundamental right in Denmark, supported by a wide range of protections in Danish law, in accordance with common human rights principles. However, it is not an absolute right and there are justified, proportionate, and necessary restrictions to limit freedom of expression in cases where public order, safety, and the rights of others are at stake. These restrictions include addressing racist and hate speech, libel, slander, and condoning heinous crimes or terrorism.

The principle and right of freedom of expression in Denmark in relation to religious freedom have been thoroughly examined and debated over the past two decades. Events such as the Muhammed Cartoons Crisis (2005-2006),[2] religiously motivated terrorism, political polarisation related to immigration, Quran-burnings and the growth of the Muslim community have prompted discussions about balancing freedom of expression and freedom of religion. These debates often revolve around the need to limit one right in consideration of the other.

This report was initially drafted during the period following the proposed 'Qur'an-burning' ban by the Danish majority coalition government of the Social Democrats, the Liberal Party, and the Moderates on August 25, 2023. The proposal comes after years of increasing attention to politically and artistically motivated burnings and 'dismantling' of the Qur'an in Denmark and Sweden, coupled with international political pressure. Turkey, the OIC, and political allies in NATO, particularly

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[2] See Klausen, J 2009. *The cartoons that shook the world.* Yale University Press.

amidst the Ukraine-Russia War, have urged Denmark to take action. Consequently, the Danish government decided to criminalise the 'improper treatment of an object with particular religious significance for a religious community.' The government views this as a 'precise operation' and a very limited regulation of freedom of speech. However, critics argue it is a concession to Islamist pressure, a violation of artistic freedom, and challenging, if not impossible, to enforce. Many of the entrenched positions from the Muhammed Cartoons Crisis are being reaffirmed. As at the time of writing, heated debates have continued before Parliament's annual session begins in early October, with the committee work in Parliament already receiving initial public hearing responses from religious communities, including the Danish Muslim Union.

In 2019 the 'Freedom of Expression Ministerial Commission' (*Ytringsfrihedskommissionen*) published the conclusion of three years of scrutiny in the form of an almost 900-page report titled 'The Framework and Conditions of Freedom of Expression in Denmark.' This comprehensive report provides a thorough historical, philosophical, and legal overview of freedom of expression in Denmark, along with a large quantitative survey and discussions of recent developments and challenges. It concludes with a number of balanced recommendations. Much of the material presented here is drawn from the extensive Danish literature on freedom of expression in general, and its relation to freedom of religion specifically. However, the most central source is the substantial committee report from the 'Freedom of Expression Ministerial Commission' of 2019.

Another significant source of information for this report has been in the form of instructions from the Director of Public Prosecutions (*Rigsadvokaten*) to public prosecutors across Denmark. These instructions are compiled in the Knowledge Bank of the Public Prosecutors Office (*Anklagemyndighedens Vidensbase*), which thematically and systematically presents the procedures and principled cases for the police and prosecutors to follow regarding violations of the criminal code and the Act on Discrimination. Additionally, my own research and many previous reports to the European Consortium for Church and State Research, which have addressed freedom of expression and religion over the years, have also been instrumental.[3]

As the Danish report is presented below, it deviates slightly from the structure of the grille thématique template. I have chosen to discuss overall issues and fundamental norms associated with Freedom of Conscience, Religion, and Expression in Section 1. In this section I also address relevant legislation and legal cases involving

[3] E.g., Vinding, N.V. 2023, 'Regulating Islam: Limitations on Freedom of Religion in Denmark' in M. Hill & L. Papadopoulou (ed.), *Islam, Religious Liberty and Constitutionalism in Europe*. Hart Publishing, pp. 121-136. Also, Vinding, N.V. 2022, 'Islam, Muslims and Human Rights in Denmark' in L. Papadopoulou (red.), *Islam and Human Rights in the European Union: Proceedings from the 32nd Annual Conference*. Editorial Comares, Granada, pp. 119-146.

limitations on freedom of expression, including hate speech, harassment, threats of violence, libel, and defamation.

Section 2 focuses primarily on issues of freedom of religion and freedom of expression within specific religious contexts, revisiting some related issues.

Section 3 covers Freedom of Expression, Digitalisation and Fundamental Rights Protection Online, although this is not very substantial in the Danish context.

Section 4 addresses Blasphemy and Art, including the protection of ecclesiastical objects and symbols and returns to the ongoing challenges of limiting Qur'an burnings. These last two sections follow the overall structure of the thematic template.

1. Freedom of Conscience, Religion, and Expression

1.1. The fundamental norms regulating freedom of expression

Along with international conventions – most significantly Article 10 of the European Convention on Human Rights – the Danish Constitution is the primary fundamental norm regulating freedom of expression and also freedom of conscience and religion. Article 77 of the Danish Constitution stipulates that everyone in Denmark has freedom of expression.

> "Any person shall be at liberty to publish his ideas in print, in writing and in speech, subject to his being held responsible in a court of law. Censorship and other preventive measures shall never again be introduced."

As a starting point and in principle, the provision protects all forms of speech and expression. This includes critical journalistic assessments of power, of religious views and practices, of political views and opinions, as well as of artistic and academic freedom. This protection applies regardless of whether the statements are made in text, speech, or images, and whether they are expressed through speeches, meetings, interviews, letters to readers, debate posts, social media posts, artistic forms of expression, or otherwise.

Part of the core history that informs this article in the constitution is the history of "censorship and other preventive measures", which are expressly done away with. The provision is indeed a ban on censorship and other preventive measures. It prevents a public employer, e.g., from requiring an employee to obtain prior permission from the authority for a private contribution in the public debate.

Regarding freedom of religion, the Danish Constitution protects religious freedom both positively and negatively. Positively, Article 67 guarantees the freedom to have a religion and to worship, stating, "Citizens shall be at liberty to form congregations for the worship of God in a manner which is in accordance with their convictions, provided that nothing contrary to good morals or public order shall be taught or done." Negatively, Article 70 protects freedom from discrimination based on faith, religion, or the absence thereof, stipulating, "No person shall by reason of his creed

or descent be deprived of access to the full enjoyment of civic and political rights, nor shall he [or she] escape compliance with any common civic duty for such reasons."[4]

1.1.1. *Limitations and restrictions*

Freedom of expression is primarily an individual right, and although it is significantly protected, there are several professional, practical, and social contexts within which it is limited.

One example is the limitation of freedom of speech for public employees. The protection of public employees' freedom of expression only applies when the employee speaks on their own behalf, as private statements, rather than statements made on behalf of the authority. Additionally, public employees have a duty of confidentiality.

While the media in Denmark enjoys extraordinary protections in legislation and courts to freely investigate, criticise, and express both journalistic news and opinions, this is often done under editorial responsibility. An editor responsible under the Danish Press Act is liable for what is printed in the media and, occasionally, authorities are justified in limiting freedom of the press. This is particularly true for issues of state security or private and confidential information that is of no public interest, which may include religious protections.

One particular case is from the 1980s, when the Masonic Order obtained an injunction to prevent the Danish Broadcasting Corporation airing a documentary about the Order. The broadcast programme would have revealed some of the Masonic Order's secret initiation rituals that they did not want shown. The case was decided in the Supreme Court, where the Masonic Order won. The Supreme Court considered that the initiation rituals were private matters. Therefore, they could not be made public and the TV documentary about the Masonic Order has never been broadcast.[5]

Limitations of freedom of expression apply to people in prison. The prison services or the prison director are empowered to restrict inmates' freedom of expression if this is necessary to maintain security and order.[6] Similarly, within the Danish armed forces it is possible to restrict soldiers' freedom of expression if this is necessary to maintain order and discipline.[7]

1.1.2. *'To offend, shock or disturb'?*

Denmark has a very strong tradition of championing freedom of expression and of pressure-testing it against occasions that 'offend, shock or disturb'. The most

[4] My Constitutional Act with explanations. 12th edition. Folketinget. 2024, pp. 48–49.
[5] My Constitutional Act, p. 46.
[6] My Constitutional Act, p. 45.
[7] My Constitutional Act, p. 45.

significant example of this was the publication of the twelve cartoons depicting Muhammad in *Jyllands-Posten* on 30 September 2005. A core motive for publishing the cartoons was to not be intimidated by threats and therefore to self-censure, but as the editor Flemming Rose wrote in the prose to accompany the cartoons:

> Modern, secular society is rejected by some Muslims. They claim a special position when they insist on special consideration for their own religious feelings. It is incompatible with a secular democracy and freedom of expression, where one must be prepared to put up with mockery, mockery and finalisation. It's certainly not always pleasant or nice to look at, and it doesn't mean that religious feelings should be made fun of at all costs, but that's secondary in the context. Thus, it is no coincidence that people in totalitarian societies go to jail for telling jokes or portraying dictators as critical. It usually happens with reference to the fact that it offends the feelings of the people. In Denmark, it has not come that far, but the examples provided show that we are on the way to a slippery slope, where no one can predict what self-censorship will end up with.[8]

In a 2011 analysis of the crisis, Carsten Stage concluded that the event marked the beginning of a new era in Denmark and was central to a shift in the negotiation of national identity.[9] Stage's analysis identifies three competing discourses in the Danish struggle following an increased awareness of globalisation. Apart from an altruistic discourse, which emphasizes nationality as the ability to value and manage human and cultural diversity, Stage identifies a 'rationalist discourse' and a 'primordialism discourse.' In both, Islam and Muslims are highly contested. In the rationalist discourse, Muslims' mixing of religion and politics is particularly criticised, since they are perceived as not engaging with contemporary rationality and reason. In the primordialism discourse, Muslims are seen as antagonistic towards Denmark, wanting to limit and contest Danish values, which some right-wing voices interpret as a reason to defend Danish cultural institutions, including popular Christianity. While such attitudes are not new, they became more clearly articulated and more legitimate after the cartoons crisis. Common to both these discourses is the political will to legislate on the basis of the perception that Islam and 'deviant' religion are alien to the public space in Denmark, regardless of the country's history with deviant Christian denominations, Judaism, or other religions. Certain aspects of Islam and the practices of some Muslims are understood – both politically and legislatively – as a negative influence on society and social cohesion.[10]

[8] https://danmarkshistorien.dk/vis/materiale/jyllands-postens-begrundelse-for-at-bringe-muhammed-tegningerne-2005

[9] Stage, C. 2011. *Tegningekrisen–som mediebegivenhed og danskhedskamp*. Aarhus: Aarhus Universitetsforlag.

[10] This paragraph closely references Vinding, Niels Valdemar, *Annotated legal documents on Islam in Europe: Denmark*. Leiden: Brill, 2020.

In the 'Freedom of Expression Ministerial Commission' report from 2019 (pp. 539ff), the commission (which included Flemming Rose) were very concerned with protecting freedom of expression ('*ytringssikkerhed*'). This concerns, in particular, the fear of terror, violence, threats and harassment, which causes many to refrain from participating in the public debate. In addition, the commission is concerned with the harsh tone of the debate, which also causes many to withdraw from the public debate, and also with the recent years' debate about how infringements are dealt with.

First and foremost, however, the commission is concerned for the safety of those who exercise their freedom of expression but also because, in the commission's view, it undermines the democratic conversation if you can use violence and threats to shut down the debate on important social issues, even though the arguments may be offensive. At the same time, the rule of law is de facto invalidated when some succeed in this way in limiting freedom of expression enforced by the threat of the use of violence. Furthermore, it is a fundamental attack on freedom of speech, as freedom of speech not only protects more harmless, neutral and politically correct speech but also speech that offends, shocks and disturbs.

The concerns and recommendations of the commission occur in a context where both the editors and cartoonists of the Muhammed Cartoons and right-wing speakers such as Rasmus Paludan have been threatened and attacked for voicing their position. For example, in January 2010 a 30-year-old Somali man forced his way into the home of cartoonist Kurt Westergaard with an axe, an act that was deemed terrorism by both the Eastern High Court and the Supreme Court.[11]

1.2. **Freedom of Religious Expression and Hate Speech**[12]

Freedom of expression is generally regulated by the Criminal Code, which contains several provisions that criminalise statements in various forms, thus limiting freedom of expression. One such provision is Article 266(b) on the dissemination of threats and racism, and Articles 267 and 270, which address defamatory and derogatory statements.

Additionally, the Criminal Code allows for the punishment of a person who, by means of encouragement, advice, or deed has abetted a criminal offense. However, to penalise someone for complicity, such as encouraging a deed, a specific criminal offence must have been committed, and the intention of the person in question must be demonstrated to a certain extent.

[11] https://nyheder.tv2.dk/krimi/2012-05-02-okseangreb-mod-tegner-var-terror

[12] See further also, Kühle, Lene 2022. "A 'Nordic Religious Freedom Paradox'?: Freedom of Religion and Belief as Constructed by Two Global Datasets." Temenos-Nordic Journal for the Study of Religion 58.2.

Finally, in addition to the general rule on participation, the Criminal Code contains several explicit prohibitions on encouraging or recruiting people to commit offences. Examples include the article on public incitement to crime, Article 114(c) on recruitment for terrorism, and Article 114(e) on promoting a terrorist organisation. Thus, under current law it is legal to express support for or approval of actions like the stoning of women or corporal punishment of children, provided that the person does not publicly encourage crime (cf. Article 136 of the Criminal Code) or abet a specific criminal offence (cf. Section 23 of the Criminal Code).

As a rule, hate crimes (and related issues) are regulated under two different codes in Danish law: either Article 266(b) of the Criminal Code or the Act on the Prohibition of Discrimination. Taken together, hate crimes may be defined as;

> Punishable circumstances that have a background in the victim's race, skin colour, national or ethnic origin or belief or disability or because of the sexual orientation, gender identity, gender expression or gender characteristics of the group in question.

As mentioned in the introduction, the instructions of the Director of Public Prosecutions (*Rigsadvokaten*) have been distributed to the public prosecutors throughout Denmark. In policing and prosecuting hate crimes, the core task of the police is to discover whether the perpetrator intended to threaten, insult or degrade a group of people because of their race, skin colour, national or ethnic origin or belief or a disability or because of the person in question group's sexual orientation, gender identity, gender expression or gender characteristics. The registration and monitoring of hate crimes is a national priority for the Danish police. All hate crimes must be updated in the Police Case handling System (POLSAS) with a search key so that the National Police can monitor the hate crime area, according to the national guidelines of the Danish police concerning the registration of hate crimes.

1.2.1. *Cases involving the Racial Discrimination Act and the Racism article in the Criminal Code*

In applying the Racial Discrimination Act, the task of the police and prosecutors is to determine whether differential treatment was justified or an expression of discrimination based on race, skin color, national or ethnic origin, faith, sexual orientation, gender identity, gender expression, or gender characteristics. When investigating hate motives under Article 266(b) of the Criminal Code, the police must consider whether there are circumstances indicating that the crime was motivated, wholly or partly, by the victim's ethnic origin, faith, disability, sexual orientation, gender identity, gender expression, gender characteristics or similar factors which can be referred to as a hate motive (cf. Article 81, subsection 6 of the Criminal Code).

Hate crimes that are not protected by freedom of expression do not necessarily have to be spoken or written; they can also be communicated by other means, such

as imagery or caricatures. Actions involving the use of well-known racist symbols may violate Article 266(b) of the Criminal Code. Examples from case law include a 1994 case where the placing of a burning cross on the roadside in front of a house inhabited by a Turkish family was considered a hate crime (U1994.993/1Ø). Similarly, the depiction of three swastikas on the brickwork of a grill bar owned by a man of Turkish origin was deemed a violation of Article 266(b) of the Criminal Code.

Hate crimes are viewed differently when they address entire abstract groups or nations rather than targeting individuals and specific groups. With respect to a group of people, it was considered a crime – but not a hate crime – to place stickers bearing a swastika and the text "Denmark for the Danes" on the window of an Indian restaurant. Similarly, possessing stickers with the wording "Race mixing is genocide" was not deemed a violation of Section 266(b) of the Criminal Code. However, the court did convict a man for shouting in a café at two persons of foreign origin with whom the defendant had had no prior interaction. He shouted: "I hate all Muslims, you are a piece of shit who only wants to exploit Denmark, you should all be thrown out of the country, Muslims are responsible for all crime in Denmark and Sweden," "I will kill all Muslims, I will kill you, Muslims should be exterminated," "You are terrorists," and "You bomb and kill and want to take over the whole world."

There is a particular degree of seriousness as a criterion concerning threatening, mocking, or degrading speech and expressions. To violate the Criminal Code, a statement or message must have the character of a threat, mockery, or degradation. According to the drafting remarks of the Criminal Code, speech and expression are acceptable if the rudeness or roughness is not severe, if points of view or arguments are made in light of scientifically advanced theories about racial, national, or ethnic differences, or if statements are part of a factual debate.

However, the instructions of the Director of Public Prosecutions include examples of rulings where the criteria of particularly aggravating language have been invoked. These include comparisons with animals, such as "breed like rats," "reproduce like rats," "pigs, black sows, black pigs," or "the only difference between Mohammedans and rats is that rats don't get welfare," or "you look like a monkey," "it's much worse that you're from Morocco – you're a bunch of monkeys," or "all blacks must leave the country," and "go down and eat bananas in the palm trees." In addition, several cases have resulted in convictions as a result of comparisons with diseases, such as statements like "The blacks are spreading everywhere. It's like a cancer!" or "Jews designated as a plague." Generalising claims about serious crime are also considered sufficient to meet the seriousness criterion. Examples of such convictions include statements such as "young immigrants rape and rape," "say no to more Mohammedan rapes," "mass rapes, serious violence, gang crime," "only here to flatter themselves until they are strong enough to execute us," and "especially the Muslims who commit violence, crime, and rape."[13]

1.2.2. *Harassment and threats*

Section 119 of the Penal Code provides special criminal protection against, for example, threats and violence to persons who act in the capacity of a public service or office. The reason for the special protection is, among other things, that persons who act as representatives of public authorities are particularly exposed to attacks and therefore need extra protection against the risk of violence and threats that this function entails, including the requirement that they can carry out their duties as public servants unhindered.

Protected persons include police officers and prosecutors; employees at sentencing and treatment institutions (e.g., prison officials, vocational teachers, health personnel, and pedagogues); employees at municipal institutions (e.g., teachers, social workers, case managers, and employees at schools, leisure, and nursing homes); public transport employees (e.g., train staff and bus drivers); healthcare staff employed in public institutions (e.g., doctors, nurses, and pre-hospital staff, including ambulance staff and rescue services); parking attendants; and politicians.

The provision covers cases where politicians, speaking in the course of a debate, are exposed to threats in response to their statements. Similarly, the provision applies to instances where a police officer or nurse faces threats participating in a debate. The provision also includes cases where a threat is made to a person within a protected circle who holds certain political or religious beliefs, with the intention of preventing that person from speaking publicly about those beliefs. More explicitly, the instructions from the Director of Public Prosecutions mandate higher penalties and harsher punishment in cases where a threat is intended to prevent the aggrieved party from speaking publicly. This is particularly significant regarding apostasy from a religion, radical community opinions, or controversial political beliefs.

1.2.3. *The Ban on Face Covering*[14]

On 31 May 2018 a majority in the Danish Parliament adopted a ban on face coverings, which has been widely discussed as a ban on wearing the niqab or burka. The ban, which amends the Danish Criminal Code, followed renewed discussions in 2017 and 2018. The question of criminalising the wearing of a burka or niqab had previously been discussed in 2009 and 2010, but the debate quietened after an academic report concluded that a maximum of 200 women wore a burka or niqab in Denmark.[15] The actual application of the section has been significantly limited and

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[13] Rigsadvokatmeddelelsen om Hadforbrydelser. [On hatecrimes]. Dated 27 March 2025.

[14] Vinding, Annotated 111-112.

[15] 'Rapport om brugen af niqab og burka', 2009, https://hum.ku.dk/faknyt/nyheder_fra_2010/2010/brugen-af-niqab-og-burka.pdf, accessed 1 February 2020.

does not apply where a qualifying purpose is found. Nevertheless, during the first year a total of 23 fines were issued.[16]

In its drafting remarks the Ministry of Justice discussed the ways in which freedom of speech and freedom of religion and belief came into consideration.

> "To the extent that covering the face in itself is regarded as an expression of opinion, it may be protected by freedom of speech. This should be included in the assessment of whether the cover serves a qualifying purpose. Similarly, it will be included in the assessment of whether covering the face takes place in a way – and in a concrete context – closely related to the exercise of religious freedom, etc. It is assumed as a clear starting point that covering the face for religious reasons is not prohibited when it comes to a specific religious act or the like, for example, in a religious building or in connection with a wedding or funeral ritual, etc. Outside such concrete religious contexts – including, for example, normal transport to and from the place of a religious act – it will not suffice to refer to the fact that the face has been covered for religious reasons."[17]

In this commentary by the Ministry of Justice it is quite clear that the circumstances in which the ban applies are limited, and there is considerable room for interpretation by the individual police officer. The commentary and subsequent instructions to police officers[18] about qualifying purposes include fancy dress parties, freedom of speech and freedom of religion, especially as regards worship. In addition, it is left up to the individual officer to assess whether this is a criminal matter at all or a matter for social services:

> If the police suspect that the person is subject to negative social control, for example, in connection with a breach of the ban on cover, i.e., because the person expresses compulsion or other pressure to wear face-covering clothing, then the police must assess whether there is a basis for investigating a criminal offence or whether the person should be offered help and support, and so on.[19]

All in all, this bill and the amendment are designed – in part – to provoke and discourage the 'Islamist elements' and – in part – to satisfy right-wing politicians and voters. Both are obviously symbolic uses. Much of this legislation has been criticised vociferously by leading representatives of the Church of Denmark, minority religious groups, civil and human advocates and much of the legal profession. The legislative

[16] *Ekstra Bladet,* 'Burkaforbud fylder år: Så mange bøder er der givet', 31 July 2019, https://ekstrabladet.dk/112/burkaforbud-fylder-aar-saa-mange-boeder-er-der-givet/7731836, accessed 1 November 2019.

[17] Cited, author's translation, http://www.justitsministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/2018/lovforslag_tildaekningsforbud.pdf, accessed 1 February 2020.

[18] "Vejledning om Politiets håndhævelse af tildækningsforbuddet," https://politi.dk/tildaekningsforbud, accessed 1 February 2020.

[19] *Ibid*.

agenda in these and related areas of law targets Muslims and Islam in Denmark, if not directly then indirectly. In sum, it is lasting evidence that anti-immigrant and anti-Muslim sentiments have influenced the former Liberal-Conservative government and continue to be part of the governing politics in Denmark. The law on banning face-coverings came into force on 1 August 2018. In 2017, the three-party centre-right minority government, its ally, the Danish People's Party, and the main opposition party, the Social Democrats, all voted for a ban on face-covering. This effectively meant a ban on the niqab and burqa. On the day the law came into force more than 1,000 people rallied to decry what they saw as an erosion of civil liberties, while a smaller demonstration by some five people celebrated what they felt was a long overdue measure.

1.3. **Context of Public Debate**[20]

As is clear, Denmark has become internationally infamous for two major public controversies: that of the Muhammed Cartoons and that of the Qur'an burnings. In addition to the Qur'an burnings, which have become an increasingly major issue in Denmark in recent years – and which are discussed in further detail below – there are also other significant cases involving (hate) crimes.

In the Freedom of Expression Committee report (p. 62) we find a discussion on the public debate of publicly visible employees' freedom of expression. A particular case from 2013 includes a news reporter who was censured unjustly by the Danish Broadcasting Company (DR). The journalist was the host of a regular news programme and as a private individual had published an op-ed in *Politiken* in 2013, where he wrote: "Religion is simply pure bullshit". The management found that his criticism of religion crossed the line of what was compatible with being a news anchor and thus gave him an official reprimand. With the reprimand came an order that if, in the future, he wished to present private views in the public debate he would first have to obtain permission from his supervisor. The Danish Parliamentary Ombudsman took up the case and expressed sharp criticism of the Danish Broadcasting Company. The ombudsman found that the requirement for prior approval was an unconstitutional censorship measure against the news host as a private person.

[20] Rapporten 'Hadefulde ytringer i den offentlige online debat' (2017), Institut for Menneskerettigheder (https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/udgivelser/ligebehandling_2017/rapport_hadefulde_ytringer_online_2017.pdf). Bemærk at undersøgelsens afgrænsning af begrebet "hadefulde ytringer" omfatter betydelig mere end ytringer, der er kriminaliseret i f.eks. straffelovens § 266 b.

2. Blasphemy, Religious Hate Speech, and Limitations of Freedom of Speech in Religious Context

2.1. Blasphemy and Defamation of Religion

What was known as the "Blasphemy" article (art. 140) of the Criminal Code was abolished in June 2017. [21] The blasphemy provision had been the subject of significant debate after the Muhammed Cartoon Crisis and its aftermath, and in 2011 the then Minister of Justice asked the Criminal Code Council (*Straffelovrådet*) to issue an opinion on the consequences of repealing the provision. [22] The Council did not recommend repealing the article but noted that it did not impose a limitation to criticism of religion. As the Freedom of Expression committee note in their comment on the recommendations of the Criminal Code Council, after a repeal of the law the authorities would no longer be able to take action against, for instance, burnings of the Bible or the Qur'an. In the spring of 2017 the Red–Green Alliance party (*Enhedslisten*) proposed to repeal the blasphemy article on the primary grounds that it constituted an overreaching restriction of freedom of expression. In consequence, the government changed its position and parliament abolished the article.

The wording of the now-abolished article was clear. Taken originally from an amendment to the Criminal Code of 1930, it stated: "Anyone who publicly makes fun of or mocks the religious teachings or worship of a legally existing religious community in this country will be punished with a fine or with imprisonment for up to 4 months." However, the use of this original provision by prosecution and courts was declining and the reasons for its continued existence became difficult to determine. In his chapter Professor Schaumburg-Müller traces the material protection of the blasphemy article over the course of a hundred years: from the fear of God's indignation and punishment upon society to the view that respect for a certain form of Christian religion is absolutely essential in the context of society, and then further to the requirement for the protection of religious feelings and finally to the claim for protection against social unrest resulting from hurt religious feelings. Schaumburg-Müller notes that the abolition was long overdue because "firstly, people had already run out of meaningful justifications for criminalisation over a hundred years ago, and secondly the provision did not have any legal effect based on its wording." [23]

[21] Schuamburg-Müller, 'Ophævelse af blasfemibestemmelsen – Much ado … Om Guds fortørnelse, retlig moralisme, religiøse følelser og religiøs ufred' in *Religionsretlig lovgivning. Trossamfundslov. Blasfemibestemmelse, Kirkeretsantologi 2019:* Christoffersen, L., Andersen, S., & Jørgensen, A. (eds.) (Copenhagen: Forlaget Eksistensen for Selskab for Kirkeret, 2019).

[22] *Betænkning fra ytringsfrihedskommissionen*, 2019, pp. 126-127.

[23] Schaumburg-Müller 2019.

2.2. **Challenging Dominant Paradigms**

While the Muhammed Cartoon Crisis and its aftermath had set a very high bar for the Danish protection of freedom of expression as an almost 'absolute' right and made the ridicule of the Prophet as well the right to 'offend, shock or disturb' a hallmark of Danish opinion on freedom of speech, the sentiments change when it comes to the freedom of expression of imams.

After the 'Mosques behind the Veil' documentary of 2016 a political majority in the Danish parliament wanted to strike down hard on imams and go to the 'limits of the constitution' to curtail what was perceived as religious preachers seeking to undermine Danish laws and values and supporting parallel judgments.[24] As part of the May 2016 political Agreement Paper, the Liberal Party Government and the Social Democrats, the Danish People's Party and the Conservative People's Party proposed initiatives that would be known as the imam-law, which would seek to limit the preaching of imams about extremist sympathies. The proper title of the amendment to the criminal code is almost impossible to translate but is something similar to an amendment to criminalise 'express approval of certain criminal acts as part of religious education', with an added list of such criminal acts referring to articles in the Criminal Code.

The amendment bill to the criminal code states:

> The agreement means that in the future it must be punishable to explicitly support terror, killings, rape, acts of violence, incest, paedophilia, false imprisonment, coercion and polygamy in the course of providing religious education. This will apply regardless of whether the statements are made in private or in public. The agreement also means that both the activities of religious preachers and those of others acting in the course of religious education must be covered by the criminalisation.[25]

This is by far one of the most significant limitations to be imposed on freedom of expression in recent years. The wording is paradoxical, as incitement to hatred or violence, for example, is already a criminal offence, while the willingness to limit freedom of expression is very surprising sincemuch of the Danish political establishment has been championing freedom of expression.

Three major criticisms may be made of this imam law, which was enacted as Article 136, subsection 2, of the criminal code.

Firstly, it does not restrict any other condoning of particularly atrocious acts. The amendment merely regulates the religious aspects of condoning criminal acts, not the political or public condoning of such criminal acts in any other context. In theory, an imam could step down from his pulpit and put on a t-shirt supporting a political

[24] Vinding, in Hill & Papadopoulou, 2024.

[25] Agreement Paper, *op. cit.*, p. 5.

party, but he would not be liable under this law. This has led the professor of law and religion, Lisbet Christoffersen, to argue that this provision nevertheless allows for general discrimination amongst the various religions, as long as the discrimination is equitable, proportionate and warranted. It is understood as a general limitation imposed on all religions since all ministers of religion are limited in their exercise of right. In a recent review published in the Danish Ecclesiastical Society's anthology, Christoffersen criticises this argument and argues that true discrimination should be compared with other groups such as politicians, media pundits and others with equally extreme viewpoints, who are not limited in their expression.[26]

Secondly, the amendment is poorly drafted and at best unclear, which leaves the state of law and the applicability of the rules difficult to for a citizen of the country to ascertain (not to speak of the difficulty in prosecution). In the commission report issued by the Freedom of Expression commission in 2019 this concern is highlighted in the summary of their findings. While the commission lauds the fact that there should be ample room in legislation for interpretation by the courts, the commission finds the lack of clarity troublesome.

> In some areas, however, there may be a lack of clarity that goes beyond this [room for interpretation]. In the commission's opinion, it is, for example, in the case of Section 136, subsection 2 of the Criminal Code, which criminalises express public approval of crimes [… such as] terrorism. It appears that it is not clear whether, according to this penal provision, there must be approval of a concrete act of terrorism that has actually taken place or whether it is sufficient to praise a hypothetical or impending [terrorist] attack. In addition, it is also not immediately clear what constitutes "express approval" in the sense of the provision, just as there may be doubts about the boundary between article 136, 2, and article 114, subsection e, which is the terrorism provision.

In addition to expanding the area of criminalisation of condonation of crimes, the new provision in § 136, subsection 1 of the Criminal Code. 3, is interesting for two reasons in particular. Firstly, statements that are not made publicly are nevertheless also covered. It is thus expressly assumed that the punishable statements will probably frequently occur in circumstances where they cannot be considered to have been made in public. Secondly, the requirement of "as part of religious education" implies that the context in which the utterances have taken place will be particularly decisive for whether it is a criminal matter.

[26] L Christoffersen, 'Religionsretlig lovgivning 2014-2019: Introduktion til bidrag og temaer i kirkeretsantologi 2019' in: A Christoffersen, A Jørgensen and A Andersen (eds), *Religionsretlig lovgivning. Kirkeretsantologi 2019: Trossamfundslov. Blasfemibestemmelse* (Frederiksberg, Eksistensen Akademisk, 2019), p. 17.

Both the political agreement and the bill have given rise to a renewed debate about the limits of freedom of expression, where the government and the parties to the agreement have been criticised from several sides for prohibiting attitudes and opinions rather than actions – that is, the well-known discussion about words versus actions.[27]

In 2005 the Danish professor of law, Henrik Palmer Olsen, had surveyed a substantial number of ECtHR rulings relevant to freedom of religion and found that only the core religious manifestations were protected by the convention and that the court had ruled accordingly. Thus, Palmer Olsen argued that freedom of religion as a protected right covered only a very small number of scenarios that were not already covered by the freedom of expression, freedom of association and freedom of assembly.[28] This then begs the question as to whether a court would rule that such a limitation on freedom of speech was a violation of freedom of expression. So far, there has been only one case of an imam with a mosque associated with Hizb ut-Tahrir who has spoken out forcefully against Jews, expressly condoning crimes against them. However, there is broad consensus amongst commentators that he might as well have been tried and convicted after the hate speech provisions.

III. Freedom of Expression, Digitalisation, and Fundamental Rights Protection Online

In the Freedom of Expression Commission report (p. 33ff) one of the topics discussed is the question of freedom of expression on online platforms and for a; several concerns are raised.

The Commission recognises that online hate is a significant challenge. It highlights the disparity between the extent of illegal statements in postings and comments on social media and the number of cases that are actually prosecuted. This disparity can create the impression that it is permissible to express oneself in violation of legislation on social media, which the Commission finds unacceptable.

However, the Freedom of Expression Commission does not advocate the imposition of new restrictions on freedom of expression in the social media or on other online platforms. Criminal protections exist and are clear, and criminal law also applies to activities in the social media. The starting point is that individuals who express themselves in the social media are responsible for all illegal statements, in the same way as with statements made in any other context.

[27] Ytringsfrihedskommissionens rapport, 2019.

[28] Palmer Olsen, H., 2005, 'Påklædningskrav og religiøs diskrimination', *EU-Ret & Menneskeret*, nr. 3, pp. 155-168.

In this connection, the Commission notes that primary and secondary schools include subjects such as digital education and media criticism. However, this area of teaching alone is insufficient since the challenges of online debates are not limited to children and young people but also affect the adult population. In consequence, further initiatives are needed that will target those outside the education system. In the Commission's opinion, digital education is not only about writing courteously but also about ensuring that individuals can stand up when the tone of the debate becomes harsh and blunt. A holistic approach should therefore be considered.

4. Blasphemy and Art – Ecclesiastical Objects, Symbols, and their Protection

Following the summer of 2023, when a lot of much attention was paid to freedom of expression in the context of the burning the Qur'an, the Danish government proposed a new bill on 25 August 2023 to criminalise the 'improper treatment of an object with significant religious significance for a religious community.'

This bill has been introduced within a complex context and has been critically received by many in Denmark.

The background[29] to the current Qur'an burnings dates back to the demonstrations led by Rasmus Paludan, the leader of the political party Tight Course (Stram Kurs) in the run-up to the 2019 general election. During these demonstrations, the burning of the Qur'an first occurred, leading to massive disturbances in the Copenhagen area of Nørrebro, including stone-throwing at police and the burning of cars and containers. Following the unrest, Paludan was repeatedly banned from demonstrating in certain areas. These bans were primarily justified by the argument that, given the threat level, the demonstrations could endanger public order and also Paludan's safety. In the wake of these limitations on Paludan's freedom of expression in Copenhagen, the law professor Jørn Vestergaard argued that the state is justified in limiting individuals when they 'abuse' freedom of expression and freedom of assembly.[30]

The international and political context is also important. The bill proposes to limit the current trend of Qur'an burnings – and other improper treatment of the Qur'an – in light of recent international pressure on the Danish government from a number of Middle Eastern countries and Islam organisations. Naturally, the bill comes at a time when Sweden's membership of NATO is in play, when Denmark is donating F-16's to Ukraine and when the Danish prime minister Mette Frederiksen is contending op-

[29] For an updated analysis and comparison across the Nordic countries, see Larsson, G., Frydenlund, I., & Brekke, T. (2024). 'A Burning Affair: Special Issue on the Burning of the Qur'an' in Temenos – Nordic Journal for the Study of Religion, 60(1), 5–26. https://doi.org/10.33356/temenos.137982.

[30] Barkholt Fruelund, 'Advokat: Ytringsfrihed beskytter ikke koranafbrænding" i Ritzaus Bureau (15. april 2019) og "Paludans hate speech er strafbar' (1. maj 2019), Refugees.dk, http://refugees.dk/aktuelt/2019/maj/paludans-hate-speech-er-strafbar/ (senest tilgået den 6. november 2019).

timistically (but ultimately unsuccessfully) for the position of General Secretary of NATO. With a little more historical scope, no one has forgotten about the Muhammed Cartoon Crises of 2005 and 2006, and this still informs the Danish government's manoeuvres, and also the international perception of Denmark.

In this light, the Organisation of Islamic Cooperation (OIC) resolved on 31 July 2023 that it

> "Condemns the repeated crimes of desecration of copies of al-Mus'haf ash-Sharif, arousing the wrath of some two billion Muslims worldwide, which represents a dangerous embodiment of the culture of hatred and racism, and hence a manifestation of Islamophobia, and demands the immediate cessation, and criminalisation of such extremist provocative acts, and underlines the need to respect religious texts and symbols and the promotion of a culture of peace and acceptance of the other."[31]

4.1. *The Qur'an burning ban*

The wording of the August version of the bill is peculiar. It concerns "physical objects which are considered sacred or particularly representative of the faith's confessional basis and/or teachings, e.g., central religious scriptures and the like, which are afforded a high degree of sanctity in the religious community." The fact that an object is used for religious reasons or as part of the practice of religion is not in itself sufficient for the object to be covered, nor are objects also not covered which for cultural or political reasons are connected with religion but which are not in themselves of significant religious significance, including clothing. By "improper treatment" is understood actions whereby the objects covered by the provision are destroyed in a insulting manner or are otherwise treated as insulting. This will include any inappropriate treatment, including burning, soiling or, for example, an object being trampled on or kicked, or that the object is destroyed by, for example, been torn or cut up or treated similarly. It will also include situations where an object has been stabbed with a knife.

The Bill includes the Qur'an, the Bible, the Torah etc., but not clothing or cartoons. Crosses and other central symbols are also included. The bill is not presented as a blasphemy law and it is not proposed that it should be concerned with such aspects as religious impact affect or violations against God. However, as Helge Årsheim, drawing on earlier analysis presented in his 2017 article *Giving Up the Ghost: On the Decline and Fall of Norwegian Anti-Blasphemy Legislation*, has argued, some of the language comes close to the now defunct blasphemy laws in both Denmark and Norway.[32]

[31] Resolution on the Repeated Crimes of Desecration and Burning of Copies of al-Mus'haf ash-Sharif in the Kingdom of Sweden and the Kingdom of Denmark Approved by the 18th Extraordinary Session of the Council of Foreign Ministers of the Organization of Islamic Cooperation, 31 July 2023.

[32] Årsheim, Helge (2017). 'Giving Up the Ghost: On the Decline and Fall of Norwegian Anti-Blasphemy Legislation' in Temperman, Jeroen & Koltay, András (Ed.), Blasphemy and Freedom of

The bill was added as a new subsection of the criminal code concerned with international relations and security, rather than out of concern for religious emotions or sentiments as such. In the view of the government, the bill deals mainly with foreign policy and security considerations and hence it is placed in the section of the Criminal Code devoted to treason and other crimes against the independence and security of the state. The Danish government is arguing for a pragmatic and precise operation; however, it is not seen this way by such people as observers, critics, and lawyers.

From a legal and religious perspective, this bill should be seen as part of a broader trend in contemporary welfare states return to a mode of governance whereby they take upon themselves to define and demarcate what religion may in practice mean. In this respect, the bill defines 'objects of significant religious meaning' and places pressure on the justice system and courts to investigate what should be included and what should not. There will, perhaps, be plenty of opportunities to 'explore this.'

Regarding the possible legality of the bill, the Ministry of Justice has exerted pressure on the Danish Constitution, international conventions and the implementation of the ECtHR. In doing so, they stress that limitations of the freedom of speech may be justifiable, as may be found listed in ECtHR art 10, ss. 2. In this regard, the Ministry of Justice is emphasising 'urgent societal need' in a democracy, a concrete overall assessment and a wide margin of acceptance of the measures.

They argue:

> "When assessing whether the proposed provision serves a worthy purpose and is necessary in a democratic society, the Ministry of Justice has emphasised that those actions that will be punishable will be regarded as derogatory in nature, and unnecessarily offensive or hurtful. In this connection, it is noted that, in the light of the Court's practice as reproduced above, it is within the margin of discretion of the state to lay down rules by laws that are intended to interfere with the right to freedom of expression if religious topics are treated in a way that can be characterised as blasphemous. The Ministry of Justice has also emphasised that the ban does not cover, for instance, writing and speech."

While the bill has been called 'a precise operation' by leading politicians, it is clear that a wide range of problems may follow. But it is in itself an interesting methodological approach to the question of freedom of religion and freedom of expression if the diverse responses to the bill are investigated, since this teases out the different positions held within this debate.

The bill was slightly revised when the parliamentary year began, with a minor change being made. Now, only texts and scripture are concerned, rather than (as

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Expression Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre. Cambridge University Press [ISSN 9781108242189], pp. 553–575.

originally intended) objects. The bill was passed on 7 December 2023 with 94 votes in favour and 77 against.

4.2. *Responses to the Qur'an burning law*

Rasmus Paludan already has a number of wild ideas that he thinks might enable him to work around the Qur'an-burning ban. He proposes, among other things, to let gay men kiss the Qur'an as part of a marriage ritual that can take place in front of an embassy. And since he has founded his own religion, he believes that he can make it a religious obligation to "soak the Qur'an in pig's blood in various public locations". To prevent him from doing so would be a violation of religious freedom, he believes. In addition, Paludan, who is himself a trained lawyer, postulates that he can separate the Qur'an page by page at home, put it in a transparent box and then go to an embassy and set fire to the pages, because then it would be a non-religious object.

Much of the criticism of the Qur'an-burning bill comes from rightwing opinion-makers and debaters, who all seem to share degrees of alarmism and use derogatory terms in characterising the bill. With reference to the demands of the Organisation of Islamic Countries (OIC) and Turkey's Erdogan, Jakob Holtermann, an associate professor of legal philosophy at the University of Copenhagen, calls it the 'Veto of the Caliphate',

> "This is the situation that can be called the Veto of the Caliphate. Because if we have shown once that we are inclined to bend when geopolitical circumstances allow the OIC to orchestrate security policy pressure, there is no reason to assume that they will not do so again in order to realise their long-term goals: a global ban on blasphemy."[33]

Vocal individuals in the artistic community in Denmark have also responded. The artist and art theorist Christian Tangø criticises the proposed legal text under the heading "Redraft the legal text! The Qur'an law is criminalising and bombarding art back into the Stone Age". "The law cannot distinguish between art and reality," he writes. His argument is that art has a democratic and powerful critical function in the Western democracies which fundamentally distinguishes them from authoritarian states.[34] A few weeks later, on 20 September 2023, several hundred artists and debaters issued a public statement against the Qur'an-burning bill. With a particular choice of words that echoes the axe-attack on Kurt Westergaard (*op. cit.*), the artists say of the bill that it is "taking the axe to freedom of expression."[35]

[33] https://www.weekendavisen.dk/2023-34/samfund/kalifatet-har-faaet-vetoret-i-danmark

[34] https://pov.international/koranloven-kriminaliserer-og-bomber-kunsten-tilbage-til-stenalderen/

[35] "Et øksehug i ytringsfriheden" https://politiken.dk/debat/art9533502/%C2%BBEt-%C3%B8ksehug-i-ytringsfriheden%C2%AB-Flere-hundrede-kunstnere-og-debatt%C3%B8rer-protesterer-mod-regeringens-lovforslag.

Charlie Hebdo also responded to the new bill. In addition to running a satire on the ridiculousness of the Qur'an having, in collaboration with several Scandinavian newspapers and media, decided to launch an appeal to alert citizens attached to democratic values and freedom of expression to the dangers of such a law.[36]

Amongst the reactions to the bill is the response from the Danish Muslim umbrella organization, the Danish Muslim Union (*Dansk Muslimsk Union*). The DMU fully supports the proposed bill but wants to augment it by adding public education on freedom of expression and a number of additional suggestions to improve the culture rather than further limit freedom of expression.[37]

A year after the original proposal (along with final revisions to the present article) newspapers and commentators argue that the bill is a success because it has apparently prevented further Qur'an burnings in Denmark. However, it is still seen by some as a significant limitation of freedom of expression.[38]

[36] https://www.lemonde.fr/en/religions/article/2023/09/05/charlie-hebdo-denounces-proposed-danish-blasphemy-law_6124007_63.html.

[37] https://dmunion.dk/dk/2023/09/20/mindehoejtidelighed-for-ofrene-i-tyrkiet-og-syrien/

[38] "Koranloven virker, som regeringen ønskede. Men den er stadig mål for kritik", Berlingske, 5 August 2024.

THE FUNDAMENTAL NORMS REGULATING FREEDOM OF EXPRESSION AND RELIGION IN FINLAND

Saramaria Kalkku / Kimmo Nuotio[1]

I. Freedom of Conscience, Religion and Expression

1.1. The fundamental norms regulating freedom of expression

In recent years speech crimes have become the focus of attention in discussions concerned with the limits of freedom of speech in Finland. Freedom of speech itself is regulated by Section 12 of the Finnish Constitution. In contrast, speech crimes constitute an informal categorisation but it is one that is considered to comprise at least the crimes of defamation (Finnish Penal Code, Chapter 24, Section 9), dissemination of information violating personal privacy (FPC, Ch. 24, S. 8) and agitation to hatred against a population group (FPC, Ch. 11, S. 10) which is the central penal provision regarding punishable hate speech. Notably, to emphasize the nature of this punishable incitement to racial and other hatred as a violation of the human rights of various minority groups, the last mentioned provision is located under the chapter devoted to war crimes and crimes against humanity, whereas the previous two are found under the chapter concerned with violation of privacy, peace and personal reputation.

The criminalisation of violation of the sanctity of religion (FPC, Ch. 17, S. 10) can be found in the chapter concerning offences against public order. The Finnish title of the penal provision refers to religious peace, and the terminology of peace appears sometimes in provisions of this kind. This term was introduced when the term blasphemy was abolished as it no longer represented the legal interest which was intended to be protected.

The Constitution of Finland (*Suomen perustuslaki*, 731/1999) regulates the freedom of expression as follows in Ch. 2, S. 12, under the title 'freedom of expression and right of access to information':

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> Everyone has freedom of expression. Freedom of expression entails the right to express, disseminate and receive information, opinions and other communications without prior prevention by anyone. More detailed provisions on the exercise of the freedom of expression are laid down by an Act. Provisions on restrictions relating to pictorial programmes that are necessary for the protection of children may be laid down by an Act.
>
> Documents and recordings in the possession of the authorities are public unless their publication has for compelling reasons been specifically restricted by an Act. Everyone has right of access to public documents and recordings.

The wording of the provision has been adjusted to that of the Article 10 of the European Human Rights Convention. The provision includes, for example, a general clause on freedom of speech, a specification of the rights included in the provision, the prohibition of censorship measures and a reservation to enact more detailed provisions on the exercise of freedom of expression at a later date, through an act.[2] There are no restrictions concerning views of life that can be covered by freedom of expression unless it falls under specific provisions in the Penal Code such as incitement to hatred. (For more on such restrictions, see more below.) As regards grave forms of punishable hate speech, the European Court of Human Rights has sometimes applied the otherwise rarely used Article 17 on the Prohibition of Abuse of Rights. When this occurs, the speech no longer enjoys the protection granted by Article 10. The Finnish Constitution does not contain any provision of this type, but the Supreme Court has discussed and introduced the principle of abuse of rights into the Finnish law.[3]

The Finnish courts are increasingly taking into account the practices of the European Court of Human Rights (ECtHR), partly as a result of its decisions that were critical of Finland's position, to avoid further convictions. The Supreme Court of Finland has a relatively rich case law on the limits of freedom of speech and it refers repeatedly to ECtHR case law, in practice, The Finnish Courts closely follow the models and the principles developed in ECtHR case law, but at the same time it has proven not to be quite a simple task to build on this rich and diverse case law.

There has also been a legislative aspect to this interaction. In the case of *Saaristo and others v. Finland*, *f*or instance, the ECtHR maintained that Finland had breached freedom of speech granted in article 10 of the European Convention of Human Rights (ECHR).[4] The decision related to a case processed in the Supreme Court of Finland,

[2] The Bill of Government of Finland, HE 1/1998 vp, p. 79.

[3] Supreme Court 2020:68, paras 12-16. See, also e.g. the Factsheet on Hate Speech produced by the ECtHR itself: https://www.echr.coe.int/documents/d/echr/FS_Hate_speech_ENG .

[4] K. Nuotio, 'Sananvapausrikosten sääntelyn ja soveltamisen kehitystrendejä ja kehittämiskohtia eräiden kotimaisten oikeustapausten valossa' in Päivi Korpisaari (ed), *Viestin viemää Viestintäoikeuden vuosikirja 2021*, (Helsinki, Helsingin yliopiston oikeustieteellisen tiedekunnan julkaisuja, 2022), pp. 48-49.

where the respondents were convicted of the dissemination of information violating personal privacy.[5] In this instance, the relevant ECtHR case law provided a reason to amend the Finnish Penal Code to ensure that crimes of defamation would in general not be punished more heavily than with fines.[6] It was considered that an adjustment was required since the normal ECtHR case law indicated that Finland had previously overemphasised personal honour and the right to individual privacy at the expense of freedom of speech.

There is no separate mention in the law about permitting free speech in cases where the actual content has been disturbing or shocking. These factors are treated by means of established case law and precedents issued by the Supreme Court of Finland, such as SC 2022:1.

An Act on the exercise of freedom of expression in the mass media (*laki sananvapauden käyttämisestä joukkoviestinnässä*, 460/2003) sets up specific regulations for dealing with the area. One requirement is that there should be an editor in charge, with his or her obligations laid down in the legislation. In the case of a breach of the law, the threat of punishment has been established, albeit a lenient one. The intention is, however, to grant a large measure of free expression and the mass media is seen as one pillar in a functioning democracy. For this reason, prosecution for the crimes committed in this context require the intervention of the State Prosecutor.[7] A recent rare case concerned the disclosure of military secrets by the leading Finnish newspaper, *Helsingin Sanomat*.[8]

With respect to soft law instruments, the self-regulation of the journalistic industry deserves a mention. The Council for Mass Media in Finland (*Julkisen Sanan Neuvosto*) describes itself as "a self-regulating committee established by publishers and journalists in the field of mass communication for the purpose of interpreting good professional practice and defending the freedom of speech and publication".[9] The Council does not have the competence to exercise public authority nor do its decisions have a binding effect on the courts, and it is important to stress that the courts would not grant any weight to its opinions. However, it could be regarded as providing customary practice that the media industry generally adheres to.[10]

[5] The Supreme Court of Finland, KKO 2005:82.

[6] Act 13.12.2013/879.

[7] Act on the use of freedom of expression in the mass media (Act 460/2003).

[8] K. Nuotio, 'Watchdog Watching Too Closely: Journalists Reporting on Military Intelligence Were Held Guilty of a Crime in Finland', VerfBlog <https://verfassungsblog.de/watchdog-watching-too-closely/> (accessible since 16 Feb 2023).

[9] The Council for Mass Media in Finland, 'What is the CMM?' <https://jsn.fi/en/what-is-the-cmm/> (accessed 22 May 2023).

[10] *Ibid*.

It seems clear that issues of freedom of expression can arise in settings in which other freedom rights are also involved. It is a known fact that in the context of political discourse more can be said than in other types of public speech. At a public demonstration the democratic rights to convene and express opinions may extend the sphere of protected freedom of expression. In some contexts a religious environment might also be relevant in this respect. This will be dealt with later by using the case example of Päivi Räsänen.

With respect to Sharia law, there have been no official legislative advances in either direction, although they do occasionally surface in public discussions. Following a request submitted by a small Muslim community about a decade ago related to "Sharia courts" as arbitration tribunals in family law and other civil disputes, the Ministry of Justice of Finland decided that they could not be established.[11] One of the notable problems mentioned is the unequal status under Sharia law of men and women.[12]

Another episode regarding freedom of speech in a context that was to some extent religious in nature occurred in spring 2023 during Finland's accession process to the North Atlantic Treaty Organization. At the time, Turkey had not yet ratified the applications of Finland and Sweden to join the defence alliance and the Finnish and Swedish delegations were continuing their negotiations. Small but loud public protests in both countries rallied against any deals or policy promises, which could potentially limit fundamental freedoms in the two Nordic states. In the course of the demonstrations the Swedish authorities allowed protesters to burn the Muslim Quran and commit other hostile actions. At the same time, the Finnish police confiscated from protesters a human-sized doll that caricatured the Turkish President, Erdoğan. According to an internal instruction, the police claimed that a mock hanging or other offensive treatment of a dummy in principle constituted grounds for suspecting defamation, and hence the act in this case could be regarded as an offence.[13]

In Denmark the burning of a Quran led to the decriminalisation of the offence of religious insult, while Finland remains the last Nordic country to still hold fast to this kind of penal provision. This particular law has not been abolished even though it has met with criticism in academic circles. The focus of the criticism has been that the protected legal interest, *Rechtsgut*, no longer fits comfortably in the present-day Finnish Penal Code. The offence of religious insult (or, in fact, breach of religious

[11] S. Reinboth, 'Sharia-tuomioistuimia on ehdotettu Suomeenkin – Islam-tutkija Hämeen-Anttila: On virheellistä ajatella, että sharia olisi kivikautinen laki', *Helsingin Sanomat*, 28 Nov. 2016.

[12] H. Muhammed, 'Islamilaisen sharia-lain soveltaminen Suomessa?' (2011) 3 *Oikeus*, pp. 376-378.

[13] M. Gustafsson and J. Mantsinen, 'STT:n tiedot: Erdoğan-nuken takavarikon taustalla on Poliisihallituksen muistio', *Helsingin Sanomat*, 28 March 2023.

peace) is considered to violate religious beliefs, which indirectly could make it a breach of the public order. It is, however, not completely clear in what sense violation of religious feelings would constitute a threat to public order, especially when we take into account than in many European countries such penal provisions have already been abolished and the offence of agitation against of population group, in turn, has been amended to provide protection to religious groups. Thus, one could argue that the relevant and necessary protection of religious groups against public expressions of hate already is in place, and the reasons for maintaining a separate offence of religious insult are increasingly weakened.

1.2. **Freedom of Religious Expression and Hate Speech**

The provision of freedom of religion is located among other fundamental rights in Chapter 2 of the Finnish Constitution. In addition, the Act on the Freedom of Religion (*uskonnonvapauslaki*, 453/2003) aims at safeguarding the exercise of the freedom as provided in the Constitution. This also lays down provisions for the establishment of registered religious communities and providing the basis for their activities. Freedom of religion was already granted in the Finnish Constitution from the year 1919, but only in 1923 entered the first act on it into force.

The Constitution regulates the freedom of religion as follows in Section 11 of Chapter 2 titled 'Freedom of religion and conscience':

> Everyone has the freedom of religion and conscience.
>
> Freedom of religion and conscience entails the right to profess and practice a religion, the right to express one's convictions and the right to be a member of or decline to be a member of a religious community. No one is under the obligation, against his or her conscience, to participate in the practice of a religion.

Blasphemy has been considered an offence for centuries. It was recognized in the Swedish comprehensive Civil Code of 1734 that was also applied in Finland and blasphemy was also punishable according to the Finnish Penal Code of 1889/1894. The first preparatory works of that reform still reflected the idea that blasphemy protected the belief according to the dominant Lutheran religion, and that it was a tool for fighting heresy. Later, more modern views were adopted and blasphemy was regarded as protecting the religious feelings of other believers.[14]

In the early years of the 20th century the role played by criminalisation was heavily debated politically but the provisions were not repealed.[15] In the 1970s a degree of modernisation was applied to the description of the offence. In the 1960s there had been two quite well-known cases relating to art works which had tested the limits

[14] E. Backman, Rikoslaki ja yhteiskunta I. SLY, Helsinki 1976, p. 293.
[15] Backman 1976, pp. 312-323.

of permissible expression. The first concerned a novel published in 1964, "Juhannustanssit" (Mid-Summer Dance), in which a character, Mr Hiltunen, delivered a prank sermon containing indecent elements. Some conservative circles of the church raised their voices and the author was sentenced to short-term conditional imprisonment and later pardoned.

The other case concerned visual art and is known under the name of "The Pig Messiah". It concerned a work by young, avantgarde painter and pop-artist, Harro Koskinen, in which he depicted a crucified pig-like Jesus with a halo around his head. 'The Pig Messiah' is remembered mainly for the blasphemy charge that it provoked, which eventually led to the imposition of fines on Koskinen and his exhibitors. The painting was part of a larger set of paintings, including also pig police etc. It seems clear now that these criminal proceedings were among the last signs of a presupposed unitary public culture consisting of the core values of home, patriotism and religion.[16] Society had already liberated itself from such chains and the legal regulations seemed unfair and badly outdated. In addition, the doctrines implicit in the constitutional right to freedom of speech were at that time still underdeveloped as it was not common to refer to such rights in individual criminal proceedings. All of this later changed.

The current formulation was eventually put in place in 1998. In this, no separate Chapter related to crimes against religion was left but the provision was placed under the heading of Offences against Public Order. The idea was that religiously insulting activities would hurt the strong feelings of religious people and hence endanger public order. The title of the provision, Finnish Penal Code Ch. 17:10, is 'Breach of the sanctity of religion'.

> A person who
>
> (1) publicly blasphemes against God or, for the purpose of offending, publicly defames or desecrates what is otherwise held to be sacred by a church or religious community, as referred to in the Act on the Freedom of Religion (267/1922), or …
>
> shall be sentenced for a breach of the sanctity of religion to a fine or to imprisonment for at most six months.

Proceedings brought on the basis of religious insult have been relatively rare, and the number of convictions has been approximately one per year.[17] The weight has shifted towards the protection of other than the majority Christian faith. In Finnish law, cases when hate speech is motivated by religious reasons are rare. More typically religious communities appear on the side of the perpetrator than on the side of the victim side. Theoretically, religious faith could at times motivate hate speech, either

[16] See, e.g., K Tuori, *Matti Wuori. Tapauskertomuksia Suomesta.* Teos 2023.

[17] In religious studies, criminal cases involving religious insult have been studied extensively by Äystö, Äystö 2019.

within a church or in relation to another faith or simply as hate speech directed against other relevant minorities.

One interesting feature is that "God" has been mentioned separately in the provision described above. The government had proposed that a separate mention of God be removed but in the final stage of parliamentary decision-making the mention reappeared as a result of the demands of conservative circles. This suggests that not all of the conservative thinking in this area had yet disappeared. The reappearance of God in the text of the law creates a slight inconsistency since it suggests that God should be a special object of religious insult.

The wording of the legal provision cited above is confusing also since the subjective element relating to blasphemy against God, as required in the penal provision, is slighter than what is required for other forms of the crime for which a specific purpose is required. Owing to a lack of *travaux préparatoires* it also remains an open question as to what "God" here actually means: does it refer only to the Christian God or should Allah also be included, for instance? To our knowledge, the case law has not elaborated on these issues and no relevant precedents from higher courts have yet been issued.

The current Finnish position could be summarised as follows. In the 1990s, when the last reform was carried out, the preparatory work was rather superficial and no comparative studies were carried out. Finland had probably followed a somewhat slower path than its Western neighbours in this area, and the reform of the law was part of a larger reform project and thus these questions of principle did not attract great attention. It is probable that the law-drafters were not even aware that in the other Nordic countries such provisions had either been repealed already (Sweden, Norway) or were applied very seldom (Denmark). This was also at a time when Finland had only recently joined the Council of Europe and its Human Rights Convention, and it was not yet routine to look at the case law of the European Court of Human Rights.

It is our view that the blasphemy regulation in the Finnish Penal Code in fact exists mainly as a result of tradition. Despite some academic criticism, on the grounds of principle it has not been seriously raised on any political agenda. It may have been seen as a rather natural limitation of freedom of expression since we tend to accept as normal what we have had for a long time. In terms of criminal policy, decriminalisations also tend to occur as part of larger law reforms rather than separately, due to obvious reasons. There are usually other more pressing issues to be dealt with.

In a secular society like Finland it is somewhat difficult to reason that public order could be threatened by religious insults. In sum, Finland has undertaken no review of the offence of blasphemy, and the Council of Europe recommendation 1805 (2007) to review the current penal regulation has not been followed. Even though the recommendation calls for the abolition of crimes involving religious insult, it basically sees some room for still preserving the laws: "…national law should only penalise

expressions of a religious nature which intentionally and severely disturb public order and call for public violence." If Finland were to carry out a review, the decisive question would concern whether there really is a pressing societal need to continue maintaining such an offence or whether the relevant protection of religious groups already can be provided by other penal provisions, especially the one concerning the agitation to hatred.

Finland has not experienced cases such as the Mohammad caricatures in Denmark in 2005 or the recent Quran burnings in Sweden and Denmark. Denmark, in particular, has opted for not maintaining any blasphemy criminalisation even though that country has had the experience that in the Arab world blasphemous actions could easily trigger severe consequences now that media reports travel with the speed of light. As mentioned above, in Finland and Sweden religious insults have become a political issue also in the sense that Turkey has regarded religious insults to be relevant for its approval of Finnish and Swedish membership of NATO. In this setting, the outdated Finnish blasphemy provision proved useful as it helped stop events which could have triggered a Turkish reaction. For Sweden and Denmark it now seems difficult to deal with the expectation of the Arabic world that Quran burnings be regarded as prohibited and hence punishable.

The NATO accession saga in some sense also showed to the public and politicians in Finland that having such a separate penal provision may be needed when ill-intended players wish to provoke and abuse the freedom of speech just to cause trouble for odd reasons. One has to admit that such events place the issue in new context, when even a larger foreign policy context and domestic security interests play a role. Also Sweden and Denmark have been forced to take a fresh look at this issue as they might adopt some restricted penal provision to address such provocations.

All EU member states have penal provisions rendering agitation to racial and other hatred punishable. This includes incitement to hatred against religious groups. It seems, however, that expressions such as burning or defaming the Quran do not automatically fall within that category.

The Finnish Penal Code of Finland criminalises religious hate speech through a provision related to incitement to hatred, in this case termed 'agitation against a population group' (*kiihottaminen kansanryhmää vastaan*). The crime of incitement to hatred is criminalised in the FPC in S. 10 of Ch. 11 under the heading of 'agitation against a population group':

> A person who makes available to the public or otherwise disseminates among the public or keeps available to the public information, an opinion or other message where a certain group is threatened, defamed or insulted on the basis of its race, colour, birth, national or ethnic origin, religion or belief, sexual orientation or disability or on another comparable basis shall be sentenced for agitation against a population group to a fine or to imprisonment for at most two years.

The aggravated form is regulated in the subsequent Section 10a of Chapter 11 titled 'Aggravated agitation against a population group':

> If agitation against a population group involves exhortation or enticement
> 1) to genocide or preparation of genocide, a crime against humanity, an aggravated crime against humanity, a war crime, an aggravated war crime, murder, or manslaughter committed with a terrorist intent, or
> 2) to serious violence other than that referred to in paragraph 1 so that the act clearly endangers public order and security, and any agitation against a population group is also aggravated when assessed as a whole,
> the perpetrator shall be sentenced for aggravated agitation against a population group to imprisonment for at least four months and at most four years.

This criminalisation is based on the International Convention on the Elimination of All Forms of Racial Discrimination dating back to 1965 and the International Covenant on Civil and Political Rights to 1966, which prohibit incitement to hatred based on either religious grounds or others. In the EU the relevant normative framework is provided by the Framework Decision on Racism and Xenophobia, 2008. The Council of Europe also has a binding legal instrument concerned with the issue.[18] The cases and other types of criminalisation will be discussed below.

1.3. **Context of Public Debate**

There are several cases that have sparked debate on hate speech in Finland – cases where offensive speech has been expressed both against a religion and also in the name of a religion. The relevance of the matter has been heightened as a result of findings showing that the use of racist language has been increasing in Finnish domestic politics.[19] One of the most highly visible cases was the decision of the District Court of Helsinki on 30 March 2022 to acquit the Christian Democrat member of Finnish Parliament Päivi Räsänen of charges of agitation against a population group. In November 2023 the Court of Appeals upheld the lower court's decision. However, the decision is not yet final as the prosecutor has applied for appeal in the Supreme Court of Finland.

[18] Council Framework decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ, L 328/55. Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. Strasbourg, 28.I.2003. European Treaty Series – No. 189.

[19] J. Hannonen and T. Hyttinen, 'Kiihottaminen kansanryhmää vastaan alioikeuskäytännössä' (2023) 2 *Defensor Legis*, p. 308. See, also, K. Nuotio, 'Sananvapausrikosten sääntelyn ja soveltamisen kehitystrendejä ja kehittämiskohtia eräiden kotimaisten oikeustapausten valossa', in *Viestin viemää: Viestintäoikeuden vuosikirja 2021.* Korpisaari, P. (toim.). Forum iuris : Helsingin yliopiston oikeustieteellisen tiedekunnan julkaisuja). 2022 Helsinki, p. 47-63.

Pursuant to the indictment, Räsänen, a Member of Parliament, had participated in a radio programme and written a pamphlet voicing offensive statements and opinions about homosexuals, e.g., that 'God did not originally create the humans as homosexuals but as a heterosexual beings'. The Court decided that her comments were based on her religious convictions and that they were not hate speech, which would lie outside the scope of the freedom of speech. It also stated that freedom of religion does not justify every action performed in the name of a religion, a belief, or a conviction. However, the Court noted that restricting the freedom of speech requires weighty societal reasons and protecting the human dignity, so that the equality of people belonging to sexual minorities could construct such a reason.[20] The Court also referred widely to the practice of the ECtHR.

Later, as expected, the Court of Appeals in Helsinki also acquitted the politician.[21] In the academic and public debate that went on during the Courts' deliberation, it had been suggested that the decision was unlikely to be changed in any higher court decision.[22] A factor that had been brought up as a point of relevance was that the suspect is a Member of a Parliament. In the indictment this was noted as a supporting factor in relation to the claims, but the Court and also academia had noted that a speech made by an MP is political in its nature, which should broaden rather than narrow down their freedom of speech.[23] The Supreme Court of Finland has granted an appeal for the prosecution. Only the part concerning the appearance in the radio program was excluded.[24]

In November 2022, the Supreme Court of Finland gave its decision on a case concerning agitation against a particular population group.[25] The accused had published and disseminated several videos, subtitled in multiple languages, on their public YouTube channel. The speaker in the videos had insulted immigrants and Muslims, which the respondent had translated into Finnish, Swedish, French, Italian and Arabic and also into several Finnish dialects. The Supreme Court held that the respondent had committed the crime of incitement to hatred as laid down in Section 10, Chapter 11 of the Finnish Penal Code. The Court reminded those present about the importance of freedom of speech in a democratic society and that it should not be violated more than is strictly necessary. It stated that, in consequence, it should be permitted to heavily criticise immigration policies without it being a crime. However, a typical act that would nevertheless be subject to punishment would be the dissemi-

[20] The District Court of Helsinki, 22/113590, n:o R 21/3567, 30 Mar. 2022, pp. 22-23.

[21] The Court of Appeals in Helsinki, 14 Nov. 2023, R 22/1094.

[22] A. Korpi, 'Räsäsen vapauttava tuomio lopputulokseltaan EIT:n linjan mukainen – Uskonnollisen puheen erityisasema Suomessa vielä tunnistamatta' (2022) 4 *Defensor Legis*, p. 1117.

[23] District Court of Helsinki 22/113590, No. R 21/3567, 30 Mar 2022, [12-15] and Korpi, [1118].

[24] Supreme Court of Finland, R2024/57.

[25] Supreme Court of Finland, KKO 2022:63.

nation of information, an opinion or any other message in which violence against a certain group is deemed acceptable or desirable or where those involved are compared to animals, parasites or others, or where a group may be accused of being generally criminal or of lower worth.[26]

In the case in question, statements were made about immigrants and Muslims as 'brutal, arrogant, stupid, worthless and diseased' and that 'one day we will throw you out'. The Supreme Court considered these to be typical examples of the provision related to incitement to hatred. It also noted that the videos did not contextualise historical events of religious confrontation in a neutral manner and that the statements were likely to incite intolerance and hatred of a group.[27] The Supreme Court considered that, even though the videos did not include incitement to violence, the speaker implied that the groups would be deported and would accept violence against them. Hence, the videos were based on intolerant statements violating human dignity and questioning the right of immigrants and Muslims to live in Finland.[28] Even the fact that the statements were made in the course of a political demonstration did not nullify the punishability of the statements nor justify them.[29]

II. Blasphemy, Religious Hate Speech, and Limitations of Freedom of Speech in a Religious Context

2.1. Blasphemy and Defamation of Religion

a) *Legal Implementation of Blasphemy and Defamation of Religion in National Contexts*

Chapter 17 of the Finnish Penal Code provides for 'offences against public order' (*rikoksista yleistä järjestystä vastaan*). This chapter rules on violations of the sanctity of religion (*uskonrauhan rikkominen*), prevention of worship (*uskonnonharjoituksen estäminen*) and violation of the sanctity of the grave (*hautarauhan rikkominen*). In turn, the crime of defamation is provided in Chapter 24 on the 'violation of privacy, peace and personal reputation'.

The Supreme Court has ruled on the freedom of speech, the violation of the sanctity of religion and the previously discussed crime of agitation against a population group in a particular case decided in 2012 and in which the publication had occurred in 2008.[30] The accused was a then new politician, Jussi Halla-aho, who started as

[26] *Ibid.,* [5], where the Supreme Court also refers to the preparatory work related to the provision, HE 317/2010, p. 42.

[27] *Ibid.,* [11, 14].

[28] *Ibid.,* [15].

[29] *Ibid.,* [19].

[30] The Supreme Court of Finland, KKO 2012:58.

an influential blogger with a nationalistic and anti-immigration agenda. He has later gained further popularity and has featured in the leadership of a political party. Since the formation of the most recent Finnish government in the summer of 2023 he has also held the position of Speaker of the Finnish Parliament. In the case in question, Halla-aho had published an article on a website and made defamatory statements about the Islamic religion and about Somali people.

The text of Hallo-Aho's blog was ironic in tone and he was knowingly testing the legal limits of what could be said since he even addressed his words to the state prosecutor who was in charge of high-profile hate speech cases. The Supreme Court held that he was guilty of violating the sanctity of a religion and also of agitating against a population group, in consequence of which he was not only sentenced to pay a high amount of day-fines but also ordered to remove these writings from the website.

The Supreme Court noted that in Halla-aho's case his criticism of a religious community was not protected by freedom of speech. The application of the criminal law provision on the sanctity of religion requires that the statement is likely to degrade or desecrate the value of what is considered sacred. This defaming or desecrating feature needs to be manifest even to persons not sharing the same religious conviction. In consequence, such defaming or desecrating must also be recognisable from the perspective of others who might not necessarily share the religious views on the holiness of particular scripture but who nevertheless value the beliefs of other people.[31]

Halla-aho had claimed that Islam was a religion cherishing paedophilia since the Quran says that Mohammed himself married a young girl. It seems that Halla-aho trusted that by simply adhering to a literal interpretation of the text of the Quran and making use of logical reasoning could not be regarded as criminal. According to the Supreme Court the offensive statements, which were even printed in bold in the text merited a conviction. The Supreme Court also pointed out that the object of the legal protection of the provision is the religious conviction and feelings in addition to the freedom of worship in society.[32]

For more concerning the offences of prevention of worship and violation of the sanctity of a grave, see below. The latter two offences have not been applied in recent years. In turn, the criminalisation of defamation has been tested in the courts, but rarely in a religious context. This particular offence is provided for in FPC, Ch. 24, S. 9.

b) *Legal developments*

The blasphemy provision has not been amended since 1998. The protection of all religions is on an equal basis, but there is a special mention of the Christian God,

[31] *Ibid.,* [6], where the Supreme Court also refers to the preparatory work, HE 6/1997 vp, p. 128.
[32] *Ibid.,* [7], where the Supreme Court also refers to the preparatory work, PeVL 23/1997 vp, s. 3.

as discussed above. The Christian God was re-in into the law in the final stage of the law reform, just before Parliament voted on the proposal, whereas the government bill had proposed that a special mention of God would have been omitted.

> FPC, Ch. 17, S. 10
> A person who
> 1) publicly blasphemes against God or, for the purpose of offending, publicly defames or desecrates what is otherwise considered sacred by a church or a religious community referred to in the Act on the Freedom of Religion (267/1922).

Public blasphemy against God requires only ordinary criminal intent, which in Finnish criminal law covers various forms of *dolus*. The lowest level requires regarding the consequence of the act as probable. Defaming or desecrating what is otherwise considered sacred requires more: this has to be the purpose of the actor.

The penal provisions have been listed under offences against the kind of public order which holds that the protected legal interest is a mediated one: offending religious feelings may constitute a social risk. Thus, a religious insult is punishable only when this is the case. In fact, however, the court does not need to assess such a danger, but this is still the underlying aim of this particular type of criminalisation.

As a result of the EU Framework Decision on racism and xenophobia (referred to above), the protection of the provision devoted to agitation against a population group was extended in 2012 to cover other convictions, in addition to religious groups. The wording of the paragraph was also revised to include internet criminality. An important change was that the formulation of motive was simplified in order to comply with the requirement of the Framework Decision. The motive of hate does not require that the incitement would go beyond targeting an individual.

In sentencing, the Finnish Penal Code recognises the motive of targeting a victim on grounds of religion or other conviction as an aggravating factor. If the same factor, however, is part of the description of the offence, the crime is not regarded as aggravated, since these factors have already been taken into account in setting the penalty scale for that particular offence.

2.2. **From Blasphemy to the Prohibition of Hate Speech**

The European Court of Human Rights (ECtHR) recently issued a judgement relating to the interplay of freedom of religion and data protection regulations (*Jehovah's Witnesses v. Finland*). The case concerned the Jehovah's Witnesses' religious activities in Finland, in particular their collection and processing of personal data in the course of door-to-door preaching and it also tested whether the national authorities could demand compatibility with data protection regulations. The ECtHR ruled that there was no incompatibility with freedom of religion (i.e., Article 9 of the European Convention of Human Rights) in demanding that consent should be requested from the subjects regarding any data obtained in the course of preaching.[33]

As already discussed above, in late 2023 the Court of Appeal in Helsinki acquitted the Finnish MP Päivi Räsänen of charges in an indictment related to hatred. In the previous year, the District Court of Helsinki had dismissed the charges against Päivi Räsänen and against "Mr JP" (the Revd. Dr Juhana Pohjola), a representative of the Luther Foundation Finland (*Luther-säätiö*), alleging agitation against a population group as prescribed in the FPC, Ch. 11, S. 10. The prosecutor applied for leave of appeal in the Supreme Court of Finland, and therefore, the decision is not yet final.

Legal status

The second part of Chapter 17, Section 10 covers some of the forms of disturbance occasioned during religious ceremonies:

> 2) by making noise, acting threateningly or otherwise disturbing a church service, a religious ceremony, or another similar form of worship or a funeral.

Menace, violence, or application of force against another's freedom of religion or of conscience are punishable under the ordinary applicable penal code provisions, and the particular motive will be taken into account in sentencing as an aggravating factor.

A separate FPC, Ch. 17 S. 11 concerns prevention of worship, any attempt being punishable. We should note that this is clearly regarded as a more serious offence than that explained above. For this offence, a heavy fine or conditional imprisonment could be expected. There is no case law on this as far as the previous years are concerned.

> A person who, by using or threatening to use violence, unlawfully prevents a church or a religious community referred to in the Act on the Freedom of Religion from holding a service or a religious ceremony or engaging in another form of worship shall be sentenced for prevention of worship to a fine or to imprisonment for at most two years.
> Any attempt may be punishable.

FPC, Ch. 17 S. 12 again covers violation of the sanctity of the grave. The culpability requirement is the usual one: criminal intent. The penalty scale is somewhat lower than for the previous case, which in turn suggests that the abstract penal value of this offence is lower. For a more serious case, the punishment could, however, include conditional imprisonment, and for a repeat offender even an unconditional sentence of imprisonment, which would nevertheless most likely be changed to community service:

> Violation of the sanctity of the grave
> A person who
> 1) unlawfully opens a grave or exhumes a corpse, a part of a corpse, a coffin or a burial urn,

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[33] See more on *Jehovan todistajat v. Finland*, application no. 31172/19, judgment 9 May 2023 [Section II].

> 2) handles an unburied corpse in an offensive manner, or
> 3) damages or desecrates a grave or a memorial of the dead shall be sentenced for a violation of the sanctity of the grave to a fine or to imprisonment for at most one year.

The issue of exhuming a corpse has also become relevant in the context of war crimes and crimes against humanity. There has been at least one case in Finland relating to the war in Iraq, where fighters have been convicted after posting social media content related to corpses.

At least in theory, aggravation of a punishment would be possible if the exhuming of a corpse includes motivation targeting the issue of religion or belief.

The offence of discrimination covers discriminatory activities directed against persons where religion is the basis of the discrimination; see FPC, Ch. 11 S. 11 (885/2009). Penal liability requires criminal intent. A typical punishment would be in the form of a fine.

> Discrimination. A person who in his or her trade or profession, service of the general public, official duties or other public function or in the arrangement of a public occasion or meeting, without an acceptable reason,
> 1) refuses someone service in accordance with the generally applicable conditions,
> 2) refuses someone entry to the occasion or meeting or ejects him or her, or
> 3) places someone in a manifestly unequal or otherwise essentially inferior position on the basis of his or her race, national or ethnic origin, colour, language, sex, age, family relations, sexual orientation, genetic inheritance, disability or state of health, or religion, societal opinion, political or vocational activities or another comparable factor shall, unless the act is punishable as work discrimination or extortionate work discrimination, be sentenced for discrimination to a fine or to imprisonment for at most six months.

There is a separate penal provision concerning work discrimination, which also applies to the recruitment process.

There currently exists no special penal provision on targeting (*maalittaminen*), which would mean any offence initiating a group action ('systematic harassment') against an individual person, such as a journalist, a judge, a prosecutor, a police officer, a priest, or a scholar. The need for such criminalisation has been discussed in public. A social interest and a need have been identified but it has not been easy to find an apt formulation of such a provision. Critics have pointed out that the current penal provisions enable more active interventions when necessary. For instance, pressurising judges in the course of their work is already included in the description of a particular offence. In 2023, however, the minister of justice has announced that she would not be putting forward any new criminalisation in this area.

We should also remember that the offence of stalking may be relevant under certain circumstances when harassment is continuous in nature and aims at controlling the behaviour of a victim. The concept and duty to include stalking as a punishable

offence arises from the Istanbul Convention on violence against women and domestic violence, but this criminalisation has also proven valuable when certain forms of grave harassment and their chilling impact are addressed in other contexts. The Supreme Court of Finland issued judgment 2022:8 in which an accused person was convicted of stalking. He had published a large number of defamatory postings on Facebook and Twitter, which had then come to the attention of the victim, a female journalist who was working on the subject of pro-Russia misinformation campaigns. The accused, who was a key figure in that particular area, had also approached this woman by means of private messages. It seems that there is, as yet, no case law in which punishable stalking would have occurred in a religious context.

2.3. **Challenging Dominant Paradigms**

a) ***Incorporation of Blasphemy Laws and Hate Speech Prohibitions in the Modern Catalogue of Fundamental Rights***

In 2020 the Supreme Court confirmed the ban of the openly fascist and neo-Nazi association named the Nordic Resistant Movement (*Pohjoismainen vastarintaliike*) in Finland.[34] The National Police Board had requested that the association be banned on the grounds that its actions were fundamentally against the law and contrary to good practice. The Supreme Court stated that the functions of the association were not protected by freedom of speech nor by freedom of association, since the functions of the association constituted an abuse of rights. This decision and the principle were already briefly mentioned above. The Court ordered the association to be banned because a warning would not be sufficient in such an obvious violation of the public good.

When the Finnish constitutional law on fundamental rights was reformed in 1995, the issue of including a provision on the abuse of rights was not openly dealt with, even though the European Convention was taken as a model for the reform. Precisely for this reason, it is a remarkable fact that the Finnish Supreme Court took the step of referring to it, even though the Supreme Court is not a constitutional court and usually only deals with matters of fundamental human rights.

b) ***Crimes against International Law – Denial of Genocide (Holocaust) and Crimes against Humanity***

Serious international crimes are prescribed in Chapter 11 of the Finnish Penal Code. Chapter 11 is titled ‘war crimes and crimes against humanity’ and most of the chapter provides for criminalisation of genocide (Section 1), the preparation of genocide (Sect. 2), crimes against humanity (Sect. 3), aggravated crimes against humanity

[34] The Supreme Court of Finland, KKO 2020:68.

(Sect. 4), crimes of aggression (Sect. 4a), preparation of a crime of aggression (Sect. 4b), war crimes (Sect. 5), aggravated war crimes (Sec 6), petty war crimes (Sect. 7), violation of the prohibition of anti-personnel mines (Sect. 7a), violation of the prohibition of chemical weapons (Sect. 8), violation of the prohibition of biological weapons (Sect. 9), torture (Sect. 9a), agitation against a population group (Sect. 10), aggravated agitation against a population group (Sect. 10a) and discrimination (Sect. 11).

The description of the crime of genocide is based on the UN Convention of 1948, with only minor adjustments. It is also in line with the Rome Statute issued by the International Criminal Court and does not explicitly mention the Holocaust:

> A person who, for the purpose of entirely or partially destroying a national, ethnical, racial or religious group or another comparable group,
>
> 1) kills members of the group,
>
> 2) causes serious bodily or mental illness or injuries to members of the group,
>
> 3) inflicts on the group conditions of life that can bring about its physical destruction in whole or in part,
>
> 4) imposes forcible measures intended to prevent births within the group, or
>
> 5) forcibly transfers children from one group to another
>
> shall be sentenced for genocide to imprisonment for at least four years or for life.
>
> Any attempt may be punishable.

The provision concerning the preparation of genocide states that:

> A person who, for a purpose referred to in section 1,
>
> 1) agrees with another person to commit genocide, or
>
> 2) devises a plan for genocide
>
> shall be sentenced for preparation of genocide to imprisonment for at least four months and at most four years.

In addition, the provision on crime against humanity mentions as per the international standards religion as an intention behind the crime:

> A person who, as part of a widespread or systematic attack directed against a civilian population,
>
> 5) engages in racial discrimination or persecutes an identifiable group or collectivity on the basis of political opinion, race, nationality, ethnic origin, culture, religion or gender or on other comparable grounds
>
> shall be sentenced for a crime against humanity to imprisonment for at least one year or for life.
>
> Any attempt may be punishable.

As explained above, the penal provision on agitation against a population group has been considered to work as a general device in addressing issues such as the examples above. There is no other detailed legislation on the use of Nazi symbols or

Holocaust denial.[35] The common academic opinion has so far been that the penal provision on agitation will also cover activities with these distinct and serious features. There is some rare case law on the punishability of Holocaust denial which confirms this view. The EU Commission has notified Finland and some other countries concerning the issue that the Framework Decision on racism and xenophobia has been deficiently implemented since Holocaust denial has not been expressly mentioned. This has triggered a law reform process in Sweden, and the Finnish Ministry of Justice has prepared for a similar type of amendment of penal law. The Finnish government is about to present a Bill to the Parliament on amending the Penal Code with a separate penal provision rendering it punishable to deny Holocaust or other serious crime against humanitarian law of a similar nature.

There is no word-by-word criminalisation of the denial of genocide or a denial of the Holocaust in the Finnish Penal Code. Recently, a few cases linked to Holocaust denial and Nazi ideology have been dealt with in the district courts, where they have been tried under the incitement provision.[36]

The use of Nazi symbols has also proven to be a hard case, as the Helsinki District Court did not apply the provision on agitation and considered that a conviction would have required an extensive interpretation of the provision and would have gone against the legality principle. Simply the carrying of a Nazi flag in a procession was not considered to embody the crime per se.[37] The Helsinki Appeals Court has, however, nevertheless concluded in its judgement that marching under Nazi flags constituted an act of agitation.[38]

The District Court stated that by carrying Nazi flags in public the respondents wanted to disseminate an opinion or a message about Nazi ideology or at least they should have understood that to be the consequence. Opportunistically, the Court noted that the carrying of Nazi flags has not been expressly prohibited in Finland. In addition, the respondents had not resorted to violence nor threatened anyone present. In consequence, the Court noted, it could not be shown that the Nazi flag had offered a threatening or defaming message related to opposing immigration. The Appeals Court reasoned otherwise, emphasising that the context in which the Nazi flag was being used had to be taken into account. It refuted the path of historical relativisation that

[35] See, generally, K Nuotio, Holocaust Denial as Memory Criminal Law Seen Through the Nordic Lenses, Bergen Journal of Criminal Law and Criminal Justice, 11(1), 1-29. https://doi.org/10.15845/bjclcj.v11i1.4038

[36] District Court of Helsinki, 23/123235 no. R 21/5462, 05 Jun. 2023; District Court of Helsinki, 22/152879, No. R 21/5462, 30 Dec. 2022, and District Court of Helsinki, 151625, No. R 20/4309, 23 Dec. 2020.

[37] District Court of Helsinki, No. R 20/1163, 30 Aug. 2021.

[38] See, K Nuotio, Rallying under a Nazi Swastika Flag. Is it a Criminal Act? Verfassungsblog. 24.4.2024. https://verfassungsblog.de/rallying-under-a-nazi-swastika-flag/

the First Instance Court had pursued. The Appeals Court recognized that the use of Nazi flags while participating in a rally carries a specific connotation of energy, power and commitment which signals a threat.[39] The judgement of the Appeals Court is final.

An act of terrorism may perhaps also can be mentioned here since the hate motive can relate to faith. Finnish penal legislation on the suppression of terrorist acts follows very strictly the developing international and European law concerning these matters. The legal frame is neutral in terms of the ideological, political or religious backgrounds of violent terrorist activity. The various waves of terrorist action in Europe and elsewhere have certainly contributed to the legal responses but there has been no visible national experience within Finland itself. We should, however, note that Finland experienced a terrorist attack when a Moroccan asylum seeker, operating alone in Turku in the summer of 2017, stabbed two innocent bystanders to death and also attempted to murder eight more. Prior to the attack he had posted Jihadist political material online. He is now serving a life sentence.

2.4. **Is Hate Speech an Expression of Religious Freedom?**

a) ***The Prohibition of Religiously Motivated Hate Speech as a Restriction of Freedom of Expression***

There has been discussion above of the case of Päivi Räsänen, which comes closest to the setting described in the title: Räsänen was accused of having defamed homosexuals in various statements that had appeared in through three different media channels and which were supported by quotations from the Bible and other religious sources. The context was, however, not totally clear since it also involved legislative debate concerning matrimonial law reform with respect to same-sex marriage. At the same time, the Lutheran Church had been criticised for having gone too far in its support of the Pride movement etc. Thus the setting was rather mixed and the distinct angle of religious freedom was not crucial for the court's reasoning. Accusing homosexuality of being wrong and a sin had not been analytically clarified.

Hence, Finnish law still lacks a case in which the relevance of religiously motivated hate speech could be elaborated in detail. It should be noted, however, that the potential exists, since, especially amongst sectarian believers, their attitudes towards sexual minorities, for instance, may be negative as a result of their religious views, giving rise to tensions of this nature. Similar tensions may also arise in other settings when societally conservative faiths are in question. As mentioned above, the Lutheran Church, which is the majority church, has in most cases already adopted a

[39] K Nuotio, Rallying under a Nazi Swastika Flag. Is it a Criminal Act? Verfassungsblog. 24.4.2024. https://verfassungsblog.de/rallying-under-a-nazi-swastika-flag/

liberal position, and hence it is unlikely that similar clashes would arise on the basis of doctrinal interpretations related to faith.

The recommendations of the European Commission on Racism and Intolerance (ECRI) are numerous, covering a wide range of issues, whereas the EU Framework Decision 2008/913/JHA is a binding legal instrument addressing certain phenomena in a quite different way.

The EU Commission has notified Finland of its deficient implementation of the EU Framework Decision mentioned above. According to the view of the EU Commission, the Finnish law on incitement to hatred is deficient on various grounds: Finnish law does not extend legal protection to cases in which the act has been directed against a single victim as it aims at protecting groups of people. There is also claimed to be uncertainty over whether Holocaust denial falls under the provision on agitation.

The issue of Holocaust denial, which is directly relevant to the Jewish community but also relevant for other victim groups of the Holocaust such as the Roma people and the disabled, was also raised in the ECRI Country Report on Finland of 2019.[40] The ECRI noted, however, that as the issue had been mentioned in the *travaux préparatoires*, the Finnish law probably complied with the recommendation: this was, indeed, the view of the Finnish government. See also the remarks above.

b) *The Trickiest Issue: Protecting "Religious Feelings"*

Finnish blasphemy law protects both public order and religious feelings, and has a double sphere of protection: in addition to public order and religious peace, it protects freedom of religion for individuals. Any religious insult should be of a nature that even a non-believer would understand the offensive character of the expression.[41] This perspective was already adopted in the *travaux préparatoires* and has been referred to by the Supreme Court of Finland (SC 2012:58, para 6). That particular case was concerned with whether Islam could be described as a paedophile religion since the Quran mentions that Mohammad had a wife who was still a child. This case was, however, somewhat unusual since it was concerned with explicitly testing the limits of what could be said in the text of a blog addressed to the state prosecutor in charge of such issues.

It seems clear that religious belief or other conviction could add a new dimension to political speech. It is possible that we have not had any case law that would illustrate this in an optimal way. The Räsänen case referred to above has had a political dimension since the debate was connected with a legislative process aimed at reforming the marriage laws. In this particular case, the religious beliefs of a politi-

[40] ECRI Report on Finland, CRI(2019)38, <https://rm.coe.int/fifth-report-on-finland/1680972fa7>.

[41] For a discussion on this problematic, see Anu Mantila 2021, pp. 12-13.

cian formulating a Christian understanding of the family had resulted in her offending homosexuals, and her reasoning included verses taken from the Bible. As freedom of speech in the political arena is in any case particularly broad, it is not easy to say whether adding a religious content to it would further increase such rights.

III. Freedom of Expression, Digitalisation, and Fundamental Rights Protection Online

The Finnish Constitution makes no distinction concerning the nature of the messages conveyed. Section 12 of the Constitution refers neutrally to 'information, opinions, and other communications' but with no specification of the nature of such messages. In the *travaux préparatoires* of the Constitution it is stated that freedom of expression is not tied to any specific form of communication, e.g., to a text in printed form, but that the freedom of expression will be safeguarded regardless of the mode of expression or publishing.[42] This can be referred to as the principle of the neutrality of channel. In consequence, remarks made on social media platforms such as Facebook and X (formerly Twitter) enjoy the same rights and responsibilities as any other form of communication. Nowadays, all levels of court instances consider cases where the platform is at least one of the various social medias. In the Supreme Court case 2012:58, weighing up the sanctity of a religion, incitement to hatred, and freedom of speech, the particular medium of expression was a blog post. In contrast, in the case of Supreme Court case 2022:63, weighing up the provision on incitement to hatred and the freedom of speech, the respondent had published videos on their YouTube channel. Thus, this goes to show that no platform or form of expression will be excluded when considering freedoms and responsibilities in modern communication.

Protecting and promoting freedom of religion in the digital age and the relationship between freedom of religion and freedom of expression

The EU Framework Decision on racism and xenophobia has been complemented by a specific instrument of the Council of Europe, namely the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed via computer systems, dating from 2003 ETS 189).[43] Nowadays, the provision on agitation against a population group (Finnish Penal Code Ch. 11 Sect. 10) employs wording that covers expressions posted online in the social media since such information is available to the public:

[42] The Bill of Government, HE 309/1993 vp, p. 56.

[43] Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, Council of Europe, European Treaty Series – No. 189, <https://rm.coe.int/168008160f>.

> A person who makes available to the public or otherwise disseminates among the public or keeps available to the public information, an opinion or another message where a certain group is threatened, defamed or insulted […]

As a general note we would add that, as such, the new channels provided by the various media, including the social media, are positive in the sense that people have more channels to express themselves and also to live their religious life, if they so wish. The downside is, however, that it is also easier to exceed the limits of freedom of speech, which may cause harm since the targeted groups may feel threatened, and it is difficult for society to suppress such offensive behaviour simply because of its sheer volume. Borderline cases may also arise, such as closed WhatsApp groups with 20-30 participants which are not accessible to a general public.

A general feature regarding criminal law is that it is quite unusual to maintain separate penal provisions for offences that have been committed in real life and others for online activities. Instead, there has been the aim that traditional penal provisions would also apply in internet or online settings, and only necessary adjustments would be made. It is, in consequence, somewhat difficult to separate a cyber context from a real-life one. In point of fact, a fusion of those two already happened years ago.

In 2016 the EU Commission, following discussions with the social media platforms, jointly adopted a Code of Conduct designed to counter illegal hate speech online; they committed themselves to seeking to remove illegal content.[44] Nowadays, the EU Commission carries out annual reviews to see how well the social media companies are doing their job.[45] The Code of Conduct was reviced in 2025, and it has been integrated into the EU Digital Services Act.

In addition, in 2017-2019 the Finnish Ministry of Justice ran an EU-funded campaign known as Against Hate, in support of which educational and other materials and also the training of officials has been provided. This programme aimed at addressing hate speech on a broad front, and not simply hate or hate speech against religious groups or minorities.[46]

Regarding the recent discussion of religious feelings and religious symbols, following the Finnish parliamentary elections there was widespread public debate during the summer of 2023 concerning the nature of racist remarks made by certain politi-

[44] European Commission, Code of conduct on countering illegal hate speech online, <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en#theeucodeofconduct>.

[45] European Commission, Monitoring rounds of the Code of Conduct, <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en#monitoringrounds>.

[46] Ministry of Justice of Finland, Against hate project, <https://oikeusministerio.fi/en/project?tunnus=OM005:00/2018>.

cians in the new coalition government. One remark made in 2019 by a government minister resurfaced because it concerned the scarves and coverings worn by Muslim women. The minister had called Muslim women wearing such a scarf "unrecognisable black bags". In total, 26 Islamic communities and societies in Finland published a joint statement condemning the remark.

It has already been mentioned that the penal law provision on protecting sanctity and religious peace has been helpful since offences have frequently targeted "foreign" beliefs such as Islam. For Finland, this is a new context since, traditionally, cases have concerned insults that were aimed at the core Christian beliefs of the majority of the population.

IV. Blasphemy and Art – Ecclesiastical Objects, Symbols, and their Protection

a) *Art Works that Insult a Religion (Symbols of God or the Prophet etc.)*

We can mention here the case of the so-called "God's Theatre", in which an avantgarde group of student actors arranged a theatrical performance in which they attacked the audience with fire extinguishers and threw faeces at them. The message of their performance has remained somewhat unclear. Their principal aim seems to have been to cross limits and shock their mainstream audience. The prosecutor considered prosecuting them for blasphemy, but the archbishop wished to raise charges based rather on ordinary non-religious accounts.

As already referred to earlier, the only major case in Finland has involved the 1969 work by the pop artist Harro Koskinen in which he depicted a crucified pig-like Jesus with a halo around his head. The affair surrounding 'The Pig Messiah' is remembered mainly for its blasphemy charge, which eventually led to the imposition of fines on Koskinen and his exhibitors.

Another case is still referred to under the name of the Virgin Slut Church (*Neitsythuorakirkko*). The artist Ulla Karttunen had prepared an installation for an exhibition in which she also used child pornography, giving the exhibition the title of Ecstatic Women – Holy Virgins of the Church and Pornography. The artist was subsequently found guilty of possessing child pornography.[47]

b) *Which kind of art is most suitable for churches and what is the artist's freedom of expression?*

There has been relatively little discussion of the kind of art that would be most appropriate for churches. The Lutheran church has a long tradition in its use of church

[47] J. Jyränki, H. Kalha, *Tapaus neitsythuorakirkko*. Like 2009.

textiles, and progressive church architecture in Finland has sometimes triggered discussions concerned with what a church should look like. But because the design and construction of churches has been in the hands of church organisations, such discussions have been dealt with mainly within the religious communities themselves.

As regards performing art in the church premises, it seems that church administrations handle any requests and deny a permit if it is deemed that the proposed artwork would not suit a religious context. Concerts of classical music are typically arranged in churches, and to our understanding there have been no high-profile occasions on which artistic performers have used church premises for provocatory purposes.

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THE RELATIONSHIP BETWEEN FREEDOM OF SPEECH AND RELIGION IN THE NETHERLANDS

Sophie van Bijsterveld[1]

I. Introduction

Since the era of fundamental rights that seemingly had reached their 'completion' in the 1970s and early 1980s, freedom of speech and freedom of religion have once more become highly contested. This is also the case with respect to the way in which their interrelationship is perceived. This development goes hand in hand with changing social circumstances. Changing demographics and the composition of the population, dynamics in the social presence of religion and non-religious belief in society, the evolution of dominant values in society, a heightened sensitivity for discrimination and victimhood, and the interplay between political and legal developments at the international and national levels – all now play a role.

Thus, from a pluralism made up of Christian denominations and post-Christian secularised belief a new pluralism has emerged made up of a great variety of religions, with Islam as a dominant presence amongst the 'new' religions on the one hand, and, on the other, a strong and self-aware secular presence, whilst mainstream Christianity has lost terrain. Ongoing immigration from non-Western countries gives this development sharper edges. At the same time, values relating to male-female relationships, sexual mores, gender, and identity have undergone strong transformation in mainstream society (think of catch-words as #me too, BLM, woke, or cancel culture, and even fake news), and parallel to this transformation a great social and political sensitivity has developed with regard to these issues. This also gives the relationship between traditional religious believers and also religious or secular proponents of liberal views a sharper edge.

Moreover, international events are part of daily national news. Thus, religiously motivated terrorism such as the world has witnessed from 2001 onwards, and violent outbursts motivated by religious sensitivities such as the world has witnessed dur-

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ing the Danish cartoon affair (2006) or the French Charlie Hebdo affair (2015) have become an integral part of the national awareness and impact political and legal developments with regard to freedom of speech and of religion. Draconian laws or the draconian implementation of laws, for example, on blasphemy in other parts of the world such as Pakistan help make blasphemy laws at the national level suspect, even if they constitute no problem whatsoever and may indeed have much to be said for them. Likewise international human rights have spill-over effects at the national level.

Against this socio-political background, this contribution analyses the relationship between freedom of speech and freedom of religion in the Netherlands and the current developments therein. First, some of the constitutional aspects will addressed (II). This will be followed by a discussion of selected issues at the legislative and judicial levels (III – IV), and concluded with a brief evaluation (V).

II. Freedom of Conscience, Religion, and Expression

II.1. The Fundamental Norms Regulating Freedom of Expression

The norms regulating freedom of expression in the Netherlands can be found in international treaties, notably in Article 10 of the European Convention on Human Rights (hereafter ECHR) and Article 19 of the International Covenant on Civil and Political Rights (hereafter ICCPR), in the Constitution and in parliamentary legislation. Article 10 of the ECHR and Article 19 of the ICCPR are directly applicable as national law. The courts inevitably play a role in the interpretation of these legal instruments.[2]

The Constitution

Freedom of speech is expressly guaranteed by the Constitution as of 1983. Prior to that, the Constitution nevertheless guaranteed freedom of the press (since 1815) and prohibited censure (since 1814). As of 1983, Article 7 of the Constitution explicitly protects freedom of speech.[3]

The European Court of Human Rights stresses that the right to freedom of expression 'is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend,

[2] Dutch courts are forbidden to assess the constitutionality of parliamentary legislation (Article 120 of the Constitution). However, Article 94 of the Constitution states: 'Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.'

[3] For a commentary on Article 7 of the Constitution, see, B.P. Vermeulen, 'Artikel 7. Vrijheid van meningsuiting' in E.M.H. Hirsch Ballin, E.J. Janse de Jonge, G. Leenknegt (eds), *Uitleg van de Grondwet* (Den Haag, Boom Juridisch, 2021), pp. 157-188.

shock or disturb'.[4] This quotation is regularly referred to in Dutch court rulings on freedom of speech.

Like any fundamental right, freedom of speech can be restricted. The phrase 'without prejudice to the responsibility of every person under the law' in Article 7, Sections 1 and 3, of the Constitution states that only the parliamentary legislature is authorised to restrict freedom of the press and freedom of speech; neither delegation nor autonomous regulation by decentralised authorities is allowed in this field. Censure is unlawful and only repressive action can be lawfully taken.

Even at an early stage the Supreme Court acknowledged dissemination of printed materials as an *annexed right* to press freedom; after 1983, a similar annexed right was acknowledged with respect to freedom of speech. These annexed rights may be restricted by delegated or autonomous legislation, provided that 'some meaningful use' of these rights remains. With regard to radio and television, delegation by the national legislature is allowed according to Article 7, Section 2, of the Constitution. The international and constitutional requirements for restricting freedom of speech and freedom of the press must be complied with cumulatively.

Types of limitations

No philosophical, political, or religious life view is *a priori* denied freedom of speech or freedom of the press. What is relevant according to the law is the concrete speech act. Retroactively, legal entities whose aim or actual activity are contrary to public order can be declared prohibited and can be dissolved by a court (Article 20, Section 1, Book 2 of the Civil Code). Legal entities on the 'EU terrorist list' form an exception: they are prohibited *ipso jure* and cannot perform legally valid actions (Civil Code, Article 20, Section 6, Book 2).

The Criminal Code contains a number of speech offences, some of which are related, amongst other things, to religion. Speech can also be unlawful vis-à-vis one or more specific other factors under civil law. Apart from libel, we might think of invasion of privacy or discriminatory speech acts. Freedom of speech may also effectively be limited in the context of employer–employee working relationships. Thus, the court upheld the decision of a university to fire one of its female academics who had publicly criticised the university's positive discrimination policy for women on the grounds of 'disturbed working relationships'.[5] The court also upheld the decision to fire an academic of the same university who was said to spread conspiracy theo-

[4] See, Handyside v. United Kingdom, App no 5493/72 (ECHR, 7 Dec. 1976), [49].

[5] See, https://www.rtlnieuws.nl/economie/artikel/5371843/vrouwen-promotie-universiteit-groningen-docente-ontslag-susanne-tauber (accessed 18 Aug. 2023).

ries in his lectures on the grounds that this did not meet the university's 'academic standards'.[6] These cases date from early 2023.

Perhaps unexpectedly, the General Equal Treatment Act is also relevant with regard to the limits of free speech. The Netherlands Human Rights Commission set up under the law (formerly: Equal Treatment Commission) that delivers non-binding opinions has interpreted the Act, for example, so as to oblige an employer to guarantee a discrimination-free environment for his or her employees.[7] A self-regulatory, soft law arrangement is the Advertising Code that applies as the criteria 'the law, the truth, good taste and decency' (Article 2); the Code is interpreted by the Advertising Code Commission.[8] Social pressure influences the margins of free speech; new varieties of political correctness appear in the guise of so-called 'wokeness' and 'cancel culture'.

A fairly new development is the regulation of free speech through administrative law. In 2017, the Act on higher education and scientific research (*Wet op het hoger onderwijs en wetenschappelijk onderzoek*) was amended in order to give the Minister of Education the competence to withdraw the status of accredited, i.e., not publicly funded, institutions in the event of their failing to comply with their legal responsibility to contribute to 'the promotion of their sense of social responsibility'. It continues: 'The promotion of a sense of social responsibility means at least that the institutions, including those who formally or informally represent them, refrain from discriminatory behaviour and statements' (Article 1.3, Section 5 of the law). Although general in its scope, this competence was established with a particular view to the Islamic University of Applied Sciences Rotterdam. A prerequisite for withdrawing the accreditation according to Article 6.11 of the Act is to consult an independent advisory committee set up for this purpose. This mechanism has been activated once, with regard to statements made by the rector of the above-mentioned university based on his religious belief.[9] The accreditation was upheld following the distancing of the university from the rector's statements.

Free speech and religion: dynamics

The relation between religion and speech and the relation between religious freedom and freedom of speech have over the years become contentious. The uneasy relationship between these two pairs of phenomena and rights started to appear in the late 1990s, when it became clear that Muslims, rather than 'just' being minori-

[6] See, https://nos.nl/artikel/2462246-rechter-groningse-universiteit-mag-complotdocent-ontslaan .

[7] See, e.g., Decision 2002-62, Netherlands Human Rights Institute, 30 May 2002. (https://oordelen.mensenrechten.nl/oordeel/2002-62), (accessed 18 Aug. 2023).

[8] See, https://www.reclamecode.nl/english/ (accessed 18 Aug. 2023).

[9] For the report in this case of the Advisory Committee, https://www.eerstekamer.nl/overig/20190916/advies_inzake_uitingen_van_de.

ties, including religious minorities, not only deserved extra attention in the sphere of policies to overcome disadvantages as minorities, including in the exercise of their religion, but also held views that were contrary to those of mainstream society, for example, on the position of women or on homosexuality, and that the use of their religious freedom could also be disadvantageous to the equal treatment of other groups in society. This was one of the triggers for a government-issued memorandum on 'fundamental rights in a pluralist society'.[10]

In the course of time, tensions between freedom of speech, freedom of religion and the right to equal treatment and non-discrimination have only intensified, meshing in particular ways with non-religious developments with regard to free speech. This is even more apparent when speech spills over into attitudes, education, conduct and action. Initiatives such as the tightening of citizenship education, the partial ban on wearing burkas in specific public spaces, policies against forced or informal marriages and honour-related offences, anti-radicalisation and anti-money laundering measures are only a few examples of initiatives aimed at channelling and steering the social processes in order to uphold a version of liberal democracy in which mainstream Western values are secured.[11] In some cases, these have negative side effects for traditional Christian denominations.

II.2. **Freedom of Expression and Religion in the Criminal Code; Blasphemy**

The Criminal Code (hereafter: CC) entails a variety of speech offences. Amongst those are offences that relate to religion. Until 2014, the Criminal Code listed as a serious offence to public order the insulting of 'religious sensibilities by disparaging blasphemous utterances', and also ridiculing a church minister in the lawful exercise of his office, and making derogatory statements about objects dedicated to worship, at the place and time of lawful worship (Article 147, Sections 1 – 3).[12] The rationale of these offences was not to protect 'God' or 'religion' against insults but to protect *persons* against attacks on what they hold sacred. The protection that Article 147 CC provided was never intended to protect subjective feelings; the concept of 'disparaging blasphemous utterances' needed to be objectified. A different interpretation would also be problematic in light of the principle of legality and, in terms of the jurisprudence of the European Court of Human Rights, the required 'foreseeability'.

[10] *Kamerstukken II,* 2003 – 2004, 292614, nr.2 (Grondrechten in een pluriforme samenleving).

[11] See Sophie van Bijsterveld, 'Kerken in wetgeving en rechtspraak. Recente ontwikkelingen geduid' (2021) 12 (1) *Tijdschrift voor Religie, Recht en Beleid*, pp. 45-68.

[12] See also Sophie van Bijsterveld, 'Religion and Criminal Law in the Netherlands' in Norman Doe, Matti Kotiranta (eds), *Religion and Criminal Law - Religion et Droit Pénal* (Leuven, Peeters, 2013, pp. 199- 203.

Article 147 was incorporated into the Criminal Code as late as 1932. It was triggered by a series of attacks on various aspects of Christianity from Communist quarters, inspired by the Russian policy against Christianity. The way it was formulated expressed the view that the intention to offend was necessary for conviction. A 1938 court ruling made clear that the blasphemy offence was not limited to Christianity; it was in principle also possible to apply it to Hinduism.[13]

With the act of repealing the above-mentioned article, the dissemination of writings or an image that contains statements offensive to religious feelings through 'scornful blasphemy' or by having it in stock for that purpose, provided that the person knows or has serious reasons to suspect that such statements are contained in the material, was also removed from the Criminal Code (previously Article 147a). This also included the lesser offence of 'exhibiting writings or images with such content in a way that is visible from a public road' (previously Article 429 CC). After a failed parliamentary initiative to repeal these Articles in 2009, they were finally repealed following a subsequent parliamentary initiative.

The political trigger embodied in the act of repealing these articles was the aftermath of a murder, motivated by Islamic religious beliefs and committed in broad daylight, of a columnist and film-maker who had been critical of Islam and had regularly belittled Islam and its followers. The murder caused a shockwave in the country. It also rekindled the debate on freedom of expression and its limits. In the context of this debate the then Minister of Justice suggested that, rather than Article 147 of the Criminal Code being repealed, it deserved renewed attention. This suggestion brought renewed attention to the article and fed a renewed political desire to repeal it.

Only a few cases have been tried under Article 147 CC, and the most recent court ruling dates from 1968. The case, concerning a well-known author, attracted great public attention. The interpretation that the court provided made clear that from then onwards it would be practically impossible to convict someone on the basis of this article. Although the residual meaning of the article had, therefore, in practice become merely symbolic, repealing it also had a high symbolic charge.

Recommendations of the Parliamentary Assembly of the Council of Europe distinguish between blasphemy, religious insults and hate speech against individuals on the grounds of their religion.[14] This distinction does not work to the full in the Dutch situation as the former blasphemy provisions were meant to protect individuals and

[13] See, Ben Koolen, 'Het smalle pad van Jan Donner. De ontstaansgeschiedenis van de Lex Donner 1932' (2011) (2) 1 *Tijdschrift voor Religie, Recht en Beleid,* pp. 72-85.

[14] Recommendation 1805 (2007) on blasphemy, religious insults and hate speech against individuals on grounds of their religion (Assembly debate on 29 June 2007, recommendation adopted by the Assembly on 29 June 2007).

not religion as such. The same is the case for 'religious insult': religion as such is not protected: only persons are.

II.3 **Case Law**

The two cases concerning free speech that in recent times have attracted the most attention are those concerning the parliamentarian and party leader of the anti-Islam party PVV, Geert Wilders. After proceedings that held the nation under its spell for years, the court of first instance of Amsterdam acquitted the parliamentarian of such charges as group insult and incitement to hatred of persons on the grounds of their religion.[15] The second case led to a Supreme Court ruling of 2021, which upheld the conviction of the Court of Appeal for group discrimination on the basis of race, following a 2014 election victory speech in which Wilders targeted Moroccans.[16]

Earlier freedom of speech cases that attracted public attention concerned religiously inspired statements regarding homosexuality. In the first case, a former (Christian) parliamentarian, who was (wrongfully) cited in an interview, was initially convicted and subsequently acquitted. The same happened in the second case, regarding an Islamic imam whose statements were selectively broadcast on television.[17]

In academic circles a mayor's administrative orders to prevent controversial Islamic speakers from taking part in an Islamic conference attracted heightened attention. The orders were upheld in a summary proceeding but subsequently quashed on a legal technicality.[18]

III. Limitations of Freedom of Speech with regard to Religion

III.1. **From Blasphemy to the Protection against Group Insult**

Although blasphemy was removed as a criminal offence, various other articles of the Criminal Code contain limitations of free speech with a reference to religion. The core of these articles concerns the criminalisation of insulting statements about a group of persons because of such aspects as religion (Article 137c) and incitement to hatred or discrimination against persons or violence against their person or property in reaction to their religion (Article 137d). Other articles are related to these, and

[15] Rb. Amsterdam 23 June 2011, ECLI:NL:RBAMS:2011:BQ9001 (eindvonnis in (eerste) zaak-Wilders).

[16] Hoge Raad 6 July 2021, ECLI:NL:HR:2021:1036 (tweede zaak-Wilders).

[17] Respectively, Hof Den Haag, 9 June 1999, ECLI:NL:GHSGR:1999:AF5469 (Van Dijke); Hof Den Haag, 18 November 2002, ECLI:NL:GHSGR:2002:AF0667 (El Moumni).

[18] Rb. Oost Brabant 23 December 2015, ECLI:NL:RBOBR:2015:7607 (verbod bijwonen conferentie islamitische gastsprekers – kort-gedinguitspraak); Rb Oost Brabant, 30 januari 2017, ECLI:NL:RBOBR:2017:415 (verbod bijwonen conferentie islamitische gastsprekers – uitspraak bodemprocedure).

concern modalities in dissemination or the context in which these expressions are made (see Appendix).

Article 137c CC first emerged in the 1930s, the time of emerging anti-Semitism and fascism. It aimed at protecting public order by countering negative perceptions about groups in society.[19] Along with the incorporation of Articles 137d and 137e CC in 1971, it underwent thorough revision. In 1991 the enumeration of the discrimination grounds in Article 137c was extended. 'Belief' and 'hetero- or homosexual orientation' were added. The grounds 'physical, mental or intellectual disability' date from 2005. Throughout these legislative changes, protection of public order remained the motive for criminalisation.

The concept of 'insult' in Article 137c CC is to be interpreted objectively rather than subjectively; in other words, of decisive significance is the group including people's dignity and their equal position in society rather than the way in which statements are perceived by a group or its members. In order to determine whether a statement is insulting, the Supreme Court has developed a three-part test: a) is the statement insulting in itself? b) does the context in which the statement is made undo it as a result of its insulting nature? – This may be the case if the statement is a contribution to the public or political debate or directly flows from a religious conviction. A sanction is thus not increased if, in this context, a statement has been motivated by a religion or belief. – c) is the statement 'unnecessarily offensive' (even if the context relieves it of its insulting nature).[20]

Article 137c CC also requires that the insults have been made 'publicly' and 'intentionally'. To be intended, an actual intention to insult is not necessary: conditional intent suffices, that is, the statements' insulting nature must have reasonably been taken for granted.[21]

In the previously mentioned homosexuality cases the courts decided that the context in which the statements were made, that is, the expression of a religious view, the intention to insult was absent. In the case of the former parliamentarian, the misquotation in the interview and the interview taken as a whole also led to this conclusion. In the case of the imam, the court considered that the television broadcast only used selected materials from the interview, as a result of which the broader message was obscured.

[19] See Marloes van Noorloos, *Strafbaarstelling van 'belediging van geloof'. Een onderzoek naar mogelijke aanpassing van de uitingsdelicten in het Wetboek van Strafrecht, mede in het licht van internationale verdragsverplichtingen* (Den Haag, Boom Lemma 2014), p. 12. For an overview, see also Esther Janssen, *Faith in Public Debate. On Freedom of Expression, Hate Speech and Religion in France and the Netherlands* (Cambridge/ Antwerp/Portland, Intersentia, 2015).

[20] Enumeration Noorloos, [16-17].

[21] Noorloos, [19].

Article 137c CC also played an important role in the first Wilders case. Initially, the Public Prosecutor decided not to initiate a prosecution, as it was not convinced that prosecution would be successful. A complaints procedure was initiated by interested parties which resulted in the order of the Amsterdam Court of Appeal to the Public Prosecutor to initiate prosecution. Forced to prosecute, the Public Prosecutor filed for acquittal, which was granted by the Court of First Instance.

The differences, in this very high profile case, between the two courts concerned the interpretation in Article 137c CC of the phrase 'about a group of persons because of their … religion'. The question was whether the derogatory statements about Islam and the Koran were insulting to *a group of persons* … (Muslims). The Court of Appeal in the complaints procedure decided that they were, thus accepting *indirect insult*. Allowing for indirect insult to be a violation of Article 137c was not unusual in the context of antisemitic race cases.[22] The Court in First Instance decided otherwise: the statements concerned a religion, *not a group of persons*. A relevant fact for the interpretation made by this court was that in the period between these two decisions the Supreme Court had ruled in another case against accepting *indirect insult as* violating Article 137c CC. This case also concerned insults against Islam.[23]

The conclusion is that Article 137c does not protect religion against insults, nor does it protect a group of persons against insults made against their religion. It protects a group of persons (only) when they are insulted *because of* their religion. This may sound quite subtle, but it does make a difference, not only in theory but also in practice. This interpretation expands the scope for free speech. Hence, Article 137c CC is definitely not a blasphemy article in another guise.

III.2. **From Blasphemy to Incitement to Hatred**

Article 137d CC, which penalises incitement to hatred or discrimination against persons or violence against their person or property as a consequence of their religion has also been expanded since its adoption in 1971. In 1991, 'hetero- and homosexual orientation' and 'sex' were added as grounds; in 2005, the grounds of 'physical, mental or intellectual disability' followed. The rationale of Article 137d is identical to that of Article 137c CC. Conditional intent is also required.

Article 137d does not require actual violence to have taken place. As with respect to Article 137c, conditional intent suffices. The first Wilders case, mentioned above, has also had an impact on the interpretation of Article 137d. Until that time, courts interpreted 'hatred against persons' as an 'intrinsically conflictual divide' where a

[22] See below, III.3.

[23] Hoge Raad 10 March 2009. ECLI:NL:HR:2009:BF0655. For an elaborated discussion, see Noorloos, [39-43].

group is set up against the rest of society.[24] The Court of First Instance in the Wilders case stressed that the statements required an 'amplifying effect'.

For the concept 'discrimination', Article 90quater CC is relevant (see Appendix). In the first Wilders case the Court of Appeal stressed that the fact that certain statements made by Wilders as a politician about closing the borders to Muslims were aimed at persuading people in order to convince them that they were intended to be implemented. The Court of First Instance, however, decided that the context of the political debate could take away its incitory nature on the condition that it was not disproportional.[25] In the literature, the question is raised concerning the extent to which the context could play a role: for incitement to violence, for example, a context that can undo the inciting nature of the expression would be hard to imagine.[26] As with Article 137c, the element of 'unnecessarily offensive' has to be fulfilled. In any case, it is clear that, like Article 137c, Article 137 also applies to speech acts directed against religion as well as speech acts stemming from religious motives.

As with Article 137c, Article137d requires that the incitement should have occurred *because of* the persons' religion. Noorloos refers to a case decided in 2010 by the Court of First Instance of Utrecht concerning Christianity. In line with the Supreme Court ruling in the case of group insult against Islam, the court had acquitted the defendant of violation of group insult (Article 137c): the insult concerned religion, not a group of persons. However, the court also decided that Article 137d had been violated, notwithstanding the requirement contained in Article 137d's that the incitement should have occurred *because of* the persons' religion.[27] Similarly, the Court of Appeal in the first Wilders case had also accepted that the incitement concerning a religion may well have violated Article 137d. The Court of First Instance in the Wilders case, however, interpreted Article 137d more restrictively by stressing the phrase '*because of* the persons' religion'. A sharp dividing line may not always be so easily drawn, especially as the public order dimension of Article 137d is more pronounced or tangible than it is with Article 137c.

III.3. **Religion, Race and Nationality**

As we have seen, religion is not the only ground that is mentioned in Articles 137c and 137d. This raises the question of whether judicial interpretation of these Articles is identical with respect to the various grounds. In particular, the interpretation of the '*because of*' in these articles is relevant here (the question of direct or

[24] See HR 2 April 2002. ECLI:NL:HR:2002:AD8693, NJ 2002 (after Noorloos, [21])
[25] Noorloos, [23].
[26] Noorloos, [23-24].
[27] Noorloos, [45].

indirect insult or incitement). This question is not easy to answer, specifically where the ground of race is involved.

Noorloos distinguishes various types of expression in which an indirect connection to a specific group of people, has been, may be, or could judicially be accepted to suffice: a) a symbol (for instance, a swastika); b) negating or trivializing the Holocaust; c) political thought (Zionism); d) a group characteristic. Given the Supreme Court ruling concerning Islam, it is not unequivocally clear what the court would decide. However, the situations under c) and d) are less likely to hold.[28]

Nationality is not mentioned in Articles 137c and 137d CC. In the second Wilders case, the Supreme Court upheld the Court of Appeal to convict Wilders for violation of Article 137c. It decided that the concept of race in the Article included: 'a group of people with the same national origin, such as in this case all residents of the Netherlands with a Moroccan background'.

In 2006, a Bill was introduced by parliamentary initiative to penalise 'negationism', that is, to penalise 'public denial, gross trivialisation, approval or justification of genocide and crimes against the humanity, for the purpose of inciting hatred, discrimination or violence against persons or goods of persons because of their race, their religion or belief, their gender, their hetero- and homosexual orientation or their physical, mental or intellectual disability, or while it is expected or while it can reasonably be expected that thereby a group of people are offended on these grounds' (new Article 127da CC).[29] The initiative referred to various international instruments in its explanatory memorandum and, initially, also to the Statute of Rome in the proposed article itself. In its advisory report the Council of State was critical with respect to the proposal, in part because it doubted its necessity, given the fact that such behaviour was already unlawful and that convictions in certain of these areas had already taken place.[30] The initiative and the explanatory memorandum were slightly changed as a result. Between 2011 and 2022, no progress occurred, and in 2022 the Bill was struck from the records.

IV. Blasphemy, Group Insult, Incitement to Hatred and Art

Violent outbursts comparable to those in the aftermath of the publication of the Danish cartoons in 2006 or deadly assaults such as that on the office of the Islam-critical French satirical magazine *Charlie Hebdo* in 2015 have not happened in the Netherlands. Violence and the threat of violent outbursts related to religious sensitivities have nevertheless become rather real. In 2004 a Dutch columnist and film maker

[28] Noorloos, [28 – 36].
[29] See, *Kamerstukken II*, 2005–2006, 30 579, nrs. 1-3.
[30] *Kamerstukken II*, 2008–2009, 30 579, nr. 5.

who was known for his sharp pen, also in relation to Islam and Muslims, was killed in the street from religious motives. As we have seen, at the time this 2004 killing prompted the Minister of Justice to question whether the then still existing blasphemy law should perhaps be adapted to better protect religious believers. This triggered a debate on blasphemy as a criminal offence, which in turn led finally to its abolition. In 2008, in the run up to the release of an anti-Islam film, *Fitna*, by the Dutch anti-Islam politician Wilders, the Dutch public authorities were highly concerned about the possibility of violent protests in the Netherlands and abroad. In the end, the release of the film *Fitna* did not lead to violent incidents but it did trigger the first Wilders court case. Warned by the experiences of the Danish cartoon affair, the Dutch authorities took ample precautions to prevent national or international incidents, or at least to tone down violent reactions should they occur. As a side-effect, this strengthened the communication structures between Muslim organisations and the state.

Apart from these high profile incidents, issues are occasionally reported concerning the relationship between religion and artistic expression.[31] A situation that attracted some publicity in 2000 was the decision by its director to abstain from the performance of the opera 'Aïsja and the Women of Medina' for fear of repercussions from Islamic quarters.[32]

Issues such as these are usually resolved outside the law. As we have seen, in order to qualify as a group insult (Article 137c CC) not only the content of an expression is important but also its context. The context can make a speech act unlawful; it can also take away its unlawfulness.[33] According to the Supreme Court's case law, this will be the case if such an expression *can* contribute to the public debate or *is* an artistic expression. However, even if an expression can contribute to the public debate or is an artistic expression, conviction remains possible, namely, if the expression is 'unnecessarily offensive' (*onnodig grievend*). This notion more or less equals the ECtHR notion of 'gratuitously offensive'.[34] It is also conceivable that an artistic expression qualifies as incitement to hatred. There has been no recent criminal case involving group discrimination on the grounds of religion in which the artistic context was successfully appealed to.[35]

Friction may occasionally occur concerning the display of objects of art or artistic expressions inside a church, irrespective of whether the objects of art involving artistic expressions themselves have religious connotations or not. Different parties

[31] A.L.J. Janssens, A.J. Nieuwenhuis, *Uitingsdelicten* (4th edn, Deventer, Wolters Kluwer, 2019), p. 50.

[32] See, 'Aïsja-opera zwicht voor religieuze druk', *NRC Handelsblad* 29 Nov 2000.

[33] Janssens, Nieuwenhuis, [50].

[34] *Ibid.,* [53].

[35] Janssens, Nieuwenhuis [57].

such as the owner of a building, the religious leadership and the religious community that make use of the building, and their contractual obligations with the producer of the art are relevant in this respect. These frictions are usually resolved outside of the court room.

V. Miscellaneous Issues

Parliamentary immunity

The Wilders cases concerned an active parliamentarian. Article 71 of the Constitution states: 'Members of the States General, Ministers, State Secretaries and other persons taking part in deliberations may not be prosecuted or otherwise held liable in law for anything they say during the sittings of the States General or of its committees or for anything they submit to them in writing.'[36] This parliamentary immunity plays an essential role within a system based on democracy and the rule of law. Its predecessor was introduced in 1848, but in fact it has much older origins.

In 2020 charges were being pressed against the then Minister of Education for expressing his views during a parliamentary debate. He asserted (or confirmed) that confessional schools (private, publicly funded schools) were permitted to require the parents of pupils or prospective pupils to subscribe to the religious views of those schools, including the belief that marriage is a unique union between a man and a woman. This was regarded by some as disapproval of homosexuals. Article 71 of the Constitution made prosecution impossible; furthermore, the public prosecutor did not regard the statements of the minister to be a violation of criminal law.[37]

In the Wilders cases, Article 71 of the Constitution did not play a role. His statements were made outside the situations mentioned in this article. Partly in connection with this, the desirable scope of parliamentary immunity remains a matter of discussion.

Within parliament the issue of free speech and its limits is regularly raised. In its internal regulations, parliament itself can determine limits to what is tolerated in conjunction with imposing disciplinary measures. In particular, the implementation of such limits is a matter of controversy.

Specific protection of religious ceremonies

The Criminal Code imposes sanctions to prevent by act of violence or by threat of violence a lawful public gathering to profess a religion or a lawful ceremony to

[36] For a commentary on this article, see E.J. Janse de Jonge, 'Artikel 71. Parlementaire onschendbaarheid', in E.M.H. Hirsch Ballin, E.J. Janse de Jonge, G. Leenknegt (eds), *Uitleg van de Grondwet* (Den Haag, Boom Juridisch, 2021), pp. 755-761.

[37] Janse de Jonge [758].

profess a religion (Article 145 CC), as well as to intentionally disturb a lawful public gathering to profess a religion, a lawful ceremony to profess a religion, or a lawful funeral service by creating disorder or making noise. Incidents in these fields are rare.

VI. Evaluation

In the course of the last few decades the scope and content of freedom of speech have become increasingly controversial. Two approaches compete for priority: the first is that citizens in a highly pluralistic society should develop a high level of tolerance towards fundamentally different views, while the second is that citizens in a highly pluralistic society should develop a sensitive "antenna" in order not to offend others in their fundamentally held views or ways of life.[38] It is hard to say which view currently predominates or will predominate in the near future. On the one hand, we witness a heightened effort of the legislature to expand the grounds that are covered by the offences defined in the Criminal Code regarding group insult and incitement to hatred as well as the emergence of informal norms in social and public life that one had better not trespass on. On the other hand, we witness occasionally highly emotional pledges to support the 'inviolability of freedom of speech', and also painstakingly detailed and apparently primarily technical court rulings that result in a restrictive interpretation of these offences, with the aim of maximising freedom of speech.

One paradox is that speech against religion seems to be better protected than speech made on the basis of religion with respect to issues such as those mentioned above.[39] In other words, a more robust tolerance seems to be required from religious believers with respect to speech against their religion rather than speech based upon a religion with respect to these other issues. This is also definitely related to Islam and the struggle for dominant values in the country and the repulsion that is widely felt against violence that is used as a way of protesting against Western values.

Another paradox seems to be that religion is currently often regarded as a personal choice, whether implicitly or explicitly, whereas sexual orientation and gender identities tend to be regarded as intrinsically personal. This has not always been the case. The change may be explained in part by the greater social acceptance that has grown over the past decades with respect to the latter type of issues, whereas widespread familiarity with the Christian religion in society has decreased alongside secularisation and Islam is a matter of controversy. As for race, the experiences of

[38] See, G.A. Hartog, 'Een martelaarskroontje voor Van Dijke', in 1998 *Nederlands Juristenblad*, pp. 29-36.

[39] See Sophie van Bijsterveld, *State and Religion: Re-assessing a Mutual Relationship* (Portland, Eleven International Publishing, 2018), notably Chapter 8.

the Second World War are not forgotten; new sensitivities still emerge with respect to colonial times.

Thirdly, and connected with the previous two paradoxes, a tendency can be witnessed to equate liberal values with the prerequisites of a liberal democracy; in other words, the constitutional notion of a liberal democracy tends to be filled with substantive values. Legislation with regard to such diverse topics as citizen education or burka bans and discussions about the position of confessional schools are examples of this tendency.

In one way or another, all of these developments influence the ways in which freedom of speech and its limits are being shaped.

Appendix: Relevant Articles of the Dutch Constitution, the Criminal Code and the Act on Higher Education and Scientific Research

Article 7 of the Constitution:

1. No one shall require prior permission to publish thoughts or opinions through the press, without prejudice to the responsibility of every person under the law.
2. Rules concerning radio and television shall be laid down by Act of Parliament. There shall be no prior supervision of the content of a radio or television broadcast.
3. No one shall be required to submit thoughts or opinions for prior approval in order to disseminate them by means other than those mentioned in the preceding paragraphs, without prejudice to the responsibility of every person under the law. The holding of performances open to persons younger than sixteen years of age may be regulated by Act of Parliament in order to protect good morals.
4. The preceding paragraphs do not apply to commercial advertising.

Article 6 of the Constitution:

1. Everyone shall have the right to profess freely his religion or belief, either individually or in community with others, without prejudice to his responsibility under the law.
2. Rules concerning the exercise of this right other than in buildings and enclosed places may be laid down by Act of Parliament for the protection of health, in the interest of traffic and to combat or prevent disorders.

Article 1 of the Constitution:

All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted.

Criminal Code:[40]
Part IX. Definition of Some of the Terms and Expressions used in this Code
…
Article 90quater:

> "Discrimination" or "to discriminate against" shall be understood to mean any distinction, exclusion, restriction or preference which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the field of politics or economics, in social or cultural matters or any other area of social life.

Part V. Serious Offences against Public Order
…
Article 137c:

> 1. Any person who in public, either verbally or in writing or through images, intentionally makes an insulting statement about a group of persons because of their race, religion or beliefs, their hetero- or homosexual orientation or their physical, mental or intellectual disability, shall be liable to a term of imprisonment not exceeding one year or a fine of the third category.
> 2. If the offence is committed by a person who makes a profession or habit of it or by two or more persons in concert, a term of imprisonment not exceeding two years or a fine of the fourth category shall be imposed.

Article 137d:

> 1. Any person who publicly, either verbally or in writing or through images, incites hatred of or discrimination against persons or violence against their person or property because of their race, religion or beliefs, their sex, their hetero- or homosexual orientation or their physical, mental or intellectual disability, shall be liable to a term of imprisonment not exceeding one year or a fine of the third category.
> 2. If the offence is committed by a person who makes a profession or habit of it or by two or more persons in concert, a term of imprisonment not exceeding two years or a fine of the fourth category shall be imposed.

Section 137e:

> 1. Any person who, for any reason other than the provision of factual information:
>
> > 1°. makes public a statement which he knows or should reasonably suspect to be insulting to a group of persons because of their race, religion or

[40] Translation of the Criminal Code taken from: https://legislationline.org/sites/default/files/documents/f3/Netherlands_CC_am2012_en.pdf (accessed 18 Aug. 2023).

beliefs, their hetero- or homosexual orientation or their physical, mental or intellectual disability, or incites hatred of or discrimination against persons or violence against their person or property because of their race, religion or beliefs, their sex, their hetero- or homosexual orientation or their physical, mental or intellectual disability;

2°. sends or distributes, without request, an object which he knows or should reasonably suspect to contain such a statement to another person, or has such object in store for public disclosure or distribution;

shall be liable to a term of imprisonment not exceeding six months or a fine of the third category.

2. If the offence is committed by a person who makes a profession or habit of it or by two or more persons in concert, a term of imprisonment not exceeding one year or a fine of the fourth category shall be imposed.

Article 137f:

Any person who takes part in, or who extends financial or other material support to, activities aimed at discrimination against persons because of their race, religion or beliefs, their sex, their hetero- or homosexual orientation or their physical, mental or intellectual disability, shall be liable to a term of imprisonment not exceeding three months or a fine of the second category.

Article 137g:

1. Any person who, in the exercise of his office, profession or business, intentionally discriminates against persons because of their race shall be liable to a term of imprisonment not exceeding six months or a fine of the third category.

2. If the offence is committed by a person who makes a habit of it or by two or more persons in concert, a term of imprisonment not exceeding one year or a fine of the fourth category shall be imposed.

Section 137h:

If the offender commits any of the offences defined in sections 131 to 134 inclusive, 137c to 137g inclusive and 147a, in the exercise of his profession, he may be disqualified from practising that profession.

Article 145:

Any person who by an act of violence or by threat of violence prevents either a lawful public gathering to profess a religion or a belief, or a lawful ceremony to profess a religion or a belief, or a lawful funeral service from taking place, shall be liable to a term of imprisonment not exceeding one year or a fine of the third category.

Article 146

Any person who, by creating disorder or by making noise, intentionally disturbs either a lawful public gathering to profess a religion or a belief, or a lawful ceremony to profess a religion or a belief, or a lawful funeral service, shall be liable to a term of imprisonment not exceeding two months or a fine of the second category.

Article 147 (repealed in 2014):

Any person who:

1°. publicly, either verbally or in writing or through images, offends religious sensibilities by disparaging and blasphemous utterances;

2°. ridicules a minister of religion in the lawful performance of his duties;

3°. makes derogatory statements about objects used for religious celebration at a time and place at which such celebration is lawful;

shall be liable to a term of imprisonment not exceeding three months or a fine of the second category.

Article 147a (repealed in 2014):

1. Any person who distributes, publicly displays or posts written matter or an image containing statements that offend religious sensibilities by reason of their disparaging and blasphemous nature, or who has such in store to be distributed, publicly displayed or posted, shall be liable to a term of imprisonment not exceeding two months or a fine of the second category, if he knows or has serious reason to suspect that the written matter or the image contains such statements.
2. Any person who, with the same knowledge or reason to suspect such, publicly utters the content of such written matter shall be liable to the same punishment.

Part II. Minor Offences related to Public Order

Article 429bis (repealed in 2014):

Any person who, in a place visible from a public road, places or fails to remove words or images that offend religious sensibilities by reason of their disparaging and blasphemous nature, shall be liable to a term of detention not exceeding one month or a fine of the second category.

Article 429quater:

1. Any person who, in the discharge of his office, practice of a profession or in conducting a business discriminates against persons on the grounds of their race, their religion, their beliefs, their sex or their hetero- or homosexual orientation, shall be liable to a term of detention not exceeding two months or a fine of the third category.

2. Any person who, in the discharge of his office, practice of a profession or in conducting a business, undertakes or refrains from undertaking, for no reasonable grounds, certain acts which can have the purpose or effect in regard of persons with a physical, mental or intellectual disability of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the field of politics or economics, in social or cultural matters or any other area of social life, shall be liable to the same punishment.

Article 1.3., Section 5, Act on Higher Education and Scientific Research:

The institutions of higher education also pay attention to the personal development of their students and the promotion of their sense of social responsibility. The promotion of a sense of social responsibility means at least that the institutions, including those who formally or informally represent them, refrain from discriminatory behaviour and statements.

THE RELATION BETWEEN FREEDOM OF SPEECH AND RELIGION – THE CASE OF SWEDEN

Anna-Sara Lind[1]

I. Freedom of Conscience, Religion, and Expression

1.1. The fundamental norms regulating freedom of expression

a) *Introducing the fundamental norms*

Freedom of expression is a structural principle of a free and democratic society. It is considered a fundamental right in the Western tradition of constitutional law and international human rights law. The Swedish constitution consists of four constitutional acts: The Instrument of Government (IoG), the Act on Succession, the Freedom of the Press Act (FPA) and the Fundamental Law on Freedom of Expression (FLFE). Freedom of expression plays a central role because it serves different individuals and groups, as well as diverse purposes of individual and collective relevance. This is especially true in the case of Sweden, where freedom of expression has a solid basis in the constitution. In the Instrument of Government it is part of the very first paragraph in the chapter entitled Basic Principles of the Form of Government, where it is stated that "Swedish democracy is founded on the free formation of opinion […] ".

The Freedom of the Press Act that is currently in place dates back to 1949 but has strong roots in the original Act of 1766.[2] In Swedish, the literal meaning of the Freedom of the Press Act is "Printing freedom ordinance". Despite its name, the main function of this constitutional act is not to grant individuals fundamental rights but rather to create and protect a system where free speech can be guaranteed without the State censoring or deciding on the content of the debate. Fundamental rights have never played a major role in Swedish constitutional history. Against this background,

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[2] Lind, A-S, Reichel, J, & Österdahl, I (Eds.), Transparency in the future – Swedish openness 250 years, Ragulka förlag, 2017.

freedom of the press and the right to access public documents nonetheless remained from the 18th century up until the 1970s the only constitutionally protected rights. The Bill of Rights included in the Instrument of Government was created at a very late stage, in 1978.[3] Up until then only freedom of the press with direct reference to the Freedom of the Press Act was stated in Article 16 in the IoG of 1809.

Accordingly, in contemporary Swedish law three fundamental acts guarantee the constitutional protection of the freedom of expression, namely the Instrument of Government, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. Freedom of expression gives everyone the right to express himself or herself in different ways or, as is stated in Chapter 2 section 1 IoG, everyone shall be guaranteed the freedom of expression in his or her relations with the public institutions. In this context, freedom of expression is "the freedom to communicate information and express thoughts, opinions and sentiments, whether orally, pictorially, in writing, or in any other way". The IoG is applicable to all forms of expression that do not fall within the scope of the Freedom of the Press Act or the Fundamental Law on Freedom of Expression.

The Freedom of the Press Act is applicable to "all written material produced using a printing press" (Chapter 1, Article 2) or when such material is duplicated according to the criteria set out in the Act. Not surprisingly, an urgent need for a new version of the Act arising from the use of new forms of media and technological development led in 1991 to the enactment of the Fundamental Law on Freedom of Expression.[4] This Fundamental Law mirrors the Freedom of the Press Act, but is applicable to radio and TV programmes and to Internet-based programmes when certain conditions are met.[5] This constitutional law thus extends the constitutional guarantees of the FPA to information disseminated via television, radio, CD and DVD media. In addition to these media-oriented constitutional guarantees, the above-mentioned protection in the IoG should be mentioned as well as the protection stated in Article 10 of the ECHR.[6]

The Freedom of the Press Act and the Fundamental Law on Freedom of Expression are unique as fundamental laws if the Swedish constitution is compared to constitutions of other countries. In these two fundamental acts only matters relating to freedom of the press and freedom of expression are regulated. Both acts also contain firmly expressed fundamental principles and they also include materially very

[3] See Government Bill (hereafter Prop.) 1975/76:209.

[4] Yttrandefrihetsgrundlagen (1991:1469).

[5] In this article attention will primarily be given to the Freedom of the Press Act (FPA) as the Fundamental Law on Freedom of Expression (FLFE) mirrors the FPA. The FLFE contains almost the same rules as the FPA and refers to the FPA regularly.

[6] Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005). For the position of the ECHR in Swedish law, see Cameron, Iain, *An Introduduction to the European Convention on Human Rights*, Iustus förlag, 9th edition, 2023, pp. 204-213.

detailed rules of criminal and procedural law. These constitutional rules are accordingly to be applied directly to concrete and actual cases almost as if they were rules of lower hierarchical value, i.e., laws or ordinances.[7] From a comparative constitutional perspective, the Swedish case is unusual, which also became obvious when Sweden became a member of the European Union.

b) *Fundamental principles of freedom of expression*

Understandably, the Freedom of the Press Act aims at strengthening free and public debate in society. In order for this to happen, the law is applicable to "all written material produced using a printing press" or when such material is duplicated according to the criteria set out in the Act and when it was published (Chapter 1, Articles 2 and 3). These clear material conditions make it easy to distinguish when a person chooses to have a stronger constitutional protection for a message and take responsibility for it in the way regulated through the Freedom of the Press Act. But the Act is not, contrary to the Instrument of Government, applicable to all sorts of messages and expressions. Exceptions are provided in Chapter 1, Articles 12 and 14 stating that the Act is not applicable to expressions that appear in commercial advertising[8] or child pornography.[9] These expressions are instead governed by ordinary laws. This does not, however, mean that these expressions lack constitutional protection. They fall, of course, within the scope of the Instrument of Government, Chapter 2 Article 1.

Historically, the construction in details of the FPA is not new in the Swedish context. There is an old tradition in Sweden of writing constitutions in a rather detailed manner in all cases dealing with a free press. As we have seen, these details are also necessary for the many rules that aim at handling criminal law and procedural law. While aiming at providing stronger protection for freedom of expression in its written form, the detailed rules are also of great benefit when fighting crimes that are committed in written form. Through the enactment of the FLFE in 1992, other forms of media became part of the special constitutional protection (radio, television and other broadcasts and technical recordings). The FLFE has, since 2011, also been liable to public playback recordings from a database.[10]

[7] Lind, A-S, Sweden: 'Free press as a first fundamental right', in Suksi, M, *et al*. (Eds.) *First fundamental rights documents in Europe*, Intersentia, 2015.

[8] The tensions between free speech (as in freedom of expression), commercial speech and gender impact have been discussed by Eva Maria Svensson in several articles, for example Svensson, E-M & Edström, M, *Freedom of expression vs. gender equality – conflicting values when regulating gender stereotypes in advertising* (2014). Tidsskrift for Rettsvitenskap, vol. 127, 5/2014, pp. 479-511.

[9] See Prop. 1997/98:43 pp. 67-69 and 151.

[10] Public inquiry (hereafter SOU), SOU 2016:58 s. 141.

This said, both the FPA and the FLFE are based on the fundamental principles that provide the frame for freedom of expression. These are regarded as six in total and they will be briefly described here. The first principle is the *prohibition of censorship* established in the initial Freedom of the Press Act. From the 18th century onwards, this principle has been highly important to Swedish society and in the long run is also crucial for how transparency is perceived today. In its present form, the prohibition of censorship is guaranteed in Chapter 1 Article 1 para 3 FPA and is fundamental for the protection of freedom of expression. This absolute prohibition guarantees that the expression should always be in printed form and made public before any action against it can be taken. All possible measures in the public sphere that could prevent or hinder an expression being made public are included. Accordingly the banning of a specific form of technology, a radio device, for example, in order to hinder the reception of certain information, is not permitted. Established in the Freedom of the Press Act of 1812, the fundamental principle that *no one should be prevented from having or using printing devices (freedom of establishment)*, taken together with the prohibition of censorship, provide a solid base for a truly free freedom of expression.[11]

The next important fundament in the FPA is the *right to be anonymous* when using the right to communicate information and messages to the press (Chapter 3). From this, it follows that in no case should one fear being prosecuted or being liable. The public sector has no right to investigate who could have sent the message or given the information. This is still a cornerstone of public administrative law; no one working in the public sphere has the right to investigate outside the rules of the Freedom of the Press Act. In addition, no one can use the fact that a person has or might have exercised their constitutionally provided rights against him or her. An employer at a national agency is accordingly forbidden to threaten (even implicitly) employees about the passing of information to the press, and even the slightest suggestion of questioning would be considered a threat.[12]

As has been mentioned at the beginning of this chapter, the Freedom of the Press Act also contains *special procedural rules* that apply if a case falls within the scope of the Act (Chapter 9). These rules differ considerably from the normal proceedings in Swedish courts. First of all, the Chancellor of Justice is the only person who can decide that a case should be investigated and the only person who has the right to prosecute, as stated in the rules in the FPA. Secondly, if the Chancellor of Justice decides to prosecute, a jury is involved in the proceedings (Chapter 12). Also considered to be part of the group of the fundamentals in the Freedom of the Press Act

[11] This right is easier for a company or corporation to exercise, even though it is not limited to legal persons.

[12] JO 2020/21 s. 301.

are the *special rules of criminal law*. These rules are very detailed and state all the offences that are considered to be breaches of the Freedom of the Press Act. According to these rules, the responsibility for committing a crime cannot be shared between several persons nor can one person pass on responsibility to anyone else. Liability is to be decided according to a special "chain of command" from which it follows that *only one person can be found responsible* for an offence against the freedom of the press. Accordingly, the detailed rules on liability are construed in such a way that they indicate one person (Chapter 8 FPA). The one who is responsible according to the rules is always presumed to have knowledge about the content of the printed material. According to the principle of "*double criminalization*", the offence set out in the Freedom of the Press Act should also be part of the ordinary Criminal Code. The idea behind this is that it should be more complicated to enact new limitations on the freedom of expression than to remove already existing hindrances to it. As the Swedish constitution requires constitutional rules to be approved by two parliaments, the procedure of creating new limitations is in fact quite complicated. When applying the criminal and procedural rules, the judge, jury or Chancellor of Justice needs to respect the so-called "instruction" stated in Chapter 1 Article 3:

> Any person entrusted with passing judgment on abuses of the freedom of the press or otherwise overseeing compliance with this Act should bear constantly in mind in this connection that the freedom of the press is fundamental to a free society, direct his or her attention always more to illegality of subject matter and thought than to illegality of expression, to the aim rather than the manner of presentation, and, in case of doubt, acquit rather than convict.

Finally, a couple of remarks concerning open access to public information/transparency should also be made. It is not part of the list on fundamental principles serving a free press. A free press served from the very beginning as a control mechanism for how power was to be exercised. The constitutionally protected prohibition of censorship has contributed a lot in this regard. The principle that proceedings in courts of law shall be open to the public was established at a very early stage in Sweden and was considered as complementary to the principle of access to public documents that was eventually inserted in the Freedom of the Press Act. Today, the fundamental right to access public documents is guaranteed in Chapter 2 FPA. It follows from this chapter that the only possible way to limit this right and make an exception to the Freedom of the Press Act is when explicitly provided for in the Transparency and Secrecy Act.[13]

We can see that the system of the Fundamental Acts on Freedom of Expression aims at protecting the system itself, a system that strives to secure public debate. This

[13] Offentlighets- och sekretesslag (2009:400).

means that guaranteeing individuals' rights is less important, but rather the priority is to secure a system for maintaining a certain (high) level of freedom of expression. Indeed, this system, with all its special proceedings and material rules regulated in detail, is constructed so as to hinder the individual in gaining justice in an efficient way.[14] A free debate exposed to as few hindrances as possible is still the supreme goal of the constitutional construction. To conclude, it is noteworthy that these fundamental principles, the cornerstones of the FPA, are always more or less connected to the revisions that are being discussed and proposed.

The Freedom of the Press Act is an extensive and detailed legislative act. As was mentioned above, it has gone through a great number of changes since the 1970s. The details and the fundamental principles are, however, intertwined in the FPA.

The huge number of changes has been due to the swift technological developments in modern society. As the "technique" of communicating a message or information is decisive for deciding whether or not the FPA is applicable, modern technologies do have a great impact for the scope of the FPA. A (constitutionally speaking) intense legislative process is also a good way to make sure that the act is applicable, to the point, and up to date. Not leaving too many loose ends is a good guarantee for not permitting judges to intrude too far. It is important to keep in mind that a solid Freedom of the Press Act is a very important political goal in Sweden. The will of the people is an essential theme of the Swedish Constitution, and in Chapter 1 Section 1 IoG it is written that "[a]ll public power proceeds from the people". Further, democracy is based upon the free formation of opinion, a component that includes the Freedom of the Press Act, the Fundamental Act on Freedom of Expression, and the freedom of expression rights stated in the Instrument of Government.

As the aim of the Freedom of the Press act is to guarantee free opinion, debate and an open society that controls the exercise of public power, any individual willing to communicate and participate in public communication is crucial to the functioning of the Freedom of the Press Act. The special protection in the FPA and the FLFE is therefore constructed around established forms of media. Publishers (of journals and books), journalists and media corporations have a stronger constitutional protection than individual persons whose messages do not reach the established media. This means that the protection for individuals not falling within the scope of the FPA (for example, consumers) is weaker (only containing the dimension of the Instrument of Government), which in turn means that they are more easily subjected to sanctions for prohibited communications. This unequal system does not match the protection that individuals are guaranteed in the European Convention on Human Rights (the ECHR) or under European Union law.

[14] Bull, T, 'EU-medlemskapet och våra grundlagar', SvJT 2011, pp. 375-381.

The position of the Parliament (the Riksdag) is central to the construction of the Instrument of Government. The Riksdag, the right to access public documents, and the fundamental principles of the Freedom of the Press Act form the basic principles by which Sweden is governed. This was also clearly stated during the negotiations that preceded Swedish EU membership. Sweden made a clear and explicit Declaration on Open Government that was attached to the Treaty of accession to the European Union. Since 1995, when it became a Member State, Sweden has on many occasions welcomed and striven for greater openness and transparency in the European Union. Sweden has also declared that public access to official records and also the constitutional protection afforded to those who give information to the media are fundamental principles which form "part of Sweden's constitutional, political and cultural heritage".[15] The Committee of the Riksdag has accordingly underlined that public access to official documents and also the freedom to give information to the media form an integral part of the basic principles of Sweden's constitutional system, together with other provisions stated in the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. The Committee underlined that law-making powers which would substantially modify these constitutional principles could not be transferred to the EU.[16]

The protection granted under the Freedom of the Press Act and the Fundamental Law on Freedom of Expression is much stronger than the general protection granted in the Instrument of Government (Chapter 2 Article 1). According to the IoG, freedom of expression can be limited by law in accordance with the rules mentioned in Chapter 2 Articles 20-24. These limitation clauses are not applicable when a matter falls within the scope of the Freedom of the Press Act or the Fundamental Law on Freedom of Expression since these two specific fundamental acts take precedence over the Instrument of Government (Chapter 2 Article 1 paras 2 and 3 IoG; Chapter 1 Article 3 FPA). The only way to make an exception from these two fundamental freedom of expression Acts is in accordance with the rules in the Freedom of the Press Act. Central for the whole understanding of the Swedish constitutional protection regarding freedom of expression is that these two acts are *exclusive* in character and superior to any other constitutional act when applicable. The exclusivity ensures that the special status given to the FPA and the FLFE as criminal and procedural laws is not undermined.[17]

[15] See Österdahl, I, 'Transparency versus Secrecy in an International Context: a Swedish Dilemma', in Lind, A-S, Reichel, J, and Österdahl, I, (eds.), *Information and Law in Transition – Freedom of Speech, the Internet, Privacy and Democracy in the 21st Century*, Liber förlag, 2015.

[16] Government Bill, prop. 1994/95:112 pp. 17-18.

[17] SOU 2016:58, p. 142.

c) ***The Instrument of Government – the general protection***

Free speech is fundamental for Swedish society. Chapter 2 Article 1 consists of the following list:

> Everyone shall be guaranteed the following rights and freedoms in his or her relations with the public institutions:
>
> 1. **freedom of expression**: that is, the freedom to communicate information and express thoughts, opinions and sentiments, whether orally, pictorially, in writing, or in any other way;
> 2. **freedom of information**: that is, the freedom to procure and receive information and otherwise acquaint oneself with the utterances of others;
> 3. **freedom of assembly**: that is, the freedom to organise or attend meetings for the purposes of information or the expression of opinion or for any other similar purpose, or for the purpose of presenting artistic work;
> 4. **freedom to demonstrate**: that is, the freedom to organise or take part in demonstrations in a public place;
> 5. **freedom of association**: that is, the freedom to associate with others for public or private purposes; and
> 6. **freedom of worship**: that is, the freedom to practise one's religion alone or in the company of others.

Important to note is that these paragraphs are subsidiary in relation to the FPA and the FLFE. The importance of the rights having their separate paragraphs (p. 1–6) should not be exaggerated. A person's freedom of expression is of course linked to the freedom of information of others. Manifestations and demonstrations do include exchange of opinions etc. Freedom of expression is normally a central element in all of the other rights listed. If several rights are affected in the paragraph, the special constitutional rules relating to limitation of such rights should all be met and respected.[18] Freedom of religion is, however, somewhat differently regulated. The right expressed in para 6 is extremely narrow and with that follows that it cannot be limited – it is an absolute right.[19] It is accordingly very limited in scope, but freedom of religion is nevertheless protected within the other rights communicated in the paragraph. Religious freedom of expression, religious freedom of information, etc. provides additional protection to the freedom of religion.

The protection of freedom of expression in para 1 is not linked to specific form of expression, nor any specific content. The right is utterly different in how it is framed when compared, for example, to the FPA. When criminal law relates to freedom of

[18] Bull & Sterzel, pp. 62-66.

[19] Strömberg, H, 'Hädiska tankar om religionsfriheten', in: *Våra rättigheter V – Rättighetsperspektiv till minne* av Gustaf Petrén; Enkvist, V, Lokrantz-Bernitz, H & Zillén, K, *Religionsfrihet. Om rättsliga skiftningar och nyanser*; Enkvist, V, *Religionsfrihetens rättsliga ramar*.

expression it can lead to a more restrictive application of the criminal code.[20] Within the IoG freedom of expression can be limited by law in accordance with the rules in Chapter 2 Articles 20-24. These articles relate to different rights. For all the rights in Chapter 2 Article 1 paras 1–5 the basic assumption is that a limitation should be enacted by law (i.e., be decided by Parliament). The limitations may be imposed only to satisfy a purpose acceptable in a democratic society, as is stated in Article 21. The limitation must never go beyond what is necessary with regard to the purpose which occasioned it, nor may it be carried so far as to constitute a threat to the free shaping of opinion as one of the fundaments of democracy. No limitation may be imposed solely on the grounds of a political, religious, cultural or other such opinion. For freedom of expression there are additional requirements in Article 23 when freedom is being limited. In para 1 it is stated that freedom of expression and freedom of information may be limited with regard to the security of the Realm, the national supply of goods, public order and public safety, the good repute of the individual, the sanctity of private life, and the prevention and prosecution of crime. Freedom of expression may also be limited in the context of business activities. Freedom of expression and freedom of information may otherwise be limited only where particularly important grounds so warrant. But, when judging what limitations may be introduced in accordance with para 1, particular attention must be paid to the importance of the widest possible freedom of expression and freedom of information in political, religious, professional, scientific and cultural matters (para 2).

Freedom of expression and information are considered to be the basis of Swedish democracy, as, too, are freedom of assembly and freedom to demonstrate. When restricting these rights, Article 24 is added to the requirements set out in Article 21. These rights may accordingly be limited in the interest of preserving public order and public safety at a meeting or demonstration, or with regard to the circulation of traffic. These freedoms may otherwise be limited only with regard to the security of the Realm or in order to combat an epidemic.

Freedom of association may be limited only in respect of organisations whose activities are of a military or quasi-military nature, or constitute persecution of a population group on grounds of ethnic origin, colour, or other such conditions.

Freedom to demonstrate is a strong constitutional right and its practical realization is dependent on the Act on Public order.[21] According to this Act, a demonstration needs to have a permit granted by the Police. However, not having a permit is not a reason for forbidding a demonstration or interrupting it. The Police and the Courts have stressed the importance of ensuring a strong right to demonstrate and their in-

[20] See NJA 2012 s. 400, NJA 2020 s. 1083, NJA 2021 s. 215.
[21] Ordningslag (1993:16).

terpretation of the constitution is therefore generous.[22] The development in relation to burning religious books, has led to the Government initiating a new inquiry investigating how new circumstances relating to security can be included in the processes of approving (or not) permission to demonstrate.[23]

The negative dimensions of the freedoms in Article 1 are described in Chapter 2 Articles 2 and 3. In Article 2 we see that no one in his or her relations with the public institutions shall be coerced into divulging an opinion in a political, religious, cultural or other such connection. Nor may anyone in his or her relations with the public institutions be forced to participate in a meeting held to shape opinion, nor in a demonstration or other manifestation of opinion, or to belong to a political association, religious community or other association for opinion referred to in sentence one. In Article 3, it is stated that no record in a public register concerning a Swedish citizen may be based on his or her political opinions without his or her consent solely.

Sweden is a dualist country, which means that public international law needs to be incorporated into Swedish law in order to be directly applicable in the national context. Sweden has ratified the major human rights conventions of the Council of Europe and the United Nations. The European Convention has been part of Swedish Law since 1995 and the UN Convention on the Rights of the Child since 2020.

d) *Restrictions – a word on what is not included*

There are no restrictions on what kinds of life views are can be incorporated into freedom of expression in the Instrument of Government. Here, Sweden has progressed further than the European Court of Human Rights. The Court has underlined the importance of open debate on subjects of public interest in terms of the protection of offensive (hate) speech and of the inevitable personal animosity that may follow. In the view of the ECtHR, the search for truth, objectivity and rigour does not require an absolute proof of truth. Value judgements can be protected if they have a sufficient factual basis. Thus there is – as a point of departure – no claim of actual truth.

It is a different matter when we consider the FPA and the FLFE. In the public inquiry SOU 2016:58, dating back to 2016, we return once again to the details of the fundamental laws. These details seem, however, to draw our attention to the bigger

[22] See for example the Supreme Administrative Court, Judgment case No. 2182-23, 2023-11-06. Lately, there have been discussions relating to these interpretations especially in the lower courts where climate demonstrations and Nazi demonstrations have triggered different forms of responses. The burnings of the Quran in the past six months have given rise to discussions involving the religious dimension relating to Islam. In 2018, the demonstrations of Nazis close to the Jewish community in Gothenburg triggered a lot of debate and several Court proceedings, see, for example, Judgment case no. 10510-17, Judgment case no. 5083-17 and no. 5084-17. See also Enkvist, V, & Åström, K, *Vem får mest rätt? – om konsten att beakta rättighetsskyddet i mål med flera rättighetshavare*.

[23] Dir. 2023:123.

picture as they all inevitably connect to the fundamental principles of the FPA. The first example is what is usually known as *original sin*. It first appeared as a problem as a result of digitalization, when media (newspapers) suddenly started to put up older articles on the Internet.

The person seen as responsible for the published material is in fact regarded as responsible even though they may not be the person who contributed to the original texts or who has any actual knowledge concerning the content. There should be an assumption of intent, according to the FPA and the FLFE, and this is crucial for the principle of only one person bearing responsibility.[24] In the 2013 judgment issued by the Supreme Court, individual responsibility was being tested in relation to the timeframes for prosecution laid down in the Freedom of the Press Act.[25] These are rather short in terms of whether prosecution for crimes according to the FPA should be decided on and the point at which an announcement of the proceedings is communicated in public for the first time. By this means the legislator has attempted to ensure that contemporary values should direct the ruling in criminal law. There is however one exception to this rule and relates to information provided from databases with constitutional protection based on the FPA.

According to the FLFE and the FPA, the content of an article from an Internet newspaper with constitutional protection remains valid six months after it has been removed from the Internet. On the basis of this judgment, it is clear that an editor-in-chief is responsible for older material published on another webpage by another publisher.[26] The fact that the later editor-in-chief had no possibility of making an independent decision does not, according to the literal wording of the constitution, count. This is highlighted as a problem in the Inquiry conducted in 2016.[27] In addition, one should also note that a crime committed on the Internet is ongoing/perdurant and will continue until the information is no longer accessible on the web-site. This is the case for all crimes that could potentially be considered to be free speech crimes.[28] Considering how the modern media function, these rules appear to be strange in modern times, where all major newspapers publish extensively on web-sites.[29] When suggesting how to handle this delicate problem, the Inquiry is cautious and emphasises

[24] There are a few exceptions to this, for example when a responsible editor has been appointed largely for the sake of appearances.

[25] NJA 2013 p. 945.

[26] Lind, Sweden: A free press as a primary fundamental right.

[27] SOU 2016:58 pp. 339f and 364. In the judgment from 2013 the new publisher was considered responsible for a publication done three years before he had been nominated publisher.

[28] SOU 2016:58 s. 363. See also Persson, V, Publications based on crimes.

[29] One could also question, as the Inquiry does, if this procedural requirement would be acceptable for the European Court of Human Rights. Compare with the case Times Newspaper Ltd v. the United Kingdom.

that they do not wish to make any suggestion that would offend the present order or system of the FLFE. At the same time, they underline that a publication should be judged according to the values of its own times and should not be issued in terms of the values of the future. In no way could there be any value in setting up further complications in relation to the European Convention on Human Rights.[30] Hence, it can be a delicate task to try to find new solutions in terms of the detailed text of the Freedom of the Press Act and to balance between freedom of expression and protection of the personal integrity of individuals.[31]

The second example deserving discussion arises from the ”Lex base” case and concerns *databases and open access*. The Inquiry needed to produce a solution to this complex matter and chose to create an exception for “collections of information such as registries”. The story behind this example is an Internet service called Lexbase that was launched in 2014. The responsible editor of this service had achieved a certificate of no legal impediment to publication. He had accordingly chosen to take responsibility for the Internet service in line with the Freedom of the Press Act and thus fall within the scope of the special protection of the Freedom of the Press. Lexbase’s business idea was to gather judgments from courts in Sweden, since judgments and court rulings are public documents in Sweden. On the Internet service Lexbase it was possible to find information on Internet sites about the contact details for convicted persons such as their address, so that by clicking on a map it would then be possible to upload any judgments that could be linked to the place or the persons living at a given address. As the Freedom of the Press Act is superior to ordinary law, this led to a situation where the Personal Data Act could be ignored. Naturally, it remains questionable whether such an Internet service is an expression of editorial activity that the Freedom of the Press Act is intended in fact to protect. Thus, in this case it is possible to see how the fundamental right of access to public documents possibly interacts with new technologies and in the process works against the requirements formulated in European Law.

Our third and final case relates to *tobacco packages* and how the fundamental principles of freedom of establishment, prohibition of censorship and an editorial committee’s right to make decisions can be placed in a radically new context. The field of application of the FPA and the FLFE is decided solely through the communication techniques used. This means that messages that do not have a clear motif of “free speech” can be included and fall within the scope of the constitutional laws. As examples, the Inquiry raises warning notifications such as product information on packages, e.g., cigarette packets. If the information is printed it may well fall within the scope of the FPA. This opens up the possibility of an interesting constitutional

[30] SOU 2016:58 p. 367.

[31] The described situation has to some extent been corrected, see Prop. 2017/18:49.

clash between EU law and Swedish law. The European tobacco product directive came into force in May 2014 and issued several demands concerning the way in which tobacco and similar products could be produced, presented and sold. Warnings and alerts are prescribed carefully in the directive and the design of the packaging is accordingly decided according to a European directive.[32] The fact that the producer has no right to add text of his own to the package is problematic from a Swedish perspective. Freedom of establishment, including the prohibition on limiting the exercise of a free press, is in danger of being severely undermined.[33] The Inquiry therefore suggested that a new paragraph should be added to the Freedom of the Press Act permitting an exception to the fundamental principles by means of delegation.

e) ***Protecting free speech through the constitution as a primary goal***

As can be seen in this article, it is an ultimate goal in the Swedish system for freedom of expression to achieve a solid position. This way of handling the free word has developed over centuries and the Swedish people are favourable to the idea that expressions that offend and shock should also be protected. This is a development that has been ongoing since the 18th Century.

As follows from the above, there is very little soft law in the regulation of the freedom of expression and practices, which may be significant in courts of law, since everything is centred around the constitutional constructions of freedom of speech.

The position of the Chancellor of Justice as the sole prosecutor and in charge of the court proceedings relating to crimes that go against the rulings of the FPA and the FLFE is important. The decisions taken by the Chancellor of Justice when handling complaints are essential for a general understanding of the fundamental laws. Almost as important are the decisions taken by the Parliamentary ombudsmen.

The *Swedish press and broadcasting authority* is in charge of dealing with the licensing and registration of radio and television broadcasts. The Agency also deals with any review of the media in order to ensure compliance with laws and regulations, the distribution of financial subsidies to news media, and the monitoring and analysis of media developments.[34]

[32] SOU 2016:58 s. 211f.

[33] SOU 2016:58.

[34] In Swedish: Myndigheten för press, radio och TV. The Agency also handles distribution of financial subsidies to news media and monitors and analyses media developments. Cf. in Finland, the Council for Mass Media in Finland (*Julkisen Sanan Neuvosto*) and its resolutions regulate those media that have signed the basic treaty of the Council. The CMM is not a court of justice, nor does it exercise public authority. However, its decisions are carefully observed in Finland.

1.2. **Freedom of Religious Expression and Hate Speech**

The Council of Europe distinguishes between three different kinds of speech directed against religion or religious people, namely: (a) blasphemy, (b) religious insults, and (c) hate speech against persons in relation to their religion, as shown in its Recommendation 1805 (2007) on blasphemy, religious insults and hate speech against persons in relation to their religion.[35] In the course of this Recommendation the Parliamentary Assembly of the Council of Europe (PACE) considered that "blasphemy, as an insult to a religion, should not be deemed a criminal offence." It also added that "national law should only penalise expressions concerning religious matters which intentionally and severely disturb public order and call for public violence."

The Recommendation has not been directly used in legislation relating to the field of freedom of speech, but in relation to other human rights matters, such as preventing children under 18 from marrying.[36] It is more often the case that reference to the PACE is made regarding matters relating to the Council of Europe as such, for example the acceptance of new members or the reports produced by the Swedish parliamentarians.

1.3. **Context of Public Debate – Major legal cases**

Sweden prohibits hate speech and defines it as the act of making statements publicly that threaten or express disrespect for an ethnic group or similar group regarding their race, skin colour, national or ethnic origin, faith or sexual orientation. These regulations are enforced with respect to posts made within the social media. The law does not prohibit a pertinent and responsible debate nor statements made in a completely private sphere. As we have seen, there are constitutional restrictions pertaining to which acts have been criminalized, as well as limits set by the European Convention on Human Rights.[37]

The sexual orientation provision, added in 2002, was used to convict the Pentecostal pastor Å.G. of hate speech against homosexuality on the basis of a 2003 sermon. His conviction was later overturned, in a major legal case decided by the Supreme Court.[38]

Hate speech is considered a crime according to Swedish legislation. In the Swedish context hate crime includes any crimes consisting of hate speech (*hets mot*

[35] Assembly debate on 29 June 2007, Recommendation adopted by the Assembly on 29 June 2007. See also Res (2006) 1510 on *Freedom of Expression and Respect for Religious Beliefs*, adopted by the Assembly on 28 June 2006.

[36] Prop. 2017/18:288.

[37] See also Danelius, H, *et al*., *Mänskliga rättigheter i europeisk praxis. En kommentar till Europakonventionen om de mänskliga rättigheterna*.

[38] NJA 2005 s. 805.

folkgrupp) combined with unlawful discrimination. It can also consist of other crimes where the motive has been to violate or offend a person, an ethnic group or another group of persons on the basis of one or more of the following: skin colour, national or ethnical origin, faith or creed, sexual orientation, transgender identity or expression, or other similar conditions. The person committing the offence is said to do so as a result of his/her negative attitude towards other persons' characteristics. If the person is found guilty of an "ordinary" crime such as insult or unlawful threat that can be considered to be a hate crime, the penalty may be more severe.

II. Blasphemy, Religious Hate Speech and Limitations of Freedom of Speech in a Religious Context

2.1. Blasphemy and Defamation of Religion

Until 1970 Sweden maintained an Act defined in terms of the peace to practise a faith,[39] And previously this particular act had replaced the Act concerning blasphemy. The Act concerned with maintaining the peace to practise a faith stated that it was considered to be a criminal offence to violate, bywords or actions, anything that was considered to be sacred. The act in question was eventually abolished as a form of special protection of the freedom of religion since it was not considered to motivate restrictions on free speech or freedom of expression in the media. The underlying motive for this reform was that it must be considered to be acceptable to do things that might others and to criticize religion.

In Sweden, the crime of blasphemy was accordingly withdrawn from the penal code in 1970. It had not been very much used and was considered to be very old-fashioned. Currently, there is no legislation in Sweden aimed at protecting God or religious symbols as such.[40]

2.2. From Blasphemy to the Prohibition of Hate Speech

Freedom of expression and freedom of religion are rights that have been enshrined in all European constitutions and in the jurisprudence of the European Court of Human Rights. The ECtHR has insisted that freedom of expression "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population".[41] It is important to note, however, that the content of the right itself varies between the various national jurisdictions.

[39] SOU 1970:125.

[40] The internationally recognized author August Strindberg was accused of blasphemy in 1884. He was acquitted by the Court of Stockholm.

[41] Handyside case, ECtHR.

2.3. **Challenging Dominant Paradigms**

Crimes against Public International Law have been enshrined in all European constitutions and in the jurisprudence of the European Court of Human Rights.[42]

Genocide is defined in international law and expressed as applicable if someone has killed a member of a certain group intending to totally or partially annihilate a national, ethnically or racially decided or religious ethnic group. Also other actions such as torture and rape can be considered to be genocide. *Crimes against humanity* are indeed considered to be actions such as murder, rape, torture and forced labour if they are part of, or a stage in, an extensive attack on a group of civilians.[43] The4 preparation of genocide is punishable according to Swedish law.[44] In Sweden there are no major law cases relating to the denial of genocide (Holocaust).

2.4. **Is Hate Speech an Expression of Religious Freedom?**

There have been five reports published by the ECRI relating to Sweden, although in the latest interim follow-up relating to Sweden, religion was not the primary topic.[45] In the third, fourth and fifth monitoring cycles, however, the ECRI had presented some concerns concerned with religion.[46] More data is required on ethnic origin and religion.[47] In its Report from 2012 the ECRI also noted that, under the Discrimination Act, positive action is not generally accepted with regard to ethnicity and religion. The only provisions related to 'active measures' are in the fields of employment and education. Employers are thus required to take active measures to make the workplace more inclusive, especially for persons of different religions and ethnicities.[48] In the past, the ECRI also noted that there were still very few court decisions based on the new Act, since, despite the fact that a large number of complaints of discrimination based on religion or ethnic origin are reported to the Ombudsman every year (about 900), only approximately ten result in lawsuits. This is still the case.

The framework decision 2008/913/JHA was mentioned in a public inquiry in 2010 but did not result in any new legislation.[49] Recently, it was referred to once again

[42] SOU 2023:17 and Prop. 2023/24:93.

[43] See Act (2014:416) on the punishment of some international crimes.

[44] Act (2014:416) on the punishment of some international crimes, Art. 16

[45] Conclusions on the Implementation of the Recommendations in respect of Sweden, subject to interim follow-up, 30 September 2020. See also Abdullah, M, & Lind, A-S, *Att bekämpa rasism rättsligt – om European Commission against Racism and Intolerance (ECRI)*.

[46] ECRI Report on Sweden, 17 December 2004 (cycle III), ECRI Report on Sweden, 9 June 2012 (cycle IV) and ECRI Report on Sweden, 5 December 2017 (cycle V).

[47] ECRI Report 2018, paras 57-58.

[48] ECRI Report 2012, para 52.

[49] See 2010:55 del 2, p. 502.

when a public inquiry was given the task of discussing whether the definition of hate speech could be framed more clearly.[50] In this context hate speech is expressed as agitation against a population group in Chapter 16, Section 8 of the Swedish Criminal Code and should encompass acts consisting of incitement to violence and acts targeting individual members of the protected groups. The European Commission has launched an infringement procedure against a number of Member States as a result of alleged shortcomings in their transposition of the Framework Decision. The Commission's criticism of Sweden's criminal legislation can be summarized in terms of three points: firstly, that the act of inciting violence by reference to ethnic origin and certain other grounds of discrimination is not correctly criminalised (Article 1(1)(a) in conjunction with Article 1(2)); secondly, that acts targeting individuals in the protected groups are not criminalised to a sufficient extent (Article 1(1)); and thirdly, that denying, condoning and grossly trivialising certain serious international crimes such as genocide and crimes against humanity, including the Holocaust, are not criminalised (Articles 1(1)(c) and 1(1)(d)). Nevertheless, the Inquiry proposes amendments to both the Swedish Criminal Code and the Freedom of the Press Act. These amendments would not widen the criminal area, although a new offence is suggested – in brief, they would not make more acts punishable, nor would the amendments place any additional restrictions on freedom of expression. In short, therefore, the proposals would not prohibit any acts that are currently permitted.[51]

Regarding Art. 20 par. 2 of the International Covenant on Civil and Political Rights, when ratifying the Covenant Sweden has not made any reservation nor added any explanation. The paragraph reads: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." Since the ratification, Sweden understands that its legislation fully respects the paragraph referred to.[52]

To sum up. The protection of freedom of expression is vast and complex in the Swedish constitution. It is therefore utterly important to understand the details and the nuances of the jurisdiction. The following example may be considered an illustration of what has been described thus so far in this article. Any person fleeing a fundamentalist Islamist regime and arriving in Sweden, and as a criticism of the fundamentalist regime burns the Quran is rightly and legally practising his/her freedom of expression (and possibly also his/her right to demonstrate). It is another thing when a person, driven by islamophobic motives, does the same thing in front of a mosque during the

[50] SOU 2023:17.

[51] SOU 2023:17 p. 29. See also Nuotio, p. 4.

[52] See also SOU 2019:27. The UN Special Rapporteur on freedom of religion or belief stresses in her conclusions that Sweden being a dualist country undermines the protection of the ICCPR and especially the freedom of religion, see A/HRC/55/47/Add.2.

celebration of Eid. With respect to its limitation clauses, however, the main criminal provision has been written in a rather vague manner and does not include any references to a threat to public order or to danger.

III. Freedom of Expression, Digitalisation and Fundamental Rights

Protection Online

As has been explained above, the constitutional structure of Sweden in relation to freedom of speech is complex and framed in detail. As for expressions in the digital sphere, one needs to follow the above-mentioned scheme. Firstly, one needs to distinguish if the FPA or the FLFE is applicable. If so, for example due to the fact that an expression has been made in a journals' transmission on-line (and the journal has applied for and received authorization to get the special status according to the FLFE), one needs to apply that constitution and all the restrictions that it contains for securing free speech.

If the FPA nor the FLFE are not applicable, the IoG is always applicable providing a general protection of free speech. In the context of the FPA and FLFE, political and religious expressions are more important as expressions aiming at providing information and creating free debate are the focus of those two constitutions. The IoG is applicable for all expressions, also on-line if the FLFE is not applicable and in the context of the IoG all sorts of expressions (political, religious, artistic, scientific, commercial, entertainment-related) are included.

IV. Blasphemy and Art – Ecclesiastical Objects, Symbols, and their Protection

In the course of the past year Sweden has repeatedly seen two persons (P and S) burning the Quran in public places. Most recently, Lutheran religious leaders have joined in the debate and have echoed international voices that would like to see a legislative prohibition instated that would provide further protection for religious symbols.[53] In the Swedish debate, others have stated that burning holy books can in itself be a religious statement that the dominant religion might disapprove of, while the new religious initiative uses it as a way to create debate (compare, e.g., Martin Luther).[54]

There have been recent incidents in Sweden where the Muslim community has felt that their religious feelings have been violated in relation to art. The artist D.P. has on several occasions been condemned for hate speech, since he has been wearing clothes displaying Nazi symbols and publications in the social media. Another artist, L.V., made drawings of the prophet Mohammed in the shape of a dog and also of a pig

[53] Lambertz, G, Bränna *Koranen är hets mot folkgrupp. Edvinsson, Notiser – Förargelseväckande beteende med koran.*

[54] See Madeleine Sultan Sjökvist.

that he compared with being Jewish. These drawings were published in newspapers and were accused of representing hate speech. The Chancellor of Justice, however, decided that it could not be said to be a criminal offence.

The events of 2006 and the terrorist attacks that followed them have changed criminal law and anti-terrorism laws in the sense that there are more actions that are now criminalized, and also more severely. This has, however, not been done in order to protect religious feelings.

It must be stressed that the church decides what happens on the premises of a church. And what an artist would like to do as an artist remains the artist's decision. In Sweden, artists have been invited into churches to express their art. One example that created a big debate was when the artist E.A. was invited to Uppsala Cathedral to show her art work, Ecce homo. Huge photos illustrating famous scenes from the life of Jesus, but interpreted through models being homosexual, transgender etc., caused numerous reactions.

But in general, there has been no discussion in the public realm. The variety of art and expressions is enormous thanks to the variety of churches and confessions in the country. What has started to become a debate is, however, the question of whether art is being censured by museums and locations that do not belong to faith communities.[55] There have been at least six occasions in the 21st Century on which art works have been taken down and not shown to the public.[56]

Concluding comment

The development of the basic features of modern Sweden more than a century years ago was constructed on free speech, where the dominant institutions were heavily criticized in the democratic movement. The majority church, the police, the army, and the king were all heavily criticised and consequently reacted fiercely to the criticism.[57] The present-day Swedish debate concerns the fact that a handful of individuals have been given a dominant position from which to express their opinions, with no possibility of any counter-expression. It is time to reflect on whether that is what we need, More debate, or silence? Freedom of speech nowadays protects expressions that are offensive and which are not always easy for everyone to agree with. One could then ask why it is so valuable to protect free speech? This is a discussion that we need to have regularly and continuously, from decade to decade and generation to generation. But if we draw the line and decide to limit this freedom even further, then we risk diminishing the possibility of discussing its content and limits in the future.

[55] SAKINE MADON: Det låter "som i Iran" för att vi länge anpassat oss (unt.se).

[56] *Ibid.*

[57] Herlitz, N, *Grunddragen i det svenska statsskickets historia*.

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FREEDOM OF CONSCIENCE, RELIGION, AND EXPRESSION IN THE UK

Christopher Grout[1]

I. Freedom of Conscience, Religion, and Expression

1.1. The fundamental norms regulating freedom of expression

Freedom of expression is protected by virtue of Article 10 of the European Convention on Human Rights ("the Convention") which provides that:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are 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, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

As the European Court of Human Rights ("the ECtHR") has explained:

> The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably

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> received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.[2]

There is no shortage of domestic case law dealing with the importance of freedom of expression in a democratic society. In *Redmond-Bate v Director of Public Prosecutions*[3] Sedley LJ stressed that:

> Freedom only to speak inoffensively is not worth having. What Speaker's Corner (where the law applies as fully as anywhere else) demonstrates is the tolerance which is both extended by the law to opinion of every kind and expected by the law in the conduct of those who disagree, even strongly, with what they hear. From the condemnation of Socrates to the persecution of modern writers and journalists, our world has seen too many examples of State control of unofficial ideas. A central purpose of the European Convention on Human Rights has been to set close limits to any such assumed power. We in this country continue to owe a debt to the jury which in 1670 refused to convict the Quakers William Penn and William Mead for preaching ideas which offended against State orthodoxy.[4]

As to the role of the judge in cases involving freedom of expression, Hoffman LJ in *R v Central Independent Television plc*[5] observed that:

> The motives which impel judges to assume a power to balance freedom of speech against other interests are almost always understandable and humane on the facts of the particular case before them. Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right

[2] *Handyside v United Kingdom* (1979-80) 1 EHRR 737, at paragraph 49.

[3] [2000] H.R.L.R 249.

[4] *Ibid.,* at 260. It will be recalled that, during the reign of Charles II, Penn and Mead were charged with unlawful assembly having allegedly breached the Conventicle Act 1664 which essentially forbade religious gatherings of more than five people (other than immediate family) outside the auspices of the Church of England. Both faced trial by jury but were ultimately acquitted, much to the frustration of the trial judge who fined (and temporarily imprisoned) the jury for contempt of court. One of the jurors, Edward Bushel, petitioned the Court of Common Pleas for a writ of *habeas corpus*, the then Chief Justice of the Court of Common Pleas, Sir John Vaughan, concluding that a jury could not be punished on account of the verdict it returned, nor could it be forced into changing a verdict which the trial judge does not approve of; see *Bushel's Case* (1670) 124 E.R. 1006.

[5] [1994] Fam. 192.

> to say things which "right-thinking people" regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute.[6]

Freedom of thought, conscience and religion is likewise protected under the Convention. Article 9 provides that:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The exercise of rights under Articles 9 and 10 often clash, with recourse being made to the courts to resolve the resulting disputes. In *Central Independent Television plc* Hoffman LJ considered that:

> It cannot be too strongly emphasised that outside the established exceptions, or any new ones which Parliament may enact in accordance with its obligations under the Convention, there is no question of balancing freedom of speech against other interests. It is a trump card which always wins.[7]

In addition to the Human Rights Act 1998 (the main purpose of which was to give further effect to the rights and freedoms guaranteed under the Convention), the United Kingdom has also enacted the Equality Act 2010 ("the 2010 Act") which seeks to prevent discrimination on the basis of nine protected characteristics, namely (i) age, (ii) disability, (iii) gender reassignment, (iv) marriage and civil partnership, (v) pregnancy and maternity, (vi) race, (vii) religion or belief, (viii) sex and (ix) sexual orientation.[8] Though the 2010 Act contains carefully circumscribed exceptions[9], it has brought a structure to equality legislation which was hitherto lacking. As the Employment Statutory Code of Practice puts it:

> The Equality Act 2010 represents the culmination of years of debate about how to improve British equality law. It offers individuals stronger protection against discrimination. It gives employers and businesses greater clarity about their respon-

6 *Ibid.,* 202.
7 *R v Central Independent Television plc* (n4) 203.
8 Equality Act 2010, s. 4.
9 See Schedule 9(1) and (9)2.

> sibilities. And it sets a new expectation that public services must treat everyone with dignity and respect.[10]

The extent to which something constitutes a "belief" is often the subject of litigation, particularly within an employment context. In *Grainger plc v Nicholson*[11] the Employment Appeal Tribunal set out the criteria to be satisfied in determining whether something qualifies as a philosophical belief, namely that:

(a) The belief must be genuinely held.
(b) It must be a belief and not an opinion or viewpoint based on the present state of information available.
(c) It must be a belief as to a weighty and substantial aspect of human life and behaviour.
(d) It must attain a certain level of cogency, seriousness, cohesion and importance.
(e) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.[12]

Applying those criteria is not, however, always straightforward. *Forstater v CDG Europe and Others*[13], a judgment of the Employment Tribunal, concerned the Claimant's belief that sex is biologically immutable. She believed that there exists only two sexes- male and female- and that it is impossible for a person to change their sex. She refused to accept that a transwoman is, in reality, a woman or that a transman is a man. The Claimant had been a Visiting Fellow of the Respondents and had entered into a consultancy agreement with them. That agreement came to an end because, in the Claimant's view, she had expressed 'gender critical' opinions in line with her beliefs. The Claimant's contention was that her opinions constituted a philosophical belief and she had been discriminated against because of them.

Whilst the Employment Tribunal was prepared to accept that (a)–(d) of the *Grainger* criteria were satisfied, as to (e) the judge observed that:

> However, I consider that the Claimant's view, in its absolutist nature, is incompatible with human dignity and fundamental rights of others. She goes so far as to deny the right of a person with a Gender Recognition Certificate to be the sex to which they have transitioned. I do not accept the Claimant's contention that the Gender Recognition Act produces a mere legal fiction. It provides a right, based on

[10] Equality and Human Rights Commission, Equality Act 2010 Code of Practice, Employment Statutory Code of Practice (The Stationery Office Limited, 2011) 18. As to the legal status of the Code, paragraph 1.13 of the Code provides: 'The Code does not impose legal obligations. Nor is it an authoritative statement of the law; only the tribunals and the courts can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings'.

[11] [2009] UKEAT 0219_09_0311.

[12] *Ibid.*, paragraph 24.

[13] Case Number 2200909/2019 (18 December 2019).

> the assessment of the various interrelated convention rights, for a person to transition, in certain circumstances, and thereafter to be treated for all purposes as being of the sex to which they have transitioned. In *Goodwin* a fundamental aspect of the reasoning of the ECHR was that a person who has transitioned should not be forced to identify their gender assigned at birth. Such a person should be entitled to live as a person of the sex to which they have transitioned. That was recognised in the Gender Recognition Act which states that the change of sex applies for "all purposes". Therefore, if a person has transitioned from male to female and has a Gender Recognition Certificate that person is legally a woman. That is not something that the Claimant is entitled to ignore.
>
> Many trans people are happy to discuss their trans status. Others are not and/or consider it of vital importance not to be misgendered. The Equal Treatment Bench Book notes the TUC survey that refers to people having their transgender status disclosed against their will. The Claimant does not accept that she should avoid the enormous pain that can be caused by misgendering a person, even if that person has a Gender Recognition Certificate. In her statement she says of people with Gender Recognition Certificates "In many cases people can identify a person's sex on sight, or they may have known the person before transition…. There is no general legal compulsion for people not to believe their own eyes or to forget, or pretend to forget, what they already know, or which is already in the public domain." The Claimant's position is that even if a trans woman has a Gender Recognition Certificate, she cannot honestly describe herself as a woman. That belief is not worthy of respect in a democratic society. It is incompatible with the human rights of others that have been identified and defined by the ECHR and put into effect through the Gender Recognition Act.[14]

In relation to freedom of expression, the judge observed that:

> Having protected characteristics, including philosophical beliefs, does not prevent people from having to take care not to harass others. That being said, full regard must also be given to the qualified convention right of freedom of expression.[15]

And later:

> Even paying due regard to the qualified right to freedom of expression, people cannot expect to be protected if their core belief involves violating others dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.[16]

That judgment was, however, overturned on appeal.[17] Materially, the Employment Appeal Tribunal held that in assessing whether a person's rights under Articles 9 or 10 of the Conventions have been infringed:

[14] *Ibid.*, paragraphs 84-85.
[15] *Ibid.*, paragraph 75.
[16] *Ibid.*, paragraph 87.
[17] UKEAT/0105/20/JOJ.

> … there is a preliminary question as to whether the person qualifies for protection at all, or, to use the ECtHR's terminology, as to whether the person "fall[s] outside the scope of protection of Article 10 of the Convention by virtue of Article 17": *Lilliendahl* at para 39. Where the expression amounts to the "gravest form of hate speech" then the protection would not apply, as Article 17 would operate to deprive the person of the protection that they seek to invoke. However, if the expression does not fall into that first category, then the question is whether the steps taken by the State to restrict such expression are justified within the meaning of Article 10(2). Thus even comments which are "serious, severely hurtful and prejudicial", or which promote intolerance and detestation of homosexuals would not fall outside the scope of Article 10 altogether. However, that does not mean that the individual making such comments has free rein to make them in any circumstance at all. The individual's freedom to express their views is limited to the extent provided for by Article 10(2) and it will then be for the Court to assess whether any limitation imposed by the State is justified.[18]

The Employment Appeal Tribunal went on to observe that:

> In our judgment, it is important that in applying *Grainger V*, Tribunals bear in mind that it is only those beliefs that would be an affront to Convention principles in a manner akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms, that should be capable of being not worthy of respect in a democratic society. Beliefs that are offensive, shocking or even disturbing to others, and which fall into the less grave forms of hate speech would not be excluded from the protection. However, the manifestation of such beliefs may, depending on circumstances, justifiably be restricted under Article 9(2) or Article 10(2) as the case may be.[19]

The Employment Appeal Tribunal concluded that the Employment Tribunal had fallen into error in two key respects:

> First, the Tribunal's only task at this preliminary stage was to determine if the Claimant's belief fell within s.10, EqA. That analysis was confined, in Convention terms, to the first stage of determining whether the belief qualified for protection under Article 9, ECHR at all. There is no balancing exercise between competing rights at this first stage, because it is only a belief that involves in effect the destruction of the rights of others that would fail to qualify. The balancing exercise only arises under the second stage of the analysis under Article 9(2) (or Article 10(2)) in determining whether any restriction on the exercise of the right is justified. That exercise is context specific.
>
> The second error was in imposing a requirement on the Claimant to refer to a trans woman as a woman to avoid harassment. In the absence of any reference to specific circumstances in which harassment might arise, this is, in effect, a blanket

[18] *Ibid.*, at paragraph 66.
[19] *Ibid.*, at paragraph 79.

> restriction on the Claimant's right to freedom of expression insofar as they relate to her beliefs. However, that right applies to the expression of views that might "offend, shock or disturb". The extent to which the State can impose restrictions on the exercise of that right is determined by the factors set out in Article 10(2), i.e. restrictions that are "prescribed by law and are necessary in a democratic society … for the protection of the reputation or rights of others…" It seems that the Tribunal's justification for this blanket restriction was that the Claimant's belief "necessarily harms the rights of others". As discussed above, that is not correct: whilst the Claimant's belief, and her expression of them by refusing to refer to a trans person by their preferred pronoun, or by refusing to accept that a person is of the acquired gender stated on a GRC, could amount to unlawful harassment in some circumstances, it would not always have that effect: see para 99 above. In our judgment, it is not open to the Tribunal to impose in effect a blanket restriction on a person not to express those views irrespective of those circumstances.[20]

The matter was remitted to a differently constituted Employment Tribunal which, following a trial, upheld, in part, the Claimant's claim for direct discrimination because of belief.[21]

Turning to the topic of the impact of Sharia Law, in 2018 a report was presented to Parliament entitled "The independent review into the application of sharia law in England and Wales".[22] It had been commissioned at the request of the then Home Secretary. Within its Executive Summary, the report noted that:

> There is no clear definition of what constitutes a sharia council. Sharia councils vary in size and make up. There is also no accurate statistic on the number of sharia councils, with estimates in England and Wales varying from 30 to 85. To the best of our knowledge, there are no sharia councils in Scotland. For the purposes of this review, we are defining sharia councils as a voluntary local association of scholars who see themselves or are seen by their communities as authorised to offer advice to Muslims principally in the field of religious marriage and divorce.
>
> Sharia councils have no legal status and no legal binding authority under civil law. Whilst sharia is a source of guidance for many Muslims, sharia councils have no legal jurisdiction in England and Wales. Thus if any decisions or recommendations are made by a sharia council that are inconsistent with domestic law (including equality policies such as the Equality Act 2010) domestic law will prevail. Sharia councils will be acting illegally should they seek to exclude domestic law. Although they claim no binding legal authority, they do in fact act in a decision making capacity when dealing with Islamic divorce.
>
> Common misconceptions around sharia councils often perpetuate owing to the use of incorrect terms such as referring to them as 'courts' rather than councils or

[20] *Ibid.*, paragraphs 102-103.

[21] Case Number: 2200909/2019 (6 July 2022).

[22] Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/678478/6.4152_HO_CPFG_Report_into_Sharia_Law_in_the_UK_WEB.pdf.

> to their members as 'judges'. These terms are used both in media articles but also on occasion by the sharia councils themselves. It is important to note that sharia councils are not courts and they should not refer to their members as judges. It is this misrepresentation of sharia councils as courts that leads to public misconceptions over the primacy of sharia over domestic law and concerns of a parallel legal system. The recommendations included in this report, such as changes to marriage law, are designed to promote equality between religions in ways that should challenge misconceptions of a parallel legal system and encourage integration.

The report made three core recommendations: (a) changes to matrimonial legislation to ensure that civil marriages occur before or at the same time as the Islamic marriage, (b) awareness campaigns, educational programmes and other similar measures in order to (i) educate and inform women of their rights and responsibilities, including the need to highlight the legal protection civilly registered marriages provide, (ii) ensure that sharia councils operate within the law and comply with best practice, non-discriminatory processes and existing regulatory structures, and (iii) raise awareness of the availability of legal aid in cases involving domestic violence and child protection issues, and (c) the need to regulate sharia councils with the particular aim of preventing discrimination.

In the wake of the review, the Family Court considered the case of *NA v MSK v The Attorney General* [2018] EWFC 54. In that case, the wife petitioned for divorce. The husband defended the petition on the basis that the parties had not entered a marriage which was valid according to English law. In her reply, the wife averred that the presumption of marriage arising out of cohabitation and reputation applied so as to validate the marriage. In the alternative, she averred that the marriage was a void marriage within section 11(a)(iii) of the Matrimonial Causes Act 1973. It was common ground that the parties had undertaken a religious marriage in Dubai but had not followed it up with a civil ceremony. The central issue for the Court was whether a Nikah marriage ceremony creates an invalid or void marriage in English law. The Family Court concluded that it was a void marriage such that the wife was entitled to a decree of nullity.

The Court of Appeal allowed an appeal brought by the Attorney General.[23] It held that there had, in the present case, been no ceremony in respect of which a decree of nullity could be granted. The Court observed that the State's failure to recognise the validity of the parties' Islamic marriage did not constitute a violation of Article 8 of the Convention. The Court held that whether a marriage was void depended on the facts at the date of its alleged solemnisation, not on future events such as an intention to undertake another ceremony, or the birth of children. Put simply, there had been no marriage in respect of which a decree of nullity could be made.

[23] See [2020] EWCA Civ 122.

1.2. **Freedom of religious expression and hate speech**

See Section II below.

1.3. **Context of public debate**

See Section II below.

II. Blasphemy, Religious Hate Speech and Limitations of Freedom of Speech in Religious Context

2.1. **Blasphemy and defamation of religion**

The offences of blasphemy and blasphemous libel under the common law of England and Wales were abolished by virtue of s.79 of the Criminal Justice and Immigration Act 2008. In Scotland, the common law offence of blasphemy was abolished by s.16 of the Hate Crime and Public Order (Scotland) Act 2021. Blasphemy and blasphemous libel continue to be offences under the common law of Northern Ireland despite repeated campaigns for the law to come into line with that of the rest of the United Kingdom.

2.2. **From blasphemy to the prohibition of hate speech**

Although the offence of blasphemy has been repealed throughout most of the United Kingdom, there exist a range of offences addressing, in broad terms, the protection of religious worship and the protection of public order.

As to the former category, s.36 of the Offences Against the Person Act 1861 creates the offence of obstructing or assaulting a clergyman or other minister in the discharge of his duties. The section provides that:

> Whosoever shall, by threats or force, obstruct or prevent or endeavour to obstruct or prevent, any clergyman or other minister in or from celebrating divine service or otherwise officiating in any church, chapel, meeting house, or other place of divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place, or shall strike or offer any violence to, or shall, upon any civil process, or under the pretence of executing any civil process, arrest any clergyman or other minister who is engaged in, or to the knowledge of the offender is about to engage in, any of the rites or duties in this section aforesaid, or who to the knowledge of the offender shall be going to perform the same or returning from the performance thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years.

Under s.2 of the Ecclesiastical Courts Jurisdiction Act 1860, it is an offence, punishable by up to two months in prison, to commit "riotous, violent or indecent

behaviour" during the course of lawful liturgical action. Because of the origins of the legislation, it is limited to

> …any cathedral church, parish or district church or chapel of the Church of England . . . or in any chapel of any religious denomination, or in England in any places of religious worship duly certified under the provisions of the Places of Worship Registration Act 1855.

There are also a number of offences designed to protect the burial of the dead and prohibit the unlawful disturbance of human remains.[24]

As to marriage, it is an offence for a person to knowingly and wilfully solemnise a marriage according to the rites of the Church of England or Church in Wales whilst, among other things, falsely pretending to be in Holy Orders.[25] In addition, Part 10 of the Anti-social Behaviour, Crime and Policing Act 2014 creates a number of offences in connection with forced marriages.

Turning to the issue of public order, offences under the Public Order Act 1986 are among the most common to be seen being prosecuted in the criminal courts. Though not limited to such circumstances, there is an inter-relationship between these offences and freedom of speech, including protecting religious believers from what is often referred to as "hate speech". Examples of successful prosecutions include the display of a poster in a flat window portraying events of 9/11 with the words "Islam out of Britain" and "Protect the British people"[26], as well as the holding of a sign by an evangelical preacher which read "Stop Immorality. Stop Homosexuality. Stop Lesbianism. Jesus is Lord."[27]

The Public Order Act 1986 was amended by the Racial and Religious Hatred Act 2006, creating a new Part entitled "Hatred against Persons on Religious Grounds". Broadly speaking, the Act creates offences which are designed to protect groups of believers from being threatened in a way that is defined by reference to religious belief or lack of such a belief. For each offence, the offending words, behaviour, written material, recordings, or programmes must be threatening and intended to stir up religious hatred, that term being defined as "hatred against a group of persons defined by reference to religious belief or lack of religious belief".[28] Importantly, s.26J of the Act provides that:

> Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult

[24] See the Offences Against the Personal Act 1861, s.36, the Burial Laws Amendment Act 1880, s.7, the Burial Act 1857, s. 25, and Local Authorities' Cemeteries Order 1977, s. 18.

[25] Marriage Act 1949, s. 75.

[26] *Norwood v Director of Public Prosecutions* [2003] EWHC 1564 (Admin).

[27] *Hammond v Director of Public Prosecutions* [2004] EWHC 69 (Admin).

[28] Section 29A.

> or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system.

A person guilty of an offence is liable to a term of imprisonment not exceeding seven years.[29]

In addition to these specific offences, s.28(1) of the Crime and Disorder Act 1998 makes provision for offences which are racially or religiously aggravated. The offences to which the provision relates are pre-existing offences (such as various assaults and public order) but are aggravated by presence of racial or religious hostility. Racial or religious aggravation is proven where either (a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial or religious group, or (b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.

Where an aggravated offence is proven, the sentence passed on the offender will be higher than what would otherwise have been imposed had there been no aggravation; indeed, the offences to which the 1998 Act relates carry higher maximum sentences when aggravated.

In any event, s.66 of the Sentencing Act 2020 applies where a court makes a finding that an offence (other than one to which the 1998 Act relates) has been aggravated by hostility based on race, religion, disability, sexual orientation, or transgender identity. Where a court finds that such an offence has been aggravated, it must state so in open court and impose a higher sentence explaining, in the process, what the sentence would have been absent the aggravation and what it is in light of the aggravation.

2.3. **Challenging dominant paradigms**

Section 51 of the International Criminal Court Act 2001 makes it an offence for a person to commit "genocide, a crime against humanity or a war crime" where the offence is committed either (a) in England or Wales or (b), if outside the United Kingdom, by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction.

Genocide is defined as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

[29] Section 29L.

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.[30]

Crimes against humanity are defined as any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[31]

War crimes have an extensive definition which includes, but is not limited to, grave breaches of the Geneva Conventions of 12 August 1949.[32]

Such offences are triable only on indictment and can only be instituted with the consent of the Attorney General.[33]

Save for offences involving murder (which attract an automatic life sentence with the judge specifying a minimum term which the offender must spend in custody before the parole board may consider release), the maximum sentence available is 30 years' imprisonment.[34]

[30] Schedule 8(6).
[31] Schedule 8(7).
[32] Schedule 8(8).
[33] Section 53(2) and (3).
[34] Section 53 (5) and (6).

There is no specific offence of Holocaust denial in the United Kingdom. However, in *Ellis v Parmagan Limited*[35], a case before the Employment Tribunal, the Claimant alleged discrimination on the basis of his beliefs, one of which was that no Jewish people were killed by the use of poison gas in concentration camps during the Second World War. The Employment Tribunal held that such a view did not amount to a belief for the purposes of the Equality Act 2010. To the extent that it was a belief, it was neither cogent nor cohesive, nor was it worthy of respect in a democratic society.[36]

In *Irving v Penguin Books Limited and Professor Deborah Lipstadt*[37] the Court of Appeal heard an application for permission to appeal against the trial judge's dismissal of a claim brought by the Applicant alleging that he had been libelled in a book entitled "Denying the Holocaust – The Growing Assault on Truth and Memory" written by Professor Deborah Lipstadt and published in the United Kingdom by Penguin Books Ltd in 1994.

The Applicant had written over 30 books and specialised in the history of the Third Reich. The "Denying the Holocaust" publication contained various criticisms of the Applicant of which he complained. Examples included the statement that "scholars have described Irving as a "Hitler partisan wearing blinkers" and have accused him of "distorting evidence and manipulating documents to serve his own purpose". It was further stated that "he has been accused of skewing documents and misrepresenting data in order to reach historically untenable conclusions, particularly those that exonerate Hitler". Further, it was said that "Irving is one of the most dangerous spokespersons for holocaust denial. Familiar with historical evidence, he bends it until it conforms with his ideological leanings and political agenda."

On the subject of holocaust denial, and in dismissing the application for permission to appeal, the Court of Appeal observed that:

> "Having regard to the views expressed by the applicant about a range of events in the history of the Third Reich, we agree with the judge that the applicant may be described as a Holocaust denier. We acknowledge that he has over the years modified, and in some respects significantly modified, his views upon some of the relevant events. However, the respondents were justified in describing him as "one of the most dangerous spokespersons for Holocaust denial" having regard to the views he has expressed and in some respects persisted in, and the manner and force with which he has expressed them. The use of the word "dangerous" was justified by reason of his historiographical methods considered by the judge and in this judgment."[38]

[35] Case No: 1603027/2013.

[36] *Ibid.*, para. 30 *et seq.*

[37] [2001] EWCA Civ 1197.

[38] *Ibid.*, para. 92. For the incredibly detailed judgment at first instance, see *Irving v. Penguin Books Limited*, *Deborah E. Lipstat* [2000] EWHC QB 115.

Professor Lipstadt later wrote about her experiences of being taken to court which prompted the 2016 film *Denial* in which a dramatisation of the trial featured.

In *R (on the application of Chabloz) v Crown Prosecution Service*[39] the Appellant's convictions under the Communications Act 2003 were upheld in circumstances where she had published online a hyperlink which, when followed, directed to a blog of the Appellant's which showed her performing antisemitic songs.

2.4. **Is hate speech an expression of religious freedom?**

See sections 2.2 and 2.3 above.

The European Commission against Racism and Intolerance published its fifth report on the United Kingdom in 2016.[40] Conclusions on the implementation of the recommendations set out in that report were published in 2019.[41]

III. Freedom of Expression, Digitalisation and Fundamental Rights Protection Online

Insofar as regulation of the print media (i.e., newspapers and magazines) is concerned, the Independent Press Standards Organisation was established in 2014. It ensures, among other things, that the print media follows the Editors' Code, the latest iteration of that having come into effect in January 2021. Clause 12 of the Editors' Code makes clear that:

> The press must avoid prejudicial or pejorative reference to an individual's race, colour, religion, sex, gender identity, sexual orientation or to any physical or mental illness or disability.
>
> Details of an individual's race, colour, religion, gender identity, sexual orientation, physical or mental illness or disability must be avoided unless genuinely relevant to the story.

Broadcast media is regulated by the Office of Communications (OFCOM). OFCOM's objectives are set out in primary legislation and include ensuring that the proper degree of responsibility is exercised with respect to the content of programmes which are religious programmes.[42] Religious programmes should not involve (a) any improper exploitation of any susceptibilities of the audience for such a programme,

[39] [2019] EWHC 3094 (Admin).

[40] Available at https://rm.coe.int/government-comments-on-the-fifth-report-on-the-united-kingdom/16808b5762.

[41] Available at https://rm.coe.int/interim-follow-up-conclusions-on-the-united-kingdom-5th-monitoring-cyc/168094ce06.

[42] Communications Act 2003, s. 319(2)(e).

or (b) any abusive treatment of the religious views and beliefs of those belonging to a particular religion or religious denomination.[43]

Advertising is regulated by the Advertising Standards Authority which publishes codesfor television and radio. Article 15 of the Broadcast Code makes special provision for "Faith, religion and equivalent systems of belief" which seeks to "strike a balance between freedom of speech and the prevention of advertising that could be harmful." The aim is identified as being to:

- reduce the social harm that can result from damage to inter-faith relations
- protect the young and allow parents to exercise choice in their children's
- moral and philosophical education
- protect those who are vulnerable because, for example, of sickness or bereavement
- prevent potentially harmful advertisements from exploiting their audience.

Under Article 15.4,

> Television advertisements must not promote psychic practices or practices related to the occult, except those permitted by rule 15.5. Radio advertisements may promote psychic and occult practices but must not make efficacy claims. Psychic and occult-related practices include ouija, satanism, casting of spells, palmistry, attempts to contact the dead, divination, clairvoyance, clairaudience, the invocation of spirits or demons and exorcism.

Article 15.5 makes exceptions in respect of matters which are purely for entertainment value and those that offer generalised advice (such as horoscopes). Specific provision is also made as regards the regulation of pre-recorded tarot-based prediction services.

Under Articles 15.9 and 15.10, advertisements must not refer to the alleged consequences of faith or lack of faith and must not present the advertiser's beliefs as the "one" or "true" faith. Further, advertisements must not denigrate the beliefs of others.

Under Article 15.13, advertisements must not claim that faith healing, miracle working or faith-based counselling can treat, cure or alleviate physical or mental health problems; they may, however, make restrained and proportionate claims that such services can benefit emotional or spiritual well-being.

Online expression (particularly through social media platforms such as Twitter) has given rise to litigation. *Miller v College of Policing and Another*[44] concerned the lawfulness of the First Defendant's operational guidance on "non-criminal hate speech" and the way in which a local police force had dealt with a complaint by a member of the public about things the Claimant had posted on Twitter concerning transgender issues.

[43] *Ibid.*, s. 319(6).
[44] [2020] EWHC 225 (Admin).

The Claimant, a former police officer, had posted a number of tweets concerning the transgender debate some of which, the judge acknowledged, "contained profanity and/or abuse".[45] He was contacted by a police officer and warned that if his tweeting escalated it may turn into a criminal offence. Counsel for the Defendants submitted that there had been no interference at all with the Claimant's free expression rights or, if there had, it was at a trivial level. The judge rejected this:

> In my judgment these submissions impermissibly minimise what occurred and do not properly reflect the value of free speech in a democracy. There was not a shred of evidence that the Claimant was at risk of committing a criminal offence. The effect of the police turning up at his place of work because of his political opinions must not be underestimated. To do so would be to undervalue a cardinal democratic freedom. In this country we have never had a Cheka, a Gestapo or a
>
> Stasi. We have never lived in an Orwellian society…
>
> …Warning the Claimant that in unspecified circumstances he might find himselfbeing prosecuted for exercising his right to freedom of expression on Twitterhad the capacity to impede and deter him from expressing himself on transgender issues. In other words, the police's actions, taken as a whole, had a chilling effect on his right to freedom of expression. That is an interference for the purposes of Article 10(1).[46]

The judge concluded that the police's treatment of the Claimant disproportionately interfered with his right to freedom of expression, which the judge described as "an essential component of democracy"[47]

IV. Blasphemy and Art – Ecclesiastical Objects, Symbols, and Their Protection

As long as it does not amount to a breach of the criminal law, art and artistic objects are generally not subject to regulation. Section 1(1) of the Obscene Publications Act 1959 provides that:

> For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

Section 2 creates the offence of publishing an obscene article, which carries a maximum sentence of 5 years' imprisonment. Section 4 provides for a defence of public good. In short, if it is proved that publication of the article in question is justi-

[45] *Ibid.*, para. 23.
[46] *Ibid.*, paras. 259-261.
[47] *Ibid.*, para. 289.

fied as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern, then the person will not be guilty of an offence. Similarly, in respect of a film or soundtrack, it is a defence to show that publication is justified as being for the public good on the ground that it is in the interests of drama, opera, ballet or any other art, or of literature or learning.

Prosecutions under the Act are rare. However, in *R v N*[48] the Defendant was convicted of an offence of female genital mutilation along with an offence under s.2 as a result of having sent to others, via WhatsApp, videos of adults engaging in sexual activity with animals.

Insofar as cinematic performances are concerned, the British Board of Film Classification has produced guidelines which state, among other things, that the strength and impact of discrimination (including religious discrimination) should be taken into account as part of the classification process.[49] Famously, the film Visions of Ecstasy was refused a certificate for public showing because of its erotic content on the grounds of possible blasphemous libel (which was at that time still actionable). The case ended up before the European Court of Human Rights which held that the refusal to give a classification to the video was neither contrary to Article 10 of the Convention nor disproportionate.[50]

[48] Central Criminal Court, 8 March 2019.

[49] Available at https://www.bbfc.co.uk/about-classification/classification-guidelines.

[50] *Wingrove v United Kingdom* [1996] ECtHR 60 (No. 17419/90) (25 November 1996).