



# VENICE COMMISSION OF THE COUNCIL OF EUROPE

## Joint Council on Constitutional Justice

### MINI CONFERENCE

Blasphemy and other  
limitations to the freedom  
of expression

Bucharest, Romania  
12 June 2015





# VENICE COMMISSION

## Joint Council on Constitutional Justice

### MINI CONFERENCE

Bucharest, Romania

Friday, 12 June 2015

### TABLE OF CONTENTS

<b>REPORT.....</b>	<b>5</b>
<b>PROGRAMME .....</b>	<b>7</b>
<b>OPENING .....</b>	<b>9</b>
<b>MORNING SESSION</b>	
Chair: Il-Won KANG Co-President of the Joint Council on Constitutional Justice	
<b>SPEAKERS</b>	
<b>Krisztina KOVACS</b> - A brief overview of the 'constitutional balancing' between free speech and protected interests connected to religious beliefs.....	<b>11</b>
<b>Aida GRGIC</b> - Blasphemy and other limitations to the freedom of expression in the case law of the European Court of Human Rights.....	<b>15</b>
<b>Cristián GARCIA MECHSNER</b> - Right to compensation of immaterial damages due to an abusive or offensive exercise of the freedom of expression.....	<b>23</b>
<b>Marieta SAFTA</b> - Freedom of conscience.....	<b>27</b>
<b>AFTERNOON SESSION</b>	
Chair: Krisztina KOVACS, Co-President of the Joint Council on Constitutional Justice	
<b>SPEAKERS</b>	
<b>Sarahrose MURPHY</b> - Blasphemy Law in Ireland: an overview of its historical development and current proposals for reform.....	<b>33</b>
<b>Marjolein VAN ROOSMALEN</b> - What happened to the 'Blasphemy Clause' in the Dutch Legislation?.....	<b>39</b>
<b>Vesna BOŽIČ</b> - Freedom of expression in the recent case law of the Slovenian Constitutional Court.....	<b>43</b>
<b>Sung He LIM</b> - Blasphemy and other limitations to the freedom of expression.....	<b>47</b>





## REPORT

The co-chairs of the Joint Council on Constitutional Justice, Mr Kang and Ms Krisztina Kovács chaired the Mini Conference. The speakers were: Ms Vesna Božič, Ms Aida Grgic, Ms Sung He Lim, Ms Krisztina Kovács, Mr Cristian Garcia Mechsner, Ms Sarahrose Murphy, Ms Marieta Safta and Ms Marjolein Van Roosmalen.

Mr Dürr explained that the topic of the Mini Conference was chosen following the attack by gunmen of the office of the French satirical magazine Charlie Hebdo in Paris, France on 7 January 2015 that left 12 people dead. This led to the organisation of “Je suis Charlie” rallies all over France and abroad – supporting freedom of expression.

Mr Dürr told participants that the Venice Commission had organised a conference on blasphemy in Athens, Greece in 2008, after which the Commission adopted a Report on the relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred (CDL-AD(2008)026)<sup>1</sup>. This report looked into the issue of whether there should be criminal sanctions for blasphemy. The Venice Commission differentiated between hate speech (which should be criminalised) and blasphemy (which should not), under the motto: not everything that can be said should be said, but not everything said should be punished. The Venice Commission took a clear position against criminalising blasphemy, but said that civil or administrative sanctions could be applied. It also called upon member states to open a dialogue for the responsible use of free speech.

The speakers intervened on issues that tie their Courts’ experience to the topic of blasphemy and other limits to the freedom of expression such as: finding a balance between free speech and protecting interests connected to religious beliefs; the relevant case law of the European Court of Human Rights, the Court of Justice of the European Union and the Constitutional Courts of Slovenia and of Romania on the issue; the changes and developments in relation to blasphemy in Ireland and the Netherlands and the right to compensation of immaterial damages as a result of an abuse of the freedom of expression in Chile.

Discussions revolved around whether there is, as Dworkin termed, a “right to ridicule” beliefs or whether there was a need for blasphemy laws. Participants agreed that there is a difference between blasphemy and hate speech or incitement to hatred. It was, however, quite clear to them that there was no general agreement on where to draw the line. The European Court of Human Rights, in this respect, leaves states a relatively wide margin of appreciation in terms of what may be considered “religious insult”.

Participants also agreed that the founding principle for many International Organisations was “tolerance”, meaning to grant respect to opinions or world views one does not happen to share and that this was necessary for peaceful co-existence in a pluralistic society.

The Mini Conference provided an enriching point of view from both European Courts (ECtHR and ECJ) and from national Constitutional Courts and courts with equivalent jurisdiction.

Discussions showed the various ways in which this topic is dealt with around the world and led to the recognition that there was a general tendency to abolish blasphemy laws and introduce legislation against hate speech and the incitement to hatred instead. Every country’s constitutional situation is different, but the exchange of information and experience, notably in the form of case law, can be very useful and may help and inspire courts in their decision-making when confronted with similar cases.

Following the Mini Conference, a number of other events on this topic have taken place, notably the Council of Europe Conference on Freedom of Expression<sup>2</sup> held on 13-14 October 2015.

---

1. CDL-AD(2008)026 - Report on the Relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred - Adopted by the Venice Commission at its 76th Plenary Session (Venice, 17-18 October 2008) - [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2008\)026-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2008)026-e)

2. <http://www.coe.int/en/web/human-rights-rule-of-law/foe2015>







# PROGRAMME



## MORNING SESSION

**Chair:** Il-Won KANG, Co-President of the Joint Council on Constitutional Justice

### 09:00 – 09:30 OPENING

**Il-Won KANG**, Judge of the Constitutional Court of the Republic of Korea, Co-President of the Joint Council on Constitutional Justice

**Schnutz DÜRR**, Head of the Division on Constitutional Justice of the Venice Commission

**Krisztina KOVACS**, Counsellor at the Constitutional Court of Hungary, Co-President of the Joint Council on Constitutional Justice

09:30 – 10:00 “A brief overview of the ‘constitutional balancing’ between free speech and protected interests connected to religious beliefs”

**Aida GRGIC**, lawyer at the Registry of the European Court of Human Rights

10:00 – 10:30 “Blasphemy and other limitations to the freedom of expression in the case law of the European Court of Human Rights”

10:30 – 11:00 Discussions

**Cristián GARCIA MECHSNER**, Director of Studies at the Constitutional Court of Chile

11:30 – 12:00 “Right to compensation of immaterial damages due to an abusive or offensive exercise of the freedom of expression”

**Marieta SAFTA**, First Assistant Magistrate at the Constitutional Court of Romania

12:00 – 12:30 “Freedom of conscience”

12:30 – 13:00 Discussions

## AFTERNOON SESSION

**Chair :** Krisztina KOVACS, Co-President of the Joint Council on Constitutional Justice

**Sarahrose MURPHY**, Executive Legal Officer at the Supreme Court of Ireland

15:00 – 15:30 “Blasphemy Law in Ireland: an overview of its historical development and current proposals for reform”

**Marjolein VAN ROOSMALEN**, Legal adviser at the Council of State of the Netherlands

15:30 – 16:00 “What happened to the ‘Blasphemy Clause’ in the Dutch Legislation?”

16:00 – 16:15      Discussions

**Vesna BOŽIČ**, Advisor at the Constitutional Court of Slovenia

16:15 – 16:45      "Freedom of expression in the recent case law of the Slovenian Constitutional Court"

**Sung He LIM**, Research Officer at the Constitutional Court of the Republic of Korea

16:45 – 17:15      "Blasphemy and other limitations to the freedom of expression"

17:15 – 17:30      Discussions

**17:30 – 18:00      CLOSING**





## OPENING

**Il-Won KANG**

**Judge of the Constitutional Court of the Republic of Korea  
Co-President of the Joint Council on Constitutional Justice**



**W**elcome to all participants in this meeting. I want to express our deepest thanks to the Romanian Constitutional Court for hosting us so magnificently.

**T**oday's Mini Conference is on the subject of blasphemy and other limitations to the freedom of expression. I cannot over emphasise the importance of the freedom of expression, which is a key element for democracy. Amongst other factors, provisions on blasphemy can be a threat to the freedom of expression. Today, we will discuss the relationship between the freedom of expression and blasphemy and ways to overcome the conflict between them. This topic is of great interest and I look forward to interesting presentations and debates.

**Schnutz DÜRR**

**Head of the Division on Constitutional Justice of the Venice Commission**

**The relationship between freedom of expression  
and freedom of religion**



**L**et me first thank the Constitutional Court of Romania for hosting the Joint Council on Constitutional Justice and our Mini Conference today.

When we proposed the topic of our Mini Conference, we were of course still under the shock of the terrorist attacks of January in France. We have seen how delicate the relationship between freedom of expression and blasphemy is and how terrorism based on claims of blasphemy can shake a country's democratic foundations, leading to a tightening of security, which in itself can be a danger to the democratic state.

Therefore, it was timely indeed to propose this topic. The Venice Commission had already worked on this theme: in January 2008, the Venice Commission organised a conference in Athens on the relationship between blasphemy and freedom of expression. That conference gave a specific emphasis to the freedom of expression in the context of the arts. The proceedings of that conference were published and fed into a report which the Venice Commission adopted in October in 2008. This report is available on the website of the Commission under the reference CDL-AD(2008)026<sup>1</sup>. I would like to share with you the main conclusions of this report.

The Venice Commission examined the question as to whether criminal sanctions for blasphemy are appropriate as opposed to other means of limitations of free speech.

---

1. CDL-AD(2008)026 - Report on the Relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred - Adopted by the Venice Commission at its 76th Plenary Session (Venice, 17-18 October 2008) - [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2008\)026-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2008)026-e)

First, the Venice Commission recalled that hate speech should indeed be criminalised according to Council of Europe recommendations and to the European Commission against Racism and Intolerance (ECRI). The Commission then went on to distinguish hate speech from blasphemy.

According to the Venice Commission, not everything that can be said should be said, but this does not mean that everything which should not have been said can be criminally punished.

In a democratic society, religious groups, as others, must tolerate critical statements and debate about their activities and beliefs, provided that such statements do not amount to incitement to hatred and do not constitute incitement to disturb public peace. In a democracy, all ideas, however shocking or disturbing, should - in principle - be protected (with the exception, as explained above, of those inciting hatred). It is equally true that not all ideas deserve to be shared. As a consequence, there should be no criminal sanctions against blasphemy.

On the other hand, the Venice Commission does not support absolute liberalism. Other sanctions, such as civil or administrative sanctions can be used as a remedy.

In its report, the Venice Commission calls upon society in its member states not to retreat and ignore these issues, but to engage in dialogue on the responsible use of free speech. Notably, politicians have a responsibility to be careful in what they say in order to avoid hate speech.

The report, available on the web-site of the Venice Commission, was cited following the January 2015 terror attacks and reignited public interest in the topic.

During the presentations and discussions today, we will hear that in some countries, criminal sanctions for blasphemy still exist, while they were abolished in others.

The topic of our mini-conference today is not confined to blasphemy. As our Co-Chair, Mr Kang, just said, freedom of expression is the key to democracy. Without it, democracy cannot function. The case-law of the European Court of Human Rights is a guiding light for the development of an open approach to the freedom of expression, keeping restrictions to this freedom to a minimum.

I look forward to today's presentations. I invite you to actively engage in discussions by raising examples from your country, which will be of great interest to the other participants of this Mini Conference.

Thank you for your attention.



**Krisztina KOVACS**  
**Counsellor at the Constitutional Court of Hungary**  
**Co-President of the Joint Council on Constitutional Justice**



**A brief overview of ‘constitutional balancing’ between free speech  
and protected interests connected to religious beliefs**

**Do we really need blasphemy laws to protect religious faiths?**

**A**ccording to the dictionary of law, blasphemy was formerly “the crime of ridiculing or denying God or the Christian religion in a scandalous way”.<sup>1</sup> Blasphemy law was a law limiting the freedom of speech relating to blasphemy. At its most general level, the question of this conference is whether democratic principles justify blasphemy laws, that is, restrictions on free speech.

At the very beginning of my paper, I should make a clear distinction between blasphemy and incitement to religious hatred. Blasphemy is the act of attacking the religious belief itself: insulting or showing contempt or lack of reverence for God, to religious or holy persons or things, or toward something considered sacred. Religious hatred, by contrast, is about attacking religious believers, in particular their social status. Public incitement to hatred of a vulnerable religious minority falls into the latter category. In what follows, I will only talk about the former case, attacking or ridiculing religious belief.

Since Christianity was handled as part of the laws of the land for a long time, prosecutions for attacks on Christianity have a long history in Europe. Sir William Blackstone, the leading authority on the common law, observed that blasphemous libel was punished by English law “for Christianity is part of the laws of the land”.<sup>2</sup> In the beginning, those who committed blasphemy were sentenced to death, but in the 17th century, the death penalty for blasphemy was abolished. Since then, those who were prosecuted for blasphemy have been sentenced to imprisonment or a fine. In 1668 Adriaan Koerbagh, a friend of Spinoza, provoked the anger of the Calvinist clergy.<sup>3</sup> He ridiculed a number of traditional religious doctrines and practices, and among the teachings he advanced were that Jesus is not divine, that God is identical with nature, that everything is necessitated by the laws of nature, and that miracles are impossible. He was tried and sentenced to imprisonment on charges of blasphemy.<sup>4</sup>

Similarly, people were jailed in England and in the United States for writing essays and pamphlets that denied the existence of God and declared that “the whole story concerning (Jesus Christ) is as much a fable and fiction as that of the god Prometheus.”<sup>5</sup> As Jeremy Waldron rightly pointed out, in these cases, the logic of blasphemous libel required courts to find ways of seeing Christianity as an indispensable support of government.<sup>6</sup> However, since the Age of Enlightenment, a radical shift in the understanding of blasphemy has occurred. Secularisation, the separation of church and state, has led to the acceptance of the fact that it is not for the State to protect gods of different religions.

1. Dictionary of Law, Peter Collin Publishing, London, 2000, p. 38.

2. William Blackstone: Commentaries on the Laws of England, vol. 4, ch. 4, Cavendish, 2001, p. 46.

3. In his writing on the Een Bloemhof van allerley lieflijkheid (A Flower Garden of all Kinds of Loveliness).

4. Steinberg, Justin, “Spinoza’s Political Philosophy”, The Stanford Encyclopedia of Philosophy (Winter 2013 Edition), Edward N. Zalta(ed.), <http://plato.stanford.edu/archives/win2013/entries/spinoza-political/>

5. Jeremy Waldron: The Harm in Hate Speech, Harvard University Press, 2012, p. 22.

6. Ibid.



In the 20th century, some courts realised that the prosecutions for blasphemy is inappropriate, since “however vulnerable the Christian religion may be, it was not something that the law had any business trying to protect”.<sup>7</sup>

In 1952, in its so-called ‘Miracle Decision’, the United States Supreme Court reviewed a New York statute which permitted the banning of motion picture films on the ground that they are “sacrilegious”.<sup>8</sup> According to the interpretation of New York’s highest court, “no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule”. Based on this interpretation, after receiving hundreds of letters, the New York Commissioner of Education prohibited the public exhibition of the motion picture ‘The Miracle’ (Rosellini’s *Il Miracolo*). The Supreme Court determined that the provision which allowed a censor to forbid the commercial showing of a motion picture film it deemed to be “sacrilegious” was a “restraint on freedom of speech”. Since then in the United States, a prosecution for blasphemy would violate the Constitution’s free speech clause.

The United Kingdom maintained the crime of blasphemy for a much longer period. However, very recently, in 2008, the United Kingdom abolished its laws against blasphemy (the common law offences of blasphemy and blasphemous libel) in England and Wales with the passage of the Criminal Justice and Immigration Act.<sup>9</sup> This year, Norway and Iceland repealed their longstanding blasphemy laws.<sup>10</sup> Today, most of European Union countries do not have laws against blasphemy, but there are blasphemy laws for instance in Austria, Denmark, Finland, Greece, Italy and Ireland, not to mention the East-European states.<sup>11</sup> However, a shift could be detected recently. In those countries where blasphemy clauses still exist, convictions are extremely rare or there is no relevant case law at all (see for instance Ireland), so in most of the cases blasphemy bans are dead letters. Moreover, even in those European Union countries where blasphemy is an offence, renewed calls are being heard to eliminate the offence from the legal system.<sup>12</sup>

The international community appears to agree with the abolition of blasphemy clauses. In 2008, a Venice Commission report stated that “it is neither necessary nor desirable to create an offence of religious insult (that is, insult to religious feelings) simpliciter” and that “the offence of blasphemy should be abolished (which is already the case in most European States) and should not be reintroduced”.<sup>13</sup> In 2013, the Council of the European Union adopted guidelines noting that the “right to freedom of religion or belief, as enshrined in relevant international standards, does not include the right to have a religion or a belief that is free from criticism or ridicule”.<sup>14</sup> And recently, the United Nations Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, advocated in his latest annual report that “States should repeal anti-blasphemy laws, anti-conversion laws and any other discriminatory criminal law provisions, including those based on religious laws.”<sup>15</sup>

---

7. Ibid, p. 25, 30.

8. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495.

9. Section 79(1).

10. Eugene Volokh: Norway repeals blasphemy law, in response to Charlie Hebdo murders, *The Washington Post*, 8 May 2015. Kevin Rawlinson: Iceland repeals blasphemy ban after Pirate party campaign, *Guardian*, 3 July 2015. [www.theguardian.com/world/2015/jul/03/iceland-repeals-blasphemy-law-pirate-party-campaign](http://www.theguardian.com/world/2015/jul/03/iceland-repeals-blasphemy-law-pirate-party-campaign)

11. See the analysis of the domestic laws concerning blasphemy in Venice Commission: Tackling blasphemy, insult and hatred in a democratic society, [www.venice.coe.int](http://www.venice.coe.int)

12. Growing calls to rescind blasphemy law, 9 January 2015, *yle uutiset*, [http://yle.fi/uutiset/growing\\_calls\\_to\\_rescind\\_blasphemy\\_law/7727737](http://yle.fi/uutiset/growing_calls_to_rescind_blasphemy_law/7727737)

Colette Browne: Let’s repeal our blasphemy law if we really want to honor ‘Charlie’, *Irish Independent*, 9 January 2015, [www.independent.ie/opinion/columnists/colette-browne/lets-repeal-our-blasphemy-law-if-we-really-want-to-honour-charlie-30893656.html](http://www.independent.ie/opinion/columnists/colette-browne/lets-repeal-our-blasphemy-law-if-we-really-want-to-honour-charlie-30893656.html)

13. Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, adopted by the Venice Commission at its 76th Plenary Session (Venice, 17-18 October 2008) 89. b) and c).

14. Council of the European Union: Guidelines on the promotion and protection of freedom of religion or belief adopted at the Foreign Affairs Council meeting Luxembourg, 24 June 2013, 32a.

15. Report of the Special Rapporteur on freedom of religion or belief, UN Human Rights Council 28th session, A/HRC/28/66, 29 December 2014.

**A**fter the Charlie Hebdo massacre, a new global campaign was launched by a coalition of humanist organisations in order to abolish blasphemy laws altogether.<sup>16</sup> However, the idea that countries should consider retaining or adopting blasphemy laws has also occurred.<sup>17</sup>

Charlie Hebdo was not the first magazine to be attacked because of its alleged blasphemous content. In 2005, the Jyllands-Posten published the so-called “Danish cartoons” of Muhammad, which resulted in many violent protests in the Muslim world with a loss of many human lives. This January, twelve people were killed when gunmen stormed the offices of Charlie Hebdo responding to satirical images published in the magazine. After the attacks, a debate began on whether magazines (the press) had the right to publish and others to republish the blasphemous cartoons, which treated the prophet in an irreverent fashion as the most sacred figure within Islam.<sup>18</sup> So the question is this: do we need blasphemy laws to protect religious beliefs from such cartoons?

Apparently, there is a clash between two fundamental rights: the right to free speech and the freedom of religion. But, a closer look may reveal that restricting blasphemous cartoons may pose a threat to free speech, while publishing those cartoons does not mean a threat to freedom of religion.

Religious liberty has an important place in democratic societies. The freedom of religion is a fundamental right, closely connected to our inner self, to our human dignity. However, religions do not exist in a vacuum, they operate in societies therefore religions must observe the principles of democracy, first and foremost the freedom of expression that makes democracy possible. There are different arguments for publication in accordance with free speech.

According to Ronald Dworkin, making or giving a comically or grotesquely exaggerated representation of someone or something is a type of speech that should be protected by the fundamental right to free speech. Dworkin emphasised that “ridicule is a distinct kind of expression its substance cannot be repackaged in a less offensive rhetorical form without expressing something very different from what was intended.”<sup>19</sup> And if there is a right to ridicule, and the press has the freedom to publish cartoons as a form of criticism, people should tolerate ridicule even of their beliefs. This is because a person attacking someone’s faith or even a cartoon ridiculing the deepest religious beliefs does not require anyone to do something that violates their religious principles. Thus the fundamental right to freedom of religion remains intact. One can argue however, that it causes psychological distress when his or her faith is put under attack. That is an understandable claim, but we should make it clear that there is no right not to be insulted or offended by speech that is shocking or disturbing.

Jeremy Waldron makes a claim for free speech from a different angle. He argues that we should distinguish between the respect accorded to each and every citizen and “the disagreement we might have concerning his or her social and political conviction”. The hatred of beliefs is within the ambit of free speech, but no one has the right to hatred of persons holding these beliefs. We draw this distinction in democratic politics, and Waldron finds no reason why it should not be drawn also in the context of religious life.<sup>20</sup> There are disagreements in society not only concerning political convictions, but also concerning the doctrines, the content and the ceremonies of the various religions. Those who think differently about religions and religious issues should be free to express their opinion in speech and in other ways. Certainly, those who oppose cartoons ridiculing religious beliefs should be free to express their opinion, too.

**L**ast but not least, Timothy Garton Ash warns us that we should defy the so-called “assassin’s veto”. The term “assassin’s veto” refers to the well-known phrase of the “heckler’s veto”. The heckler’s veto occurs when an acting party’s right to freedom of speech is curtailed or restricted by the government in order to prevent a reacting party’s behaviour. In such cases, the excuse of the government for not giving

---

16. End Blasphemy Laws campaign, International Humanist and Ethical Union, [iheu.org](http://iheu.org)

17. See for instance Denmark which has recently announced that it keeps its blasphemy law. <http://iheu.org/denmark-announces-it-will-keep-its-blasphemy-law/>

18. More on the classification of the French cartoons, see Neville Cox, ‘After Charlie Hebdo: A Public Forum on Religion, Freedom and Human Rights’, Trinity College Dublin, 27 February 2015.

19. Ronald Dworkin: The Right to Ridicule, *The New York Review of Books*, Vol. 53, no., 5, 23 March 2006.

20. Waldron, pp. 120-121.

permits to express an opinion in print or on the streets is that the expression of the opinion would create a public danger or put participants in danger because of the violence that might ensue. In a recent case,<sup>21</sup> the United States Supreme Court found this unacceptable and a deprivation of the freedom of expression, saying that the government cannot grant power to a private actor, the heckler, to unilaterally silence a speaker because of a concern for the violent reaction by the heckler. According to Ash, the Charlie Hebdo massacre was an attempt to impose not the heckler's, but the assassin's veto, which says: "dare to express that and we will kill you".<sup>22</sup> Ash reminds us that "if we are not careful, the conclusion drawn by anyone who wants to impose any taboo will be 'go and get a gun.'"

It seems that the recently published blasphemous cartoons raised many important questions: Is it within the ambit of the freedom of expression to publish blasphemous cartoons? Is there a difference between the attack on a body of beliefs and the attack on the reputation of the believers? Does the public have the right to see whatever it wants no matter what the cost? Is there an overwhelming public interest in viewers having the relevant information, including the cartoons themselves? Should the press reprint the blasphemous cartoons or should it refrain from republishing?

Let me conclude by saying that the most important thing concerning every human rights controversy is the discussion of the pros and the cons, which can already lead to a better position. This is the same for blasphemy. That is why I am very much looking forward to our discussions.



---

21. *Hill v. Colorado* 530 US 703, 735 (2000)

22. Timothy Garton Ash: Defying the Assassin's Veto, Vol. 62, no. 3, 19 February - 4 March 2015, p. 4.



**Aida GRGIC,  
Lawyer at the Registry of the European Court of Human Rights**



**Blasphemy and other limitations to the freedom of expression in the  
case law of the  
European Court of Human Rights**

**Introductory comments**

In modern societies characterised by a variety of cultures, religions and lifestyles, it has become increasingly necessary to reconcile the right to freedom of expression with other fundamental rights, such as the right to freedom of religion, the right to protection of reputation or the right to be free from discrimination.

This reconciliation can become a source of problems, because all of the aforementioned rights are fundamental elements of a “democratic society” and most of them are expressly protected by the European Convention on Human Rights as well as other international instruments.

The European Court of Human Rights has time and again affirmed that freedom of expression guaranteed under Article 10 constituted one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man. But however vast the scope of freedom of expression, it is not an absolute right. The exercise of this freedom carries with it certain duties and responsibilities and is subjected to certain restrictions as set out in Article 10-2 ECHR, in particular those that concern the protection of the rights of others.

Several rights, equally protected by the Convention, can compete in this regard. The right to freedom of expression can, for instance, be limited by the right to freedom of thought, conscience or religion. Confronted with attacks on religious beliefs the European Court of Human Rights has highlighted that the question involves “balancing the conflicting interests that result from exercising those two fundamental freedoms: on the one hand, the applicant’s right to communicate his or her ideas on religious beliefs to the public, and, on the other hand, the right of other persons to respect of their right to freedom of thought, conscience and religion.” In some circumstances, freedom of expression can also be a threat to the right to respect of privacy or reputation. And, finally, there is the risk of conflict between freedom of expression and the interdiction of all forms of discrimination in those cases where exercising this freedom is used to incite hatred and shows the characteristics of “hate speech”. In my presentation today I will concentrate on issues of blasphemy and hate speech in the jurisprudence of the European Convention on Human Rights .

**B**lasphemy

Already in its early case-law, *Wingrove v. the United Kingdom*, no. 17419/90, 25.11.1996, the Court observed that blasphemy legislation was still in force in various European countries, notwithstanding the fact that application of those laws had become increasingly rare and that several States had repealed them entirely. The Court concluded that there wasn’t sufficient common ground (“European consensus”) in the legal and social orders of the member States of the Council of Europe to conclude that a system whereby a State could impose restrictions on the propagation of materials on the basis that it was blasphemous would, in itself, be unnecessary in a democratic society and thus incompatible with the Convention.

As the Court has held since 1976 and its landmark judgment, *Handyside v. United Kingdom*, no. 5493/72, 07.12.1976, Article 10 applies to all sorts of ideas and information, even those that offend, shock or disturb the State or any sector of the population. Nevertheless, those who exercise the freedom of expression undertake certain duties and responsibilities. In *Klein v. Slovakia*, no. 72208/01, 31.10.2006, the Court highlighted that “those duties and responsibilities – in the context of religious opinions and beliefs – may legitimately include an obligation to ensure the peaceful enjoyment of the rights guaranteed under Article 9 to the holders of such beliefs including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane.”

Given that there was no uniform European conception of the requirements of “the protection of the rights of others” in relation to attacks on their religious convictions in the various European States, the Court leaves the States a rather wide margin of appreciation in matters of religious insult. This was particularly evident in its early case-law which seemed to show a greater degree of tolerance towards limitations of freedom of expression for reasons of offending religious feelings of part of the population.

In one of its leading cases on the matter, *Otto-Preminger-Institut v. Austria*, no. 13470/87, 20.9.1994, the Court concluded that seizure of a movie containing “[t]rivial imagery and absurdities of the Christian creed in a caricatural mode” which “investigated the relationship between religious beliefs and worldly mechanisms of oppression” had been justified. Noting the provocative portrayal of God, the Father, the Virgin Mary and Jesus Christ and taking into account that the overwhelming majority of local population in Tirol was Roman Catholic, the Court accepted the national courts’ assessment and found no violation of Article 10.

In *Wingrove v. the United Kingdom*, the applicant’s movie was refused a classification certificate by the British Board of Film Classification on the basis that it “depicted the mingling of religious ecstasy and sexual passion... presenting the wounded body of the crucified Christ solely as the focus of, and at certain moments a participant in, the erotic desire of St Teresa with no attempt to explore the meaning of the imagery beyond engaging the viewer in an erotic experience”. The Board concluded that a reasonable and properly directed jury would find that the work infringes the criminal law of blasphemy.

The Court recalled that the margin of appreciation when regulating freedom of expression relating to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion, was wider than, for example, with regard to restrictions on political speech or on public debates. What is likely to cause substantial offence to persons of a particular religious persuasion might vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations. The Court considered national authorities to be in a better position to determine what was necessary in such a case which did not, of course, exclude final European supervision. Given the content of the video, the Court did not find the national authorities’ decision to be arbitrary or excessive. As a result, it found no violation of Article 10.

In *İ.A. v. Turkey*, no. 42571/98, 13.9.2005, a publisher of a novel was convicted for blasphemy against “God, the Religion, the Prophet and the Holy Book”. The wording of his novel was quite severe, one of the passages stating: “Muhammad did not forbid sexual intercourse with a dead person or a live animal.” The Court found that the measure which had been taken by the national authorities in relation to the statements at stake was intended to provide protection against offensive attacks on matters regarded as sacred by Muslims. Considering all the relevant aspects of the case, the interference complained of could reasonably have been considered as meeting a pressing social need and the margin of appreciation was not overstepped as the reasons presented for the measure were relevant and sufficient. Lastly, the insignificant fine imposed on the applicant was proportionate to the aim pursued by the national authorities.

In more recent cases, presumably for fear of downgrading the standard of protection of free speech, pursuant to some authors the Court seems to have taken a more audacious stance. Instead of basing its assessment to subjective feelings of followers of a specific religion, the emphasis has shifted to a more objective evaluation of the public sentiment.

In *Klein v. Slovakia*, no. 72208/01, 31.10.2006, a journalist strongly criticized the Archbishop who had protested against the display of a poster for the movie "The People vs. Larry Flynt" as being profane. The Court noted that the applicant's criticism was directed at the Archbishop following his call for the withdrawal of the film in question and the accompanying poster. The applicant's article was aimed at intellectually-oriented readers and a limited amount of copies were published. Moreover, the applicant's strongly worded pejorative opinion related exclusively to the Archbishop and his statements did not discredit an entire sector of the population on account of their faith. Consequently the publication did not interfere with other persons' right to freedom of religion in a manner justifying the sanction imposed on the applicant and Article 10 had been violated.

In *Giniewski v. France*, no. 64016/00, 31.1.2006, the applicant was convicted for defaming the Christian community in an article he had published on Pope John Paul II's book essentially accusing it of "containing the seeds of anti-Semitism". The Court considered that the applicant aimed at developing an argument about the scope of a specific doctrine and its possible links with the origins of the Holocaust, thereby making a contribution to a wide-ranging and ongoing debate without sparking off any controversy that was gratuitous or detached from the reality of contemporary thought. The text may have contained conclusions and phrases which might offend, shock or disturb some people; nevertheless, such views did not in themselves preclude the enjoyment of freedom of expression. Moreover, the article in question was not "gratuitously offensive" or insulting, in contrast to *I.A. v. Turkey*, and did not incite disrespect or hatred or cast doubt in any way on clearly established historical facts. The interference had thus not been necessary in a democratic society and Article 10 had been violated.

As regards the famous caricatures of the Prophet Muhammad published in a Danish newspaper in 2005, particularly the one where he was shown with a bomb in his turban, a Moroccan national and two Moroccan associations had complained to the Court against Denmark about the publication of those cartoons. However, their case was declared inadmissible on the basis that the applicants were not within the jurisdiction of Denmark in accordance with Article 1 of the Convention, *Ben el Mahi and others v. Denmark*, no. 5853/06, 11.12.2006. As a result, the Court did not have to elaborate on a clear concept of insult to a religion and the dividing line between on the one hand art which might be offensive to a religious community, but could still be considered legitimate under Article 10, and on the other hand matters which are likely to incite religious hatred and would, therefore, not be considered legitimate under the same Article<sup>1</sup>.

## **H**ate speech

### **a. General**

This brings us to the second group of cases I would like to speak about today, which are in my view closely linked to the cases discussed previously – those concerning "hate speech".

Despite its frequent usage, there does not seem to be a universally accepted definition of the term "hate speech".

Even though the ECHR has never given a precise definition of the term, it has always affirmed that "it was particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations." It emphasised in various judgments "that tolerance and respect for dignity of all human beings constituted the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued." The challenge that the authorities must face is therefore to find the correct balance between the conflicting rights and interests at stake.

---

1. Rainey, B., Wicks, E. and Ovey, C. "Jacobs, White, & Ovey, the European Convention on Human Rights" (Oxford University Press, Oxford, 2014, 6th ed.), p.458.



Finally, the ECHR considers “hate speech” to be an «autonomous» concept and is therefore not bound by the domestic courts classification. As a result, the ECHR can sometimes rebut classifications adopted by national courts or, on the contrary, classify certain statements as “hate speech”, even when domestic courts have not done so.

The concept of “hate speech” can encompass a multitude of situations.

Firstly, it can concern incitement of racial hatred or hatred on religious grounds. But it can also include homophobic speech and incitement to all other forms of hatred based on intolerance.

Generally speaking, when faced with a conflict between the right to freedom of expression and another right guaranteed by the Convention, the European Court has two options.

Firstly, the Court can decide to completely exclude the expression in question from the protection offered by the Convention, by applying Article 17 ECHR which prohibits to any State, group or person performance of any act with the aim of destroying any of the rights and freedoms contained in the Convention. As will be shown below, this first option has been frequently – even though not exclusively – used in cases of hate speech.

On the other hand, the Court can also assess whether a restriction of freedom of expression is legitimate by applying Article 10 (2) of the ECHR. We will now look at these two options in more detail and see how they were applied in practice.

## **A. Application of Article 17 ECHR**

### **a. Totalitarian doctrine contrary to the Convention**

The European Commission of Human Rights applied Article 17 for the first time – and in a broad interpretation – in the context of the Cold War, in its decision on *Communist Party (KPD) v. the Federal Republic of Germany*, no. 250/57, 20.07.1957, considering that the establishment of “the communist social order by means of a proletarian revolution and the dictatorship of the proletariat” was contrary to the Convention. Although the political activities employed by this party at the time of its appeal had been constitutional, the Commission concluded that it had not renounced its revolutionary goals. In the following decades, the Convention bodies repeatedly affirmed that National Socialism was a totalitarian doctrine incompatible with democracy and human rights and that its adherents undoubtedly pursued aims of the kind referred to in Article 17. Accordingly, any activity inspired by National Socialism would be considered incompatible with the Convention.

### **b. Negationism**

Article 17 has also been applied to prevent freedom of expression from being used to promote revisionist or negationist statements. Negationism is a specific category of racist comments since it both constitutes a denial of crimes against humanity – meaning here the Nazi Holocaust – and an incitement to hatred against the Jewish community.

On this subject, the European Court stated in *Lehideux and Isorni v. France*, no. 55/1997/839/195, 23.09.1998, that “like any other remark directed against the Convention’s underlying values ..., the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10.” In other words, there was a category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17. The concrete case which concerned the convictions of the publication manager of *Le Monde* and the author of an article about a historical French figure from WWII was found, however, not to fall within that category. In this case, the applicants did not deny or revise clearly established historical facts, but supported the conflicting “double game” theory in the debate about the role of the protagonist of the article who had been accused of Nazi collaboration. The Court noted that more than forty years had passed since the relevant events and that the applicants’ criminal convictions were disproportionate and unnecessary in a democratic society.

In *Garaudy v. France*, no. 65831/01, 24.06.2003, the Court applied for the first time the principles outlined above to demonstrate the inadmissibility *ratione materiae* of an Article 10 complaint for abuse of rights. It noted that in his book on Israeli politics the applicant questioned the reality, extent and seriousness of historical events such as the persecution of the Jews by the Nazis, the Holocaust and the Nuremberg Trials which were clearly established historical events. The applicant systematically denied the crimes against humanity perpetrated by the Nazis. As a result, his book could not be considered to constitute historical research to determine the truth. Instead, its aims were revisionist and ran counter to justice and peace as expressed in the Convention. The applicant did not limit himself to political criticism of the State of Israel, but pursued a proven aim of racism. In accordance with Article 17, the applicant could therefore not rely on the protection provided for under Article 10.

### **c. Racial hate speech**

The European Court further had recourse to Article 17 when the right to freedom of expression was invoked to incite hatred or racial discrimination, the “classic” cases of hate speech. So, for example, the Convention organs have made use of Article 17 to oppose applicants who had made manifestly racist statements constituting racial “hate speech” in for instance *Glimmerveen and Hagenbeek v. the Netherlands*, no. 8348/78, 11.10.1979, where the applicants had been convicted for possessing leaflets addressed to “White Dutch people”, which tended to make sure notably that everyone who was not white left the Netherlands.

The Court has firmly reiterated its position on the subject in a number of occasions. In *Jersild v. Denmark*, no. 15890/89, 23.09.1994, concerning an interview made by a group called the Greenjackets, there was no doubt for the Court that “the remarks in respect of which the group was convicted ... were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10.” However, the case before the Court actually concerned the journalist who had merely conducted an interview with the members of the said group, the aim of which was not racist but rather informative – to expose, analyse and explain this particular group of youths. The Court ultimately found a violation of Article 10 of the Convention for conviction of the journalist because he had conducted the said interview.

The Court applied Article 17 for the first time with regard to an attack directed at a religious community in the case of *Norwood v. the United Kingdom*, no. 23131/03, 16.11.2004, in which the applicant had been convicted for having displayed in his window a large poster of the British National Party showing a photograph of the Twin Towers in flame, with the words “Islam out of Britain – Protect the British People” and the symbol of a crescent and star in a prohibition sign. The Court found that “such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, had been incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant’s display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14.

In the case of *Pavel Ivanov v. Russia*, no.35222/04, 20.02.2007, the Court concluded that the applicant could not benefit from the protection of Article 10, as the publications of which he was the author, and which had led to his conviction by the domestic courts, were aimed to incite hatred towards the Jewish people and were therefore in contradiction with the Convention’s underlying values.

Confronted with a clearly racist statement, the Court will therefore exclude it from the protection of Article 10. Direct recourse to Article 17 remains nevertheless rare, since in cases of comments which leave room for doubt, the Court prefers to use this provision indirectly as a “principle of interpretation” in order to assess whether restrictions on freedom of expression have been proportionate.

## **B. Examination of proportionality under Article 10-2**

As already stated, the second – and perhaps safer – option for the Court when confronted with cases of conflict of rights, including those concerning “hate speech”, is to conduct a proportionality analysis under Article 10-2 using Article 17 as a “principle of interpretation”. In such cases, “the Court will begin considering the question of compliance with Article 10, whose requirements it will however assess in the light of Article 17.”

This methodology might also prevent States from slipping into abusive recourse to Article 17. Indeed, the Court might sometimes disagree with the domestic authorities' classification of a given expression.

For example, in *Leroy v. France*, no. 36109/03, 2.10.2008 the applicant was a cartoonist who had published, two days after the attack on the World Trade Centre, a drawing representing the attack with the caption "We have all dreamt of it... Hamas did it". The Court found at the outset that the impugned form of expression did not fall under Article 17 of the Convention as opposed to the findings of the national court. The applicant did not try to convey the negation of fundamental rights and the message could not be equated with racist, anti-Semitic or Islamophobic remarks going directly against the values underpinning the Convention. Furthermore, the drawing could not be seen as an unequivocal attempt to justify terrorist acts. Instead, the Court found that the case had to be examined on the merits. Accepting that cartoons and caricatures involved artistic expression and could be provocative, it considered that the applicant's drawing did not merely "criticize American imperialism" as intended by the applicant, but supported and glorified its violent destruction, expressed approval of the violence applied and undermined the dignity of the victims. Granting particular importance to the timing of the publication as well as the political sensitivity of the Basque region where it had been published, the Court found no violation of Article 10.

Instead of applying Article 17, the Court has examined the merits of cases concerning possible hate speech on a number of occasions.

For instance, in *Balsytė-Lideikienė v. Lithuania*, no. 725896/01, 4.11.2008 it examined a complaint of a publisher of a so-called "Lithuanian calendar" which was found insulting for persons of Polish, Russian and Jewish origin. In the domestic proceedings, two experts held that the calendar was promoting "the radical ideology of nationalism which rejected the idea of the integration of civil society, incited ethnocentrism, contained xenophobic and offensive statements, in particular with regard to the Jewish and Polish populations, and promoted territorial claims and national superiority vis-à-vis other ethnic groups". The Court found no violation of Article 10 on account of the administrative penalty and confiscation of the said publication ordered by the domestic authorities.

Another good example of this type of analysis may be found in *Féret v Belgium*, no. 15615/07, 16.7.2009, where the applicant, president of an extreme right-wing party, had been for inciting the public to discrimination and racial hatred in leaflets distributed during the party's electoral campaign. The writings included slogans such as "Stand up against the Islamification of Belgium", "Stop the sham integration policy" and "Send non-European job-seekers home". Non-European immigrant communities were presented as criminally-minded and as intending to exploit the benefits from living in Belgium. The applicant was sentenced to 250 hours' community service together with a 10-month suspended prison sentence and a declared ineligibility for 10 years. Concerning the necessity of the impugned measure, the Court noted that the relevant statements unavoidably led to feelings of disrespect, rejection and hatred against foreigners in the public. The national court held that even though the statements might have not led to an incitement of violence, they at least incited to discrimination, segregation or hatred towards a group, a community or their members on the basis of their race, colour, national or ethnic origin.

73. *La Cour estime que l'incitation à la haine ne requiert pas nécessairement l'appel à tel ou tel acte de violence ou à un autre acte délictueux. 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, comme cela a été le cas en l'espèce, suffisent pour que les autorités privilégient la lutte contre le discours raciste face à une liberté d'expression irresponsable et portant atteinte à la dignité, voire à la sécurité de ces parties ou de ces groupes de la population. Les discours politiques qui incitent à la haine fondée sur les préjugés religieux, ethniques ou culturels représentent un danger pour la paix sociale et la stabilité politique dans les Etats démocratiques.*

Additionally, with regard to the specific circumstances, the Court recalled that there existed a crucial importance for politicians not to disseminate statements that could nourish intolerance. The incitement to the exclusion of foreigners constituted a fundamental breach to the rights of individuals and should, therefore, require particular precautions to be taken also by politicians. The Court also attached particular importance to the ways and circumstances in which the statements had been disseminated and to their potential impact



on the public order and the cohesion in this social group. Since those were statements made by a political party before elections they tended to become more rigid and stereotype formulas become more powerful than reasonable arguments.

Consequently, the Court found that the interference had been necessary in a democratic society and that no violation of Article 10 had taken place.

As regards cases of hate speech based on religious intolerance, a good example of the Court's balancing exercise can be found in *Gündüz v. Turkey*, no. 35071/97, 4.12.2003. In that case the applicant, a leader of an Islamic sect appeared in a TV program broadcast live on an independent channel and shared his opinions, including that democratic values were incompatible with its conception of Islam, a matter which constituted a problem of general interest at the material time. His statements included the following: 'anyone calling himself a democrat, secularist ... has no religion ... Democracy in Turkey is despotic, merciless and impious [dinsiz] ... This secular ... system is hypocritical. He was ultimately convicted to two years' imprisonment and a fine for statements inciting hatred and hostility on the basis of a distinction founded on religion. What had to be established was whether the national authorities rightly determined the statements made by the applicant as "hate speech". The Court highlighted the weight that needs to be attached to the fact that the applicant was actively participating in a lively public discussion and considered that the mere fact of defending sharia, without calling for violence to establish it, could not be regarded as "hate speech". Consequently, there had been a violation of Article 10.

In *Soulas and Others v. France*, no. 15948/03, 10.7.2008 the applicants were convicted for inciting hatred and violence against Muslim communities through the publication of the book "The Colonisation of Europe – Truthful remarks about immigration and Islam". The Court recalled at the outset that this case related to issues of general interest being problems related to the integration of immigrants in their country of reception. It especially concerned France as it was a country which had received a great number of immigrants over the years. The impact that politics had in this area can depend on several aspects such as history, demography and culture and the domestic authorities enjoyed a wide margin of appreciation in this field as they knew best about the actual situation and problems in their states. In assessing the relevant text, the Court noted that it was written in a simple and clear style common to newspaper articles and included an analysis of the situation, proposals and their possible effects and an outlook of the future. The authors tried to show that the Islam was embarking on a hostile conquest of France and of Europe and saw it as an upcoming event which might be worse than the big plagues and wars that have taken place in Europe. Several passages of the book presented a negative image of the communities at stake as were written in a polemical style presenting the effects of immigration as leading to a catastrophe. The national court of appeal has highlighted that the proposals made in the book aim at provoking feelings of rejection and antagonism in the reader and to agree with the authors solution found being a war of ethnic recapture. The Court found that the national authorities had not exceeded their margin of appreciation and found no violation of Article 10.

And finally, in *Vejdeland and others v. Sweden*, no. 1813/07, 09.02.2012, the applicants were convicted of agitation against a national or ethnic group after leaving homophobic leaflets in pupils' lockers at an upper secondary school. The Court agreed with the Supreme Court that, even if the applicants' aim of starting a debate about the lack of objectivity of education in Swedish schools had been acceptable, it was necessary to have regard to the wording of the leaflets, which stated that homosexuality was a "deviant sexual proclivity", had "a morally destructive effect" on society and was responsible for the development of HIV and AIDS. The leaflets further alleged that the "homosexual lobby" had tried to play down paedophilia. Even though they made no direct call for violence, these were serious and prejudicial allegations. While acknowledging the applicants' right to express their ideas, the Supreme Court had found that the statements made in the leaflets were unnecessarily offensive. It had further emphasised that the applicants had imposed the leaflets on the pupils by leaving them in or on their lockers. The European Court noted that the pupils had been at an impressionable and sensitive age and that the distribution of the leaflets had taken place at a school which none of the applicants attended and to which they did not have free access. None of the applicants were given an immediate custodial sentence and the sentences they received were not excessive in the circumstances. There had therefore been no violation of Article 10 in the present case.

## **C**onclusion

In conclusion, it is evident from the above examples that there is no black and white solution to cases of conflict of freedom of expression with other fundamental rights.

Indeed, the Court has shown a very low threshold of acceptance for any expression inciting to any sort of racism or other forms of intolerance. In its most severe forms frequently related to cases of “hate speech”, such expression may be excluded from the application of Article 10 altogether. More traditionally the Court will examine such complaints under Article 10-2 bearing in mind the need to protect the underlying values of the Convention and protect any abuse of rights as stated in Article 17.



**Cristián GARCIA MECHSNER**  
**Director of Studies at the Constitutional Court of Chile**



**Right to compensation of immaterial damages due to an abusive or offensive exercise of the freedom of expression**

**I**ntroduction

Before I begin with my original presentation, which refers to other limits on the freedom of expression, I feel compelled to say something about blasphemy, although the Court I represent has not played a role in the following decisions.

“The Last Temptation of Christ? Ring your bell? That film directed by Martin Scorsese”.

In 1989 – still under the dictatorship of Pinochet - a film distributor wanted to screen this film in Chilean cinemas and asked the administrative authorities, the Cinema Council, for authorisation to do so. They rejected the petition due to the inappropriate content of images and references to Christ. In the end, an appeal was granted, but rejected. At that time, prior censorship was not prohibited and all films were reviewed by that Council before public screening.

In 1997, the owner of the rights of the film in my country tried again – now under democracy - and obtained the authorisation, but a group of Catholics with strong beliefs challenged the administrative act before the Court of Appeal and won. The Supreme Court confirmed the decision for two main reasons:

First, the Cinema Council had no right to revoke the previous administrative decision, because the decision taken back in 1989 was legal; there was no specific right to revoke a previous decision, and if there was, then there was no justification to revoke the decision because the film and the people had not changed.

Second, the screening of a film, which shows Jesus Christ in a humiliated and denigrated way, inflicted harm to his honour and reputation and also to his true believers, who look to his life as an example.

After that, a group of lawyers submitted a request to the Inter-American Court of Human Rights. Briefly, the Court unanimously accepted that there was a breach to the freedom of thought and expression and condemned the Chilean State to modify our internal legislation in order to prohibit prior censorship. In the meantime, the Government presented a constitutional reform to introduce a complete prohibition of any kind of prior censorship and completely reformed the functioning of the Cinema Council. Both were approved in 2001. Today, films are merely rated on the basis of an international scale.

**P**resentation

Restrictions to the freedom of expression are contained in the Constitution. The first one is the possible responsibility that may arise from abuse or an offence committed through the exercise of the freedom of expression; the second is conferring on anyone who has been unfairly mentioned or offended, the right to a public and “free-of-charge” rectification through social media. Prior censorship is not allowed.

The jurisprudence of the Constitutional Tribunal of Chile on the limitations to the freedom of expression is not as vast and rich as that on other topics.

A possible conflict between the freedom of expression and the right to the protection of one's honour and reputation, and to private life, or the thin line that separates the two, has been indirectly resolved by the Constitutional Tribunal in several concrete cases, and more specifically, on the right of the offended person to claim compensation for non-pecuniary (immaterial or moral) damages.

Why is that? The general rule, contained in the Civil Code, is that every injury shall be fully compensated. This is also consistently recognised in the jurisprudence of our Tribunal. Nevertheless, difficulties arise with a specific provision – Article 2331 of the Civil Code – which prescribes that "slandorous accusations against the honour or credit of a person shall not entitle to financial compensation, unless proven consequential damages or financial loss that can be valued in money, but even then there will be no monetary compensation, if the accusation is proved to be truthful."

In other words, ordinary courts cannot order the payment of non-pecuniary (immaterial or moral) damages to compensate someone who was injured by slanderous accusations. Such problems do not arise where slanderous accusations were committed through social media, because they are considered criminal offenses and a specific provision applied to broadcasters includes compensation for all kinds of inflicted harm.

**A**t this point, I need to stop my presentation to explain to you how our constitutional and legal system works in such cases:

First, ordinary courts have the competence to solve cases of slander in order to determine if the slanderous remark by the accused has caused harm, and the verification of a possible application of the *exceptio veritatis* principle.

Second, the decisions of the Constitutional Tribunal merely state whether or not the application of a legal provision to a pending case could have unconstitutional effects i.e. they have *inter partes* effects. Therefore, the task of the Tribunal is to declare whether or not the application of the legal norm that denies non-pecuniary compensation in such cases is in line with constitutional guarantees and principles. It also implies that the previous jurisprudence is not binding on the Tribunal, because the factual circumstances change from case to case and sometimes the weighing of the possible non-applicability of a legal norm depends on those facts.

The Constitutional jurisprudence on such cases is interesting in many ways:

- First, there has been an evolution or involution, depending on the perspective taken;
- Second, during that process, an *ex officio* procedure was initiated to declare the unconstitutionality of the precept, with *erga omnes* effects, and
- Third, the different arguments presented at concurring and dissenting opinions of judges.

With respect to the development of the jurisprudence - the first decision dates back to 2008, and stated that Article 2331 of the Civil Code greatly restricted, including in its essence, the right to the protection of one's honour and reputation and also affected important constitutional principles and values, such as the primacy of the human being and his or her dignity, and the respect, promotion and protection of fundamental rights. There was a dissenting opinion, maintained in all following rulings, based on the autonomy of the legislative branch to regulate different ways in which to compensate such loss or harm, such as through a public apology or the publication of the Tribunal's decision in full, and not necessarily through pecuniary compensation.

The first modification of that doctrine occurred in 2010. The Tribunal declared that just the part of Article 2331 of the Civil Code that absolutely impeded and *a priori* on the compensation for non-pecuniary damages provoked by slanderous accusations infringed the Constitution, and maintained the *exceptio veritatis* principle and the compensation for consequential damages and loss of profit. It also slightly changed



the reasoning for the inapplicability declaration: the legal disposition affected the essence of constitutional guarantees, such as the right to protect one's honour and reputation and equality before the law. The latter, because there is no proportionate and objective justification in order to allow an exception to the general rule that permits the integral compensation of all kinds of damage suffered. Freedom of expression cannot be considered as affected by a rule that allows for damages to be paid for all kinds of loss or harm and therefore is no justification for such an exception.

In 2011, the reasoning of the decision and the extension of the declaration of inapplicability of the legal provision reverted to the original position; but there was a strong minority among the judges, who still advocated to restrict the unconstitutionality and to consider the breach of the principle of equal treatment before the law.

At that time (May 2011), the decision of the Tribunal about the unconstitutionality of Article 2331 of the Civil Code was published. A year before that, the lawsuit was filed *ex officio* after many accepted the inapplicability actions. Finally there was no quorum to estimate the unconstitutionality (4/5 of the judges, according to the Constitution), because of the divided opinions among the judges; the same situation happened with respect to the decisions rendered the previous years.

The first opinion followed the original reasoning for the declaration of unconstitutionality of the entire legal provision, i.e. the severe restriction of the right to the protection of one's honour and reputation and of the primacy of human being, his or her dignity, and the respect, promotion and protection of fundamental human rights.

Other judges were of the opinion that just a part of the Article should be declared unconstitutional, maintaining the compensation of consequential and loss of profit damages and the *exceptio veritatis* principle.

A third position based its vote for a partial unconstitutionality, but only keeping the *exceptio veritatis* principle, because the compensation of all kind of damages is sustained in the general rule of damage compensation, contained in another Article of the Civil Code.

And the fourth vote stated its constitutionality, due to the legislator's autonomy to regulate compensation and the fact that it does not necessarily have to be pecuniary damages.

The high quorum was not reached which led to the discussion of whether the decision is *res judicata* or not. Would it be possible for the Tribunal to review its constitutionality in the future? There was no doubt about the possibility to challenge Article 2331 of the Civil Code through an "inapplicability action"; but is it another constitutionality review with *erga omnes* effects? The majority of the judges were of the opinion that *res judicata* did not apply to such procedures because it would restrict the competence of the Tribunal.

Back to the following "inapplicability actions", during 2012 the minority turned into the majority. The reasoning was further developed until the last decision was rendered (April 2014), which provided a number of interpretational criteria on which the Tribunal founded its reasoning.

First, the Constitution does not establish a right to compensation for non-pecuniary damage;

Second, the legislation was slowly recognising compensation for non-pecuniary damage. At the time the legal provision was drafted and approved as law (end of 20th century) there was a negative connotation for the pecuniary compensation of such damages. Today, it is an exception to the general rule, that every loss or harm has to be compensated; it therefore needs a very good justification.

A breach to an equal treatment before the law was proven; also an unjustified and excessive restriction to the essence of the right to the protection of one's honour and reputation, but not an infringement to the right itself.

A new and interesting dissenting vote appeared in the last decisions, arguing that the previous decision, which rejected the unconstitutionality of Article 2331 of the Civil Code, as sufficient reason to deny the action of inapplicability.

As you can see, our constitutional system of protection of the Constitution's supremacy has shown some developments in these cases that could prove to be problematic, on some points, in safeguarding equal treatment before the law:

First, the problem that implies the non-binding character of the Tribunal's jurisprudence, with relative effects (case-to-case-effects) often makes it too easy to change votes and opinions based on the "concrete circumstances" of every case.

Second, every change of integration (an ill judge or one who is on holiday) has the power of changing the doctrine set by the Constitutional Tribunal.



**Marieta SAFTA**  
**First Assistant Magistrate at the Constitutional Court of Romania**



**Freedom of conscience**

**Introduction**

The Romanian legislation does not lay down specific rules on blasphemy and the Constitutional Court has not been notified in this regard. Related however to this issue, which concerns both the freedom of expression and the freedom of conscience and religion, I have chosen to refer in this study to the cases dealt with by the Romanian Constitutional Court, cases in which the authors have relied upon the constitutional provisions relating, in particular, to the freedom of religion. I have come with this proposal because the decisions to which I shall refer have been pronounced in situations which have given rise to controversy and recently to the decision ascertaining the unconstitutionality of the National Education Law.

First, I will make a short presentation of the constitutional and legal framework of reference. I shall refer to three of the areas/rights in connection with which it was invoked the freedom of conscience/religion: health, elections and education.

**Regulation of the freedom of conscience in Romania**

Article 29 of the Constitution of Romania, entitled freedom of conscience, regulates the freedom of thought, opinion and religious belief all together.

In the view of the Romanian Constitutional legislature, the freedom of conscience is the individual right to have and to express, in private or in public, a particular conception of the world, to share or not to share a certain belief, to belong or not to belong to a religion, to fulfil or not to fulfil a ritual under that belief.

The largest regulation in the overall constitutional text mentioned above, belongs to the freedom of religion.

Thus, the text enshrines:

- prohibition of the coercion to adopt an opinion or to join a religious belief;
- freedom of religious denominations and organisation thereof according to their own statutory rules, in accordance with the law;
- prohibition of any form, means, act or action of religious enmity in the relations between cults;
- religious cults' autonomy in relation to the State;
- State's obligation to support religious cults also by facilitating religious assistance in the army, hospitals, prisons, homes and orphanages;
- right of parents or legal tutors to ensure, according to their own convictions (also religious), the education of children who are minors.

From amongst all constitutional provisions, the cited rules on freedom of religion relate, in particular, to those of:

- Article 4 paragraph 2 which states that "Romania is the common and indivisible homeland of all citizens, without any discrimination on account of [...] religion";
- Article 6 paragraph 1 - "The State recognises and guarantees for persons belonging to national minorities the right to the preservation, development and expression of their [...] religious identity";

- Article 16 paragraph 1 - "Citizens are equal before the law and public authorities, without any privilege or discrimination";
- Article 32 paragraph 7 - "The State ensures freedom of religious education, subject to the specific requirements for each denomination";
- Article 48 which refers to religious marriage;
- Article 53 governing the conditions for the restriction on the exercise of certain rights and freedoms.

Moreover, pursuant to Article 20 of the Constitution, which enshrines the constitutional interpretative value of international human rights instruments to which Romania is a party and their priority when they contain more favourable provisions, the constitutional rules are linked with the provisions of international instruments which enshrine the freedom of religion. I consider as particularly relevant the Universal Declaration of Human Rights,<sup>1</sup> the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>2</sup> and the Charter of Fundamental Rights of the European Union.<sup>3</sup>

In the application of the constitutional principles and based on the international instruments referred to, Law no. 489/2006 on the freedom of religion and the general regime of cults<sup>4</sup> defines freedom of religion as including "the right of every person to have or to adopt a religion, to express it individually or collectively, in public or in private, through specific rituals and practices, including through religious education, as well as the freedom to preserve or change one's religion". The Law also establishes that "the freedom to express religion beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society for public security, for the protection of order, health or morals, or for the protection of human rights and fundamental freedoms."

Religious freedom is also protected by the rules set forth in the Criminal Code<sup>5</sup>, i.e. under Title VIII — Offences affecting social relations, in a separate Chapter — Offences against religious freedom and the respect due to deceased persons. Within the said Chapter, the following are punishable as offences against religious freedom: Hindering the exercise of religious freedom (Article 381 of the Criminal Code) and Desecration of places or objects of worship (Article 382 of the Criminal Code).

As regards the offence of hindering the exercise of religious freedom regulated by Article 381 of the Criminal Code (having as correspondent "hindering freedom of worship" provided for by the Criminal Code of 1969), this occurs, in the simple form, in two alternative ways, consisting of hindering the free exercise of the ritual of a religious cult, which is organised and operates in accordance with the law, or disruption of the free exercise of a religious cult, which is organised and operates in accordance with the law.

The criminalisation text provides for two aggravated forms, consisting of compelling a person to attend the religious service of a cult or to carry out an act linked to the exercise of a cult, or compelling a person, through violence or threat, to perform an act prohibited by the cult, organised according to the law, to which he or she belongs.

---

1. Article 18: "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 teaching, practice, worship and observance."

2. Article 9: "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. 2. 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."

3. Article 10: "(1) Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. (2) The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right."

4. Republished in Official Gazette of Romania, Part I, no. 201 of 21 March 2014

5. T. Toader, M. SAFTA, Libertatea religioasă între consacrarea constituțională și protecția penală, International Conference "Dreptul între modernizare și tradiție", Bucharest, 21-23 April 2015, Hamangiu Publishing House, 2015, pp. 407-413



# **T**he case-law of the Constitutional Court of Romania on the freedom of conscience in its component on freedom of religion

## **1. The regulations in the field of health — an approach from the perspective of freedom of religion**

### **1.1 The compulsory health insurance does not infringe the freedom of conscience and religion**

The Constitutional Court was notified with the exception of unconstitutionality of the provisions of Law no. 95/2006 on health reform concerning the compulsory health insurance.<sup>6</sup> These provisions have been criticised, *inter alia*, in the light of the provisions of Article 29.1 of the Constitution on unrestricted freedom of thought, conscience and religious belief. It was deemed as unconstitutional the obligation to contribute to the health insurance system where personal beliefs would prevent a person to get treatment in cases of illness.

Dismissing as unfounded the exception of unconstitutionality<sup>7</sup>, the Court found that the contested rules do not lay down any obligation for a person to adopt a certain conduct on his or her state of health, which would be contrary to his or her religious beliefs. They establish a general and neutral duty to contribute to the health insurance fund so that the State can fulfil its constitutional obligation to take measures for ensuring hygiene and public health. It is also an expression of the social nature of the Romanian State, which includes, *inter alia*, participation of all citizens in ensuring the exercise of the rights by and the welfare of all other people. In this respect, the Court noted that “the social health insurance scheme can achieve its main objective due to the solidarity of the contributors, so that Article 208.1.e, 208.3 and 208.6 of Law no.95/2006 is in fact an expression of the constitutional provisions on the protection of health and which enshrines the obligation of the State to ensure the social protection of citizens”<sup>8</sup>.

### **1.2 The rules on the national health insurance card do not infringe the freedom of conscience and religion**

The Constitutional Court was notified with the exception of unconstitutionality of the provisions of Law no. 95/2006 on health reform with regard to the “national health insurance card”<sup>9</sup>. The author of the exception argued that these provisions are contrary to the constitutional provisions of Article 29.2 on freedom of conscience since “they establish an obligation without any alternative to the acceptance of such electronic health insurance card”. There should be an alternative to the national health insurance card by virtue of the right of option of citizens who refuse this document, on grounds of conscience or religion.

Having examined the exception of unconstitutionality, the Court held that the legal provisions subject to criticism have been amended after the notification to the Constitutional Court, and the legal solution criticised by the author of the exception has no longer been enacted.<sup>10</sup> According to the new legal content of Article 212.1 of Law no. 95/2006, “The documents certifying the status as insured person are, as the case may be, the certificate issued by the care of the insurance agency where the insured is registered or the document resulted when the providers that are under contract with health insurance agencies access the electronic tool made available by the National Health Insurance Agency. After the implementation of the provisions of Title IX, these supporting documents are replaced by the national health insurance card, or the certificate with a validity of 3 months for persons who expressly decline for reasons related to conscience or religion the receipt of the national card. [...]”. At the same time, under the second sentence of Article 330.2 of Law no. 95/2006, as amended by Government Ordinance no. 11/2015, in order to enable the persons who expressly decline for reasons related to conscience or religion the receipt of the national card to prove their status as insured person, a certificate shall be issued with a validity of 3 months, as provided for in Article 319.b1, which provides that such certificate is “the document attesting the capacity as insured person, valid for a maximum of 3 months from the date of issue, for persons who expressly decline for reasons related to conscience or religion the receipt of the national card, the model of which is established by order of the president of the National Health Insurance Agency”.

6. Published in the Official Gazette of Romania, Part I, no. 372 of 28 April 2006.

7. Decision no. 1.362 of 18 October 2011, published in Official Gazette no. 39 of 17 January 2012

8. Decision no. 838 of 24 June 2010, published in Official Gazette of Romania, Part I, no. 566 of 11 August 2010

9. Published in the Official Gazette of Romania, Part I, no. 372 of 28 April 2006, as subsequently amended and supplemented

10. By Government Ordinance no. 11/2015 amending and supplementing Law no. 95/2006 on healthcare reform, published in Official Gazette of Romania, Part I, no. 84 of 30 January 2015

As a result, given that after the notification of the Constitutional Court, the impugned legal texts were modified in line with the claims made by the author of the exception, the complaint has become devoid of purpose, and the exception of unconstitutionality was dismissed as inadmissible.<sup>11</sup>

## **R**egulation of the right to vote from the perspective of the freedom of conscience/religion

The Constitutional Court was notified with the exception of unconstitutionality of the provisions of Article 34 of Law no. 3/2000 on the organisation and holding of the referendum, criticised in relation to the rules set forth in the Constitution and in the Conventions for the purpose to guarantee freedom of thought, conscience and religion, on the one hand, and the right to vote, on the other hand. It was invoked the discrimination on grounds of religious affiliation, as citizens whose weekly day of prayer is Saturday were prevented to participate in the referendum on the dismissal of the President of Romania held on 19 May 2007, Saturday, from 8.00 a.m. to 8.00 p.m. As by Article 1.3 of Resolution no. 21/2007 of the Parliament of Romania, Saturday was established as the day of the referendum for the dismissal of the President of Romania, and given the time interval set forth in the impugned legal text, the followers of this cult were prevented to vote in the referendum organised then, as they had to meet their religious obligations during the whole Saturday until sunset.

The Court dismissed as unfounded the exception of unconstitutionality.<sup>12</sup> The fact that, by the organisation and conduct of the referendum for the dismissal of the President of Romania dated 19 May 2007, regulated by a law of general application covering all citizens of the country, the followers of a religious minority in Romania were unable to effectively exercise their right to vote, in exchange choosing to fulfil their religious obligations and cult-related practices, within the same time interval, cannot be construed as a ground of unconstitutionality of the provisions of Article 34 of Law no. 3/2000 or as a restriction of voting rights or exercise of freedom of religion. In accordance with Article 29.5 of the Basic Law "Religious cults are autonomous of, and shall enjoy support from the State [...]", but they are to be organised according to their own statutory rules, under the conditions set out by the law, without distorting the legal order of the State or infringing upon citizens' fundamental rights and freedoms.

The importance of a referendum or of elections organised at a given moment in a State is obviously overriding in terms of the general interest the limited group or individual interest proclaimed by some religious minority, so that the followers of such a cult cannot justifiably claim that the organisation of national elections must take place according to the practices of that cult. In electoral matters, and not only, the legislature takes into account the general interests of society and cannot legislate depending on the option of every citizen. At the same time, this legislative policy cannot be construed as discrimination on the grounds of religion, as claimed by the author of the exception, since it represents the natural mechanism of a democratic and social State governed by the rule of law, where citizens' rights and freedoms are protected in such a way as to achieve a reasonable balance between the general interests of society, on the one hand, and the individual rights and freedoms, on the other.

The Court also noted that the criticism of the author of the exception is rather an issue of practical nature as regards the organisation of the referendum of 19 May 2007 and not an issue of unconstitutionality against the provisions of Article 34 of Law no. 3/2000 on the organisation and conduct of the referendum which would be of the competence of the Constitutional Court. Moreover, the date and the time of the referendum were established by resolution of Parliament, and not by the impugned legal text, which is a text of principle and of general application.

## **T**he right to education and the freedom of religion - teaching religion in schools

The Constitutional Court was notified with the exception of unconstitutionality of the provisions of the National Education Law no. 1/2011 concerning the possibility that the pupil does not attend religion classes provided that a request in this respect is made in writing by the parent, the legal guardian or the major pupil.<sup>13</sup> As grounds for the exception of unconstitutionality, it was claimed that these provisions violate the right to

---

11. Decision no. 105 of 3 March 2015, Official Gazette, no. 273 of 23 April 2015

12. Decision no. 845 of 3 June 2009, Official Gazette, no. 524 of 30 July 2009

13. Published in the Official Gazette of Romania, Part I, no. 18 of 10 January 2011

freedom of thought, conscience and religion, both of the pupils and of his or her parents. The legal provisions subject to criticism enable parents to request in writing non-attendance of these classes by the pupil, but this rule does not cancel the obligation to study religion, as until such written request, the child is required to attend religion classes.

The Court upheld the exception of unconstitutionality and found that the way in which the legislature has regulated the educational offer relating to religion is likely to affect freedom of conscience. Thus, according to the provisions of Article 29.1 of the Constitution, individuals are entitled to unrestricted freedom of thought, conscience and religious belief, which gives consistency to the free development of human personality as a supreme value guaranteed by Article 1.3 of the Basic Law. At the same time, according to Article 32.5 of the Constitution "Tuition at all levels is conducted in public, private, or confessional schools, according to the law", therefore religious education concerns both religious education institutions organised by cults for training own staff in accordance with the law, and religious education in public schools, as well as respect for the right of parents or legal tutors to bring up the minor children according to their own convictions. This framework is set up to ensure the protection of each individual's religious beliefs.

The Court found that the Basic Law guarantees the parents' right to care for and educate their children and includes the right to religious education. Therefore, their right to transmit to their children their own beliefs relating to religious issues is paramount. In addition, parents have the right to keep the children away from religious beliefs. But this right of education does not pertain solely to parents, whereas the State, entrusted with the control over the entire school system, autonomously and concurrently assumes its own mission of education, in a correlative relationship with the parents.

The Court has distinguished between the negative obligation of the State not to intervene in forming or joining a conviction or religious belief, and the positive obligation that, insofar as the individual expresses his or her will to study or to attend the teachings of a certain cult or religious belief, create the legislative and institutional framework necessary to the exercise of the rights provided for by Articles 29 and 32 of the Constitution.

The Court held that in no case a person may be placed *ab initio* in the situation to defend or protect freedom of conscience, because such an approach would be at odds with the obligation of the State, which, by virtue of that obligation cannot require the study of religion. Therefore, only once the major student or the pupil's parents or legal guardian expresses the will to study the philosophical concepts specific to a certain religious worship, the State must comply with its positive obligation, i.e. to ensure that the necessary framework.

Upon enacting the regulations in the field of education, the legislature must take into account the fact that Article 29.6 of the Constitution guarantees the right to religious education and not the obligation to attend religion classes. In this respect, the free choice necessarily implies the person's own initiative in terms of attendance of religion classes and not the tacit consent or outright refusal.

To fully respect freedom of conscience and religion, which includes the freedom to either belong or not to a religion, enshrined in Article 29.1, 29.2 and 29.6 of the Constitution, the legislature is bound by an obligation of neutrality and impartiality. This obligation is fulfilled if the State sees to the compliance with these freedoms, enshrining the parents, legal representatives of minor pupils, adult learners' possibility to request attendance of religion classes.

## onclusions

The above legislation and case-law review illustrates the importance which the Romanian legislature attaches to the religious freedom in all its components. As a general remark, I consider that exercise of the freedom of religion should be organised by the State authorities so that the expression of inner beliefs does not affect the fundamental rights and values. In other words, the constitutional rules do not guarantee an individual's absolute right to behave in public in accordance with his or her own beliefs. Consequently, conscience cannot constitute a basis for non-compliance with legal obligations, such as, for example, the obligation to contribute to the social security system, especially since such an obligation is established based on neutral criteria, which are not related to religious beliefs, the right to vote, the right to education, the freedom of expression.<sup>14</sup>

---

14. Published in the Official Gazette of Romania, Part I, no. 18 of 10 January 2011.

As regards the specific issue of blasphemy, the Romanian legislation does not contain a separate regulation in this respect. The current international debates, highlighted also during this conference, pave the way for development of the law in this regard. Moreover, the last initiative for revision of the Constitution has contained a proposal for a more comprehensive regulation of the freedom of conscience and religion. It was thus proposed to amend of Article 29.4 of the Constitution in the sense of prohibiting any form, means, act or action of religious enmity, and not just those “in the relations between cults” as laid down in the current constitutional text.





**Sarahrose Murphy BCL, LLM, Barrister-at-Law**  
**Executive Legal Officer to the Chief Justice of Ireland**  
**The Honourable Mrs. Justice Susan Denham**



**Blasphemy Law In Ireland**  
**An Overview of its Historical Development and Current Proposals**  
**for Reform**

**B**ackground – Report of the Venice Commission

As Mr. Durr noted in his opening address, blasphemy law as a restriction of freedom of expression received attention in the 2008 Venice Commission Report on Blasphemy, insult and hatred: finding answers in a democratic society. The Report noted that [b]lasphe my is an offence in only a minority of member states and is “nowadays, rarely prosecuted in European states.” While the Commission found that incitement to hatred, including religious hatred, should be the object of criminal sanctions, as it is in most Member States, it was of the view that the offence of blasphemy should be abolished and should not be reintroduced. In Ireland, the Defamation Act 2009 provides for the offence of blasphemy. However, this provision did not appear from thin air. A look at the overall constitutional and legislative framework together with case law of the Supreme Court of Ireland goes some way towards explaining the relatively recent enactment of this blasphemy law.

**The Irish Legal System**

Ireland is a common law country and has been described as the “first adventure of common law” outside of England. It became independent in 1922 and is governed by a written Constitution called *Bunreacht na hÉireann* in the Irish Language, which was enacted in 1937. The Constitution provides that Ireland is a sovereign, independent and democratic State. Power derives from the people and is divided between the legislature, executive and the judiciary. The Constitution provides for a tripartite separation of powers between these organs. Importantly for the purpose of this presentation, the Constitution may only be amended by national referendum.

**The Irish Constitutional and Legislative Framework**

**The Constitution of Ireland – Article 40.6.1(i)**

A considerable portion of the Constitution of Ireland is devoted to the protection of fundamental rights. Article 40.6.1(i) guarantees freedom of expression “subject to public order and morality”. This guarantee and general restriction of freedom of expression is followed by what is considered to be “one of the most extraordinary” and unusual aspects of the Irish Constitution; a statement that:

“The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.”

This is the only crime provided for in the Constitution of Ireland. However, as the Irish professor of law, Cox, has noted, it is not an aspect of the Constitution that has “unduly troubled the Irish courts.” There are very few records of blasphemy cases in Ireland, and only one since the enactment of the Constitution.

### **Other references to religion in the Constitution**

The blasphemy clause is one of many allusions to religion in the Constitution of Ireland. Religious references are contained in Article 44.4.1, which provides that the State “acknowledges that the homage of public worship is due to Almighty God” and states that “[i]t shall hold His Name in reverence and shall respect and honour religion.” The Constitution guarantees freedom of conscience and the free profession and practice of religion, “subject to public order and morality”. It prohibits the State from endowing any religion or imposing any disabilities or making any discrimination on the grounds of religious profession, belief or status.

The Constitution once referred to the “special position of the Roman Catholic church” in addition to recognising certain other specified religious denominations. However, the fifth amendment of the Constitution removed this provision in the early 1970s.

### **The Defamation Act 2009**

The Defamation Act 2009 gives statutory definition to the constitutional crime of blasphemy. It provides for a maximum fine of €25,000 upon conviction of the publication or utterance of blasphemous matter.

According to the 2009 Act, a person publishes or utters blasphemous matter if:

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

It is a defence to prove that a reasonable person would find genuine literary, artistic, political, scientific, or academic value in the matter to which the offence relates. It has been noted that this means that it would be very difficult to bring a successful prosecution for blasphemy and that, arguably, “the terms of the statutory offence are so tightly drawn that it is highly unlikely to have any application in practice.” In fact, there have been no prosecutions under the 2009 Act to date.

### **Prohibition of Incitement to Hatred**

An attack on religion may constitute an offence under the Prohibition of Incitement to Hatred Act 1989, a hate speech law which prohibits the publication or distribution of written material, words, behaviour, visual images or sounds which are “threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred.” It has been suggested that a high standard for proof under the 1989 Act has resulted in a lack of prosecutions under the 1989 Act.

### **European Convention on Human Rights**

Ireland incorporates the European Convention on Human Rights through the European Convention on Human Rights Act 2003, and therefore Article 10 of the Convention forms part of Irish law. When challenged, the European Court of Human Rights has upheld the application of domestic blasphemy laws. This morning, Ms. Grigc provided a comprehensive overview of the case law of the European Court of Human Rights.

### **Early Common Law Developments**

The current constitutional and legislative framework of Irish blasphemy law can only be properly understood when put in its historical context. I will therefore refer briefly to early common law developments in England and Ireland.

## England

In England, there were many prosecutions for blasphemy in the 18th and 19th centuries. The crime of blasphemy was originally perceived as a crime against Christianity. In *Taylor's Case* in 1675, the first reported case of the common law offence of blasphemy, Sir Matthew Hale defined blasphemy as "contumelious reproaches of God or the religion established." Blasphemy law was concerned with the protection of the legal order, of which the Anglican Church was a part, so blasphemy law did not apply to other religions. Any denial of Christianity amounted to a breach of blasphemy law. However, by the middle of the 19th century, a new rationale had developed for blasphemy law, which was concerned with the protection of religious sensibilities from scurrilous attack rather than any mere denial of Christianity. In the 1917 House of Lords decision *Bowman V Secular Society*, Lord Parker stated that blasphemy involved "such an element of vilification, ridicule, or irreverence as would be likely to exasperate the feelings of others and so lead to a breach of the peace."

## Ireland

In Ireland, there are three recorded blasphemy case in the common law courts, the earliest dating from 1703. The final blasphemy case in Ireland prior to independence in 1922 was *R. v Petcherine*. This case involved a Redemptorist priest who had organised a bonfire to destroy so called "vile English novels" and inadvertently burned a bible which was hidden in these novels. He was acquitted as the Court found that for a blasphemy prosecution to be successful, it would have to be demonstrated that the accused intended to burn the Bible. Baron Green referred to the ambit of blasphemy law at the time:

"It has been truly stated to you that the Christian religion is part and parcel of the law of this land. Any publication or conduct tending to bring Christianity or the Christian religion into disrespect, or to expose it into hatred or contempt, is not only committing an offence against the majesty of God, but is in violation of the common law of the land."

This was the last case to come before the Irish courts for over 140 years. In the meantime the following developments occurred:

1. The Church of Ireland, a province of the Anglican church, ceased to be established by law in 1869; and
2. Ireland became independent in 1922.

Therefore, the original rationale for blasphemy law, which was the protection of the established order, was redundant. The dearth of case law since the case of Petcherine meant that it was unclear whether Irish law experienced the change that is evident from the English case law leading up to and including the 1917 House of Lords decision in *Bowman*. There is debate as to whether pre-1922 decisions of the House of Lords were carried over into Irish law following independence. If such a change did occur, the nature of the language would be of crucial significance to a successful prosecution for blasphemy.

President Éamonn DeValera, who oversaw the drafting of the 1937 Constitution of Ireland said that the constitutional crime of blasphemy did not create a new offence, but simply mirrored the old common law offence. However, it was unclear what the common law offence of blasphemy involved.

This was the position of blasphemy law in 1999 when the Supreme Court of Ireland considered *Corway v. Independent Newspapers*, the first blasphemy case instituted in Ireland since independence.

### ***Corway v. Independent Newspapers***

The applicant in *Corway* sought leave under the Defamation Act 1961 (the applicable legislation at the time) for the bringing of a criminal prosecution against the publishers of an article and cartoon in a popular weekly Sunday newspaper. The article followed a referendum in 1995 favouring the removal of the prohibition of divorce from the Irish Constitution. One group in a campaign poster had used the phrase "Hello Divorce, Bye Bye Daddy." The newspaper article at issue in *Corway* questioned whether the referendum result indicated a decrease in the influence of the Catholic Church in Ireland. The article was accompanied by a cartoon of a plump priest offering the Eucharist to three prominent politicians. They were portrayed as walking away from the priest and the cartoon was captioned, "Hello Progress – Bye Bye Father?"

Although the Constitution criminalises blasphemy, there was neither a constitutional nor a legislative definition of blasphemy at the time. The Defamation Act 1961 simply provided for the penalties and seizure of material.

The Supreme Court considered the development of the offence of blasphemy at common law, to which I have briefly referred. Having done so, the Court found that the common law offence of blasphemy, which was solely concerned with Christianity, was incompatible with Article 44.2.3 of the Constitution of Ireland, which prohibits discrimination by the State on grounds of religious profession, belief or status in addition to the general equality guarantee in Article 40.1. However, Barrington J, giving the judgment of the Court, noted that the crime must exist in Irish law as the Constitution says so. The Supreme Court found:

“In this state of the law, and in the absence of any legislative definition of the constitutional offence of blasphemy, it is impossible to say what the offence of blasphemy consists... The task of defining the crime is one for the legislature not the courts. In the absence of legislation and in the present uncertain state of the law the Court could not see its way to authorising the institution of a criminal prosecution for blasphemy...”

In *Corway*, the Supreme Court “essentially neutralised the reference to blasphemy”. The decision meant that a prosecution for blasphemy could not be brought under the Defamation Act 1961 until the legislature provided a statutory definition of blasphemy in the Defamation Act 2009. The 2009 Act takes into account the constitutional principles of religious pluralism, equality and freedom of conscience by applying to all religions. As I mentioned, there have been no prosecutions for the offence of blasphemy under the 2009 Act.

## **Calls for reform**

### **Reaction to Defamation Act 2009**

The introduction of the blasphemy provision in the 2009 Act attracted considerable controversy in Ireland and was strongly opposed by secular organisations. The relatively recent enactment of legislation referring to blasphemy is unusual in a ‘Western’ liberal democracy, with the trend leaning towards the abolition of blasphemy offences. In addition, some would say that its introduction in Ireland is surprising given what has been described as the “secularisation of constitutional adjudication and constitutional discourse”.

The then Minister for Justice, Equality and Law Reform admitted that the 2009 Act had been drafted to “make it virtually impossible to gain a successful prosecution” under the legislation. However, at the time of its enactment, the Minister stated that he did not “have the luxury of ignoring our Constitution” and “faced a choice – referendum or reform.” The concern was that a law repealing the Defamation Act 1961 without replacing it may not have withstood constitutional scrutiny in light of the constitutional provision for the offence of blasphemy.

### **Recommendations of the Law Reform Commission**

Calls for reform in this area of law are nothing new. In 1991, the Law Reform Commission of Ireland had, in its Report on the Crime of Libel, recommended that “in any revision which may be undertaken by referendum of the Constitution, so much of Article 40.6.1.i which renders the publication or utterance of blasphemous matter an offence should be deleted.” Following a consideration of the arguments in favour and against retaining the offence, it concluded that “there was no place for an offence of blasphemous libel in a society which respects freedom of speech.” However, the Commission observed that abolition of blasphemy legislation could not occur without a constitutional referendum, and a referendum solely for this purpose “would rightly be seen as time wasting and expensive” and should occur in the course of a more extensive revision of the Constitution. In the meantime, it recommended that the offence be redefined as the “publication of matter the effect of which is likely to cause outrage to a substantial number of the adherents to a religion by reason of its insulting content concerning matters held sacred by that religion”, and that “religion” for the should include Christian and non-Christian religions.



## **Report of the Constitution Review Group**

In 1995, the Irish Government established the Constitution Review Group “to review the Constitution, and in the light of this review, to establish those areas where constitutional change may be desirable or necessary”. The Group of 15 members from different backgrounds was of the view that Article 40.6.1(i) as drafted was unsatisfactory and recommended it be replaced with a new clause protecting free speech based on Article 10 ECHR. It concluded that the constitutional offence of blasphemy was inappropriate.

## **Report of the Joint Committee on the Constitution**

In 2007, the Joint Committee on the Constitution was established by the Houses of the Oireachtas. It had the role of identifying areas requiring reform and recommending change where necessary. The First Report of the Committee concentrated on the constitutional Freedom of Expression provision, including the prohibition against blasphemy. The Committee endorsed the view of the Constitution Review Group and also recommended that the reference to blasphemy in Article 40.6.1.i should be deleted. It stated that “in a modern Constitution, blasphemy is not a phenomenon against which there should be an express constitutional prohibition” and “[i]f there is a need to protect against religious offence of incitement, it is more appropriate that this be dealt with by way of legislative intervention, with due regard to the fundamental right to free speech.”

## **The Convention on the Constitution**

Most recently in 2012, the Convention on the Constitution was established to discuss proposed amendments to the Constitution. The Convention was a new venture in participative democracy and comprised 100 members, including 66 randomly selected citizens of Ireland. It was asked to consider eight issues, one of which was the removal of blasphemy from the Constitution. Two of the issues considered by the Convention have already been the subject of constitutional referenda. In a referendum which took place on 22 May 2015, 62.07% of Irish voters approved a provision in the constitution that marriage be recognised irrespective of the sex of the partners – a worldwide first for popular vote. On the same day the electorate rejected a proposal to reduce minimum the age of presidential candidates from 35 to 21.

Following a consideration of the constitutional offence of blasphemy, a clear majority of members of the Convention on the Constitution (61%) voted in favour of its removal from the Constitution. Most members (53%) favoured its replacement with a general constitutional prohibition of incitement to religious hatred; and a significant majority (82%) favoured the introduction of a new set of detailed legislative provisions concerning incitement to religious hatred. Interestingly, 49% of members believed there should be legislative provision for the offence of blasphemy.

On the 2<sup>nd</sup> October 2014, the Government announced in response to the Constitutional Convention that it will “put this question to the people, and that a referendum should be held on the question of amending Article 40.6.1(i) of the Constitution to remove the offence of blasphemy.” As two referenda were held in 2015, the Government has said that there will not be a referendum on the issue of blasphemy this year.

## **Conclusion** **Recent debate**

The offence of blasphemy has had an interesting, if somewhat uneventful life. For the moment, it remains nestled within our Constitution. Debate regarding its existence was rekindled following the terrible events which took place at the offices of Charlie Hebdo in Paris in January of this year. It was suggested that publication by national newspapers in Ireland of the Charlie Hebdo cartoons or ‘survivor’s issue’ depicting the prophet Muhammad, could form the basis of a blasphemy prosecution. The chairman of a secular organisation in Ireland has said that although there have been no cases under the Defamation Act 2009, it creates “the chilling effect of self censorship.” It is impossible to say whether such an effect was responsible for the failure by most Irish media to publish the cartoons, or whether it was due to the view (expressed by the Irish Times) that “publication of the cartoons was likely to be seen by Muslims as gratuitously offensive and would not contribute significantly to advancing or clarifying the debate on the freedom of the press.”

## Freedom of Expression

The nature of the Irish constitutional referendum process has been described by Mr. Justice Hogan in the High Court of Ireland as follows:

"The Constitution envisaged a plebiscitary as well as a parliamentary democracy and, in doing so, it has created a state which can demonstrate - in both word and deed - that it is a true democracy. By providing in Article 6.1 for popular sovereignty in which the People would "in final appeal... decide all questions of national policy", it envisaged a society in which all citizens would be called upon from time to time to make critical decisions regarding their future, the future of their neighbourhood and, ultimately, the future of their country."

It is likely that it will be through this important process that the Irish electorate will decide the fate of Ireland's blasphemy law - an issue affecting the right to freedom of expression, a right which Lord Steyn once described as "the lifeblood of democracy". Many have spoken with impassioned words on the importance of freedom of expression. American jurist, Mr. Justice Benjamin Cordozo once referred to it in the case of *Palk v Connecticut* as the "the matrix, the indispensable condition, of nearly every other form of freedom".

The English poet John Milton's 1644 prose, *Areopagitica* is one of history's most powerful and influential defences of freedom of speech and expression. Milton made the following plea to the Parliament of England in response to a law concerning pre-publication licensing, which he distributed in pamphlet form in defiance of the very law against which he campaigned:

"... [C]onsider what Nation it is whereof ye are, and whereof ye are the governours: a Nation not slow and dull, but of a quick, ingenious, and piercing spirit, acute to invent, subtle and sinewy to discours, not beneath the reach of any point the highest that human capacity can soar to..."

"Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."

On that note I will finish ladies and gentlemen, and thank you for listening.



**Marjolein VAN ROOSMALEN**  
**Legal adviser at the Council of State of the Netherlands**



## What happened to the 'Blasphemy Clause' in the Dutch Legislation?

**T**his report tells what has happened to the blasphemy clause in the Dutch legislation. When it comes to blasphemy, two fields of Dutch law are of relevance: constitutional law and penal (criminal) law<sup>1</sup>. The Netherlands Constitution<sup>2</sup> does not contain a blasphemy clause as such. However, three clauses are of specific importance to this subject. Article 1 of the Constitution prohibits discrimination, *inter alia* based on religion. Article 6 of the Constitution protects the right to freedom of religion, whereas Article 7 guarantees the freedom of expression.

In 1886, Minister of Justice MODDERMAN introduced a new Penal Code (hereinafter, "PC"). It had a clause imposing a term of imprisonment or a fine on a person for ridiculing a minister of religion for the lawful execution of his duties or for making derogatory statements about objects used in lawful religious celebrations. MODDERMAN, a liberal, found there was no need for legislation on blasphemy at the time.

In the 1930s however, the so-called Lex DONNER was adopted after left-wing anti-religious propaganda was seen as becoming a serious threat to the peace of the land. From 1932 onwards, Article 147 PC provided that a term of imprisonment not exceeding three months or a second category fine shall (also) be imposed on a person for publicly offending, either orally or in writing or by image, religious sensibilities by malign blasphemies.<sup>3</sup>

There were only a few cases concerning blasphemy in the Dutch courts. The most notorious one was the 1968 prosecution of the novelist VAN HET REVE, who had presented God as a donkey in one of his books. Finally, the Court of Cassation found for the author, holding that only a person who had the intention of expressing himself with regard to a particular religion in a contemptible and humiliating manner, was guilty of blasphemy in the sense of Article 147.1 PC.<sup>4</sup> The words 'malign blasphemies' did not merely have the function of describing a certain form of expression, which was capable of hurting religious feelings, but they also implied a subjective element of an intention to show contempt for 'the Supreme Being'. The prosecution against VAN HET REVE failed. In later years there were only a few prosecutions. This may be due to the strict requirements set for establishing the subjective element, but perhaps also because no (or not many) accusations were brought to the authorities' attention. In the Netherlands, the Prosecution Service has prosecutorial discretion. In short, as from 1968, Article 147 PC knew many quiet years. The blasphemy clause was part of our law, but did not get much attention.

In 2004, the filmmaker VAN GOGH was ritually murdered while cycling in Amsterdam. His murderer felt that VAN GOGH's provocative film *Submission*, criticising the treatment of women by Islam, had crossed the line of blasphemy. This event brought about an intense debate on freedom of speech, in particular as to whether legislation ought to be amended. Cabinet ministers, among them Prime Minister BALKENENDE, Minister of Justice DONNER and Minister of Integration VERDONK, proposed different solutions. Whereas the first (member of a Christian-Democratic party) felt that freedom of expression does not mean that everything which can be said, needs to be said at all times, the second (member of the same Christian party) advocated rethinking prosecution policies with regard to blasphemy. The third (a liberal) though, was of the opinion that, on the contrary, freedom of expression should be widened.<sup>5</sup>

---

1. Also: relevant/equivalent international clauses, cf. Article 94 of the Netherlands Constitution.

2. See: Codices Database or <https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008>.

3. See also: the Venice Commission's report *Blasphemy, insult and hatred: finding answers in a democratic society* (2010).

4. Court of Cassation 2 April 1968, Case no. ECLI:NL:HR:1968:AB3494, NJ 1968/373 (Donkey-case).

5. See: P.B. CLITEUR, 'Godslastering en zelfcensuur na de moord op Theo van Gogh [Blasphemy and Self-censorship after the Murder of Theo van Gogh]', *Nederlands Juristenblad* 2004, p. 2328-2335

These questions were not only debated in the government, but also by Parliament. In 2004, there was no majority for the abolishment of the blasphemy clause in Parliament. In the following years, two proposals relating to blasphemy were brought into the political arena. First, the government proposed to amend the hate speech clause in Article 137c PC,<sup>6</sup> a provision which was inserted into the Penal Code in 1934, notably to protect Jewish and Roman-Catholic citizens. The government proposed to extend its scope to 'direct and indirect insults'. Secondly, three Members of (the Second Chamber of) Parliament – originally VAN DER HAM, DE WIT and TEEVEN (the first and third members of liberal parties, the second of a socialist party) – initiated draft legislation to abolish the blasphemy clause. In its advisory opinion on the abolishment proposal, the Council of State raised the question of whether there was a pressing social need for the abolishment of the blasphemy clause.<sup>7</sup> The Council, which is not only the highest administrative court with general jurisdiction, but (on the basis of the Netherlands Constitution) also the last and mandatory advisory body on drafted legislation,<sup>8</sup> elaborated on the preventative and normative significance of Article 147 PC, pointing out that abolishment may neither solve the lack of clarity with regard to the content and boundaries of the freedom of expression nor clarify the clause's significance for the position of religious minorities in Dutch society.

In 2013, the political landscape in the Netherlands shifted significantly. The Senate<sup>9</sup> approved of the 2009 initiative bill, so that in 2014 the blasphemy clause was abolished. This abolishment did not provide for answers to questions relating to the freedom of expression in society though, which may be illustrated, for instance, by an initiative bill proposed by Member of Parliament VAN KLAVEREN (member representing the Freedom Party) *inter alia* to abolish the hate speech clause in Article 137c PC in 2014. In its advisory opinion, the Advisory Division of the Council of State took into account *inter alia* the treaties to which the Netherlands is a party, the proportionality principle and the *lex certa* principle. The Advisory Division concluded, *inter alia*, that the explanatory notes did not sufficiently explain the proposal's proportionality to the aim pursued, that is, to bring more clarity.




---

6. Article 137c PC provides that any person who verbally or by means of written or pictorial material gives intentional public expression to views insulting to a group of persons on account of their race, religion or convictions, their heterosexual or homosexual preferences or physical, mental or intellectual disability, shall be liable to a term of imprisonment not exceeding one year or to a fine of the third category.

7. Council of State, advisory opinion, 15 June 2010, Case no. W03.09.0473, Parliamentary Documents 2009/10, 32 203, no. 4.

8. See: <[www.raadvanstate.nl/the-council-of-state.html](http://www.raadvanstate.nl/the-council-of-state.html)>.

9. The First Chamber of Parliament, which debates and votes on draft legislation after bills have been accepted by the Second Chamber of Parliament (the House of Representatives).



**What happened to the 'Blasphemy Clause' in the Dutch Legislation?**

**Powerpoint Presentation**

Raad  
van State



## **I Constitutional Law**

- Article 1 Constitution: non-discrimination
- Article 6: Freedom of Religion
- Article 7: Freedom of Expression
- No Blasphemy Clause in the Constitution

## **II Penal (Criminal) Law**

Raad  
van State



### **1886 - Not Yet Introduced**

- Minister of Justice Modderman
- Penal Code
- Article 147



## Article 147 Penal Code (PC)

- Imprisonment (3 m.)/fine imposed upon:
  - for ridiculing a minister of religion in the lawful execution of his duties;
  - for making derogatory statements about objects used for religious celebration at a time and place at which such celebration is lawful.

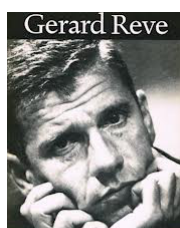
## 1932 - Introduction

- Amendment (§ 1): a person who publicly, either orally or in writing or by image, offends religious sensibilities by **malign blasphemies**
- “Lex Donner”
- Reason: left-wing, anti-religious propaganda



## 1968 - Limited Interpretation

- No convictions since 1968
- ‘Donkey’-Case (1966-1968); novel
- Court of Cassation: Subjective Element



Nader tot U



## Quiet Years

- Very few cases on Article 147 PC
- No convictions
- Prosecutorial Discretion
- Complaints

## 2004 - Murder

- Ritual Murder
- Film Maker



## Freedom of Speech – amending legislation?

- Prime Minister, Minister of Justice, Minister for Integration: Differences of Opinion





## After 2004

- 2004: No majority in Parliament for abolishment
- 2007: Governmental Proposal to amend Article 137c PC (Hate Speech)
- 2009: Bill by 3 Members of Parliament



## Opinion Council of State on the Abolishment Proposal (2010)

- Pressing social need for abolishment ?
- Preventative and normative significance of Article 147 PC
- Abolishment may not solve the lack of clarity with regard to Freedom of Expression
- Position of Religious Minorities



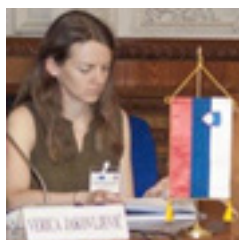
## The Ending

- **2013:** Shifts Political Landscape
- **2014: Abolishment of Article 147 PC**

## Recent Development

- Bill proposed by MP to abolish Article 137c PC (2014)
- Opinion Council of State (2014): Treaties, Proportionality and Lex Certa Principle

**Vesna BOŽIČ**  
**Advisor at the Constitutional Court of Slovenia**



## **Freedom of expression in the recent case law of the Slovenian Constitutional Court**

Visual presentation that may be accessed at:

[http://prezi.com/ykkfpizqr78/?utm\\_campaign=share&utm\\_medium=copy](http://prezi.com/ykkfpizqr78/?utm_campaign=share&utm_medium=copy)

### **Some introductory words**

Article 39 of the Constitution of the Republic of Slovenia proclaims that freedom of expression of thought, freedom of speech and public appearance, freedom of the press, and other forms of public communication and expression shall be guaranteed. Everyone may freely collect, receive, and disseminate information and opinions. The Constitution does not provide any special provision on the limitations of the freedom of expression. In accordance with the third paragraph of Article 15 of the Constitution, however, human rights may be limited in order to guarantee the protection of the rights of others. Thus, freedom of conscience enshrined in Article 41 of the Constitution could be applied to limit the freedom of expression. However, none of the cases hitherto resolved by the Constitutional Court included a conflict between the freedom of conscience or religion and the freedom of expression.

In addition, blasphemy as such is not incriminated in Slovenia. There are a number of criminal offences that at least indirectly protect the freedom of religion, for example, Violation of the Right to Equality (Article 131), Disrupting Religious Ceremonies (Article 311), Disrupting Funerals and Desecration of Graves (Article 312), and Public Incitement of Hate, Violence, and Intolerance (Article 297 of the Criminal Code) based *inter alia* on religion.

The cover of the album *Bitchcraft* by the Slovene group *Strelnikoff* depicts Virgin Mary holding a rat instead of Jesus as she does in the original painting at the church in Brezje, an important pilgrimage site in Slovenia. This could have been the closest we have ever come to a case of “blasphemy”. As the cover allegedly severely offended and humiliated Slovene Christians, the members of the band were charged with the qualified form of the criminal offence of Violent Conduct.<sup>1</sup> The band claimed that the entire album was a critical response to statements that the Archbishop had made against the reproductive rights as they are proclaimed by the Constitution, in particular the right to freely decide on bearing children.<sup>2</sup>

The criminal charges were eventually rejected, and the case did not reach the Constitutional Court, so (un) fortunately, I have no blasphemy case law that I could share with you.

---

1. Article 299 of the Criminal Code then in force read as follows:

“Violent Conduct

(1) Whoever insults another, or treats him in an ugly manner or violently or endangers his security, thereby provoking endangerment, indignation or fright in public or in family, shall be punished by imprisonment of up to two years.

(2) If the offence under the above paragraph has been committed by at least two or more persons, or has entailed the serious humiliation of several persons or light bodily harm, the perpetrator shall be punished by imprisonment of up to three years.”

2. Article 55 of the Constitution lays down the Freedom of Choice in Childbearing and reads as follows:

“Everyone shall be free to decide whether to bear children.

The state shall guarantee the opportunities for exercising this freedom and shall create such conditions as will enable parents to decide to bear children.”



In fact, in the majority of the Constitutional Court cases regarding the freedom of expression, the right to personal dignity (Article 34 of the Constitution) and the right to privacy and personality rights (Article 35 of the Constitution) were invoked to justify limitations of the freedom of expression. These were either cases that originated in criminal proceedings for criminal offences against honour and reputation<sup>3</sup> or cases that originated in civil law suits for the payment of compensation. Today, I would like to outline two cases from this last line of case law.

## **P**resentation of the case law

### **Constitutional Court Decision no. Up-1391/07 of 10 September 2009 (Codices: SLO-2009-3-009)<sup>4</sup>**

The case originated in a civil law suit. There was a conflict between the right to protect the honour and reputation of a deputy of the National Assembly (the Lower House of the Slovene Parliament), on one side, and the freedom of expression of the weekly magazine *Mladina* and its journalists, on the other. The ordinary courts found that the magazine published an article that was objectively offensive and entailed a negative value judgment of the deputy's personality. They favoured the deputy's right to protection of his honour and reputation over the freedom of expression of the magazine and its journalists. The magazine was ordered to pay about 3,000 euros compensation for the deputy's mental suffering and it had to publish the operative provisions of the judgment.

The article in question was a presentation of a parliamentary debate that took place during the procedure for the adoption of a draft law on same-sex civil partnerships. In the debate, the deputy who was a member of the Slovene National Party vigorously opposed the adoption of the draft law and expressed both by words and gestures a very negative opinion regarding homosexuals. In the article at issue, the journalist wrote that such behaviour "really turned out to be just in the normal range of a cerebral bankrupt who is lucky to be living in a country with such limited human resources that a person with his characteristics can even end up in the parliament when in any normal country worthy of respect he could not even be a janitor in an average urban primary school."

In its constitutional complaint, the magazine emphasised that the journalist merely responded to the deputy's own statements and conduct, which were extremely insulting for a particularly vulnerable social group and that the journalist only expressed an opinion regarding the deputy's statements and conduct, not his personality. The complainant also pointed out that the article was a political satire and highlighted the important role of the freedom of the press in a democratic society.

In its review, the Constitutional Court recalled the relevant constitutional case law. The body of constitutional case law on the freedom of expression is quite extensive and, as a general rule, the Constitutional Court affords strong protection to the freedom of expression. Thus, in cases regarding the interferences in the freedom of expression, or even artistic freedom, with the rights of private individuals to the protection of their personality rights stemming from Articles 34 and 35 of the Constitution, the Constitutional Court often decided in favour of the freedom of expression.<sup>5</sup> The Constitutional Court also recalled the relevant case law of the European Court of Human Rights (hereinafter, "ECtHR"). It underlined the importance of the freedom of expression, and in particular of the freedom of the press, as one of the foundations of modern democratic societies. However, the Constitutional Court then recalled that the freedom of expression is not unlimited, as it may have to be restricted in order to guarantee the rights of others. In this regard it stressed that journalists carry a particular responsibility regarding the information they convey.

The Constitutional Court confirmed that the deputy was a public figure and thus had to accept a higher degree of criticism than other persons. It also agreed that the deputy's conduct may have been inappropriate and therefore increased the threshold of acceptable criticism, recalling that also critical, even insulting opinions may be protected

---

3. See e.g. the recent Constitutional Court Decision no. Up-1128/12, dated 14 May 2015, that originated in criminal proceedings against a former deputy of the National Assembly for defamatory statements he made against a state prosecutor. The Constitutional Court found that the regular courts failed to take into account all constitutionally relevant circumstances of the case and strike a fair balance between the deputy's freedom of expression and the right of the state prosecutor to protection of his honour and reputation. It abrogated the challenged court decisions and remanded the case for new adjudication.

4. The decision has been translated into English and may be found in CODICES or at: <http://odlocitve.us-rs.si/en/odlocitev/AN03281?q=Up-1391%2F07>.

5. See e.g. Constitutional Court Decisions no. Up-50/99, dated 14 December 2000, SLO-2000-S-002, accessible at: <http://odlocitve.us-rs.si/en/odlocitev/AN02274>, no. Up-406/05, dated 6 July 2006, abstract accessible at: <http://odlocitve.us-rs.si/en/odlocitev/AN02997>, and no. Up-444/09, dated 12 April 2012, abstract accessible at: <http://odlocitve.us-rs.si/en/odlocitev/AN03614>.

by the freedom of expression if they entail a response to provocative statements. Nevertheless, the Constitutional Court then found that the ordinary courts did not excessively limit the complainant's freedom of expression. It explained that an average reader would have understood the article as the journalist's assessment of the deputy's low intelligence, incapacity, and poor personal characteristics. It rejected the complainant's argument that the article constituted political satire and found that it was intended to inform the public about a parliamentary debate. The Constitutional Court further held that there was no substantial connection between the deputy's conduct and the journalist's reaction. In the opinion of the Constitutional Court, the article did not contribute to people being informed or encourage a socially important and sensitive public discussion on the position of homosexuals. The journalist had thus overstepped the boundaries of his freedom of expression and inadmissibly interfered with the rights of the deputy.

The Constitutional Court concluded that the regular courts have struck an appropriate balance between the competing rights and rejected the constitutional complaint as unfounded.

#### **ECtHR: *Mladina D.D. Ljubljana v. Slovenia* (17 April 2014)<sup>6</sup>**

However, the story did not end with the Constitutional Court Decision, as the magazine complained to the ECtHR.

It was interesting to read the ECtHR Judgment, as the Court initially highlighted the same aspects of the freedom of expression and its limits and referred to some of the same case law as the Constitutional Court had done in its decision in the case at issue. The ECtHR found that the limitation of the right to the freedom of expression had been lawful – the right to compensation is determined in the Code of Obligations. It further pursued a legitimate aim, i.e. the protection of the rights of another. However, while the reasons that the Slovene courts put forward to justify the limitation were relevant, the ECtHR concluded that they were not sufficient to justify the limitation of the freedom of expression in the case at issue.

The ECtHR drew attention to the fact that the domestic courts did not sufficiently consider the context and style of the article. Contrary to the Constitutional Court, which mainly concentrated on the article, the ECtHR also focused on the deputy's conduct and statements and stressed that the deputy's own statements and conduct provided a sufficient basis for the journalist's response. The ECtHR explained that his imitation of homosexuals during the debate was a form of ridicule that promoted negative stereotypes. It held that the article should be interpreted as a strong disagreement or even as contempt for the deputy's position on the issue of same-sex partnerships rather than a factual assessment of his intellectual abilities. In the opinion of the ECtHR, in the article the journalist simply matched the deputy's provocative statements and adopted a satiric style to match the manner in which the deputy had chosen to express himself. The domestic courts thus did not correctly balance the rights in conflict.

The ECtHR concluded that the interference was not necessary in a democratic society within the meaning of Article 10-2 of the European Convention on Human Rights (hereinafter, "ECHR") and that there had been a violation of Article 10 ECHR.

This case was decided by the fifth section of the ECtHR and even before it became final the Constitutional Court decided another somewhat similar case in which it referred to the Judgment in *Mladina D.D. Ljubljana v. Slovenia*.

#### **Constitutional Court Decision no. Up-584/12 of 22 May 2014<sup>7</sup>**

This was Decision no. Up-584/12 of 22 May 2014. A closer look at the Decision shows that the Slovene Constitutional Court considered the arguments put forward by the ECtHR in its Judgment in *Mladina D.D. Ljubljana v. Slovenia* to be convincing. Case no. Up-584/12 again concerned a conflict between the freedom of expression and personality rights. The complainant was the host of the satirical television show *Hri-bar*. He was ordered to pay damages to the director of entertainment programming on TV Slovenia due to defamatory statements he had made regarding his person. The complainant emphasised that his statements were a critical response to the censorship of satirical observations, which is incompatible with democratic values. The regular courts, however, found that

---

6. The decision is accessible at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-142424>.

7. The Decision is accessible in Slovene at: <http://odlocitve.us-rs.si/si/odlocitev/US30419>; the abstract in English is accessible at: <http://odlocitve.us-rs.si/en/odlocitev/AN03699>.

the statements made by the complainant in various interviews were not made within the scope of satire and that they were offensive. He was ordered to pay about 2,000 EUR compensation.

In its review, the Constitutional Court stressed the particular importance of the freedom of expression. It explained that in a conflict between human rights, freedom of expression must be given considerable weight. However, due to the inviolability of the core of the rights determined by Articles 34 and 35 of the Constitution, a limit must also be drawn as regards expressions of harsh value judgments. This limit is reached where the intent of the speaker is no longer to influence the debate on matters of public concern, but only to insult someone.

The Constitutional Court emphasised that when weighing the competing rights, the circumstances of the case must be considered as a whole. The Constitutional Court established that the ordinary courts did not take into account that, in the interest of preserving a free and unrestricted debate on matters of general interest, the sharpness, roughness, and exaggeration of certain expressed opinions or a certain degree of exaggeration and provocation must be tolerated. The courts also failed to establish the factual basis for the contested statements. In their review, they did not include the context in which the statements at issue were expressed. When weighing the competing rights, they especially failed to evaluate the allegation that by the statements at issue the complainant was responding to the prior conduct of the plaintiff as an executive at the public television network, i.e. to the censorship of the complainant's satirical show on the national television network. They also did not take into account the fact that, in the framework of the right to the freedom of expression, not only the content, but the style of the statements (as a form of expression) is also protected. These were all constitutionally relevant circumstances that the regular courts should not have overlooked when carrying out the weighing of the competing rights.

The Constitutional Court therefore abrogated the challenged court decisions and remanded the case to the first instance court for new adjudication. It instructed the court to reweigh all the constitutionally relevant circumstances of the case at issue and, on this basis, decide whether the right of the plaintiff to the protection of his honour and reputation, or the right of the complainant to the freedom of expression must be given priority in this case.

In the meantime, in the new proceedings, the complainant was again ordered to pay compensation by the first instance court. He appealed the decision and the Higher Court has not yet decided on the appeal. The case might thus even return to the Constitutional Court.

## **C**oncluding remarks

I hope you enjoyed this glimpse into the case law of the Slovene Constitutional Court with regard to the limits on the freedom of expression. Before I conclude, I would like to add that I believe that the previous presentations and the debate have clearly shown that the question of the limits on the freedom of expression cannot be resolved on an abstract level or by means of a general rule. Instead, in each case, the competing rights have to be carefully weighed against each other and their relative importance must be duly assessed in the light of all of the circumstances of the individual case. Only by such consideration can we ensure that a fair balance between the freedom of expression and other rights has been struck.

Thank you for your attention.



**Sung He LIM**  
**Research Officer at the Constitutional Court of the Republic of Korea**



**Blasphemy and other limitations to the freedom of expression**

In Korea, there is relatively little discussion about blasphemy restricting the freedom of expression. The reason for this may be that Korea is still largely a racially homogeneous nation and that extremist religious groups or hostility among different ethnic groups are hard to find. Also, another reason may be that the main religion in Korea, Buddhism, does not exclude other religious beliefs.

According to recent studies, only half of the Korean people responded that they believe in some kind of a religion. Among these, approximately 22% are Buddhists, 21% are Protestants, and 7% are Catholics. There is little tension among these religious groups, so the question of blasphemy compatible with the freedom of expression has not been an issue. However, if the Korean society becomes more religiously or ethnically diverse in the future, this situation may of course change.

The Korean Constitution guarantees freedom of expression and yet provides that “neither speech nor the press shall violate the honour or rights of other persons nor undermine public morals or social ethics.” So in theory, if the speech in question should “violate the honor or rights of others”, then it may be restricted. Blasphemy is no exception to this rule, in theory. In Korea, violation of personal honour and human dignity, such as libel, slander, defamation, etc. is more hotly debated, especially with the wide access to the internet and the instant spread of information.

I believe that the significant changes in the means of communication affecting the freedom of expression should also be taken into account in balancing the relevant interests.









# **PARTICIPANTS**

## **ALBANIA**

**Noela RUCO, Head of Department for Research, Studies and Publications, Constitutional Court, Tirana**

## **ARMENIA**

**Grigori VAHANYAN, Adviser, Constitutional Court, Yerevan**

## **AZERBAIJAN**

**Kamran YUSIFOV, Chief Adviser, Constitutional Court, Baku**

## **BELGIUM**

**Rik RYCKEBOER, Référendaire, Cour Constitutionnelle, Bruxelles**

**Anne RASSON, Référendaire, Cour Constitutionnelle, Bruxelles**

## **BOSNIA AND HERZEGOVINA**

**Mira PEKMEZ, Deputy Secretary General, Constitutional Court, Sarajevo**

**Ermina DUMANIJC, Head of Centre for Records, Documentation, Information and Publication, Constitutional Court, Sarajevo**

## **CHILE**

**Cristián Andrés GARCÍA MECHSNER, Director de Estudios, Tribunal Constitucional, Santiago**

## **CROATIA**

**Mirjana STRESEC, Senior Adviser, Constitutional Court, Zagreb**

## **CZECH REPUBLIC / RÉPUBLIQUE TCHÈQUE**

**Lubomir MAJERCIK, Head of Analytical Department, Constitutional Court, Brno**

## **ESTONIA**

**Ms Ulrika EESMAA, Law Clerk of Constitutional Review Chamber, Supreme Court, Tartu**

## **HUNGARY**

**Ms Krisztina KOVÁCS, Counsellor, Constitutional Court, Budapest**

## **IRELAND**

**Ms Sarahrose MURPHY, Executive Legal Officer, Supreme Court, Dublin**

## **KOREA**

**Il-Won KANG, Justice, Constitutional Court, Seoul**

**Kook Hee LIM, Deputy Director, International Affairs Division, Constitutional Court, Seoul**

**Sung He LIM, Research Officer, Constitutional Court, Seoul**

## **KOSOVO**

**Veton DULA, Director, Communication and Information Office, Constitutional Court, Pristina**

## **KYRGYZSTAN**

**Kanybek MASALBEKOV, Head of International Department of Constitutional Chamber, Bishkek**

## **LATVIA**

**Laila JURCENA, Adviser to the President, Constitutional Court, Riga**

## **LITHUANIA**

**Ingrida DANIELIENE, Secretary General, Constitutional Court, Vilnius**

**LIECHTENSTEIN**

**Ivo ELKUCH, Legal Adviser, State Court, Vaduz**

**LUXEMBOURG**

**Georges SANTER, Président, Cour constitutionnelle, Luxembourg**

**Lily WAMPACH, Greffier, Cour constitutionnelle, Luxembourg**

**MOLDOVA**

**Rodica SECRIERU, Secrétaire générale, Cour constitutionnelle, Chisinau**

**Lilia RUSU, chef de la Direction juridique-greffe, Cour constitutionnelle, Chisinau**

**Mihaela BESCHIERU, Chef du service des relations extérieures, Cour constitutionnelle, Chisinau**

**MONTENEGRO**

**Jadranka NOVAKOVIĆ, Head of Division for Constitutional complaints, Constitutional Court, Podgorica**

**Nerma DOBARDŽIĆ, Advisor, Constitutional Court, Podgorica**

**MOROCCO**

**Adil MOUSSEBBIH, Docteur en droit, Conseil constitutionnel, Rabat**

**NETHERLANDS**

**Marjolein VAN ROOSMALEN h.j.th., legal adviser, Council of State, The Hague**

**Mariam CHÉBTI, Supreme Court, Legal Assistant, The Hague**

**NORWAY**

**Elin HOLMEDAL, Deputy Secretary General, Supreme Court, Oslo**

**PERU**

**Felipe PAREDES SAN ROMAN, Adviser the President, Constitutional Court, Lima**

**POLAND**

**Anna ROZYCKA-KOSIOREK, Department of Jurisprudence and Studies, Constitutional Tribunal, Warsaw**

**PORTUGAL**

**Manuela BAPTISTA LOPES, Secretary General, Constitutional Tribunal, Lisbon**

**ROMANIA**

**Augustin ZEGREAN, Chairman, Constitutional Court, Bucharest**

**Daniel-Marius MORAR, Judge, Constitutional Court, Bucharest**

**Marieta SAFTA, First Assistance Magistrate, Constitutional Court, Bucharest**

**SERBIA**

**Verica JAKOVLJEVIĆ, Senior Legal Adviser, Constitutional Court, Belgrade**

**SLOVENIA**

**Vesna BOŽIČ, Advisor, Constitutional Court, Ljubljana**

**SWITZERLAND**

**Paul TSCHÜMPERLIN, Secretary General, Tribunal Fédéral, Lausanne**

**Julianne ALBERINI, Chef du Service de documentation, Tribunal Fédéral, Lausanne**

**TURKEY**

**Serhat KÖKSAL, Rapporteur-Judge, Constitutional Court, Ankara**

**EUROPEAN COURT OF HUMAN RIGHTS**  
**Aida GRGIC, Lawyer, Registry, Strasbourg, France**

**COURT OF JUSTICE OF THE EUROPEAN UNION**  
**Maria Pilar NUNEZ RUIZ, Research and Documentation Department, Luxembourg**

**SPECIAL GUESTS**

**CONFERENCE OF CONSTITUTIONAL JURISDICTIONS OF AFRICA**  
**Moussa LARABA, Secrétaire Général adjoint de la CJCA, Algérie**

**JORDAN**  
**Nizar AL KHARABSHEH, Director of Public Relations and International Cooperation, Constitutional Court, Amman**

**TAJIKISTAN**  
**Gulnora NURLYAMINOVA, Head of Legal Department, Constitutional Court, Dushanbe**  
**(Excused / Excusé)**

**SECRETARIAT**  
**VENICE COMMISSION**

**Schnutz Rudolf DÜRR**  
**Tanja GERWIEN**  
**Jayne APARICIO**  
**Ana GOREY**

**INTERPRETERS**

**Corinne MCGEORGE-MAGALLON**  
**Philip MINNS**









## FOR FURTHER INFORMATION

### VENICE COMMISSION

- DG-I, Council of Europe  
67075 Strasbourg Cedex France  
Tel.: +33 3 88 41 20 67  
Fax: +33 3 88 41 37 38  
Email: [venice@coe.int](mailto:venice@coe.int)
- All documents are available on the website  
of the Venice Commission:

[www.venice.coe.int](http://www.venice.coe.int)

[www.coe.int](http://www.coe.int)

The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.