

Blasphemy, insult and hatred:  
finding answers in a democratic society

**Science and technique of democracy, No. 47**



**Venice Commission**

Council of Europe Publishing

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Today's Europe is a large space where opportunities for intercultural exchanges multiply and the potential for cultural enrichment develops constantly, even as we strive to consolidate our common values. Will we take these chances? Or will we retreat into our traditional identities, out of fear of assimilation? Will diversity really become the asset we claim it is, or will it engender xenophobia and ignorance? Will intolerance and violence give way to acceptance and open-mindedness?

The Council of Europe's European Commission for Democracy through Law ("the Venice Commission") reflected on these matters when dealing with a request from the Parliamentary Assembly to look into the issue of the regulation and prosecution of blasphemy, religious insult and incitement to hatred.

The Venice Commission thus brainstormed with intellectuals, politicians and the civil society. In its report on freedom of expression and freedom of religion, it strove to propose a new ethic of responsible intercultural relations – an attitude that starts by acknowledging that it is not always others who are the intolerant ones: each and every one of us is often intolerant too.

Section I of this publication is that Report of the Venice Commission, 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", which was adopted by the Venice Commission at its 76th Plenary Session (17-18 October 2008).

Section II contains three documents from the Council of Europe: General Policy Recommendation No. 7 of the European Commission Against Racism and Intolerance (ECRI) on national legislation to combat racism and racial discrimination, from 2002, which sets out the fundamental principles which inspired the Venice Commission's report; Resolution 1510 of the Parliamentary Assembly on freedom of expression and respect for religious beliefs, from 2006; and the Assembly's Recommendation 1805 on blasphemy, religious insults and hate speech against persons on grounds of their religion, from 2007.

Section III has some interesting reports that were presented at the international round-table conference on Art and Sacred Beliefs: from Collision to Co-existence, which

the Venice Commission organised in Athens on 31 January and 1 February 2008, in co-operation with the Hellenic League of Human Rights.

Finally, Section IV consists of the two appendices to the Report of the Venice Commission. Appendix 1 collects together European national laws on blasphemy, religious insult and incitement to religious hatred; Appendix 2 analyses domestic laws on blasphemy, religious insult and inciting religious hatred in various countries, on the basis of replies to a questionnaire.

Taken together, these documents help Europe to face the dilemma of getting strong opinions to live with genuine tolerance. They show how we can live with other people's beliefs without sacrificing our own.

*Simona Granata-Menghini*  
*Head of the Constitutional Co-operation Division, Venice Commission*

# **I. Report by the Venice Commission**

*Adopted by the Venice Commission at its 76th Plenary Session  
(Venice, 17-18 October 2008)*



# 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

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## 1. Introduction

1. In its Resolution 1510 (2006) on Freedom of expression and respect for religious beliefs,<sup>1</sup> the Parliamentary Assembly of the Council of Europe addressed the question of whether and to what extent respect for religious beliefs should limit freedom of expression. It expressed the view that freedom of expression should not be further restricted to meet increasing sensitivities of certain religious groups, but underlined that hate speech against any religious group was incompatible with the European Convention on Human Rights. The Assembly resolved to revert to this issue on the basis of a report on legislation relating to blasphemy, religious insults and hate speech against persons on grounds of their religion, after taking stock of the different approaches in Europe, including the report and recommendations of the Venice Commission.

2. By a letter of 11 October 2006, the Secretariat of the Parliamentary Assembly, on behalf of Mrs Sinikka Hurskainen, Rapporteur of the Committee on Culture, Science and Education on this matter, requested the Venice Commission to prepare an overview of national law and practice concerning blasphemy and related offences with a religious aspect in Europe.

3. A working group was promptly set up within the Venice Commission, composed of Mr Pieter van Dijk (member, the Netherlands), Ms Finola Flanagan (member, Ireland) and Ms Hanna Suchocka (member, Poland). Mr Louis-Léon Christians, Professor at Louvain University, Belgium, was invited to join the group as an expert and to collect the domestic provisions relating to blasphemy, religious insults and incitement to hatred of the Council of Europe's member states. Mr Christians' preliminary report was submitted to the Venice Commission in December 2006; it was subsequently supplemented and updated, where necessary, by the commission members, and finalised by the Secretariat (CDL-AD(2008)026add). It collects the legal provisions which are in force in all Council of Europe member states, and contains some references to the relevant case law of the national courts.

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1. Adopted by the Parliamentary Assembly on 28 June 2006 (19th sitting).

4. A preliminary discussion of the request submitted to the Venice Commission took place at the meeting of the Sub-commission on Fundamental Rights, held in Venice on 13 December 2006. At this meeting, in the light of the impossibility, under the applicable time constraints, of gathering exhaustive information on the practice and case law of all Council of Europe member states, it was decided to send a more detailed questionnaire to selected countries to obtain some indication of current trends and problems in Europe, and related legal practices. The questionnaire was sent to twelve states (Albania, Austria, Belgium, Denmark, France, Greece, Ireland, the Netherlands, Poland, Romania, Turkey, the United Kingdom). Appendix II (CDL-AD(2008)026add2 – page 229) contains the replies received from these twelve states.

5. The working group also relied on the material and information collected by the Committee of Experts for the Development of Human Rights (DH-DEV) relating to national legislation on hate speech.<sup>2</sup>

6. The working group exchanged information with the above Committee of Experts as well as with the Secretariat of the European Commission against Racism and Intolerance (ECRI).<sup>3</sup> It wishes to thank them for the fruitful co-operation.

7. A preliminary report was discussed at the meeting of the Sub-Commission on Fundamental Rights on 15 March 2007 and was subsequently adopted by the Commission at its 70th Plenary Session (Venice, 16-17 March 2007). This preliminary report was subsequently sent to the Parliamentary Assembly.

8. On 29 June 2007, the Parliamentary Assembly adopted Recommendation 1805 (2007) on blasphemy, religious insults and hate speech against persons on grounds of their religion, which contains references to the commission's preliminary report.

9. The commission subsequently organised, in co-operation with the Hellenic League of Human Rights, an international round-table conference on Art and Sacred Beliefs: from Collision to Co-existence, which took place in Athens on 31 January and 1 February 2008. At this conference, which gathered lawyers, artists, journalists, MPs and representatives of civil society, the intersection between freedom of expression and freedom of religion was extensively discussed, with a view to proposing constructive solutions to the conflicts which have been occurring in recent times.

10. The present report was discussed and adopted by the commission at its 76th Plenary Session (Venice, 17-18 October 2008).

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2. GT-DH-DV A[2006]008 Addendum, Human Rights in a Multicultural Society: compilation of the replies received from the member states to the questionnaire on hate speech. This information covers 37 countries.

3. [www.coe.int/T/e/human\\_rights/ecri/1-ECRI](http://www.coe.int/T/e/human_rights/ecri/1-ECRI).

## 2. Applicable international standards<sup>4</sup>

11. Article 9 of the European Convention on Human Rights (ECHR) provides that:

1. 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 the protection of the rights and freedoms of others.

12. Article 10 of the ECHR provides that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

13. Article 14 of the ECHR provides that:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

14. Article 1 of Protocol 12 to the ECHR provides that:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

15. The Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, provides that:

Article 3 – Dissemination of racist and xenophobic material through computer systems

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4. For a full review of relevant international standards, see: Anne Weber, *Handbook on Hate Speech*, Council of Europe Publishing, Strasbourg, October 2009.

1. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct:

distributing, or otherwise making available, racist and xenophobic material to the public through a computer system.

2. A Party may reserve the right not to attach criminal liability to conduct as defined by paragraph 1 of this article, where the material, as defined in Article 2, paragraph 1, advocates, promotes or incites discrimination that is not associated with hatred or violence, provided that other effective remedies are available.

3. Notwithstanding paragraph 2 of this article, a Party may reserve the right not to apply paragraph 1 to those cases of discrimination for which, due to established principles in its national legal system concerning freedom of expression, it cannot provide for effective remedies as referred to in the said paragraph 2.

#### Article 4 – Racist and xenophobic motivated threat

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct:

threatening, through a computer system, with the commission of a serious criminal offence as defined under its domestic law, (i) persons for the reason that they belong to a group, distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors, or (ii) a group of persons which is distinguished by any of these characteristics.

#### Article 5 – Racist and xenophobic motivated insult

1. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct:

insulting publicly, through a computer system, (i) persons for the reason that they belong to a group distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors; or (ii) a group of persons which is distinguished by any of these characteristics.

2. A Party may either:

a. require that the offence referred to in paragraph 1 of this article has the effect that the person or group of persons referred to in paragraph 1 is exposed to hatred, contempt or ridicule; or

b. reserve the right not to apply, in whole or in part, paragraph 1 of this article.

#### Article 6 – Denial, gross minimisation, approval or justification of genocide or crimes against humanity

1. Each Party shall adopt such legislative measures as may be necessary to establish the following conduct as criminal offences under its domestic law, when committed intentionally and without right:

distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts

constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.

2. A Party may either

a. require that the denial or the gross minimisation referred to in paragraph 1 of this article is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors, or otherwise

b. reserve the right not to apply, in whole or in part, paragraph 1 of this article.

16. Article 20.2 of the United Nations International Covenant on Civil and Political Rights provides that:

every kind of propaganda for national, racial or religious hatred, which constitutes incitement to discrimination, hostility or violence must be prohibited by law.

17. Article 4 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination calls upon states party to it to

declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.

18. Recommendation No. R (1997) 20 on Hate Speech<sup>5</sup> of the Committee of Ministers of the Council of Europe contains the following relevant principles:

Principle 2

The governments of the member states should establish or maintain a sound legal framework consisting of civil, criminal and administrative law provisions on hate speech which enable administrative and judicial authorities to reconcile in each case respect for freedom of expression with respect for human dignity and the protection of the reputation or the rights of others. To this end, governments of member states should examine ways and means to:

- stimulate and co-ordinate research on the effectiveness of existing legislation and legal practice;
- review the existing legal framework in order to ensure that it applies in an adequate manner to the various new media and communications services and networks;
- develop a co-ordinated prosecution policy based on national guidelines respecting the principles set out in this recommendation;

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5. Adopted by the Committee of Ministers on 30 October 1997 at the 607th meeting of the Ministers' Deputies.

- add community service orders to the range of possible penal sanctions;
- enhance the possibilities of combating hate speech through civil law, for example by allowing interested non-governmental organisations to bring civil law actions, providing for compensation for victims of hate speech and providing for the possibility of court orders allowing victims a right of reply or ordering retraction;
- provide public and media professionals with information on legal provisions which apply to hate speech.

### Principle 3

The governments of the member states should ensure that in the legal framework referred to in Principle 2, interferences with freedom of expression are narrowly circumscribed and applied in a lawful and non-arbitrary manner on the basis of objective criteria. Moreover, in accordance with the fundamental requirement of the rule of law, any limitation of, or interference with, freedom of expression must be subject to independent judicial control. This requirement is particularly important in cases where freedom of expression must be reconciled with respect for human dignity and the protection of the reputation or the rights of others.

### Principle 4

National law and practice should allow the courts to bear in mind that specific instances of hate speech may be so insulting to individuals or groups as not to enjoy the level of protection afforded by Article 10 of the European Convention on Human Rights to other forms of expression. This is the case where hate speech is aimed at the destruction of the rights and freedoms laid down in the Convention or at their limitation to a greater extent than provided therein.

### Principle 5

National law and practice should allow the competent prosecution authorities to give special attention, as far as their discretion permits, to cases involving hate speech. In this regard, these authorities should, in particular, give careful consideration to the suspect's right to freedom of expression given that the imposition of criminal sanctions generally constitutes a serious interference with that freedom. The competent courts should, when imposing criminal sanctions on persons convicted of hate speech offences, ensure strict respect for the principle of proportionality.

### Principle 6

National law and practice in the area of hate speech should take due account of the role of the media in communicating information and ideas which expose, analyse and explain specific instances of hate speech and the underlying phenomenon in general as well as the right of the public to receive such information and ideas. To this end, national law and practice should distinguish clearly between the responsibility of the author of expressions of hate speech, on the one hand, and any responsibility of the media and media professionals contributing to their dissemination as part of their mission to communicate information and ideas on matters of public interest on the other hand.

## Principle 7

In furtherance of Principle 6, national law and practice should take account of the fact that:

- reporting on racism, xenophobia, anti-Semitism or other forms of intolerance is fully protected by Article 10, paragraph 1, of the European Convention on Human Rights and may only be interfered with under the conditions set out in paragraph 2 of that provision;
- the standards applied by national authorities for assessing the necessity of restricting freedom of expression must be in conformity with the principles embodied in Article 10, as established in the case law of the Convention's organs, having regard, *inter alia*, to the manner, content, context and purpose of the reporting;
- respect for journalistic freedoms also implies that it is not for the courts or the public authorities to impose their views on the media as to the types of reporting techniques to be adopted by journalists.

19. The Council of Europe's European Commission against Racism and Intolerance (ECRI), in its general policy recommendation No. 7,<sup>6</sup> makes, *inter alia*, the following recommendations on domestic criminal legislation:

### I. Definitions

1. For the purposes of this Recommendation, the following definitions shall apply:
  - a. "racism" shall mean the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.

...

### II. Constitutional law

2. The constitution should enshrine the principle of equal treatment, the commitment of the State to promote equality as well as the right of individuals to be free from discrimination on grounds such as race, colour, language, religion, nationality or national or ethnic origin. The constitution may provide that exceptions to the principle of equal treatment may be established by law, provided that they do not constitute discrimination.

...

### IV. Criminal law

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18. The law should penalise the following acts when committed intentionally:
  - a. public incitement to violence, hatred or discrimination,

6. ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, adopted by the ECRI on 13 December 2002, found at [www.coe.int/t/e/human\\_rights/ecri/1-ecri/3-general\\_themes/1-policy\\_recommendations/recommendation\\_n7/3-Recommendation\\_7.asp](http://www.coe.int/t/e/human_rights/ecri/1-ecri/3-general_themes/1-policy_recommendations/recommendation_n7/3-Recommendation_7.asp).

- b. public insults and defamation or
- c. threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;
- d. the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;
- e. the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes;
- f. the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, with a racist aim, of written, pictorial or other material containing manifestations covered by paragraphs 18 a, b, c, d and e; ...

23. The law should provide for effective, proportionate and dissuasive sanctions for the offences set out in paragraph 18 .... The law should also provide for ancillary or alternative sanctions ....

20. The Committee of Ministers' Declaration on freedom of political debate in the media, adopted in February 2004, holds that defamation or insult by the media should not lead to prosecution, "unless the seriousness of the violation of the rights or reputation of others makes it a strictly necessary and proportionate penalty, especially where other fundamental rights have been seriously violated through defamatory or insulting statements in the media, such as hate speech" (emphasis added).<sup>7</sup>

21. In its Recommendation 1805 (2007) on blasphemy, religious insults and hate speech against persons on grounds of their religion, the Parliamentary Assembly of the Council of Europe considers that "national law should only penalise expressions about religious matters which intentionally and severely disturb public order and call for public violence".<sup>8</sup>

### 3. National legislation on blasphemy, religious insults and inciting religious hatred

22. The Venice Commission collected the criminal law provisions of Council of Europe member states relating to blasphemy, religious insults and incitement to religious hatred.<sup>9</sup> This information is contained in document CDL-AD(2008)026add

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7. The criminalisation of defamation on the ground of race, colour, language, religion, nationality, or national or ethnic origin recommended by the ECRI does not conflict with the modern trends towards decriminalisation of defamation, which concerns more particularly the cases of criticism of politicians and other public figures.

8. Assembly debate on 29 June 2007, recommendation adopted by the Assembly on 29 June 2007. See also Res(2006)1510 on Freedom of expression and respect for religious beliefs, adopted by the Assembly on 28 June 2006. See also the statement of the Human Rights Commissioner: "Do not criminalise critical remarks against religions", of 11 June 2007, available at the commissioner's website at [www.commissioner.coe.int](http://www.commissioner.coe.int).

9. The criminal legislation of several states also imposes limitations on the freedom of association and assembly with a view to preventing hate speech.

(see Appendix I, p. 149). The commission also sought more specific and detailed information about the legislation and legal practice in a selected number of member states (Albania, Austria, Belgium, Denmark, France, Greece, Ireland, the Netherlands, Poland, Romania, Turkey and the United Kingdom); this information is contained in document CDL-AD(2008)026add2. The commission's analysis, set out hereinafter (see Appendix II, p. 229), is based on this information.

23. Most states penalise the disturbance of religious practice (for instance, the interruption of religious ceremonies).

## Blasphemy

24. Blasphemy is an offence in only a minority of member states (Austria, Denmark, Finland, Greece, Italy, Liechtenstein, the Netherlands, San Marino).<sup>10</sup> It must be noted in this context that there is no single definition of "blasphemy". In the Merriam-Webster Dictionary, blasphemy is defined as: 1: the act of insulting or showing contempt or lack of reverence for God b: the act of claiming the attributes of deity; 2: irreverence toward something considered sacred or inviolable. According to the Committee on Culture, Science and Education, in their report on blasphemy, religious insults and hate speech against persons on grounds of their religion,<sup>11</sup> blasphemy can be defined as the offence of insulting or showing contempt or lack of reverence for God and, by extension, towards anything considered sacred. The Irish Law Reform Commission suggested a legal definition of "blasphemy" as "Matter the sole effect of which is likely to cause outrage to a substantial number of adherents of any religion by virtue of its insulting content concerning matters held sacred by that religion".<sup>12</sup>

25. The penalty incurred for blasphemy is generally a term of imprisonment (mostly, up to three, four or six months; up to two years in Greece for malicious blasphemy) or a fine.

26. The offence of blasphemy is, nowadays, rarely prosecuted in European states.

## Religious insult

27. Religious insult is a criminal offence in about half the member states (Andorra, Cyprus, Croatia, the Czech Republic, Denmark, Spain, Finland, Germany,<sup>13</sup> Greece, Iceland, Italy, Lithuania, Norway,<sup>14</sup> the Netherlands, Poland, Portugal, Russian Federation, Slovak Republic, Switzerland, Turkey and Ukraine),

10. The introduction of the criminal offence of blasphemy is being discussed in Ireland in order to implement Article 40 paragraph 6.1(l) of the Constitution.

11. Doc. 11296, 8 June 2007.

12. There exist several other definitions: see Angela Evenhuis, *Blasphemous Matter: Blasphemy, Defamation of Religion and Human Rights*, Magenta Foundation, 2008, p. 8.

13. In Germany it is a condition that the offender has disturbed the public peace for the offence to materialise. Similarly, in Portugal the offender is required to have breached the peace.

14. Prosecution of religious insults is only done when it is in the public interest to do so.

whereas insult as such is generally considered as a criminal or administrative offence in all countries.

28. Although there is no general definition of "religious insult", the relevant European provisions appear to cover the different concepts (often at the same time) of "insult based on belonging to a particular religion" and "insult to religious feelings".

29. The penalty incurred is generally a term of imprisonment, varying significantly amongst member states and ranging from a few months (four or six) to one, two, three and even five years (in Ukraine). A pecuniary fine is always an alternative to imprisonment.

### Negationism

30. Negationism, in the sense of public denial of historic crimes is an offence in a few countries (Austria, Belgium, France, Switzerland). In other countries such as Germany, certain activity amounting to negationism may come within the definition of the offence of incitement to hatred.

### Discrimination

31. Discriminatory treatment of various kinds, including on religious grounds, is prohibited at constitutional level in all Council of Europe member states. Some states also have specific laws or provisions against such discrimination.

32. In some countries, the commission of any crime with an ethnic, racial, religious or similar motive constitutes a general aggravating circumstance (for example in France, Georgia, Italy, Luxembourg, Sweden, Spain and Ukraine). In some countries, certain specific crimes (for instance, murder) are aggravated by a racial or similar motive (as in Belgium, France, Georgia and Portugal).

### Incitement to hatred

33. Practically all Council of Europe member states (except for Andorra and San Marino) provide for an offence of incitement to hatred.<sup>15</sup> However, in some of

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15. There is no generally recognised definition of "incitement to hatred" or "hate speech". The Committee of Ministers, in its Recommendation No. R (1997) 20, provides the following working definition: "the term 'hate speech' shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin." The European Court of Human Rights referred to "all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)" in its *Gunduz v. Turkey* judgment of 4 December 2003, paragraph 40. Hate speech is not a so-called "hate crime". Hate crimes always comprise two elements: 1) a criminal offence committed with 2) a bias motive. As speech would not be a crime without the bias motive, it lacks the first essential element of hate crimes. However, "direct and immediate incitement to criminal acts" is prohibited in all member states: in those countries where what is penalised is not incitement to hatred as such, but incitement to violent acts or through violent acts, such incitement would qualify as a hate crime. General and specific penalty enhancements

these countries (among them Austria, Cyprus,<sup>16</sup> Greece, Italy<sup>17</sup> and Portugal) the law punishes incitement to acts likely to create discrimination or violence, not incitement to mere hatred. In some states (like Lithuania), the law penalises both (but incitement to violence carries more severe penalties).

34. In most member states, the treatment of incitement to religious hatred is a subset of incitement to general hatred, the term "hatred" generally covering racial, national and religious hatred in the same manner,<sup>18</sup> but at times also hatred on the ground of sex or sexual orientation, political convictions, language, social status or physical or mental disability. In Georgia, Malta, Slovakia and "the former Yugoslav Republic of Macedonia", religion is not specifically foreseen as a ground for hatred.

35. In several states (among them Armenia, Bosnia and Herzegovina, Latvia, Montenegro, Serbia, Slovenia, Ukraine), the fact that the incitement to hatred has been committed through – or has actually provoked – violence, constitutes an aggravating circumstance.

36. In the majority of member states (with the exception of Albania, Estonia, Malta, Moldova, Montenegro, the Netherlands, Poland, Serbia, Slovenia and Ukraine – and the United Kingdom, but with the exception of one's private dwelling), the incitement to hatred must occur in public. In Armenia and France, the fact that the incitement is committed in public represents an aggravating circumstance.

37. In Austria and Germany, the incitement to hatred must disturb the public order in order for it to become an offence. In Turkey, it must clearly and directly endanger the public.

38. Some states provide for specific, more stringent or severe provisions relating to incitement to hatred through the mass media (such as Armenia, Azerbaijan, Czech Republic, Romania).

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(see para. 32 above) also qualify as hate crime legislation. See OSCE/ODIHR Hate Crime Laws: A Practical Guide, available at [www.osce.org/item/36671.html?ch=1263](http://www.osce.org/item/36671.html?ch=1263).

16. In Cyprus, incitement to acts which are likely to cause discrimination, hatred or violence is penalised.

17. In Italy, the law distinguishes between incitement to commit discriminatory acts and incitement to commit violent acts.

18. In General Policy Recommendation No. 7, the ECRI uses "racism" to mean "the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons"; The ECRI uses "direct racial discrimination" to mean "any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification." It must also be noted that the judges in Strasbourg have stated that "no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures." (European Court of Human Rights, *Timishev v. Russia* judgment of 13 December 2005 [final on 13 March 2006], paragraph 58).

39. The intention to stir up hatred is generally not a necessary element of the offence, but it is so in Cyprus, Ireland, Malta, Portugal, Ukraine and England and Wales. In some member states, recklessness is taken into account too. In Ireland, for example, it is a defence for the accused to prove not to have intended to stir up hatred or not to have intended or not to have been aware that the words, behaviour or material concerned might be threatening, abusive or insulting. In Italy, the words, behaviour or material in question must stir up, or be intended to stir up, or be likely to stir up hatred. In Norway, the offence of incitement to hatred may be committed willingly or through gross negligence.

40. The maximum prison sentence incurred for incitement to hatred varies significantly (from one year to ten years) among member states:<sup>19</sup> one year (Belgium, France, the Netherlands); eighteen months (Malta); two years (Austria, Cyprus, Czech Republic, Denmark, Georgia, Iceland, Ireland, Lithuania, Slovenia, Sweden); three years (Azerbaijan, Bulgaria, Croatia, Estonia, Hungary, Italy, Latvia, Moldova, Norway, Poland, Slovakia, Spain, Turkey); four years (Armenia); five years (Bosnia and Herzegovina, Germany, Monaco, Montenegro, Portugal, Serbia, "the former Yugoslav Republic of Macedonia", Ukraine); ten years (Albania). In all countries, a prison term is alternative to or cumulative with a pecuniary fine.

## **4. General remarks**

### **Scope of the reflection**

41. The Parliamentary Assembly requested an overview of the legislation of the Council of Europe member states in regard to religious offences in the context of reciprocal limitations of freedom of expression and freedom of religion.

42. The following questions arise:

- Is there a need for specific supplementary legislation in this area?
- To what extent is criminal legislation adequate and/or effective for the purpose of bringing about the appropriate balance between the right to freedom of expression and the right to respect for one's beliefs?
- Are there alternatives to criminal sanctions?

### **Criminal legislation as a basis for interference with freedom of expression**

43. Freedom of expression, guaranteed by Article 10 of the European Convention on Human Rights (ECHR), constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received, or regarded

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19. Information on penalties is not available for all states.

as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.<sup>20</sup>

44. A democracy should not fear debate, even on the most shocking or anti-democratic ideas. It is through open discussion that these ideas should be countered and the supremacy of democratic values be demonstrated. Mutual understanding and respect can only be achieved through open debate. Persuasion through open public debate, as opposed to ban or repression, is the most democratic means of preserving fundamental values.

45. Article 10.2 of the ECHR provides for the possibility of imposing formalities, conditions, restrictions or penalties on freedom of expression, as are prescribed by law and are necessary in a democratic society in pursuit of specifically listed legitimate interests.

46. In the commission's view, however, in a true democracy, imposing limitations on freedom of expression should not be used as a means of preserving society from dissenting views, even if they are extreme. Ensuring and protecting open public debate should be the primary means of protecting inalienable fundamental values like freedom of expression and religion at the same time as protecting society and individuals against discrimination. It is only the publication or utterance of those ideas that are fundamentally incompatible with a democratic regime because they incite to hatred that should be prohibited.

47. Measures and acts to ensure respect for the religious beliefs of others pursue the aims of "protection of the rights and freedoms of others" and "protecting public order and safety". These aims can justify restrictions on the right to freedom of expression.<sup>21</sup> Indeed, the European Court of Human Rights has held that, in order to ensure religious peace, states have an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.<sup>22</sup> Respect for the religious feelings of believers can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration or offensive attacks on religious principles and dogmas; these may in certain circumstances be regarded as malicious violation of the spirit of tolerance, which must also be a feature of a democratic society.<sup>23</sup>

48. There is a view that, to the extent that religious beliefs concern a person's relation with the metaphysical, they can affect the most intimate feelings and

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20. European Court of Human Rights, *Giniewski v. France*, judgment of 31 January 2006, paragraph 43.

21. See, *inter alia*, European Court of Human Rights, *Murphy v. Ireland*, judgment of 10 July 2003, paragraph 64.

22. European Court of Human Rights, *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, paragraph 56.

23. *Ibid.*, paragraph 47.

may be so complex that an attack on them might cause a disproportionately severe shock. In this respect, it is argued that they differ from other beliefs, such as political or philosophical beliefs, and it is argued that they deserve a higher degree of protection.<sup>24</sup>

49. At any rate, the concepts of pluralism, tolerance and broadmindedness on which any democratic society is based mean that the responsibility that is implied in the right to freedom of expression does not, as such, mean that an individual is to be protected from exposure to a religious view simply because it is not his or her own.<sup>25</sup> The purpose of any restriction on freedom of expression must be to protect individuals holding specific beliefs or opinions, rather than to protect belief systems from criticism. The right to freedom of expression implies that it should be allowed to scrutinise, openly debate and criticise, even harshly and unreasonably, belief systems, opinions and institutions, as long as this does not amount to advocating hatred against an individual or groups.

50. Restrictions on the right to freedom of expression must be made "in accordance with the law". The nature and quality of the domestic legislation are therefore important, and so are the interpretation and application of the law, which depend on practice. Domestic law is interpreted and applied by domestic courts, which therefore play a vital role in bringing about the balance of interests and deciding whether an interference with the right to freedom of expression is necessary in a democratic society, and notably whether it is proportionate to the legitimate aims pursued.

51. Member states enjoy a certain, but not unlimited, margin of appreciation in that respect. The absence of a uniform European concept of the requirements of the protection of the rights of others in relation to attacks on religious convictions broadens the contracting states' margin of appreciation when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or religion.<sup>26</sup> What is likely to cause substantial offence to persons of a particular religious persuasion will 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: state authorities are therefore better placed than the international judge to appreciate what is "necessary in a democratic society".<sup>27</sup>

52. When looking into the extent of permissible restrictions on freedom of expression, the commission stresses that a distinction can be drawn between, on the one hand, works of art (in whatever form, such as painting, sculpture, installation, music, including pop music, theatre, cinema, books or poetry), and, on

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24. See contribution by N. Alivizatos, "Art and religion: the limits of liberalism", on p. 73.

25. European Court of Human Rights, *Murphy v. Ireland*, judgment of 10 July 2003, paragraph 72.

26. European Court of Human Rights, *Giniewski v. France*, judgment of 31 January 2006, paragraph 44; *Aydin Tatlav v. Turkey*, judgment of 2 May 2006, paragraphs 26, 27.

27. European Court of Human Rights, *Murphy v. Ireland*, judgment of 10 July 2003, paragraph 67.

the other hand, statements or publications expressing an opinion (for instance, speech that is audible in public, journalism, public speaking or television/radio debate). However, a work of art may contain political comment, and an ostensibly political expression may also be or become accepted as art. In respect of both forms of expression, therefore, restrictions will only be possible if they cause an undue interference in a guaranteed right of another person or group as per Article 17 of the ECHR, having regard to the permissible limitations in Article 10.2 of the ECHR.

53. Before proceeding with the analysis of the forms of interference with freedom of expression, the commission wishes to underline that what it may be necessary to limit in a democratic society is not the freedom of artistic or intellectual or other expression in itself, but the manner and extent of circulation of the intellectual or artistic product (the ideas expressed, the work of art created, the book or articles written, the cartoon drawn and so on). This explains why it is, at least theoretically, possible to hold accountable for incitement to hatred or religious insults not only and not even primarily the author of a statement or work of art, but also those who have directly or indirectly contributed to the circulation of such statement or work of art: a publisher, an editor, a broadcaster, a journalist, an art dealer, an artistic director or a museum manager.

54. There exist several forms of sanction of freedom of expression,<sup>28</sup> including:

- administrative fines;
- civil law remedies, including liability for damages;
- restraints on publication of periodicals, magazines, newspapers or books, or on art exhibitions; or criminal sanctions, both fines and imprisonment.

55. Criminal sanctions related to unlawful forms of expression which impinge on the right to respect for one's beliefs, which are specifically the object of this report, should be seen as last resort measures to be applied in strictly justifiable situations, when no other means appears capable of achieving the desired protection of individual rights in the public interest.

56. It is beyond doubt that hate speech towards members of other groups including religious groups "is in contradiction with the Convention's underlying values, notably tolerance, social peace and non-discrimination". Consequently, the author of hate speech "may not benefit from the protection afforded by Article 10 of the Convention". This arises by virtue of Article 17 of the Convention, which provides that:

Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the

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28. Similarly, freedom of assembly and association may be restricted in order to protect the rights of others.

destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.<sup>29</sup>

No one is allowed to abuse his or her right to freedom of expression to destroy or unduly diminish the right to respect for the religious beliefs of others.

57. Hate speech thus justifies criminal sanctions. Indeed, the pan-European introduction of sanctions against incitement to hatred has a very strong symbolic value, which goes beyond the objective difficulty of defining and prosecuting the crime of incitement to hatred. This trend is in accordance with General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, produced by the European Commission against Racism and Intolerance (ECRI). Similarly, the European Court of Human Rights has stated:

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.<sup>30</sup>

58. The application of hate legislation must be measured in order to avoid an outcome where restrictions, which potentially aim at protecting minorities against abuses, extremism or racism, have the perverse effect of muzzling opposition and dissenting voices, silencing minorities and reinforcing the dominant political, social and moral discourse and ideology.

59. The need for specific criminal legislation prohibiting blasphemy and religious insults is more controversial. There are two opposite views on this: one advocating the repeal of legislation on blasphemy and religious insult altogether; and one advocating introduction of the offence of religious insult or even the specific offence of "incitement to religious hatred".

60. In this respect, it is worth recalling that it is often argued that there is an essential difference between racist insults and insults on the ground of belonging to a given religion: whereas race is inherited and unchangeable, religion is not, and is instead based on beliefs and values that the believer will tend to hold as the only truth. This difference has prompted some to conclude that a wider scope

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29. See European Court of Human Rights, *Pavel Ivanov v. Russia*, dec. 20 February 2007; see also *Günduz v. Turkey*, judgment of 14 December 2003, paragraph 41, where the Court states that "Furthermore, as the Court noted in *Jersild v. Denmark* (judgment of 23 September 1994, Series A No. 298, p. 5, paragraph 35), there can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention". In the case of *Norwood v. the United Kingdom*, the Court stated that "a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination" (*Norwood v. the UK* (dec.), No. 23131/03, 16 November 2004). See also European Court of Human Rights, *Garaudy v. France*, dec. 24 June 2003, and *Lawless v. Ireland*, judgment of 1 July 1961, Series A No. 3, p. 45, paragraph 7.

30. European Court of Human Rights, *Gunduz v. Turkey*, judgment of 14 December 2003, paragraph 40.

of criticism is acceptable in respect of a religion than in respect of a race. This argument presupposes that, while ideas of superiority of a race are unacceptable, ideas of superiority of a religion are acceptable, because it is possible for the believer of the “inferior” religion to refuse to follow some ideas and even to switch to the “superior” religion.

61. In the commission’s opinion, this argument is convincing only insofar as genuine discussion is concerned, but it should not be used to stretch unduly the boundaries between genuine “philosophical” discussion about religious ideas and gratuitous religious insults against a believer of an “inferior” faith. On the other hand, it cannot be forgotten that international instruments and most domestic legislation put race and religion on an equal footing as forbidden grounds for discrimination and intolerance.

62. The Parliamentary Assembly – noting that, in the past, national law and practice concerning blasphemy and other religious offences often reflected the dominant position of particular religions in individual states – has considered that “in view of the greater diversity of religious beliefs in Europe and the democratic principle of the separation of state and religion, blasphemy laws should be reviewed by member states and parliaments” and that “blasphemy, as an insult to a religion, should not be deemed a criminal offence. A distinction should be made between matters relating to moral conscience and those relating to what is lawful, and between matters which belong to the public domain and those which belong to the private sphere.”<sup>31</sup>

63. The commission agrees with this view.

64. The commission does not consider it necessary or desirable to create an offence of religious insult (that is, insult to religious feelings) *simpliciter*, without the element of incitement to hatred as an essential component.<sup>32</sup> Neither does the commission consider it essential to impose criminal sanctions for an insult based on belonging to a particular religion.<sup>33</sup> If a statement or work of art does not qualify as incitement to hatred, then it should not be the object of criminal sanctions.

31. Parliamentary Assembly of the Council of Europe, Recommendation 1805 (2007) on blasphemy, religious insults and hate speech against persons on grounds of their religion.

32. This finding does not appear to comply fully with UN Human Rights Council Resolution 7/19 of 27 March 2007 on “Defamation of religion”, which reads as follows: “[the Human Rights Council] ... also urges States to provide, within their respective legal and constitutional systems, adequate protection against acts of hatred, discrimination, intimidation and coercion resulting from the defamation of any religion, to take all possible measures to promote tolerance and respect for all religions and their value systems and to complement legal systems with intellectual and moral strategies to combat religious hatred and intolerance”.

33. In its General Policy Recommendation No. 7, the ECRI recommends that public insults and defamation against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin be penalised. The commission recalls in this respect that the offences of “insult” and “defamation” exist in every member state and can be used, subject to all the relevant legal conditions, also in cases of public insults and defamation on religious grounds.

65. It is true that penalising insult to religious feelings could give a powerful signal to everyone, both potential victims and potential perpetrators, that gratuitously offensive statements and publications are not tolerated in an effective democracy.

66. On the other hand, the commission reiterates that recourse to criminal law, which should of itself be reserved in principle to cases when no other remedy appears effective, should only take place with extreme caution in the area of freedom of expression.

67. In addition, one has to be aware of certain difficulties with enforcement of criminal legislation in this area. The intention of the accused speaker or author, the effects of his or her action and the political, social or scientific context in which the contested statements or publications are made constitute elements that may be problematic to evaluate and balance for the prosecuting authorities and the courts. For this reason or for reasons of opportunity within the discretionary powers of the prosecuting authorities, new, specific legislation might raise expectations concerning prosecution and conviction that will not be met. Moreover, too activist an attitude on the part of the latter authorities may place the suspect persons or groups in the position of underdog, and provide them and their goal with propaganda and public support (the role of martyrs).

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

69. When it comes to statements, certain elements should be taken into consideration in deciding if a given statement constitutes an insult or amounts to hate speech: the context in which it is made; the public to which it is addressed; whether the statement was made by a person in his or her official capacity, in particular if this person carries out particular functions. For example, with respect to a politician, the Strasbourg Court has underlined that "it is of crucial importance that politicians in their public speeches refrain from making any statement which can provoke intolerance."<sup>34</sup> This call on responsible behaviour does not, of itself, unduly limit the freedom of political speech, which enjoys a reinforced protection under Article 10 of the ECHR.<sup>35</sup> On the other hand, however, it has to be pointed out that, in most legal systems, politicians enjoy certain immunities for their official statements.

70. As concerns the context, a factor which is relevant is whether the statement (or work of art) was circulated in a restricted environment or widely accessible

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34. European Court of Human Rights, *Erbakan v. Turkey*, judgment of 6 July 2006, paragraph 64.

35. European Court of Human Rights, *Incal v. Turkey*, judgment of 9 June 1998, paragraph 46.

to the general public, whether it was made in a closed place accessible with tickets or exposed in a public area. The circumstance that it was, for example, disseminated through the media bears particular importance, in the light of the potential impact of the medium concerned. It is worth noting in this respect that "it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media; the audiovisual media have means of conveying, through images, meanings which the print media are not able to impart."<sup>36</sup>

71. The commission notes in addition that circumstances as regards publication have changed since the arrival of the Internet. It is now possible to communicate instantly to a vast number of people in the world at large. Therefore, the power to incite to hatred is far greater than in pre-Internet days. Furthermore, publication is now much less in the control of the author or publisher, who may find it impossible to limit publication in the manner he or she would have originally intended.

72. As concerns the content, the Venice Commission wishes to underline that in a democratic society, religious groups must tolerate, as other groups must, critical public statements and debate about their activities, teachings and beliefs, provided that such criticism does not amount to incitement to hatred and does not constitute incitement to disturb the public peace or to discriminate against adherents of a particular religion.

73. Having said so, the Venice Commission does not support absolute liberalism. While there is no doubt that in a democracy all ideas, even though 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 circulated. Since the exercise of freedom of expression carries duties and responsibilities, it is legitimate to expect from every member of a democratic society to avoid, as far as possible, wordings that express scorn or are gratuitously offensive to others and infringe their rights.

74. It should also be accepted that when ideas which, to use the formula used by the Strasbourg Court, "do not contribute to any form of public debate capable of furthering progress in human affairs"<sup>37</sup> cause damage, it must be possible to hold whoever expressed them responsible. Instead of criminal sanctions, which in the Venice Commission's view are only appropriate to prevent incitement to hatred, the existing causes of action should be used, including the possibility of claiming damages from the authors of these statements. This conclusion does not prevent the recourse, as appropriate, to other criminal law offences, notably public order offences.

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36. European Court of Human Rights, *Jersild v. Denmark*, judgment of 23 September 1994, paragraph 31.

37. European Court of Human Rights, *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, paragraph 49.

75. Whether damage has been suffered and, if so, the extent of such damage, is for the courts to determine (including the matter of whether the action is possibly barred by parliamentary immunity). Courts are well placed to enforce rules of law in relation to these issues and to take into account the facts of each situation; they must reflect public opinion in their decisions, or the latter risk not being understood and accepted, and to lack legitimisation.

76. The Venice Commission underlines, however, that it must be possible to criticise religious ideas, even if such criticism may be perceived by some as hurting their religious feelings. Awards of damages should be carefully and strictly justified and motivated, and should be proportional, lest they should have a chilling effect on freedom of expression.

77. It is also worth recalling that an insult to a principle or a dogma, or to a representative of a religion, does not necessarily amount to an insult to an individual who believes in that religion. The European Court of Human Rights has made clear that an attack on a representative of a church does not automatically discredit and disparage a sector of the population on account of their faith in the relevant religion,<sup>38</sup> and that criticism of a doctrine does not necessarily contain attacks on religious beliefs as such.<sup>39</sup> The difference between group libel and individual libel should be carefully taken into consideration.

78. A legitimate concern which arises in this respect is that only the religious beliefs or convictions of some would be given protection. It might be so on account of their belonging to the religious majority or to a powerful religious minority, or their being recognised as a religious group. It might also be the case on account of the vehemence of their reactions to insults: a reasonable fear of uncontrollable reactions could lead to specific caution in respect of Muslims, for example.

79. In different societies it can indeed be observed that there are different sensitivities which affect the interpretation of, in the past, the offences of blasphemy and religious insult and, nowadays, the offence of incitement to hatred.

80. Certain individuals have undoubtedly shown increasing sensitivities in this regard and reacted violently to criticism of their religion. The commission accepts that, in the short term, these sensitivities may be taken into due account by the national authorities when, in order to protect the rights of others and to preserve social peace and public order, they are to decide whether or not a restriction to freedom of expression is to be imposed and implemented.

81. It must be stressed, however, that democratic societies must not become hostage to these sensitivities, and freedom of expression must not indiscriminately retreat when facing violent reactions. The threshold of sensitivity of certain

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38. European Court of Human Rights, *Klein v. Slovakia*, judgment of 31 October 2006, paragraph 51.

39. European Court of Human Rights, *Giniewski v. France*, judgment of 31 January 2006, paragraph 51.

individuals may be too low in certain specific circumstances, and incidents may even happen in places other than, and far away from, those where the original issue arose, and this should not become of itself a reason to prevent any form of discussion on religious matters involving that particular religion: the right to freedom of expression in a democratic society would otherwise be jeopardised.

82. The commission considers that any difference in the application of restrictions to freedom of expression with a view to protecting specific religious beliefs or convictions (including as regards the position of a religious group as victim as opposed to perpetrator) should either be avoided or duly justified.

83. A responsible exercise of the right to freedom of expression should endeavour to respect the right to respect for religious beliefs or convictions of others. In this and other areas, sensible self-censorship could help to strike a balance between freedom of expression and ethical behaviour. Refraining from uttering certain statements can be perfectly acceptable when it is done in order not to hurt gratuitously the feelings of other persons, whereas it is obviously unacceptable when it is done out of fear of violent reactions.

84. As important as the role of the courts may be in deciding whether a statement amounted to incitement to hatred or whether damages are incurred, the commission is of the opinion that the relationship between freedom of expression and freedom of religion should not per se be regulated through court rulings, but, first and foremost, through rational consultation between people, believers and non-believers.<sup>40</sup>

85. For this reason, the recommendations of the Parliamentary Assembly of the Council of Europe, the ECRI and many others as to the need to promote dialogue and encourage an ethic of communication for both the media and religious groups should be taken up with urgency. Education leading to better understanding of the convictions of others and to tolerance should also be seen as an essential tool in this respect.

86. In the long term, every member of a democratic society should be able to express in a peaceful manner his or her ideas, no matter how negative, on other faiths or beliefs or dogmas. Constructive debates should take place as opposed to dialogues of the deaf.

87. Mutual understanding and acceptance is perhaps the main challenge of modern societies. Diversity is undoubtedly an asset; but cohabiting with people of different backgrounds and ideas entails the need for everyone to refrain from gratuitous provocation and insults. In the end of the day, it is the price to pay for a new ethics of responsible intercultural relations in Europe and in the world.

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40. See contribution by D. Christopoulos and D. Dimoulis, "Art can legitimately offend", on p. 83.

## 5. Conclusions

88. The Venice Commission has examined the European legislation on blasphemy, religious insult and incitement to religious hatred, and has extensively reflected on this matter, including at the international round-table conference on Art and Sacred Beliefs: from Collision to Co-existence, which was held in Athens on 31 January and 1 February 2008. The commission has reached the following conclusions.

89. As concerns the question of whether or not there is a need for specific supplementary legislation in the area of blasphemy, religious insult and incitement to religious hatred, the commission finds:

a. That incitement to hatred, including religious hatred, should be the object of criminal sanctions as is the case in almost all European states, with the exception only of Andorra and San Marino. The latter two states should criminalise incitement to hatred, including religious hatred. In the commission's view, it would be appropriate to introduce an explicit requirement of intention or recklessness, which only a few states provide for.

b. That it is neither necessary nor desirable to create an offence of religious insult (that is, insult to religious feelings) *simpliciter*, without the element of incitement to hatred as an essential component.

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

90. As concerns the question of to what extent criminal legislation is adequate and/or effective for the purpose of bringing about the appropriate balance between the right to freedom of expression and the right to respect for one's beliefs, the commission reiterates that, in its view, criminal sanctions are only appropriate in respect of incitement to hatred (unless public order offences are appropriate).

91. Notwithstanding the difficulties with enforcement of criminal legislation in this area, there is a high symbolic value in the pan-European introduction of criminal sanctions against incitement to hatred. It gives strong signals to all parts of society and to all societies that an effective democracy cannot bear behaviours and acts that undermine its core values: pluralism, tolerance, respect for human rights and non-discrimination. The application of legislation against incitement to hatred must be done in a non-discriminatory manner.

92. In the commission's view, instead, criminal sanctions are inappropriate in respect of insult to religious feelings and, even more so, in respect of blasphemy.

93. Finally, as concerns the question of whether there are alternative options to criminal sanctions, the commission recalls that any legal system provides for other courses of action, which can be used in cases other than incitement to hatred.

94. However, as is the case with other problems of society, it is not exclusively or even primarily for the courts to find the right balance between freedom of religion and freedom of expression, but rather for society at large, through rational discussions between all parts of society, including believers and non-believers.

95. A new ethic of responsible intercultural relations in Europe and in the rest of the world is made necessary by the cultural diversity in modern societies and requires that a responsible exercise of the right to freedom of expression should endeavour to respect the religious beliefs and convictions of others. Self-restraint, in this and other areas, can help, provided of course that it is not prompted by fear of violent reactions, but only by ethical behaviour.

96. This does not mean, however, that democratic societies must become hostage to the excessive sensitivities of certain individuals: freedom of expression must not indiscriminately retreat when facing violent reactions.

97. The level of tolerance of these individuals, and of anyone who would feel offended by the legitimate exercise of the right to freedom of expression, should be raised. A democracy must not fear debate, even on the most shocking or anti-democratic ideas. It is through open discussion that these ideas should be countered and the supremacy of democratic values be demonstrated. Mutual understanding and respect can only be achieved through open debate. Persuasion, as opposed to ban or repression, is the most democratic means of preserving fundamental values.

98. For this reason, in the commission's opinion, the recommendations of the Parliamentary Assembly of the Council of Europe, the ECRI and many others as to the need to promote dialogue and encourage a communication ethic for both the media and religious groups should be taken up by way of urgency. Education leading to better understanding of the convictions of others and to tolerance should also be seen as an essential tool in this respect.



## **II. Council of Europe texts on respect for others' culture and beliefs**



# ECRI General Policy Recommendation No. 7 on National legislation to combat racism and racial discrimination (adopted on 13 December 2002)<sup>41</sup>

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## Preamble

The European Commission against Racism and Intolerance (ECRI):

Recalling the declaration adopted by the heads of state and government of the member states of the Council of Europe at their first summit held in Vienna on 8 and 9 October 1993;

Recalling that the plan of action on combating racism, xenophobia, antisemitism and intolerance set out as part of this declaration invited the Committee of Ministers to establish the European Commission against Racism and Intolerance with a mandate, *inter alia*, to formulate general policy recommendations to member states;

Recalling also the Final Declaration and Action Plan adopted by the heads of state and government of the member states of the Council of Europe at their second summit held in Strasbourg on 10-11 October 1997;

Recalling that Article 1 of the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights;

Having regard to the International Convention on the Elimination of All Forms of Racial Discrimination;

Having regard to Convention No. 111 of the International Labour Organization concerning Discrimination (Employment and Occupation);

Having regard to Article 14 of the European Convention on Human Rights;

Having regard to Protocol No. 12 to the European Convention on Human Rights, which contains a general clause prohibiting discrimination;

Having regard to the case law of the European Court of Human Rights;

Taking into account the Charter of Fundamental Rights of the European Union;

Taking into account Directive 2000/43/EC of the Council of the European Union implementing the principle of equal treatment between persons irrespective of

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41. Published for the ECRI by the Council of Europe, Strasbourg, 2003.

racial or ethnic origin, and Directive 2000/78/EC of the Council of the European Union establishing a general framework for equal treatment in employment and occupation;

Having regard to the Convention on the Prevention and Punishment of the Crime of Genocide;

Recalling the ECRI's General Policy Recommendation No. 1 on combating racism, xenophobia, antisemitism and intolerance, and the ECRI's General Policy Recommendation No. 2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level;

Stressing that, in its country-by-country reports, the ECRI regularly recommends to member states the adoption of effective legal measures aimed at combating racism and racial discrimination;

Recalling that, in the political declaration adopted on 13 October 2000 at the concluding session of the European Conference against Racism, the governments of member states of the Council of Europe committed themselves to adopting and implementing, wherever necessary, national legislation and administrative measures that expressly and specifically counter racism and prohibit racial discrimination in all spheres of public life;

Recalling also the declaration and the programme of action adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa, from 31 August to 8 September 2001;

Aware that laws alone are not sufficient to eradicate racism and racial discrimination, but convinced that laws are essential in combating racism and racial discrimination;

Stressing the vital importance of appropriate legal measures in combating racism and racial discrimination effectively and in a way which both acts as a deterrent and, as far as possible, is perceived by the victim as satisfactory;

Convinced that the action of the state legislator against racism and racial discrimination also plays an educative function in society, transmitting the powerful message that no attempts to legitimise racism and racial discrimination will be tolerated in a society ruled by law;

Seeking, alongside the other efforts under way at international and European level, to assist member states in their fight against racism and racial discrimination, by setting out in a succinct and precise manner the key elements to be included in appropriate national legislation;

Recommends to the governments of member states:

- a. to enact legislation against racism and racial discrimination, if such legislation does not already exist or is incomplete;

- b. to ensure that the key components set out below are included in such legislation.

## Key elements of national legislation against racism and racial discrimination

### I. Definitions

1. For the purposes of this recommendation, the following definitions shall apply:
  - a. "racism" shall mean the belief that a ground such as race,<sup>42</sup> colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.
  - b. "direct racial discrimination" shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.
  - c. "indirect racial discrimination" shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

### II. Constitutional law

2. The constitution should enshrine the principle of equal treatment, the commitment of the state to promote equality as well as the right of individuals to be free from discrimination on grounds such as race, colour, language, religion, nationality or national or ethnic origin. The constitution may provide that exceptions to the principle of equal treatment may be established by law, provided that they do not constitute discrimination.
3. The constitution should provide that the exercise of freedom of expression, assembly and association may be restricted with a view to combating racism. Any such restrictions should be in conformity with the European Convention on Human Rights.

42. Since all human beings belong to the same species, the ECRI rejects theories based on the existence of different "races". In this recommendation the ECRI uses this term to ensure that those persons generally and erroneously perceived as belonging to "another race" are not excluded from the protection given by legislation.

### III. Civil and administrative law

4. The law should clearly define and prohibit direct and indirect racial discrimination.

5. The law should provide that the prohibition of racial discrimination does not prevent the maintenance or adoption of temporary special measures designed either to prevent or to compensate for disadvantages suffered by persons designated by the grounds enumerated in paragraph 1.b (henceforth: enumerated grounds), or to facilitate their full participation in all fields of life. These measures should not be continued once the intended objectives have been achieved.

6. The law should provide that the following acts, *inter alia*, are considered as forms of discrimination: segregation; discrimination by association; announced intention to discriminate; instructing another to discriminate; inciting another to discriminate; aiding another to discriminate.

7. The law should provide that the prohibition of discrimination applies to all public authorities as well as to all natural or legal persons, both in the public and in the private sectors, in all areas, notably: employment; membership of professional organisations; education; training; housing; health; social protection; goods and services intended for the public and public places; exercise of economic activity; public services.

8. The law should place public authorities under a duty to promote equality and to prevent discrimination in carrying out their functions.

9. The law should place public authorities under a duty to ensure that those parties to whom they award contracts, loans, grants or other benefits respect and promote a policy of non-discrimination. In particular, the law should provide that public authorities should subject the awarding of contracts, loans, grants or other benefits to the condition that a policy of non-discrimination be respected and promoted by the other party. The law should provide that the violation of such condition may result in termination of the contract, grant or other benefits.

10. The law should ensure that easily accessible judicial and/or administrative proceedings, including conciliation procedures, are available to all victims of discrimination. In urgent cases, fast-track procedures, leading to interim decisions, should be available to victims of discrimination.

11. The law should provide that, if persons who consider themselves wronged because of a discriminatory act establish before a court or any other competent authority facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no discrimination.

12. The law should provide for effective, proportionate and dissuasive sanctions for discrimination cases. Such sanctions should include the payment of compensation for both material and moral damages to the victims.

13. The law should provide the necessary legal tools to review, on an ongoing basis, conformity with the prohibition of discrimination in all laws, regulations and administrative provisions at national and local levels. Laws, regulations and administrative provisions found not to be in conformity with the prohibition of discrimination should be amended or abrogated.

14. The law should provide that discriminatory provisions included in individual or collective contracts or agreements, internal regulations of enterprises, rules governing profit-making or non-profit-making associations, and rules governing the independent professions and workers' and employers' organisations should be amended or declared null and void.

15. The law should provide that harassment related to one of the enumerated grounds is prohibited.

16. The law should provide for an obligation to suppress public financing of organisations which promote racism. Where a system of public financing of political parties is in place, such an obligation should include the suppression of public financing of political parties which promote racism.

17. The law should provide for the possibility of dissolution of organisations which promote racism.

#### **IV. Criminal law**

18. The law should penalise the following acts when committed intentionally:

- a. public incitement to violence, hatred or discrimination,
- b. public insults and defamation or
- c. threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;
- d. the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;
- e. the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes;
- f. the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, with a racist aim, of written, pictorial or other material containing manifestations covered by paragraphs 18a, b, c, d and e;
- g. the creation or the leadership of a group which promotes racism; support for such a group; and participation in its activities with the intention of contributing to the offences covered by paragraph 18a, b, c, d, e and f;
- h. racial discrimination in the exercise of one's public office or occupation.

19. The law should penalise genocide.

20. The law should provide that intentionally instigating, aiding, abetting or attempting to commit any of the criminal offences covered by paragraphs 18 and 19 is punishable.

21. The law should provide that, for all criminal offences not specified in paragraphs 18 and 19, racist motivation constitutes an aggravating circumstance.

22. The law should provide that legal persons are held responsible under criminal law for the offences set out in paragraphs 18, 19, 20 and 21.

23. The law should provide for effective, proportionate and dissuasive sanctions for the offences set out in paragraphs 18, 19, 20 and 21. The law should also provide for ancillary or alternative sanctions.

## **V. Common provisions**

24. The law should provide for the establishment of an independent specialised body to combat racism and racial discrimination at national level (henceforth: national specialised body). The law should include within the competence of such a body: assistance to victims; investigation powers; the right to initiate, and participate in, court proceedings; monitoring legislation and advice to legislative and executive authorities; awareness-raising of issues of racism and racial discrimination among society and promotion of policies and practices to ensure equal treatment.

25. The law should provide that organisations such as associations, trade unions and other legal entities which have, according to the criteria laid down by the national law, a legitimate interest in combating racism and racial discrimination, are entitled to bring civil cases, intervene in administrative cases or make criminal complaints, even if a specific victim is not referred to. If a specific victim is referred to, it should be necessary for that victim's consent to be obtained.

26. The law should guarantee free legal aid and, where necessary, a court-appointed lawyer, for victims who wish to go before the courts as applicants or plaintiffs and who do not have the necessary means to do so. If necessary, an interpreter should be provided free of charge.

27. The law should provide protection against any retaliatory measures for persons claiming to be victims of racial offences or racial discrimination, persons reporting such acts or persons providing evidence.

28. The law should provide for one or more independent bodies entrusted with the investigation of alleged acts of discrimination committed by members of the police, border control officials, members of the army and prison personnel.

## **Explanatory memorandum to ECRI General Policy Recommendation No. 7 on National legislation to combat racism and racial discrimination**

### **Introduction**

1. This general policy recommendation (hereafter: the Recommendation) focuses on the key elements of national legislation to combat racism and racial discrimination. Although the ECRI is aware that legal means alone are not sufficient to this end, it believes that national legislation against racism and racial discrimination is necessary to combat these phenomena effectively.

2. In the framework of its country-by-country approach, the ECRI regularly recommends to member states of the Council of Europe the adoption of effective legal measures aimed at combating racism and racial discrimination. The Recommendation aims to provide an overview of these measures and to clarify and complement the recommendations formulated in this respect in the ECRI's country-by-country reports. The Recommendation also aims to reflect the general principles contained in the international instruments mentioned in the Preamble.

3. The ECRI believes that appropriate legislation to combat racism and racial discrimination should include provisions in all branches of the law, that is, constitutional, civil, administrative and criminal law. Only such an integrated approach will enable member states to address these problems in a manner which is as exhaustive, effective and satisfactory from the point of view of the victim as possible. In the field of combating racism and racial discrimination, civil and administrative law often provides for flexible legal means, which may facilitate the victims' recourse to legal action. Criminal law has a symbolic effect which raises the awareness of society of the seriousness of racism and racial discrimination and has a strong dissuasive effect, provided it is implemented effectively. The ECRI has taken into account the fact that the possibilities offered by the different branches of the law are complementary. As regards in particular the fight against racial discrimination, the ECRI recommends that the member states of the Council of Europe adopt constitutional, civil and administrative law provisions, and that, in certain cases, they additionally adopt criminal law provisions.

4. The legal measures necessary to combat racism and racial discrimination at national level are presented in the form of key components which should be contained in the national legislation of member states. The ECRI stresses that the measures it recommends are compatible with different legal systems, be they common law or civil law or mixed. Furthermore, those components that the ECRI considers to be key to an effective legal framework against racism and racial discrimination may be adapted to the specific conditions of each country. They could thus be set out in a single special act or laid out in the different areas of national legislation (civil law, administrative law and penal law). These key components might also be included in broader legislation encompassing the fight

against racism and racial discrimination. For example, when adopting legal measures against discrimination, member states might prohibit, alongside racial discrimination, other forms of discrimination such as those based on gender, sexual orientation, disability, political or other opinion, social origin, property, birth or other status. Finally, in a number of fields, member states might simply apply general rules, which it is therefore not necessary to set out in this Recommendation. This is the position, for example, in civil law, for multiple liability, vicarious liability, and for the establishment of levels of damages; in criminal law, for the conditions of liability, and the sentencing structure; and in procedural matters, for the organisation and jurisdiction of the courts.

5. In any event, these key components represent only a minimum standard; this means that they are compatible with legal provisions offering a greater level of protection adopted, or to be adopted, by a member state and that under no circumstances should they constitute grounds for a reduction in the level of protection against racism and racial discrimination already afforded by a member state.

## **I. Definitions**

### **Paragraph 1 of the Recommendation**

6. In the Recommendation, the term “racism” should be understood in a broad sense, including phenomena such as xenophobia, antisemitism and intolerance. As regards the grounds set out in the definitions of racism, and direct and indirect racial discrimination (paragraph 1 of the Recommendation), in addition to those grounds generally covered by the relevant legal instruments in the field of combating racism and racial discrimination, such as race, colour and national or ethnic origin, the Recommendation covers language, religion and nationality.<sup>43</sup> The inclusion of these grounds in the definitions of racism and racial discrimination is based on the ECRI’s mandate, which is to combat racism, antisemitism, xenophobia and intolerance. The ECRI considers that these concepts, which vary over time, nowadays cover manifestations targeting persons or groups of persons, on grounds such as race, colour, religion, language, nationality and national and ethnic origin. As a result, the expressions “racism” and “racial discrimination” used in the Recommendation encompass all the phenomena covered by the ECRI’s mandate. National origin is sometimes interpreted as including the concept of nationality. However, in order to ensure that this concept is indeed covered, it is expressly included in the list of grounds, in addition to national origin. The use of the expression “grounds such as” in the definitions of racism and direct and indirect racial discrimination aims at establishing an open-ended list of grounds, thereby allowing it to evolve with society. However,

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43. The ECRI understands the term “nationality” as defined in Article 2a of the European Convention on Nationality: “‘nationality’ means the legal bond between a person and a State and does not indicate the person’s ethnic origin”.

in criminal law, an exhaustive list of grounds could be established in order to respect the principle of foreseeability which governs this branch of the law.

7. Unlike the definition of racial discrimination (paragraphs 1b and c of the Recommendation), which should be included in the law, the definition of racism is provided for the purposes of the Recommendation, and member states may or may not decide to define racism within the law. If they decide to do so, they may, as regards criminal law, adopt a more precise definition than that set out in paragraph 1a, in order to respect the fundamental principles of this branch of the law. For racism to have taken place, it is not necessary that one or more of the grounds listed should constitute the only factor or the determining factor leading to contempt or the notion of superiority; it suffices that these grounds are among the factors leading to contempt or the notion of superiority.

8. The definitions of direct and indirect racial discrimination contained in paragraph 1.b and c of the Recommendation draw inspiration from those contained in Directive 2000/43/CE of the Council of the European Union, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and in Directive 2000/78/CE of the Council of the European Union, establishing a general framework for equal treatment in employment and occupation as well as on the case law of the European Court of Human Rights. In accordance with this case law, differential treatment constitutes discrimination if it has no objective and reasonable justification. This principle applies to differential treatment based on any of the grounds enumerated in the definition of racial discrimination. However, differential treatment based on race, colour and ethnic origin may have an objective and reasonable justification only in an extremely limited number of cases. For instance, in employment, where colour constitutes a genuine and determining occupational requirement by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, differential treatment based on this ground may have an objective and reasonable justification. More generally, the notion of objective and reasonable justification should be interpreted as restrictively as possible with respect to differential treatment based on any of the enumerated grounds.

## **II. Constitutional law**

9. In the Recommendation, the term “constitution” should be understood in a broad sense, including basic laws and written and unwritten basic rules. In paragraphs 2 and 3, the Recommendation provides for certain principles that should be contained in the constitution; such principles are to be implemented by statutory and regulatory provisions.

### **Paragraph 2 of the Recommendation**

10. In paragraph 2, the Recommendation allows for the possibility of providing in the law for exceptions to the principle of equal treatment, provided that they do not constitute discrimination. For this condition to be met, in accordance with

the definitions of discrimination proposed in paragraph 1b and c of the Recommendation, the exceptions must have an objective and reasonable justification. This principle applies to all exceptions, including those establishing differential treatment on the basis of nationality.

### **Paragraph 3 of the Recommendation**

11. According to paragraph 3 of the Recommendation, the constitution should provide that the exercise of freedom of expression, assembly and association may be restricted with a view to combating racism. In Articles 10.2 and 11.2, the European Convention on Human Rights enumerates the aims which may justify restrictions to these freedoms. Although the fight against racism is not mentioned as one of these aims, in its case law the European Court of Human Rights has considered that it is included. In accordance with the articles of the Convention mentioned above, these restrictions should be prescribed by law and necessary in a democratic society.

## **III. Civil and administrative law**

### **Paragraph 4 of the Recommendation**

12. The Recommendation provides in paragraph 4 that the law should clearly define and prohibit direct and indirect racial discrimination. It offers a definition of direct and indirect racial discrimination in paragraph 1b and c. The meaning of the expression "differential treatment" is wide and includes any distinction, exclusion, restriction, preference or omission, be it past, present or potential. The term "ground" must include grounds which are actual or presumed. For instance, if a person experiences adverse treatment due to the presumption that he or she is a Muslim, when in reality this is not the case, this treatment would still constitute discrimination on the basis of religion.

13. Discriminatory actions are rarely based solely on one or more of the enumerated grounds, but are rather based on a combination of these grounds with other factors. For discrimination to occur, it is therefore sufficient that one of the enumerated grounds constitutes one of the factors leading to the differential treatment. Use of restrictive expressions such as "difference of treatment solely or exclusively based on grounds such as ..." should therefore be avoided.

### **Paragraph 5 of the Recommendation**

14. In its paragraph 5, the Recommendation provides for the possibility of temporary special measures designed either to prevent or compensate for disadvantages suffered by persons designated by the enumerated grounds, or to facilitate their full participation in all fields of life. As an example of temporary special measures designed to prevent or compensate for disadvantages linked to the enumerated grounds: a factory owner who has no black employees among his managerial staff but many black employees on the assembly line

might organise a training course for black workers seeking promotion. As an example of temporary special measures designed to facilitate the full participation, in all fields of life, of persons designated by the enumerated grounds: the police could organise a recruitment campaign designed to encourage applications particularly from members of certain ethnic groups who are under-represented within the police.

### **Paragraph 6 of the Recommendation**

15. The Recommendation specifically mentions in paragraph 6 certain acts which should be considered by law as forms of discrimination. In theory, the application of the general legal principles and the definition of discrimination should enable these acts to be covered. However, practice demonstrates that these acts often tend to be overlooked or excluded from the scope of application of the legislation. For reasons of effectiveness, it may therefore be useful for the law to provide expressly that these acts are considered as forms of discrimination.

16. Among the acts which the Recommendation mentions specifically as forms of discrimination, the following warrant a brief explanation:

a. Segregation is the act by which a (natural or legal) person separates other persons on the basis of one of the enumerated grounds without an objective and reasonable justification, in conformity with the proposed definition of discrimination. As a result, the voluntary act of separating oneself from other persons on the basis of one of the enumerated grounds does not constitute segregation.

b. Discrimination by association occurs when a person is discriminated against on the basis of his or her association or contacts with one or more persons designated by one of the enumerated grounds. This would be the case, for example, of the refusal to employ a person because s/he is married to a person belonging to a certain ethnic group.

c. The announced intention to discriminate should be considered as discrimination, even in the absence of a specific victim. For instance, an employment advertisement indicating that Roma/Gypsies need not apply should fall within the scope of the legislation, even if no Roma/Gypsy has actually applied.

### **Paragraph 7 of the Recommendation**

17. According to paragraph 7 of the Recommendation, the prohibition of discrimination should apply in all areas. Concerning employment, the prohibition of discrimination should cover access to employment, occupation and self-employment as well as work conditions, remunerations, promotions and dismissals.

18. As concerns membership of professional organisations, the prohibition of discrimination should cover: membership of an organisation of workers or employers, or any organisation whose members carry on a particular profession; involvement in such organisations; and the benefits provided for by such organisations.

19. Concerning education, the prohibition of discrimination should cover pre-school, primary, secondary and higher education, both public and private. Furthermore, access to education should not depend on the immigration status of the children or their parents.

20. As concerns training, the prohibition of discrimination should cover initial and on-going vocational training, all types and all levels of vocational guidance, advanced vocational training and retraining, including the acquisition of practical work experience.

21. As concerns housing, discrimination should be prohibited in particular in access to housing, in housing conditions and in the termination of rental contracts.

22. As concerns health, discrimination should be prohibited in particular in access to care and treatment, and in the way in which care is dispensed and patients are treated.

23. Concerning social protection, the prohibition of discrimination should cover social security, social benefits, social aid (housing benefits, youth benefits, etc.) and the way in which the beneficiaries of social protection are treated.

24. As concerns goods and services intended for the public and public places, discrimination should be prohibited, for instance, when buying goods in a shop, when applying for a loan from a bank and in access to discotheques, cafés or restaurants. The prohibition of discrimination should not only target those who make goods and services available to others, but also those who receive goods and services from others, as would be the case of a company which selects the providers of a given product or service on the basis of one of the enumerated grounds.

25. Concerning the exercise of economic activity, this field covers competition law, relations between enterprises and relations between enterprises and the state.

26. The field of public services includes the activities of the police and other law enforcement officials, border control officials, the army and prison personnel.

### **Paragraph 8 of the Recommendation**

27. According to paragraph 8 of the Recommendation, the law should place public authorities under a duty to promote equality and to prevent discrimination in carrying out their functions. The obligations incumbent on such authorities

should be spelled out as clearly as possible in the law. To this end, public authorities could be placed under the obligation to create and implement “equality programmes” drawn up with the assistance of the national specialised body referred to in paragraph 24 of the Recommendation. The law should provide for the regular assessment of the equality programmes, the monitoring of their effects, as well as for effective implementation mechanisms and the possibility for legal enforcement of these programmes, notably through the national specialised body. An equality programme could, for example, include the nomination of a contact person for dealing with issues of racial discrimination and harassment or the organisation of staff training courses on discrimination. As regards the obligation to promote equality and prevent discrimination, the Recommendation covers only public authorities; however, it would be desirable were the private sector also placed under a similar obligation.

### **Paragraph 10 of the Recommendation**

28. According to paragraph 10 of the Recommendation, in urgent cases, fast-track procedures, leading to interim decisions, should be available to victims of discrimination. These procedures are important in those situations where the immediate consequences of the alleged discriminatory act are particularly serious or even irreparable. Thus, for example, the victims of a discriminatory eviction from a flat should be able to suspend this measure through an interim judicial decision, pending the final judgment of the case.

### **Paragraph 11 of the Recommendation**

29. Given the difficulties complainants face in collecting the necessary evidence in discrimination cases, the law should facilitate proof of discrimination. For this reason, according to paragraph 11 of the Recommendation, the law should provide for a shared burden of proof in such cases. A shared burden of proof means that the complainant should establish facts allowing for the presumption of discrimination, whereupon the onus shifts to the respondent to prove that discrimination did not take place. Thus, in case of alleged direct racial discrimination, the respondent must prove that the differential treatment has an objective and reasonable justification. For example, if access to a swimming pool is denied to Roma/Gypsy children, it would be sufficient for the complainant to prove that access was denied to these children and granted to non-Roma/Gypsy children. It should then be for the respondent to prove that this denial to grant access was based on an objective and reasonable justification, such as the fact that the children in question did not have bathing hats, as required to gain access to the swimming pool. The same principle should apply to alleged cases of indirect racial discrimination.

30. As concerns the power to obtain the necessary evidence and information, courts should enjoy all adequate powers in this respect. Such powers should be

also given to any specialised body competent to adjudicate on an individual complaint of discrimination (see paragraph 55, below).

### **Paragraph 12 of the Recommendation**

31. Paragraph 12 of the Recommendation states that the law should provide for effective, proportionate and dissuasive sanctions for discrimination cases. Apart from the payment of compensation for material and moral damages, sanctions should include measures such as the restitution of rights which have been lost. For instance, the law should enable the court to order re-admittance into a firm or flat, provided that the rights of third parties are respected. In the case of discriminatory refusal to recruit a person, the law should provide that, according to the circumstances, the court could order the employer to offer employment to the discriminated person.

32. In the case of discrimination by a private school, the law should provide for the possibility of withdrawing the accreditation awarded to the school or the non-recognition of the diplomas issued. In the case of discrimination by an establishment open to the public, the law should provide for the possibility of withdrawing a licence and of closing the establishment. For example, in the case of discrimination by a discotheque, it should be possible to withdraw the licence to sell alcohol.

33. Non-monetary forms of reparation, such as the publication of all or part of a court decision, may be important in rendering justice in cases of discrimination.

34. The law should provide for the possibility of imposing a programme of positive measures on the discriminator. This is an important type of remedy in promoting long-term change in an organisation. For instance, the discriminator could be obliged to organise for its staff specific training programmes aimed at countering racism and racial discrimination. The national specialised body should participate in the development and supervision of such programmes.

### **Paragraph 15 of the Recommendation**

35. According to paragraph 15 of the Recommendation the law should provide that harassment related to one of the enumerated grounds is prohibited. Harassment consists in conduct related to one of the enumerated grounds which has the purpose or the effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. As far as possible, protection against harassment related to one of the enumerated grounds should not only target the conduct of the author of the harassment but also that of other persons. For instance, it should be possible for the employer to be held responsible, where applicable, for harassment by colleagues, other employees or third parties (such as clients and suppliers).

### **Paragraph 16 of the Recommendation**

36. Paragraph 16 of the Recommendation states that the law should provide for the obligation to suppress public financing of political parties which promote racism. For example, public financing for electoral campaigns should be refused to such political parties.

### **Paragraph 17 of the Recommendation**

37. Paragraph 17 of the Recommendation states that the law should provide for the possibility of the dissolution of organisations which promote racism. In all cases, the dissolution of such organisations may result only from a court decision. The issue of the dissolution of these organisations is also dealt with under Section IV on criminal law (see paragraphs 43 and 49, below).

## **IV. Criminal law**

### **Paragraph 18 of the Recommendation**

38. The Recommendation limits the scope of certain criminal offences set out in paragraph 18 to the condition that they are committed in "public". Current practice shows that, in certain cases, racist conduct escapes prosecution because it is not considered as being of a public nature. Consequently, member states should ensure that it should not be too difficult to meet the condition of being committed in "public". Thus, for instance, this condition should be met in cases of words pronounced during meetings of neo-Nazi organisations or words exchanged in a discussion forum on the Internet.

39. Some of the offences set out in paragraph 18 of the Recommendation concern conduct aimed at a "grouping of persons". Current practice shows that legal provisions aimed at punishing racist conduct frequently do not cover such conduct unless it is directed against a specific person or group of persons. As a result, expressions aimed at larger groupings of persons, as in the case of references to asylum seekers or foreigners in general, are often not covered by these provisions. For this reason, paragraph 18a, b, c and d of the Recommendation does not speak of "group" but of a "grouping" of persons.

40. The term "defamation" contained in paragraph 18b should be understood in a broad sense, notably including slander and libel.

41. Paragraph 18e of the Recommendation refers to the crimes of genocide, crimes against humanity and war crimes. The crime of genocide should be understood as defined in Article II of the Convention for the Prevention and Punishment of the Crime of Genocide and Article 6 of the Statute of the International Criminal Court (see paragraph 45, below). Crimes against humanity and war crimes should be understood as defined in Articles 7 and 8 of the Statute of the International Criminal Court.

42. Paragraph 18f of the Recommendation refers to the dissemination, distribution, production or storage of written, pictorial or other material containing racist manifestations. These notions include the dissemination of this material through the Internet. Such material includes musical supports such as records, tapes and compact discs, computer accessories (e.g. floppy discs, software), video tapes, DVDs and games.

43. Paragraph 18g of the Recommendation provides for the criminalisation of certain acts related to groups which promote racism. The concept of a group includes in particular de facto groups, organisations, associations and political parties. The Recommendation provides that the creation of a group which promotes racism should be prohibited. This prohibition also includes maintaining or reconstituting a group which has been prohibited. The issue of the dissolution of a group which promotes racism is also dealt with under Section III on civil and administrative law (see paragraph 37, above) and below (see paragraph 49). Moreover, the notion of "support" includes acts such as providing financing to the group, providing for other material needs, and producing or obtaining documents.

44. In its paragraph 18h the Recommendation states that the law should penalise racial discrimination in the exercise of one's public office or occupation. On this point, the definitions contained in paragraphs 1b, 1c and 5 of the Recommendation apply *mutatis mutandis*. Racial discrimination in the exercise of one's public office or occupation includes notably the discriminatory refusal of a service intended for the public, such as discriminatory refusal by a hospital to care for a person, and the discriminatory refusal to sell a product, to grant a bank loan or to allow access to a discotheque, café or restaurant.

### Paragraph 19 of the Recommendation

45. Paragraph 19 of the Recommendation provides that the law should penalise genocide. To this end, the crime of genocide should be understood as defined in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide and Article 6 of the Statute of the International Criminal Court, that is, as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group". The Recommendation refers only to penalisation of genocide and not of war crimes and crimes against humanity since these are not necessarily of a racist nature. However, if they do present such a nature, the aggravating circumstance provided for in paragraph 21 of the Recommendation should apply.

### **Paragraph 20 of the Recommendation**

46. Paragraph 20 of the Recommendation provides that instigating, aiding, abetting or attempting to commit any of the criminal offences covered by paragraphs 18 and 19 should be punishable. This recommendation applies only to those offences for which instigating, aiding, abetting or attempting are possible.

### **Paragraph 21 of the Recommendation**

47. According to paragraph 21 of the Recommendation, the racist motivation of the perpetrator of an offence other than those covered by paragraphs 18 and 19 should constitute an aggravating circumstance. Furthermore, the law may penalise common offences but with a racist motivation as specific offences.

### **Paragraph 22 of the Recommendation**

48. According to paragraph 22 of the Recommendation, the law should provide for the criminal liability of legal persons. This liability should come into play when the offence has been committed on behalf of the legal person by any persons, particularly acting as the organ of the legal person (for example, a president or director) or as its representative. Criminal liability of a legal person does not exclude the criminal liability of natural persons. Public authorities may be excluded from criminal liability as legal persons.

### **Paragraph 23 of the Recommendation**

49. According to paragraph 23 of the Recommendation, the law should provide for ancillary or alternative sanctions. Examples of these could include community work, participation in training courses, deprivation of certain civil or political rights (like the right to exercise certain occupations or functions, or voting or eligibility rights) or publication of all or part of a sentence. As regards legal persons, the list of possible sanctions could include, besides fines: refusal or cessation of public benefit or aid, disqualification from the practice of commercial activities, placing under judicial supervision, closure of the establishment used for committing the offence, seizure of the material used for committing the offence and the dissolution of the legal person (see on this last point paragraphs 37 and 43, above).

## **V. Common provisions**

### **Paragraph 24 of the Recommendation**

50. According to paragraph 24 of the Recommendation, the law should provide for the establishment of an independent specialised body to combat racism and racial discrimination at national level. The basic principles concerning the statute of such a body, the forms it might take and its functions, responsibilities, administration, functioning and style of operation are set out in the ECRI's

General Policy Recommendation No. 2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level.

51. The functions given to this body should be established by law. The Recommendation enumerates a certain number of such functions. Assistance to victims covers provision of general advice to victims and legal assistance, including representation in proceedings before the courts. It also covers assistance in seeking friendly settlement of complaints.

52. As concerns investigative powers, in order that a national specialised body may conduct investigations effectively, it is essential that the law provides this body with the requisite powers, subject to the rules of procedure of the national legal order. This includes powers granted within the framework of an investigation, such as requesting the production for inspection and examination of documents and other elements; seizure of documents and other elements for the purpose of making copies or extracts; and questioning persons. The national specialised body should also be entitled to bring cases before the courts and to intervene in legal proceedings as an expert.

53. The functions of the national specialised body should also include monitoring any legislation against racism and racial discrimination, and control of the conformity of legislation with equality principles. In this respect, the national specialised body should be entitled to formulate recommendations to the executive and legislative authorities on the way in which relevant legislation, regulations or practice may be improved.

54. As concerns raising awareness of issues of racism and racial discrimination throughout society and promoting policies and practices to ensure equal treatment, the national specialised body could run campaigns in collaboration with civil society; train key groups; issue codes of practice; and support and encourage organisations working in the field of combating racism and racial discrimination.

55. In addition to these functions, the national specialised body may be given other responsibilities. Moreover, another body could be entrusted with the adjudication of complaints through legally-binding decisions, within the limits prescribed by the law.

### **Paragraph 25 of the Recommendation**

56. The Recommendation provides in its paragraph 25 that organisations such as associations, trade unions and other legal entities with a legitimate interest should be entitled to bring complaints. Such a provision is important, for instance, in cases where a victim is afraid of retaliation. Furthermore, the possibility for such organisations to bring a case of racial discrimination without reference to a specific victim is essential for addressing those cases of discrimination where it is

difficult to identify such a victim or cases which affect an indeterminate number of victims.

### **Paragraph 27 of the Recommendation**

57. According to paragraph 27 of the Recommendation, the law should provide protection against retaliation. Such protection should not only be afforded to the person who initiates proceedings or brings the complaint, but should also be extended to those who provide evidence, information or other assistance in connection with the court proceedings or the complaint. Such protection is vital to encourage the victims of racist offences and discrimination to put forward their complaints to the authorities and to encourage witnesses to give evidence. In order to be effective, the legal provisions protecting against retaliation should provide for an appropriate and clear sanction. This might include the possibility of an injunction order to stop the retaliatory acts and/or to compensate victims of such acts.



# Parliamentary Assembly of the Council of Europe: Resolution 1510 (2006) Freedom of expression and respect for religious beliefs

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1. The Parliamentary Assembly of the Council of Europe reaffirms that there cannot be a democratic society without the fundamental right to freedom of expression. The progress of society and the development of every individual depend on the possibility of receiving and imparting information and ideas. This freedom is not only applicable to expressions that are favourably received or regarded as inoffensive but also to those that may shock, offend or disturb the state or any sector of the population, in accordance with Article 10 of the European Convention on Human Rights (ETS No. 5).

2. Freedom of thought, conscience and religion constitutes a necessary requirement for a democratic society and one of the essential freedoms of individuals for determining their perception of human life and society. Conscience and religion are basic components of human culture. In this sense, they are protected under Article 9 of the European Convention on Human Rights.

3. Freedom of thought and freedom of expression in a democratic society must, however, permit open debate on matters relating to religion and beliefs. The Assembly recalls in this regard its Recommendation 1396 (1999) on religion and democracy. Modern democratic societies are made up of individuals of different creeds and beliefs. Attacks on individuals on grounds of their religion or race cannot be permitted but blasphemy laws should not be used to curtail freedom of expression and thought.

4. The Assembly emphasises the cultural and religious diversity of its member states. Christians, Muslims, Jews and members of many other religions, as well as those without any religion, are at home in Europe. Religions have contributed to the spiritual and moral values, ideals and principles which form the common heritage of Europe. In this respect, the Assembly stresses Article 1 of the Statute of the Council of Europe (ETS No. 1), which stipulates that the aim of the Council of Europe is to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage.

5. The Assembly underlines its commitment to ensuring that cultural diversity becomes a source of mutual enrichment, not of tension, through a true and open dialogue among cultures on the basis of mutual understanding and respect. The overall aim should be to preserve diversity in open and inclusive societies based

on human rights, democracy and the rule of law, by fostering communication and improving the skills and knowledge necessary for living together peacefully and constructively within European societies, between European countries and between Europe and its neighbouring regions.

6. Reactions to images perceived as negative, transmitted through books, films, cartoons, paintings and the Internet, have recently caused widespread debates about whether – and to what extent – respect for religious beliefs should limit freedom of expression. Questions have also been raised on the issues of media responsibility, self-regulation and self-censorship.

7. Blasphemy has a long history. The Assembly recalls that laws punishing blasphemy and criticism of religious practices and dogmas have often had a negative impact on scientific and social progress. The situation started changing with the Enlightenment, and progressed further towards secularisation. Modern democratic societies tend to be secular and more concerned with individual freedoms. The recent debate about the Danish cartoons raised the question of these two perceptions.

8. In a democratic society, religious communities are allowed to defend themselves against criticism or ridicule in accordance with human rights legislation and norms. States should support information and education about religion so as to develop better awareness of religions as well as a critical mind in its citizens in accordance with Assembly Recommendation 1720 (2005) on education and religion. States should also develop and vigorously implement sound strategies, including adequate legislative and judicial measures, to combat religious discrimination and intolerance.

9. The Assembly also recalls that the culture of critical dispute and artistic freedom has a long tradition in Europe and is considered as positive and even necessary for individual and social progress. Only totalitarian systems of power fear them. Critical dispute, satire, humour and artistic expression should therefore enjoy a wider degree of freedom of expression, and recourse to exaggeration should not be seen as provocation.

10. Human rights and fundamental freedoms are universally recognised, in particular under the Universal Declaration of Human Rights and international covenants of the United Nations. The application of these rights is not, however, universally coherent. The Assembly should fight against any lowering of these standards. The Assembly welcomes the United Nations Secretary-General's initiative on an alliance of civilisations, which aims to mobilise concerted action at the institutional and civil society levels to overcome prejudice, misperceptions and polarisation. A true dialogue can only occur when there is genuine respect for and understanding of other cultures and societies. Values such as respect for human rights, democracy, rule of law and accountability are the product of mankind's collective wisdom, conscience and progress. The task is to identify the roots of these values within different cultures.

11. Whenever it is necessary to balance human rights which are in conflict with each other in a particular case, national courts and national legislators have a margin of appreciation. In this regard, the European Court of Human Rights has held that, whereas there is little scope for restrictions on political speech or on the debate of questions of public interest, a wider margin of appreciation is generally available when regulating freedom of expression in relation to matters liable to offend intimate personal moral convictions or religion. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place.

12. The Assembly is of the opinion that freedom of expression as protected under Article 10 of the European Convention on Human Rights should not be further restricted to meet increasing sensitivities of certain religious groups. At the same time, the Assembly emphasises that hate speech against any religious group is not compatible with the fundamental rights and freedoms guaranteed by the European Convention on Human Rights and the case law of the European Court of Human Rights.

13. The Assembly calls on parliaments in member states to hold debates on freedom of expression and respect for religious beliefs, and on parliamentarians to report back to the Assembly on the results of these debates.

14. The Assembly encourages religious communities in Europe to discuss freedom of expression and respect for religious beliefs within their own community and to pursue a dialogue with other religious communities in order to develop a common understanding and a code of conduct for religious tolerance which is necessary in a democratic society.

15. The Assembly also invites media professionals and their professional organisations to discuss media ethics with regard to religious beliefs and sensitivities. It encourages the creation of press complaints bodies, media ombudspersons or other self-regulatory bodies, where such bodies do not yet exist, which should discuss possible remedies for offences to religious persuasions.

16. The Assembly encourages intercultural and inter-religious dialogue based on universal human rights, involving – on the basis of equality and mutual respect – civil society, as well as the media, with a view to promoting tolerance, trust and mutual understanding, which are vital for building coherent societies and strengthening international peace and security.

17. The Assembly encourages the Council of Europe bodies to work actively on the prevention of hate speech directed at different religious and ethnic groups.

18. The Assembly resolves to revert to this issue on the basis of a report on legislation relating to blasphemy, religious insults and hate speech against persons on grounds of their religion, after taking stock of the different approaches in Europe, including the application of the European Convention on Human Rights, the reports and recommendations of the European Commission against

Racism and Intolerance (ECRI) and of the European Commission for Democracy through Law (the Venice Commission), and the reports of the Council of Europe Commissioner for Human Rights.

# Parliamentary Assembly of the Council of Europe: Recommendation 1805 (2007) Blasphemy, religious insults and hate speech against persons on grounds of their religion

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1. The Parliamentary Assembly recalls its Resolution 1510 (2006) on freedom of expression and respect for religious beliefs and reiterates its commitment to the freedom of expression (Article 10 of the European Convention on Human Rights, ETS No. 5, hereafter “the Convention”) and the freedom of thought, conscience and religion (Article 9 of the Convention), which are fundamental cornerstones of democracy. Freedom of expression is not only applicable to expressions that are favourably received or regarded as inoffensive, but also to those that may shock, offend or disturb the state or any sector of population within the limits of Article 10 of the Convention. Any democratic society must permit open debate on matters relating to religion and religious beliefs.

2. The Assembly underlines the importance of respect for, and understanding of, cultural and religious diversity in Europe and throughout the world and recognises the need for ongoing dialogue. Respect and understanding can help avoid frictions within society and between individuals. Every human being must be respected, independently of religious beliefs.

3. In multicultural societies it is often necessary to reconcile freedom of expression and freedom of thought, conscience and religion. In some instances, it may also be necessary to place restrictions on these freedoms. Under the Convention, any such restrictions must be prescribed by law, necessary in a democratic society and proportionate to the legitimate aims pursued. In so doing, states enjoy a margin of appreciation because national authorities may need to adopt different solutions taking account of the specific features of each society; the use of this margin is subject to the supervision of the European Court of Human Rights.

4. With regard to blasphemy, religious insults and hate speech against persons on the grounds of their religion, the state is responsible for determining what should count as criminal offences within the limits imposed by the case law of the European Court of Human Rights. In this connection, the Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. A distinction should be made between matters relating to moral conscience and those relating to what is lawful, matters which belong to the public domain, and those which belong to the private sphere. Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

5. The Assembly welcomes the preliminary report adopted on 16 and 17 March 2007 by the European Commission for Democracy through Law (the Venice Commission) on this subject and agrees with it that in a democratic society, religious groups must tolerate, as must other groups, critical public statements and debate about their activities, teachings and beliefs, provided that such criticism does not amount to intentional and gratuitous insults or hate speech and does not constitute incitement to disturb the peace or to violence and discrimination against adherents of a particular religion. Public debate, dialogue and improved communication skills of religious groups and the media should be used in order to lower sensitivity when it exceeds reasonable levels.

6. Recalling its Recommendation 1720 (2005) on education and religion, the Assembly emphasises the need for greater understanding and tolerance among individuals of different religions. Where people know more about the religion and religious sensitivities of each other, religious insults are less likely to occur out of ignorance.

7. In this context, the Assembly welcomes the initiative of the United Nations to set up a new body under the theme "Alliance of Civilizations" to study and support contacts between Muslim and so-called Western societies, but feels that such an initiative should be enlarged to include other religions and non-religious groups.

8. The Assembly recalls the relevant case law on freedom of expression under Article 10 of the Convention developed by the European Court of Human Rights. Whereas there is little scope for restrictions on political speech or on the debate of questions of public interest, the Court accepts a wider margin of appreciation on the part of contracting states when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.

9. However, the Assembly stresses that this margin of appreciation is not unlimited and that any restrictions on the freedom of expression must comply with the case law of the European Court of Human Rights. Freedom of expression guaranteed under Article 10 of the Convention is of vital importance for any democratic society. In accordance with the Statute of the Council of Europe, common recognition of democratic values is the basis for membership of the Organisation.

10. The Assembly is aware that, in the past, national law and practice concerning blasphemy and other religious offences often reflected the dominant position of particular religions in individual states. In view of the greater diversity of religious beliefs in Europe and the democratic principle of the separation of state and religion, blasphemy laws should be reviewed by the governments and parliaments of the member states.

11. The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.

12. The Assembly reaffirms that hate speech against persons, whether on religious grounds or otherwise, should be penalised by law in accordance with General Policy Recommendation No. 7 on National legislation to combat racism and racial discrimination produced by the European Commission against Racism and Intolerance (ECRI). For speech to qualify as hate speech in this sense, it is necessary that it be directed against a person or a specific group of persons. National law should penalise statements that call for a person or a group of persons to be subjected to hatred, discrimination or violence on grounds of their religion.

13. The Assembly emphasises that freedom of religion as protected by Article 9 of the Convention also protects religions in their capacity to establish values for their followers. While religions are free to penalise in a religious sense any religious offences, such penalties must not threaten the life, physical integrity, liberty or property of an individual, or women's civil and fundamental rights. In this context, the Assembly recalls its Resolution 1535 (2007) on threats to the lives and freedom of expression of journalists and strongly condemns the death threats issued by Muslim leaders against journalists and writers. Member states have the obligation to protect individuals against religious penalties which threaten the right to life and the right to liberty and security of a person under Articles 2 and 5 of the Convention. Moreover, no state has the right to impose such penalties for religious offences itself.

14. The Assembly notes that member states have the obligation under Article 9 of the Convention to protect freedom of religion including the freedom to manifest one's religion. This requires that member states protect such manifestations against disturbances by others. However, these rights may sometimes be subject to certain justified limitations. The challenge facing the authorities is how to strike a fair balance between the interests of individuals as members of a religious community in ensuring respect for their right to manifest their religion or their right to education, and the general public interest or the rights and interests of others.

15. The Assembly considers that, as far as it is necessary in a democratic society in accordance with Article 10, paragraph 2, of the Convention, national law should only penalise expressions about religious matters which intentionally and severely disturb public order and call for public violence.

16. It calls on national parliaments to initiate legislative action and scrutiny regarding the national implementation of this recommendation.

17. The Assembly recommends that the Committee of Ministers:

17.1. take note of Resolution 1510 (2006) on freedom of expression and respect for religious beliefs together with this recommendation and forward both texts to the relevant national ministries and authorities;

17.2. ensure that national law and practice:

17.2.1. permit open debate on matters relating to religion and beliefs and do not privilege a particular religion in this respect, which would be incompatible with Articles 10 and 14 of the Convention;

17.2.2. penalise statements that call for a person or a group of persons to be subjected to hatred, discrimination or violence on grounds of their religion as on any other grounds;

17.2.3. prohibit acts which intentionally and severely disturb the public order and call for public violence by references to religious matters, as far as it is necessary in a democratic society in accordance with Article 10, paragraph 2, of the Convention;

17.2.4. are reviewed in order to decriminalise blasphemy as an insult to a religion;

17.3. encourage member states to sign and ratify Protocol No. 12 to the European Convention on Human Rights (ETS No. 177);

17.4. instruct its competent steering committee to draw up practical guidelines for national ministries of justice intended to facilitate implementation of the recommendations contained in paragraph 17.2 above;

17.5. instruct its competent steering committee to draw up practical guidelines for national ministries of education intended to raise understanding and tolerance among students with different religions;

17.6. initiate, through their national ministries of foreign affairs, action at the level of the United Nations in order to ensure that:

17.6.1. national law and practice of signatory states of the International Convention on the Elimination of All Forms of Racial Discrimination do not privilege persons with a particular religion;

17.6.2. the work of the Alliance of Civilizations avoids the stereotype of a so-called Western culture, widens its scope to other world religions and promotes more open debates between different religious groups and with non-religious groups;

17.7. condemn on behalf of their governments any death threats and incitements to violence by religious leaders and groups issued against persons for having exercised their right to freedom of expression about religious matters;

17.8. invite member states to take more initiatives to promote tolerance, in co-operation with the ECRI.



**III. Excerpts from reports presented at  
the international round-table conference on  
Art and Sacred Beliefs: from Collision  
to Co-existence**

*(Athens, 31 January to 1 February 2008)*



# 1. Art and Sacred Beliefs: from Collision to Co-existence

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Gianni Buquicchio

*Secretary of the Venice Commission*

The Council of Europe now has 47 member states – and 53 countries, including six outside Europe, are involved in the Venice Commission. The concept of Europe that the Council of Europe and the Venice Commission are proud to uphold and promote is based on the principle of inclusion in a context of diversity. Indeed, we are convinced that diversity is, and must be, a source of mutual enrichment fostering political, intercultural and interfaith dialogue.

We believe there is but one civilisation, with a cultural, religious and humanist heritage rooted in common values and principles. This civilisation encompasses a range of religious, social, political, historical and legal elements, which may be so similar as to be indistinguishable, although that is not necessarily the case.

Our societies are evolving, intersecting and mingling as a result of modernisation and globalisation. Owing to the presence of cultures and religions other than those that were clearly in the majority until quite recently, new models are constantly being introduced, and new challenges thrown up. Fear of loss of identity and assimilation could – but must not – prompt us to take refuge in past traditions, refusing to reappraise them in the light of new situations both now and in the future. Rising to such challenges, rather than ignoring them, will make our societies stronger and further their development. This calls, however, for discussion and a willingness to learn and compromise.

The law is an excellent means of democratisation, as the Venice Commission, whose full title is the European Commission for Democracy through Law, can attest: democracies have to be subject to the rule of law and respect human rights and fundamental freedoms. In the complex, multicultural society we now live in, however, respecting human rights with the degree of sophistication to which Europe is accustomed is not necessarily straightforward. These rights overlap and sometimes clash. We are here for the very purpose of discussing the clash between freedom of expression, particularly artistic expression, and freedom of conscience and religion.

The preliminary point should be made that this is not a clash between categories of people, but between the interests each individual may uphold at a given time. The same person invoking his or her freedom of conscience today may tomorrow invoke his or her freedom of expression. It is therefore in the interests of all of us to arrive at a balanced solution to this clash.

I also wish to point out that, in Europe, each and every one of us enjoys rights and fundamental freedoms, and that states are duty-bound to guarantee them for everyone under their jurisdiction, irrespective of citizenship, religion or culture. Ignoring an individual's rights on the pretext that he or she does not possess citizenship of a European state is contrary to the European Convention on Human Rights. Furthermore, any restriction on fundamental rights must be necessary in a democratic society, which means an inclusive society built on the contributions of each individual.

Freedom of expression is a key component of the democratic process. It is not absolute, however; restrictions on it include defamatory libel and incitement to violence and hatred, *inter alia* of a racial or religious nature.

We can and must restrict freedom of expression where this is necessary in a democratic society, but cannot and must not make it subject to a duty of respect. A newspaper article or work of literature or art cannot be prohibited solely on the grounds that it shows irreverence towards an established order or a shared belief, even one shared by the majority of the population. Certain statements may shock some of the population, in which case they must be refuted, condemned and rejected. They must be countered by the means available within a democratic society, such as debate and protest. On no account, however, is there any excuse whatsoever for resorting to violence or threats against those who utter them.

Legal proceedings can also be an effective way to combat intolerant and offensive statements, such as those inciting hatred. According to the Venice Commission's study of criminal legislation in this area, the latter is a criminal offence in almost all Council of Europe member states. Existing legislation should be applied comprehensively, properly and without discrimination. "Race" must not be deemed more important than "religion" when it comes to punishing insults or incitement to hatred. Nor must a religious group's status unduly influence its treatment when it is the perpetrator of an offence rather than the victim.

However, the Venice Commission has come to the conclusion that criminal provisions afford only a partial solution to intolerance. It is of the view that, in a democratic society, intolerance and prejudice are more effectively countered by means of public debate.

Just like other groups within society, religious groups have to tolerate public statements and debates critical of their activities, teachings and beliefs, provided that such criticism does not consist of deliberate, gratuitous insults or incitement to disturb public order or discriminate against followers of a particular religion.

National authorities must give due and proportionate consideration to religious groups' sensibilities when deciding whether or not to impose and enforce restrictions on freedom of expression. Modern societies must not be taken hostage

by such sensibilities, even if they are expressed in many parts of the world, including locations other than that of the incident having aroused them.

It must be emphasised, however, that the exercise of free speech entails duties and responsibilities, as stipulated in Article 10 of the European Convention on Human Rights. Accordingly, we shall discuss the existence of an “ethic of responsibility” for artists and the media, which is an avenue worth exploring. It may be the case that not enough attention has hitherto been given to the need to improve the communication skills of both the media and religious groups.

Finally, I would like to say a few words about the approach we have adopted for this round-table conference. We believe it is possible to move on from confrontation to the co-existence of the right to artistic freedom and freedom of expression, on the one hand, and the right to respect for one’s beliefs, on the other. We are keen to identify ways of doing so, and are open to any practical, constructive suggestions.

Today we have brought together representatives of very different cultures, religions, backgrounds and occupations. We have also invited our non-European friends to talk about their experiences and share their opinions and their reactions to our ideas.

If this round-table conference is to achieve the results sought by the Venice Commission, however, our statements must not be dictated by our intellectual comfort zones or the certainty of our own immunity to intolerance. It is all too easy to assume that only other people are intolerant. Dialogue, especially intercultural dialogue, based on such a premise will never be successful. Any discussion held under such conditions would be false, and this round-table conference would be completely pointless.



## 2. Art and religious beliefs: the limits of liberalism

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As a lawyer, when dealing with cases of freedom of art and its limits, I feel as awkward as an engineer would feel, if called to give solutions to practical problems, having no tools, but merely abstract concepts in hand.

For there is no such thing as a generally accepted definition of the notion of “art”. Therefore, every time one comes across a case that explores possible restrictions on artistic creation, it does not suffice to claim that the latter is free and hence protected; first one needs to clarify whether or not the work at issue is indeed a work of art. In our legal systems, if the competent court is convinced on this matter, it is highly likely that we reach a judgment in our favour. If not, then, in all likelihood, the case is lost.

But which are the criteria that would allow us to claim that painting A is a work of art, while painting B is not? If in relation to a Picasso or a David painting, the name of the creator alone would be enough to convince, then the case might be more complicated for a new artist. It is similarly the case when the question is raised in relation to the work of a well-known artist who, however, happens to be unknown to the bench. Will we rely on the judges’ aesthetics? Or should we resort to experts’ opinions? And if we opt for the second option, who would these experts be eventually?

These are some of the great dilemmas that a legist (in particular, a practising lawyer) comes across when handling such cases. And it does not come as a surprise that he or she might feel insecure.

However, I did not prefix the above examples just to gain the reader’s sympathy; what I wished was to introduce the foundation upon which I will attempt to base the reflections that follow. This foundation is not to be found in solid legal certitude, but rather in the drifting sand of abstract notions. Thus, you should not expect clear-cut solutions from this approach, but rather criteria, which, again, might not always lead to the best outcome in all cases.

Religious beliefs are much stronger compared to other beliefs, equally significant, but ones that do not concern equally intimate choices. Each person’s relation with the metaphysical is usually so complex and special that a relevant offence of similar emotions might well cause a disproportionately severe shock – so severe that it would be natural, not just for the victim, but further for every

sensitive person, not to tolerate such an offence. In brief, religious beliefs globally enjoy a higher level of protection – compared to that guaranteed for political, philosophical, national or other relations between a person and a certain group, faith or theory – because offences against religious beliefs affect the most intimate part of a person’s inner world.

On the other hand, I have the impression – though I am not an expert – that a constituent element of art, in general and of each particular work of art, is that it refers or addresses itself to the general public, irrespective of political, national, philosophical, religious, racial or other affiliations. This is probably why the broader the public that is moved by a certain work of art (usually even after the lapse of several years after its creation), the more significant the latter is considered.

Therefore, the special protection reserved for religious beliefs (on the one hand) and the special protection reserved for art – on the basis of the universality or breadth of the public, beyond geographic or other affiliations, to which a work of art is addressed – (on the other hand) constitute the two pivots of the main argument underlying my approach on the limits of liberalism in the field of art, whenever a work of art “hurts” – directly or indirectly – the religious beliefs of those to whom it is addressed.

For example, if there had been a movie based on Salman Rushdie’s *Satanic Verses*, it would not have been the same if that film had been broadcast in a cinema in central Athens as opposed to a cinema in a town of purely Muslim population in Thrace, such as Echinus. The same would be the case with a novel that violently criticised Zionism: while it could be freely on sale in bookstores, it would have been impermissible to distribute it outside a synagogue at the end of a religious ritual. Lastly, a cover of a magazine featuring a cartoon of our late Archbishop Christodoulos (one of those occasionally published by his critics) would have been truly inconceivable as something to be handed out to those attending his funeral.

All the above examples refer to the context, that is, the circumstances under which it is legitimate for a work of art to be exposed. When these circumstances, taken together with the work’s content, cease to pertain to the general public and instead aim (often deliberately) at a distinct group, with the (obvious) intention to strike at the group members’ religious beliefs, I support the view that it is legitimate for restrictions to the freedom of art to be introduced. In such cases, it would not really be restrictions on the artist’s freedom to create, but on his/her discretion to choose how to present a certain work to the public. In other words, such a restriction would not affect the content of a work itself, but would constitute a mere and only marginal restriction on the work’s free presentation and dissemination, using as a criterion the focalisation and individualisation that each presentation and dissemination bear.

According to this criterion, since it seems there was not such intention to individualise, I consider the judgments given by the European Court of Human Rights – on the well-known cases of *Otto Preminger v. Austria*, in 1994, and *Wingrove v. the UK*, in 1996 – to be false. In the first case, because the Court overlooked the fact that the broadcast of the particular movie did not take place in a central venue, but in a small *cinéfile* cinema, with a clear forewarning to the public on what it was about to watch; in the second case, because the contentious work was not even going to be openly broadcast, but was only going to be distributed as a video. Therefore, in both cases, prospective spectators were aware of the “risk” they were taking. Under these circumstances, the ban to broadcast the work was not legitimate, since it surpassed the aim for which it was imposed. Fortunately, on the occasion of – and this has to be stressed – a series of Turkish cases, the Strasbourg Court shifted from its previous case law on the issue to hold that a possible offence of religious beliefs caused by a work of art does not justify restrictions on the author’s literary style and philosophical-religious views.

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

This is not the appropriate occasion to refer in detail to the circumstances and peculiarities of each of the above incidents. What underlies all of them, though, is that the enforcement of the above measures against the works was the result of action taken by groups of fundamentalist Greek Orthodox, who were complaining that the contentious works offended their religious beliefs. Luckily, in none of the above cases were the restrictions imposed (against the artists, dealers and others) confirmed in the main proceedings that followed the interim measures.

Let us go ahead now with implementing the individualisation criterion on the incomparably more sensitive aspect, which is the content of the work of art itself: is it legitimate for a religious leader to oppose a direct, and probably extravagant, satire against him in a play or movie? Do the followers of a certain religion have the same right? The above example does not focus on the restriction on the way a work of art is presented (that is, the work’s context), but on its very content. Would not the endorsement of such restrictions be equal to an unacceptable shrinkage of the freedom of artistic work?

Thus, we reach the core of the individualisation argument, since in such cases, the restriction concerns the artist himself and not his/her manager. At this point, two running distinctions can prove useful:

Firstly, there is a distinction between a person and a group that is a religious community. With the exception of marginal and blatantly gross insults, I consider that it is only when a specific individual's religious beliefs are hurt by a work of art that such restrictions could be found plausible – because, in such cases, the pain caused can be intolerable. In contrast, it would be hard to imagine the imposition of such restrictions when the artist does not offend individuals, but rather a certain religious group in an impersonal way: “the Catholics are ... the Muslims are...”. Of course, the question raised is how individualisation should be defined in each specific case.

At this point, it is important to clarify what is the specific object of the offence. In particular, I consider that, along with other human beliefs and feelings, religious beliefs are not that solid and cohesive, but instead encompass a gradation. According to the distinction made by paragraph 1 of Article 9 of the European Convention on Human Rights, a person's freedom of conscience and religion includes their inner world (*intérieur*) as well as that person's right to change religion or beliefs at any time, without formalities and with no adverse implications on him and his family.

A second level includes the person's freedom, either alone or with others, in public or in private, to manifest their religion or beliefs. Lastly, in the periphery of this freedom, lies religious practice.

I reckon that an imaginary diagram, which consists of three homocentric circles, can be helpful to classify offences to the religious beliefs of a certain person as more or less tolerable. The closer the offence gets to the freedom's core, that is, to the freedom of religious consciousness, the less tolerable it should be.

For example, a work of art that questions the sincerity of a religious leader's beliefs or a specific believer's faith should be less bearable than another that simply criticises the way the same leader or person manifests their beliefs. Even greater tolerance should be shown towards critics of everyday religious practices, such as use of the Muslims' scarf, the fast, the cross.

The above approach – in particular, the focalisation and individualisation criterion – provides, I would like to believe, an indicator for that exceptional point where freedom of art reaches its limits, because the pain that this freedom may cause to a specific person could be disproportionate. This criterion has the privilege that it can be applied both to the way a work of art is presented, that is, the circumstances, and to the work's content. Its application might not be always easy; however, it facilitates the ad hoc deliberation that aims to reach a sound solution in each particular case.

### 3. An ethics of responsibility for artists

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Boualem Bessaih

*President of the Constitutional Council of Algeria*

This is a place infused with art and history, to which Alfred de Musset paid the greatest possible homage by writing, in his *Premières Poésies*:

O Greece! Of arts, idolatry, the land,  
Of my insensate vows the country grand.

Whether by deliberate choice or happy coincidence, we are here in this “land of arts” to discuss the complex, sensitive theme of Art and Sacred Beliefs: from Collision to Co-existence, in relation to both the various fields on which it touches, particularly those pertaining to cultures, civilisations, human rights and beliefs, and the tensions it provokes in a world that is increasingly prey to intolerance and violence as forms of expression. However, our theme is also an appeal to humanity, in its rich plurality and diversity, to take up the challenge of confrontation and win the gamble of co-existence, yet without undermining the sacrosanct principle of freedom.

This is a difficult challenge, since it is a matter of balancing freedom with the sacred beliefs of every human being, and safeguarding freedom of expression, which feeds artistic creativity, while respecting other people’s sacred beliefs: in short, arriving at an enduring, continually renewed equilibrium between art and religion. In a world built on plurality and diversity, human beings’ co-existence is conditional upon a lasting balance between the two fundamental values of freedom and respect for sacred beliefs, both of which are at once demanding and edifying.

Freedom is a universal human value. Let us listen to the words of the French poet and author Alfred de Musset, on whom I shall once again call. With his usual magical mastery of language, he describes it as follows:

Wealth is less than life, life less than love,  
love less than liberty! Yes, liberty!  
The word must have some meaning, since  
these past five thousand years peoples have been  
intoxicated by its utterance.

I have no intention of going back over what has already been said about freedom of expression and freedom of belief, or the limitations of the law as a solution to blasphemy and other insults to people’s sacred beliefs via images, writings or painting. The aims of my contribution are modest. With a view to

taking forward the debate on the existence of an ethic of responsibility for artists, I shall give my esteemed audience a few historical examples of such an ethic, which is crucial if human beings are to co-exist, as they can and must. This co-existence is vital for the future of humanity; it can be achieved, as long as human beings, all human beings, are prepared to enter into calm, frank and sincere dialogue, so that they can all get to know one another, understand what causes hurt to others, accept one another and learn to live together in spite of their differences.

For surely human beings anywhere and everywhere have no choice but to live alongside one another, to accept one another, to tolerate one another and even to endure one another, in spite of their differences, if confrontation is to be avoided.

While it is now difficult to dispute the existence of universal values forming the "hard core" of the human being, it is equally difficult to deny the existence of values and cultures by which individuals and peoples identify and distinguish themselves. As an expression of the universal and distinctive aspects of these values and cultures, art can help to bring people together and ward off the spectre of confrontation.

As an aesthetic form, art's ultimate goal is to arouse emotions and sensations, to strike a chord, to attract positive aesthetic judgments, to elicit sensitivity and to enchant. Poets, for example, who possess the "art of combining words, tones and rhythms to evoke images and suggest sensations and emotions", according to an encyclopaedia definition, are themselves imbued with emotion and sensitivity. As Abu Hamid Al-Ghazali (1058-1111), the renowned Muslim theologian and intellectual, said in this connection:

He who enchants not the springtime  
And its flowers,  
Who cradles not the lute and its strings,  
Has a morbid nature  
For which he has no cure.

In their relations with others, poets – as creators of dreams – cannot attract negative judgments without betraying their own sensibilities or tarnishing the dreams they procure for others, and hence their very *raison d'être*. This relationship between dreams and the opinions of others is just as valid for the artist wielding a paintbrush.

The poet's cry from the heart, appeal to reason, ardent desire for intelligence and spontaneous deferral to wisdom all make us want to build a world in which the co-existence of peoples, civilisations, cultures and religions can flourish under the banner of freedom, thereby becoming conviviality, love and friendship.

In the face of so much disorder in a disturbed world, so much incomprehension, so many misunderstandings, so much rejection, so much blasphemy, which defame their victims and degrade their perpetrators, perhaps we ought to refer

to the inspiring humanist works of great artists who have left their indelible mark in the form of enduring, vital points of reference, and who are united by history despite their differing backgrounds and beliefs and the fact that they express themselves in different languages and are separated by both distance and time.

I would like to talk about four events, each of which serves as an example of constructive tolerance, greatness of spirit and emotional intelligence.

Let us begin with St Francis of Assisi, the apostle who in 1219, scorning earthly favours and pleasures, devoted his life to human happiness and went to the Pope as a pilgrim of humanity to exhort him to suspend the crusades because, in his view, Christianity and Islam were soulmates and the offspring of one and the same God.

In 1229, Francis of Assisi went to meet the Governor of Egypt, Sultan Al-Kamil, the nephew of Saladin, to join with him in opening, under their combined auspices, the first dialogue between Christian and Muslim theologians in the city of Damietta.

It was this very Al-Kamil who granted to Frederick II, Emperor of Germany and King of Sicily, a man of culture and fluent in Arabic, a right of passage to holy sites for Christian pilgrims, the neutrality of Jerusalem and a right of access to the holy sites of Nazareth and Bethlehem, and then sent him scholars and artists in various disciplines to make Palermo into a city of culture and civilisation.

Drawing on more recent times, I would like to mention the Amir Abdelkader, a statesman, military leader, philosopher and poet. In 1860, in Damascus, where he was living in exile from his native Algeria, he and his men saved 12 000 Christians condemned to certain death. A crowd of fanatical, manipulated Muslims having decided to massacre the Christians, for reasons too lengthy to explain, Abdelkader gave refuge to all the Christians of Damascus in his own home and those of his lieutenants. He went to fetch them himself, under the protection of his arms. He worked day and night to finish the task he had set himself, then sat in front of his house and promised a monetary reward from his personal funds to anyone who brought him a Christian alive. This admirable feat earned him written recognition and presents from all the kings and princes of the time, headed by the Pope.

The agitated crowd responded to his gesture by shouting out loud: "You who once fought the Christians in Algeria, why do you now try to stop us avenging their insults? Deliver us those you have hidden in your house." He replied: "What you are doing is a culpable act, contrary to God's law. As for me, I did not fight Christians, but conquerors claiming to be Christians." When Bishop Pavy of Algiers wrote to thank him in 1862, he answered as follows: "We had a duty to do right by the Christians, out of respect for the Muslim faith and the rights of humanity". Respect for the rights of humanity! Surely this is already the

thinking of a harbinger, his words presaging the 1948 Universal Declaration of Human Rights.

Today, tensions caused by a number of factors are making the world an unstable and hence a less safe place. As well as wars and other social scourges, factors such as exclusion, intolerance and rejection of those who are different make it harder for us to find spiritual peace and serenity, and may spark fresh conflicts. If freedom is to retain some degree of moral ethics, it must refrain from all forms of profanation, insult and abuse. Any act with the potential to generate verbal or physical violence must be deplored and condemned.

To some extent, the law can condemn blasphemy and abuse, and punish insults. While this is necessary, however, it is not sufficient, as recent history shows only too well. Aside from the fact that they selectively target the sacred beliefs of one part of the world, such insults can be used to justify violent retaliation in the name of self-defence, thereby creating a source of tension and multiple, unpredictable conflicts. In addition to these dangers, such insults open rifts of mistrust and hatred that may lead to confrontations between communities living in the same country.

If legal rules alone cannot deal with blasphemy and other insults in the form of cartoons, writings or paintings, can we simply leave it up to artists to search their own consciences and thereby submit to the throes of remorse? Is it possible to do evil without hatred, or good without love?

On the subject of remorse, Victor Hugo is known to have been devastated by the death of his daughter Léopoldine, who drowned in the Seine along with her husband. He wrote a number of famous poems railing against fate, going so far as to curse and blaspheme in his anger; then, as time tempered the emotion of his sobs, he returned to God, exclaiming:

For all are sons of the same father,  
We are all the same tears wept by the same eye.

Further on, he adds:

Lord, I realise that Man is crazy  
If he dares complain;  
I've stopped accusing, I've stopped cursing,  
But let me weep!

Remorse is a kind of guilty distress that inhabits our hearts once we have committed our crime, like Abel's uncontrollable remorse after he killed his brother Cain. The great Arab critic Taha Hussein was right when, in a surge of generosity towards human beings, he wrote:

All I wish on my friend  
And all I wish on my enemy,  
Were it possible for me to wish him well,  
Is that God spare him cause for remorse.

This goes to show that remorse can sometimes be more painful than criminal sanctions.

Can we not dream – for dreams are not forbidden – that one day, thanks to human beings' fertile imaginations and constructive determination, voices will rise up in every chapel in which the one God is worshipped in order to call for love in a context of diversity and respect for each and every one of us; that in every school and university, as places and vehicles for the transmission of knowledge, voices will rise up to spread the same message, the same values of tolerance and respect for difference, and to shape the human beings and artists of the future; and lastly that, like the Olympic flame that set off from this legendary ancient city, an Olympic flame will be lit for friendship between civilisations and dialogue between the athletes of arts and letters, disciplines which are known to have been part of the Olympic Games before being abolished by the Roman Emperor Theodosius in 394?

This noble ideal can be realised only by means of a universal, well-organised movement promoting the alliance of civilisations, which strikes me as one of the best ways to reconcile cultures and civilisations and to make art the product of a harmonious balance between freedom of expression, as a principle that fosters artistic creativity and respect for others' sacred beliefs and symbols. To my mind, striking such a balance will mean we successfully rise to the challenge of co-existence and democracy.

I would like to finish by quoting two eloquent statements from witnesses of the First World War, which artists may find inspiring. Firstly, Georges Clemenceau set himself apart from Jules Ferry, who was advocating colonial expansion in the name of the superiority of races and civilisations, by declaring from the rostrum in the Bourbon Palace:

The Hindus, an inferior race? The Chinese, an inferior race? No, the so-called superior nations have no rights over inferior nations. Let us not attempt to cloak violence in the hypocritical name of civilisation.

The other statement, from another Georges, this time by the surname of Duhamel, reinforces my argument. Duhamel, on seeing the shells falling in the trenches of eastern France, the thousands of wounded piled up in makeshift camps and the surgeons busy amputating arms and legs, exclaimed:

Civilisation is not to be found in the surgeon's knife.  
If civilisation is not in the heart of man,  
then it exists nowhere.



## 4. Art can legitimately offend

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The Church will have many clashes with the human rights movement. The Church is not only for human rights, but surpasses them, since in the position of rights, which is a legal concept, it puts forward the concept of service. In the position of what the law permits, it puts forward free service and dedication. Nevertheless, the Church cannot accept what the leader of this world promotes through the human rights movement: the abolition of sin. What they want to present as a right is not respect for the human person but his obliteration; the interdiction for man to feel his weakness before God, his sinful nature. The impossibility of the human being to show repentance and be forgiven is to be set about. In other words, the abolition of moral consciousness and its replacement by legal rules is planned. In the world they prepare, there will no longer be sins but only legal infringements. ... But I can say that for the Orthodox Church, love for art will constitute a criterion of its own ability to respond to the well-being of its flock because the more our societies become impersonal and massive, the more the Church must conceive of art as a weapon of defence of the human being against the powers of alienation. I will not accept, of course, that all art expresses the face of man. I am well aware that much is offensive and strips him bare. However, art remains far and beyond, a loyal ally and a strong weapon in the battle of the human being in facing depressive circumstances, in breathing freely and feeling the breath of God.

(Archbishop Christodoulos, Delphi, 5 July 2006)

It appears that the ambivalence in the relationship between religion and art is rather difficult to overcome: the sacred has always been a source of inspiration and the reason for the production of masterpieces in all arts. On the other side, however, the freedom of artistic expression has been severely violated in the name of religion as much today as in the past. Every society is thus called upon to strike a balance between these two dimensions, freedom of religion and freedom of art. The conflict between them is fundamentally a political matter and not a theological or an aesthetic issue. Can the sensibilities of religious communities restrict the freedom of individuals to determine, on their own, what art is? To what extent can liberated art provoke the religious feelings of devout communities? Are there any limits and, if yes, how are they set? In the final analysis, how does democracy balance the two freedoms and to what extent does this balance qualify a regime as democratic?<sup>44</sup>

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44. These questions were addressed in the international symposium on Art and Sacred Beliefs: from Collision to Co-existence, organised by the European Commission for Democracy through Law

We may agree, by way of introduction, that although religion and art are doomed to co-exist in conditions of tension, it is important that any solutions arise from rational consultation between people, believers and non-believers, and not from court rulings or, even worse, violence. The threat of violence, however, can easily cause any attempt to balance freedom of art and respect for religious convictions to deviate, to the detriment of free art. The tribulations of the Danish cartoons of Muhammad have created a gloomy atmosphere for freedom of art in Europe. The view that seems to prevail is that freedom of art cannot allow people to make representations that can reasonably be expected to offend the religious sensibilities of believers. As we will try to explain, this is a very risky view for democracy.

One solution, which has been put to the test as much by the Catholic as by the Christian Orthodox Church, is the revival of the offence of blasphemy that has been relied upon from time to time in order to censor “blasphemous works” and punish their makers and those responsible for their presentation to the public. In 2006 a Christian Orthodox minister, in his testimony as witness for the prosecution in the trial against the curator of Outlook, an international exhibition of contemporary art organised in Athens, said: “Nobody’s personal perversion can be allowed to qualify as art”.<sup>45</sup> The exhibition included a painting by the Belgian painter Thierry de Cordier, which was considered as offensive against Christ. In the end, the art historian and curator who was forced to consent to withdraw Cordier’s painting, as a result of the surge of protests from the Church and a number of politicians, was acquitted on 10 May 2006. So, this is how the latest case of art censorship was settled in Greece after a flurry of publicity: the painting was censored and the curator was acquitted.<sup>46</sup> Does this perhaps mean that all sides can claim victory? Not quite. “Do you wish the defendant to be put in prison?” asked the defence counsel of the same minister who testified as prosecution witness. “For my part, I am satisfied that the painting was taken down”, answered the witness.

Let us state the obvious. The right to freedom of expression is non-negotiable. It is not an absolute right, but it forms an integral part of any society that purports to be democratic. The limits to this freedom must be sought in the moral damage, suffering or pain it might cause to actual persons. But should such limits apply in all cases of moral damage? In all cases of suffering? In all cases of pain? Certainly not. As Ronald Dworkin brilliantly put it, “so in a democracy

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([www.venice.coe.int](http://www.venice.coe.int)) of the Council of Europe in co-operation with the Hellenic League for Human Rights ([www.hlhr.gr](http://www.hlhr.gr)).

45. Excerpt from the testimony of M. Epifanios, prosecution witness in the criminal trial of the Outlook exhibition curator on 10 March 2006 (see the newspaper *Eleftherotypia*, 11 May 2006).

46. This case prompted the publication of a collection of essays, including a detailed account of art censorship cases in Greece: G. Ziogas, L. Karabinis, G. Stavarakakis and D. Christopoulos (eds), *Aspects of censorship in Greece*, Eds. Nefeli, 2008 (Γ. Ζιώγας, Λ. Καραμπίνης, Γ. Σταυρακάκης, Δ. Χριστόπουλος, επιμ. Όψεις λογοκρισίας στην Ελλάδα).

no-one, however powerful or impotent, can have a right not to be insulted or offended."<sup>47</sup>

There is no place in our societies for a generalised right of everyone not to be offended. For, if such a right existed, we would be heading for a system of social organisation where any allegation of offence by anyone would become an obstacle to the exercise of any freedom. Muslims would never be allowed to build a mosque in Athens because that would sincerely and deeply offend the sensibilities of Christian residents and church authorities (as it is claimed today), visual artists would not be judged or appraised by their peers but by those who take offence at their works, and so on and so forth. In short, in the name of respecting the sacred convictions of a given community, the possibility of individual or collective freedom is abolished. The "freedom" to be able to prohibit any offending or ridiculing of our values is not only a sign of personal and political immaturity but also a clear expression of intolerance.

A religious Greek professor of law made this statement, which should frankly disarm and reassure all believers who take offence at having their beliefs attacked: "God does not need the support of the prosecutor to confirm His presence, nor can He be considered as a legally protected interest for He is the beginning and the end of all legally protected interests."<sup>48</sup>

To put it simply, whoever offends religion by word or art may well go to hell, but not to prison. The priest quoted at the beginning of this article affirms that: "Nobody's personal perversion can be allowed to qualify as art". But how many of us would be willing to leave the crucial power of defining art to the (average) priest (or judge)? If liberal constitutions bestow unreserved immunity on a given category of activities in view of their artistic nature, then reasonably the key to the special constitutional protection of any such activity must lie in the diagnosis of its artistic character. To make this possible, however, one must have a more or less fixed view of what should or should not qualify as art. And this is even more difficult.

For any effort to tackle the problems arising from the idea of an unreserved freedom of art presupposes an appropriate definition of art, a definition that would place outside the scope of constitutional immunity any acts, items or situations that, albeit claiming to be of an artistic nature, appear to infringe fundamental rights, interests or values. The technique of restriction by definition raises the question: who is to judge and on what grounds? The history of art is a history of violent restrictions prompted not by lack of artistic value but by the opposition of a particular artistic expression to the aesthetic, moral or political preferences of those in power.

47. R. Dworkin, "The right to ridicule", *New York Review of Books*, Vol. 53/5 (23 March 2006).

48. A. Kostaras, "Freedom of art and penal law" in *Democracy-Freedom-Security* [volume in tribute to Ioannis Manoledakis], Eds. Sakoulas, Athens/Thessaloniki, 2005, p. 428 (A. Κωστάρας, "Ελευθερία της Τέχνης και Ποινικό Δίκαιο" σε: Τιμητικό τόμο για τον Ιωάννη Μανωλεδάκη, *Δημοκρατία-Ελευθερία-Ασφάλεια*).

Lately, starting from the emblematic story of the Danish cartoons of the prophet Muhammad, violent restrictions to freedom of art emanate not only from the blasphemous nature of artistic works against the dominant religion in Europe but also against the major minority religion. The virulent indignation of part of the Muslim world at the publication of the cartoons in 2006 and the more subdued reactions two years later against the documentary film (of extreme-rightist inspiration) *Fitna*, by the Dutch politician Geert Wilders, frame the question “freedom of expression or freedom to insult?” in totally Manichaeic terms, as if freedom of opinion were limited only to compliments and innocuous utterances. According to one of the most classical formulations of the European Court of Human Rights, however, in a democratic society this freedom involves mainly disturbing or shocking views.<sup>49</sup>

In our times, the prevailing view on freedom of art has receded disquietingly due to fear of Islamic reaction. Evidently, contemporary restrictions are not concerned so much with the outdated cloak of blasphemy as they are with a new cloak: the dictates of political correctness and the restriction of hate-speech. The penalisation of blasphemy is no longer fashionable, though it is still used by several jurisdictions to remind Europe of its not so distant obscurantist past. Nowadays, the endeavour to protect beliefs, ethnic groups or religions has shifted to the penalisation of “intolerant” or “racist” speech. But this is actually a retreat: why in the name of offending religion – in this case Islam and Judaism – are we accepting prosecutions that would be unthinkable in other contexts?<sup>50</sup> Why should the religious sensibilities of some people command more respect than the political sensitivities of civil war victims in Spain or Greece who have to put up with seeing statues of their exterminators in public squares? The only politically honest answer is that, in the first case, the right to free expression retreats before the reasonable fear of uncontrollable reactions whereas, in the second case, freedom of art prevails because reactions can be controlled. Honest as this answer may be, it is a pure case of normative double standards.

But why do reactions in the name of these religious sensibilities inspire fear for the cohesion of our societies, whereas others do not? The answer is, once again, obvious. The social position of Muslim immigrants in Europe and the international geopolitical state of affairs in the relationships between East and West,

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49. “Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10.2, it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society.’” *Handyside v. United Kingdom*, 7 December 1976, para. 49, [www.worldlii.org/eu/cases/ECHR/1976/5.html](http://www.worldlii.org/eu/cases/ECHR/1976/5.html).

50. Let us recall the most extreme example: on 20 February 2006, the British historian David Irving was sentenced to three years’ imprisonment by an Austrian court and was actually incarcerated for a few months for the views he published in one of his books in 1989 on denial of the Jewish Holocaust. See [www.independent.co.uk/news/europe/irving-gets-three-years-jail-in-austria-for-holocaust-denial-467280.html](http://www.independent.co.uk/news/europe/irving-gets-three-years-jail-in-austria-for-holocaust-denial-467280.html)

with emphasis on the Middle East, makes some Muslims susceptible to the lures of the most reactionary political ideology of our times. The antidotes to the development of Islamic fundamentalism, however – namely, the equitable social integration of immigrants and the struggle against imperialist politics in the Middle East – entail an incomparably higher political, ideological and economic price. By contrast, free art or free expression is the weak link. It can be curtailed at no political or economic cost.<sup>51</sup> Nonetheless, given more careful consideration, the long-term implications of these restrictions for the conquests of liberal democracy bode nothing good for the future.

In early 2005, a 61-year-old German businessman thought it a good idea to write the word *Qur'an* on toilet-paper rolls and distribute them to newspapers and Muslim religious authorities. What most people might have taken as a silly joke (or mere stupidity) cost its originator a suspended twelve-month prison sentence and 300 hours of compulsory community work. The perpetrator had the misfortune to be judged in 2006, when the scandal of the Danish sketches depicting the prophet Muhammad was in full swing. Under the pressure of events and a related official protest by the Republic of Iran, the German court felt obliged to issue a ruling of a punitive nature.<sup>52</sup>

So severe a penalty for such a mindless act may cause surprise and legal or political indignation. It is part of the sway of recent proposals and trends to revive the provisions of blasphemy in European countries (a side effect of the wider trend towards a law of “zero tolerance” in order to terrorise and ultimately annihilate opponents and dissidents). Such a measure is obviously deprived of justification in a constitutional state.<sup>53</sup>

Half a century earlier, on the other side of the Atlantic, the US Supreme Court issued an injunction against projection of the motion picture *Il miracolo* by Roberto Rossellini, featuring Anna Magnani and Federico Fellini. The motion picture presented the sad story of a half-witted peasant woman who thought she was the Virgin Mary and was impregnated by a stranger whom she took to be Joseph, exposing herself to social ridicule and exclusion. According to its director, the film was of a mystic nature and was clearly inspired by Christendom. But this failed to convince the Vatican or the Catholic ministers of New York.

51. It was no accident that among the first who hastened to voice their understanding for Muslims in the affair of the Danish sketches were the leaders of the occupation forces in Iraq: Bush and Blair.

52. Ph. Lenhard, “Blasphemie und Alltag”, *Konkret*, No. 2 (2006), p. 21.

53. See D. Christopoulos, “The incongruity of penalizing blasphemy. On the reactions of the Muslim world against the Danish sketches”, in the newspaper *Avgi* (24 February 2006) [Δ. Χριστόπουλος, “Το απρόσφορο της ποινικοποίησης της βλασφημίας. Για τις αντιδράσεις μουσουλμανικού κόσμου για τα δανικά σκίτσα”, *Η Αυγή*]; on the lack of political and crime-preventive grounds of the penal operation of blasphemy, see D. Dimoulis, “Arguments for repealing offences against religious peace” (Επιχειρήματα για την κατάργηση των αδικημάτων κατά της θρησκευτικής ειρήνης) (2005), [www.hlhr.gr/papers/dimoulis0.doc](http://www.hlhr.gr/papers/dimoulis0.doc). See also D. Dimoulis, “Blasphemy, a feudal remnant in religious state” in P. Dartvelle et al., *The Right to Blasphemy*, Black List, Athens, 2000, pp. 42-45 [Δ. Δημούλης, «Βλασφημία: μια φεουδαρχική επιβίωση στο θρησκευόμενο κράτος» σε: Π. Ναρτβέλ, Φ. Ντενί, Γ. Ρόμπιν, σε: Δ. Δημούλης (επιμ.), *Δικαίωμα στη βλασφημία*].

Following strong and persistent protests by the latter, the state's Censure Board designated the picture as sacrilegious and caused the required permission of projection to be revoked.<sup>54</sup>

When the Supreme Court examined the case in 1952, it ruled that the state law that permitted the censorship of sacrilegious pictures was incompatible with the federal constitutional provisions on freedom of speech. It held that: "It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures."<sup>55</sup>

There should be nothing original about this ruling. A state adhering to its constitutional provisions in its respect for freedom of speech and proclaiming its religious neutrality cannot meddle in private disputes about whether someone offended the metaphysical views of another. If certain legal limits are infringed, the provisions protecting honour and reputation apply, giving grounds for compensation and eventually criminal liability. Beyond that, the state ought not to, and may not, interfere in the private sphere by telling people what they may or may not say or who is allowed to say what.

Comparison of the two cases implies once more that, in fact, the law is what judges decide. Had a different judge, state of affairs or religion been involved, the ruling would probably also have turned out differently. The legally and politically infuriating ruling of the German court is nevertheless very appealing to common sense. A man who makes toilet paper of a religion's sacred texts in public may perhaps not deserve imprisonment but surely ought to be reprimanded, if not given a good thrashing, as common sense would have it.

Indeed, we all know that certain things are better not written or said. This statement undermines absolute liberalism and the theory of total state abstention by indicating a need to draw lines and produce arguments to justify them.<sup>56</sup> To put it more explicitly, disapproval of censorship does not do away with the real need to set restrictions on speech.

The above discussion implies that the liberal claim for freedom of speech is fraught with problems. The liberal position ignores the need to set limits and, by decrying censorship in general, fails to engage in the crucial and difficult discussion of who is responsible for setting limits and on what grounds. As we saw, one particular type of command of silence has to do with sacredness. A

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54. *Joseph Burstyn Inc. v. Wilson*, 343 U.S. 495. On the content of the film, see [www.imdb.com/title/tt0040092](http://www.imdb.com/title/tt0040092).

55. *Joseph Burstyn Inc. v. Wilson*, 343 U.S. 505.

56. The US Supreme Court affirms: "The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances." (*Tinker et al. v. Des Moines*, 393 U.S. 513). This comment illustrates the inefficacy of absolute liberalism but also a lack of will on part of the court to define what is "reasonable" and which are the "circumstances" of censorship.

politically dominant group prohibits utterances of a certain kind in order to protect what it considers as sacred and holy, that is, in order to assert its power over those wishing to question the order of things. The outcome in normative terms is ex-ante and ex-post censorship. It is by understanding the rationale of censorship in individual cases that we are able to evaluate it and then take a stance with regard to its purpose.

The comparative study of various jurisdictions indicates significant differences in the degree and requirements of protection against blasphemy.<sup>57</sup> We no longer encounter laws threatening blasphemers with having their tongues and lips pierced as decreed by Louis IX in 1263, causing even the Pope to protest.<sup>58</sup> It is also a fact that the gradual secularisation of government leads to a retreat of blasphemy.<sup>59</sup>

In some countries indeed, courts have exhibited a degree of courage that was lacking in the legislature and have found the laws on blasphemy to be counter to the constitution. By such means, they allowed application of the common rules restricting freedom of expression in the religious domain, instead of the exceptional censorship mechanism of blasphemy. This has been the case in the USA in recent decades, with a series of rulings gradually extending the borders of freedom of speech and thus preventing trials for offending religion.<sup>60</sup> A similar development took place in Italy in 2000 when, after some hesitation in the case law, the Constitutional Court found the criminal offence against “state religion”, which protected only the Catholic Church, to be counter to the constitution.<sup>61</sup>

Internationally too, it appears that sentences are being reduced and legislation is becoming more liberal, though this is only a rough guess for we lack clear data, and flare-ups about the occasional scandal may still occur. Despite all this, a ban on offending the divine by word or art still applies in many countries, which amounts to recognising the divine as an independent constitutional-legislative value, as older juridical texts point out.<sup>62</sup> This is what contemporary legal debate and court rulings try to conceal, with constructions on the protection of honour or religious peace, in their effort to find liberal grounds to justify the ban of blasphemy.<sup>63</sup>

But this is only a subterfuge aiming to justify what cannot be justified in liberal terms – the protection of the divine in officially secularised states – and to issue

57. A. Cabantous, *Histoire du blasphème en Occident, XVIe-XIXe siècle*. Paris: Albin Michel, 1998. F. Hildesheimer, “La repression du blasphème au XVIIIe siècle” in J. Delumeau (ed.), *Injures et blasphèmes*, Paris: Imago, 1989, pp. 63-81.

58. A. Cabantous, *Histoire*, p. 58.

59. *Ibid.*, pp. 150-2.

60. Levy L., *Blasphemy. Verbal Offense against the Sacred, from Moses to Salman Rushdie*, Chapel Hill, NC: University of North Carolina Press, 1995, pp. 522-33.

61. Corte costituzionale, ruling 508, 20 November 2000 ([www.giurcost.org/decisioni/2000/0508s-00.html](http://www.giurcost.org/decisioni/2000/0508s-00.html)).

62. See references in Hildesheimer, “La repression du blasphème au XVIIIe siècle”, pp. 63-4.

63. For criticism of these opinions, see Dimoulis, “Blasphemy, a feudal remnant in religious state”, pp. 24-32.

decisions finding favour with Christian lobby groups. For instance, if we accept the reasoning of the European Court of Human Rights to the effect that a ban on screening a film that would scandalise the Christian Catholic majority of the inhabitants of Tyrol<sup>64</sup> aims to protect religious peace and the honour of the said Catholics, we will also have to ban anything that might be in the nature of aggravating terrorists in order to ward off their violent reactions. In other words, in view of the protest of an oversensitive person (who in this case pays the cinema ticket only to be scandalised!), we will have to curtail the exercise of an entire series of other people's rights and at the same time adopt a set of rules penalising any challenge to the views and convictions of other social groups, ending up with a society of generalised censorship.<sup>65</sup>

In the final analysis (despite appearances to the contrary), in order to speak convincingly against censorship and make an ideologically robust and realistic case for free art, it does not suffice to be liberal-minded. It requires a theoretical and ideological stance of opposition and resistance to a specific power scheme that imposes public devotion, one that controls and scares people away from thinking about the divine and, by extension, about the secular authorities that represent it and draw their power from this representation.

This is what the general liberal imperative of freedom of speech cannot (or cares not to) understand and that is why it is at a loss when asked to set criteria for censorship. It makes no sense to be in favour of freedom of expression solely as a matter of principle. There are specific power structures in whose interest it is to silence certain kinds of discourse in particular domains: we can only be against such power structures. And this is what those who have reasons to resist are doing. In other words, the crux of the matter in the prohibition of blasphemy and the protection of freedom of art consists in the social antagonism between asymmetric social forces. With the outcome remaining open ...

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64. Otto-Preminger-Institut, 20 September 1994, n. 56, *Revue trimestrielle des droits de l'homme*, 1995, p. 464.

65. In legal terms, the Court's ruling confuses the operation of fundamental rights as imperatives of state abstention from the individual's sphere of freedom with the obligation of the state to intervene in third-party rights that encroach on other individual rights. The Court converted the religious freedom of Catholics into an obligation for Catholics to respect it, under threat of public punishment, thus reversing the roles of state and citizens. See also F. Rigaux, "La liberté d'expression et ses limites", *Revue trimestrielle des droits de l'homme*, 1995, pp. 408-10.

## 5. Whose responsibility? The case of Iran

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Is there such a thing as an “ethic of responsibility” for artists? First of all, let us recall the causal relationship between freedom and responsibility, which is based on the dialectic between individual freedom and the rights and freedoms of others.

### Limits on freedom of expression

It is in this context that the International Covenant on Civil and Political Rights and the European Convention on Human Rights restrict both freedom of expression and freedom of religion and belief, in the light of the need to respect others’ rights and freedoms. Article 18 of the Covenant says:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

Article 18 of the Universal Declaration of Human Rights is even more explicit in this respect, stating that freedom of religion also includes the “freedom to change [one’s] religion or belief”. On the subject of freedom of expression, Article 19 of the Covenant is also clear:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

Accordingly, like every other citizen, artists have the right to express themselves, impart their ideas and publish their works. However, Article 19 goes on to say that the exercise of these freedoms

carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

For the respect of the rights or reputations of others;

For the protection of national security or of public order, or of public health or morals.

Article 10 of the European Convention on Human Rights imposes similar restrictions on freedom of expression, but states that such measures must be prescribed by law and must be “necessary in a democratic society”. This stipulation is central to our discussion, because freedom of expression is the cornerstone of democracy.

Accordingly, the Parliamentary Assembly of the Council of Europe reaffirmed in its Resolution 1510 of 28 June 2006 “that there cannot be a democratic society without the fundamental right to freedom of expression”, recalling the case law of the European Court of Human Rights in Strasbourg as follows:

[freedom of expression] is not only applicable to expressions that are favourably received or regarded as inoffensive but also to those that may shock, offend or disturb the state or any sector of the population.

In respect of blasphemy, it is true that on several occasions the European Court of Human Rights has adopted a liberal interpretation consistent with that of the Council. In the case of *Handyside v. United Kingdom*, the Court handed down this decision on 7 December 1976:

Freedom of expression constitutes one of the essential foundations of [a democratic society]; it is applicable ... also to [ideas] that offend, shock or disturb.

The Strasbourg judges have not always confirmed this approach, however, and one example is the case of *Otto-Preminger-Institut v. Austria*. Following an application from the Catholic Church against the screening of a film by Werner Schroeter, *Council in Heaven*, the film was confiscated in accordance with a decision by the Innsbruck Regional Court. The projection company lodged an application with the Strasbourg Court. In a judgment of 20 September 1994, the Court, referring to the phrase “duties and responsibilities” set out in Article 10.2 of the Convention, held that, in order to keep the peace and safeguard religious freedom, states have to protect religious beliefs from improper and “gratuitously offensive” attacks. The Strasbourg judges consequently rejected the complainant’s application.

Accordingly, in its preliminary report on blasphemy of 23 March 2007, the Venice Commission emphasised that, in a democratic society, freedom of expression includes “the right for an individual to impart to the public controversial views”. With reference to Article 9 of the European Convention on Human Rights, however, the Venice Commission also notes that freedom of expression must be:

weighed against the need to allow others the enjoyment of their right to respect for their religion and beliefs as well as against the general interest to preserve public order (including “religious peace”).

Article 18.3 of the International Covenant on Civil and Political Rights lays down similar restrictions in respect of freedom of religion:

Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Against this backdrop, Article 20 of the Covenant prohibits "any propaganda for war" and "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".

It may be noted that religious insults and incitement to religious hatred are prohibited as related offences. However, criticism of religious beliefs must not be regarded as an attack on the "rights or reputations of others" as referred to in Article 19.3 of the Covenant. In its judgment of 31 January 2006 in the case of *Giniewski v. France*, the European Court of Human Rights held that criticisms of doctrine do not necessarily "contain attacks on religious beliefs as such".

Likewise, the Parliamentary Assembly of the Council of Europe notes in Resolution 1510 that, on the one hand, religious communities are allowed to "defend themselves against criticism or ridicule in accordance with human rights legislation and norms", but, on the other hand, the culture of "critical dispute and artistic freedom has a long tradition in Europe and is considered as positive and even necessary for individual and social progress", considering that "only totalitarian systems of power fear them". Lastly, the Assembly emphasises that "critical dispute, satire, humour and artistic expression should, therefore, enjoy a wider degree of freedom of expression and recourse to exaggeration should not be seen as provocation".

It must be recognised that most protests and demonstrations against freedom of expression or artistic freedom, protests which are often violent and aggressive, are organised by extremist and even fanatical groups, or states that respect neither freedom of expression nor freedom of belief. The organisers of such mass rallies have a good understanding of crowd psychology and use religious beliefs for political ends.

### **Iranian hostility to freedom of expression**

The *fatwa* against Salman Rushdie, author of *The Satanic Verses*, issued by the Ayatollah Khomeini in February 1989, was a political act from the outset. The novel had not yet been translated into Persian or Arabic when the *fatwa* was issued, so Khomeini, who did not speak any foreign languages, could not have read it. The *fatwa* consequently did not comply with *sharia* law, since Khomeini could not have given his verdict (*fatwa*) with sincerity. Moreover, the legitimacy of such a death sentence, pronounced against a citizen of a UN member state by a Supreme Leader who was also the head of another UN member state, is questionable.

The international community has misunderstood, if not wilfully ignored, the political and legal nature of the Iranian state. In fact, the Islamic Republic of Iran is a theocratic oligarchy in which the enjoyment of rights and freedoms is conditional on subscribing to an official Islamist ideology justified by divine right.

The right to govern, legislate and judge, for instance, is conferred by the clerical authorities, whom the Constitution designates as the supreme branch of power, placing them above the executive, legislative and judiciary. This principle, known as *Velayat-e-Faqih* ('transcendence of the religious leader'), is the cornerstone and basis of the regime's legitimacy.

Paradoxically, the Constitution of the Islamic Republic of Iran also provides for a president of the republic, elected by universal suffrage, and a parliament whose members are elected by the same means.

Provision is also made for a Guardian Council, comprising six religious leaders appointed by the Supreme Leader, to "supervise" presidential and parliamentary elections. In fact, this Council selects both presidential and parliamentary candidates in advance, on the basis of purely political and religious criteria, and publishes a list of approved candidates. That shortlist is submitted to universal suffrage, and the people consequently have no other choice.

Notwithstanding this pre-election purge, the president elected by the people must then be "appointed" by the Supreme Leader in order for his election to be valid. The president is therefore merely the head of government, answerable to parliament, while the head of the executive is the Supreme Leader, who enjoys, *inter alia*, all the powers of a head of state, including authority over the armed forces, without being answerable to parliament.

As for the legislature, the parliament elected by the people from a shortlist must have regard to the official ideology of the Islamic Republic of Iran. Accordingly, all laws passed by parliament must be submitted to the Guardian Council so that its six religious members can check that they comply with "Islamic precepts". If a majority of the religious leaders on the Council consider a law passed by parliament to be incompatible with "Islamic precepts", it is deemed null and void. Yet these precepts are not defined in either the Constitution or any other legal instrument. Nor does the Guardian Council have to give reasons for its decisions.

Lastly, the judiciary is headed by a religious leader appointed by the Supreme Leader. The head of the judiciary in turn appoints a religious leader as president of the Supreme Court, and another as attorney-general.

The people's elected representatives are thus supervised by the clerics, who do not have a political mandate obtained by universal suffrage. The Supreme Leader, who governs as the "12th Imam's representative", exercises ultimate authority. Iran is therefore a state in which religion has become an ideology, and theocracy is coupled with oligarchy.

It is on this basis that its Supreme Leader, its sovereign by divine right, takes the liberty of sentencing an individual to death even though the latter does not belong to his people or his community (*Ummah*) or live in his country.

In September 1988, four months before the *fatwa* against Rushdie, this depositary of divine legitimacy and public authority ordered a purge in which more than 3 000 political prisoners and prisoners of conscience were executed after partially serving the prison terms to which they had been sentenced following their refusal to repent and swear allegiance to the regime.

Twelver Shi'ite Islam (*Esna Ashari*), practised by 80% of the population, is the official state religion of this "republic", but non-Shi'ite and non-Twelver Iranians do not enjoy the same rights as their Twelver compatriots. Non-Muslim Iranians have even fewer rights. Christians, Jews and Zoroastrians are deemed to be "recognised minorities", with the status of second-class citizens. Other minorities and atheists do not enjoy any social or political rights, or freedom of conscience, and nor do they have access to higher education or the civil service.

It follows that the freedom of conscience and religion set out in Article 18 of the International Covenant on Civil and Political Rights, ratified by Iran in 1976, is not recognised by the Islamic Republic of Iran. Worse still, exercising the right "to manifest one's religion or beliefs" can attract severe penalties, including the death penalty. Indeed, the Iranian authorities recognise only positive conversion: a non-Muslim Iranian can convert to Islam, but the converse is not permitted and is severely punished. An Iranian who has a Muslim father but converts to another religion or commits apostasy may be sentenced to death. Furthermore, blasphemy carries the same penalty.

## Balancing the freedoms

Unfortunately, the Iranian example is not an isolated case: in a number of Muslim countries, along with many non-Muslim countries, as yet neither the state nor the religious authorities show tolerance or demonstrate a political commitment to balancing freedom of expression with freedom of thought, conscience and religion, tolerating criticism in the context of debate and public statements, particularly in the media, or respecting the dignity, rights and freedoms of all citizens regardless of their religious beliefs and intellectual opinions.

Let us come back to our democratic societies, which must permit "open debate on matters relating to religion and religious beliefs" (Recommendation 1805 of 29 June 2007 of the Parliamentary Assembly of the Council of Europe).

In addition to these recommendations, however, given that Muslim communities in a number of European countries are subject to various forms of social and economic discrimination, states need to bear in mind that, in a democracy, the principle of freedom of conscience and religion has to go hand in hand with the principle prohibiting discrimination on religious or spiritual grounds.

On the other hand, religious groups whose fundamentalism is criticised in a speech or a written or artistic work must never take it upon themselves to incite the public to confrontation or issue death threats against writers or artists.

Lastly, in a democratic society, individuals must be regarded as being capable of autonomy and independent thought. When an idea is attacked in a speech, article or literary or artistic work, it is wholly legitimate for its proponents either to respond, even in a shocking or offensive manner, or to reflect upon the message in question and possibly be persuaded by it, thus changing their minds.

## 6. The intersection between freedom of expression and freedom of belief: the position of the United Nations

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Given that all human rights are universal, indivisible, interdependent and inter-related, it follows that freedom of expression and freedom of belief, being two fundamental human rights, are of equal value and are related to, and dependent on, each other, must co-exist in harmony with each other and must be respected, protected and promoted in equal measure.

Neither right should, however, be respected, protected or promoted at the expense of the other. One person's freedom of expression, through any known expressive medium, has to co-exist in harmony with the exercise of freedom of belief (including theistic, non-theistic, atheistic and agnostic or any other belief) by others, and vice versa.

Moreover, the co-existence of these two rights implies that permissible limitations, or restrictions on specific grounds, may be placed on the exercise of either right provided that they do not put in jeopardy the very right itself. Limitations or restrictions must not, however, be imposed for discriminatory purposes or be applied in a discriminatory manner.

### **Permissible restrictions on freedom of expression or freedom of belief**

The International Covenant on Civil and Political Rights (the Covenant) provides that in the exercise of their freedom of either belief or expression, individuals have (for example) to respect the rights of others, whereas the exercise of freedom of expression carries with it special duties and responsibilities (vide Articles 18.3 and 19.3) that indeed permit a restricted range of compelling countervailing considerations, interests or values or pressing social needs to be invoked to justify restrictions on the rights to freedom of belief and free speech.

Any limitation on the right to free speech or the right to freedom of belief is only permissible if it is convincingly established in evidence by a compelling countervailing consideration, interest or value or pressing social need which it is necessary for the state to protect.

The scope of the restriction on the right to free speech or the right to freedom of belief must, however, be proportionate to the consideration, interest, value or

social need which ought to be protected in order that the restriction does not put in jeopardy that very right itself.

### **The 2007 Report of the UN Special Rapporteur**

In her last report of July 2007, the UN Special Rapporteur on Freedom of Religion or Belief, Ms Asma Jahangir (AJ), referred to the joint press statement issued by her and the UN Special Rapporteur for the Promotion and Protection of the Right to Freedom of Opinion and Expression, Mr Ambeyi Ligabo, along with the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Mr Doudou Diène (DD) (together, the special rapporteurs), in response to what they called the “offensive” publication of cartoons of the prophet Muhammad by the media in some countries in 2005.

In that statement, the three special rapporteurs had expressed concern at the grave offence caused by the cartoons and at the violent response provoked by them. While accepting that freedom of religion and freedom of expression must be equally respected, they underlined the fact that the exercise of the right to freedom of expression carries with it special duties and responsibilities.

Such an exercise requires, according to the special rapporteurs, “good judgment, tolerance and a sense of responsibility”. Moreover, while the peaceful expression of opinions and ideas should always be tolerated to promote not only a free flow of news and information, within and across national frontiers, but also debate and dialogue,

the use of stereotypes and labelling [as in the case of the published cartoons] that insult deep-rooted religious feelings do[es] not contribute to the creation of an environment conducive to constructive and peaceful dialogue among different communities.

### **Joint report of the special rapporteurs**

In their joint report of September 2006, AJ and DD (special rapporteurs) restated that the right to freedom of religion or belief in international law does not include the right to have a religion or belief that is free from criticism or ridicule; and the right to free speech can legitimately be restricted for expressions that not only do not respect the right to freedom of religion or belief of individuals, groups of individuals or communities, but also incite imminent acts of discrimination, hostility or violence against them on the basis of their religion (vide Article 20.2 of the Covenant). The threshold for the acts mentioned in Article 20.2 of the Covenant is, according to AJ and DD, relatively high since the acts must constitute “advocacy of national, racial or religious hatred”.

AJ, in her 2007 Report, also cautioned that any attempt to lower this threshold would be counterproductive and would promote a climate of religious intolerance since it would “not only shrink the frontiers of free expression but also limit freedom of religion or belief itself”.

Both AJ and DD in their joint report, however, agreed that the question of whether any criticism, derogatory statement, insult or ridicule of one religion may actually have a negative impact on the right to freedom of religion of individuals, groups of individuals or communities can only be determined objectively and, in particular, by examining whether the different aspects of the manifestation of the right to religion on their part have indeed been negatively affected.

In other words, it is for an independent and impartial judiciary to strike a fair balance on the particular facts of a given case between the competing rights to free speech and to freedom of religion, in light of the permissible and restricted limitations placed on such rights.

Both AJ and DD also took the view that the published Danish cartoons

seem to reveal intolerance and absence of respect for the religion of others, particularly in the aftermath of 11 September 2001 and may constitute threats to the religious harmony of a society and the source of incitement to discrimination, hostility or violence on the basis of religion

under Article 20.2 of the Covenant.

### **Blasphemy laws**

In her report of July 2007, AJ made certain interesting observations on blasphemy laws. She deplored the fact that blasphemy laws are used in a discriminatory and disproportionate manner to punish members of religious minorities, dissenting believers and non-theists or atheists, and to censure all inter-religious and intra-religious criticism.

AJ agreed with the Parliamentary Assembly of the Council of Europe, which recommended in 2007 that blasphemy as an insult to religion should be decriminalised and that instead statements should be penalised that call for individuals, groups of individuals or communities to be subject to hatred, discrimination or violence on ground of religion or any other ground.

AJ suggested that a useful alternative to blasphemy laws would be to legislate to protect individuals against advocacy of national, racial or religious hatred (including, possibly, hatred for lack of a religious belief) where such hatred constitutes incitement to imminent acts of discrimination, hostility or violence under Article 20.2 of the Covenant.

### **Defamation of religions**

AJ also considered, in her report of July 2007, that criminalising defamation of religions would: (a) be difficult, especially on account of the existence of a large number of religions and beliefs and of the differences of opinion among their believers; (b) be counterproductive because it might create a climate of intolerance, fear and persecution against religious minorities, dissenting believers and non-theists or atheists; and (c) stifle legitimate debate, discussion or research on

religious practices and laws that might infringe human rights, thus having also a negative impact on free speech.

After all, the right to freedom of religion or belief protects individuals, groups of individuals or communities, but it does not protect religions or beliefs as such, least of all religious or other ideas.

In this regard, it is interesting to note that section 29J of the UK's Racial and Religious Hatred Act 2006, which makes it illegal to stir up hatred against individuals by reason of their religious belief or lack of it, expressly specifies that, in order to protect free speech, nothing in this Act should be interpreted in any way that would restrict debate or prevent criticism of any religious belief.

### **Actual restrictions on freedom of expression or freedom of belief**

We now examine the interplay between the right to freedom of belief or the right to freedom of expression and the permissible and restricted limitations placed on such a right under Articles 18.3 and 19.3 of the Covenant, since it is the interaction between a particular right and the limitations placed on it that determines the actual scope of enjoyment of that right. Reference will, in this connection, be made to two important decisions of the Human Rights Committee (the Committee).

#### **Ross v. Canada (2000)**

In *Ross v. Canada* (2000), the author of the communication, a teacher, claimed to be a victim of violation by Canada of Articles 18 and 19 of the Covenant, since he was transferred to a non-teaching position after having been put briefly on leave without pay for allegedly having expressed in public, whilst off-duty, anti-Jewish views and denigrated the Jewish faith, in defence of his Christian religion.

The Committee first observed that, in accordance with Article 19.3 of the Covenant, any restriction on the right to freedom of expression must cumulatively meet several conditions specified therein. Second, the loss of a teaching position by the author was, according to the Committee, a significant detriment, even if no, or only insignificant pecuniary damage, was incurred. Since this detriment was imposed on the author on account of the expression of his views, this restriction must be justified under Article 19.3 of the Covenant.

The Committee next examined whether the restriction on the author's right of freedom of expression met the conditions of Article 19.3, namely that it must be provided by law, it must address one of the aims set out therein (viz respect for the rights and reputations of others; protection of national security or public order; or protection of public health or morals) and it must be necessary to achieve a legitimate purpose.

With regard to the requirement that the restriction must be provided by law, the Committee had no difficulty in finding that there was a legal framework for the proceedings leading to the removal of the author from a teaching position.

In determining whether the restrictions placed on the author's freedom of expression were applied for the purposes set out in Article 19.3, the Committee noted that such restrictions may be permitted in a case of respect for the rights or reputations of others (meaning other persons or a community as a whole) and

that both the Board of Inquiry and the Supreme Court [of Canada] found that the author's statements were discriminatory against persons of the Jewish faith and ancestry and that they denigrated the faith and beliefs of Jews and called upon true Christians to not merely question the validity of Jewish beliefs and teachings but to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy and Christian beliefs and values.

In light of such findings, the Committee came to the conclusion that the restrictions imposed on the author were for the purpose of protecting the "rights or reputations" of people of Jewish faith, including the right to have an education in the public school system free from bias, prejudice and intolerance.

The final issue decided upon by the Committee was whether the restriction on the author's freedom of expression was necessary to protect the rights or reputations of people of the Jewish faith.

The Committee recalled that the exercise of the right to freedom of expression carries with it special duties and responsibilities that are of particular relevance within the school system, especially with regard to the teaching of young students. Given that the Supreme Court of Canada found that there was a causal link between the expressions of the author and the "poisoned school environment" experienced by Jewish children, the removal of the author from a teaching position could be considered a restriction "necessary to protect the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance". Moreover, since the author was appointed to a non-teaching position after only a minimal period of leave without pay, the restriction was not, in the opinion of the Committee, disproportionate (that is, it did not go any further than what was necessary to achieve its protective object). Consequently, the facts did not disclose a violation of Article 19.

As for the author's claims under Article 18 of the Covenant concerning his right to freedom of religion, the Committee noted that the actions taken against the author were not directed at his thoughts or beliefs *per se*, but rather at the manifestation of those beliefs.

Since the freedom to manifest religious beliefs may be subject to limitations that are prescribed by law and are necessary to protect the fundamental rights and freedoms of others, the issues under Article 18.3 are therefore substantially the same as under Article 19.3. Consequently, the Committee held that there was no violation of Article 18.

It is significant that the Committee also stressed that restrictions placed on the freedom of expression for the respect of the rights of others (meaning other persons or a community as a whole, under Article 19.3 of the Covenant) were also permitted under Article 20.2 of the Covenant “in order to uphold the Jewish communities’ right to be protected from religious hatred” since the public statements of the author were amply found to be of such a nature as to raise or strengthen anti-Semitic feeling, as was also the case in *Faurisson v. France* (1996).

### **Faurisson v. France (1996)**

In *Faurisson*, the author of a communication, a professor of literature, claimed a violation of his right to free speech after having been convicted under the Gaysot Act (hereafter, the Act) of denying certain aspects of the Holocaust in an interview published in a magazine.

The French courts had examined the statements made by the author and came to the conclusion that the author was not engaged in historical research, but that his statements were of such a nature as to raise or strengthen anti-Semitic tendencies. In a strong concurring opinion, three members of the Committee stated that, although the Act was too broad in its objective and would appear to prohibit even publication of bona fide research connected with matters decided by the Nuremberg Tribunal in order to protect the right of others to be free from incitement to anti-Semitism, and was thus capable *in abstracto* of being disproportionate in its impact, they were concerned only with the restrictions placed on the freedom of expression of the author by his conviction for his statements in the interview.

The restrictions on freedom of expression permitted under Article 19.3 of the Covenant may, they went on to point out, relate to the interests of other persons or a community as a whole, especially when the right protected is the right to be free from racial, national or religious incitement under Article 20.2 of the Covenant. They consequently held that the restrictions on the author’s freedom of expression in the particular circumstances of the case

did not curb the core of his right to freedom of expression, nor did they in any way affect his freedom of research; they were intimately linked to the value they were meant to protect – the right [of the Jewish community in France] to live free from fear of incitement to racism or anti-Semitism and thus met the proportionality test and were necessary in order to protect the right of others.

The following pertinent observations were also made by the three distinguished members:

- a. There may be circumstances in which the right of a person, a group of persons or a community to be free from incitement to discrimination, hostility or violence on grounds of race, religion or national origin cannot be fully protected by a narrow, explicit law on incitement that falls squarely within the ambit of Article 20.2 of the Covenant.

b. In a particular social and historical context, statements that do not meet the strict legal criteria of incitement may, however, be shown to constitute part of a pattern of incitement against a specific racial, religious or national group, especially when it is borne in mind that those interested in spreading hostility and hatred often adopt sophisticated forms of speech that may not always be punishable under an existing law against racial, national or religious incitement, even though their effect may be as pernicious as explicit incitement, if not more so.

c. The power given to state parties under Article 19, paragraph 3, to place restrictions on freedom of expression, must not be interpreted as a licence to prohibit unpopular speech, or speech that some sections of the population find offensive. Much offensive speech may be regarded as speech that impinges on one of the values mentioned in Article 19, paragraph 3a or b (the rights or reputations of others, national security, public order, public health or morals).

d. The Covenant therefore stipulates that the purpose of protecting one of those values is not, of itself, sufficient reason to restrict expression. The restriction must be necessary to protect the given value. This requirement of necessity implies an element of proportionality. The scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. It must not exceed that needed to protect that value. As the Committee stated in its General Comment 10, the restriction must not put the very right itself in jeopardy.

## Conclusions

The position of the UN is, in my opinion, practically the same as that of the European Court of Human Rights. In this regard, we may usefully refer to, *inter alia*, three decisions of the Court that adopt the same reasoning as the Committee and reach the same conclusion on similar facts.

In *Otto E.F.A. Remer v. Germany* (1995), a conviction for incitement to racial hatred by publishing materials denying the gassing of Jews in Nazi Germany was held to be an interference with the applicant's right to free speech, but was justified and necessary in a democratic society for the protection of the rights and reputations of others.

In *Otto-Preminger-Institut v. Austria* (1994), a film portraying God, Jesus and Mary in a manner that could have been deeply offensive to Christians was confiscated by the authorities. The Strasbourg Court held, by a majority, that the right to freedom of expression carries with it certain duties and responsibilities, and that the restriction of such a right was justified and necessary in that it had the legitimate aim of protecting the rights of Christians.

The Court stressed the duty of those who exercise the right to free speech to avoid expressions that do not contribute to public debate and are gratuitously offensive to others. See also *Wingrove v. U.K.* (1996), where the Judges in Strasbourg decided that state authorities are in a better position than the international judge to give an opinion as to what is required nationally to prevent offence to persons of particular religious beliefs.

The duty and responsibility of those who exercise the right to free speech to avoid expressions that do not contribute to public debate and are gratuitously offensive to others, is particularly important when several religions co-exist in a given country. It will then be necessary for the state authorities, in furtherance of their positive obligation to comply with international standards:

- a. to respect the rights of individuals, groups of individuals or communities;
- b. to protect them from any quarter against any advocacy of religious hatred that constitutes imminent acts of discrimination, hostility or violence against them and take remedial action; and
- c. to promote a culture of inter-religious tolerance and harmony.

To attain these legitimate objectives, the state will thus be required to impose justifiable and proportionate restrictions on the right to free speech, as was done in *Otto Preminger and Wingrove*, cited above, in order to reconcile the interests of the various religious groups or communities in a democratic society, in accordance with the values of pluralism, tolerance and broad-mindedness.

It should come as no surprise that the stand of the UN is substantially identical to that of European Court of Human Rights, given that the articles relating to freedom of expression and freedom of belief in both the Covenant and the European Convention on Human Rights (the Convention) are couched in almost identical terms and that those countries which have ratified the Covenant include those that are parties to the Convention, and must fulfil their international obligations and implement the provisions of the Covenant in their respective domestic legal orders.

## 7. Blasphemy in the Greek Orthodox legal tradition

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Chapter VII of the Greek Penal Code on “Offences against religious peace” deals with the offences of malicious blasphemy, common blasphemy, religious insult and disturbance of religious gatherings.

According to the definition of malicious blasphemy, whoever publicly and maliciously offends God in any way whatsoever is punishable with imprisonment for a term of up to two years. According to the definition of common blasphemy, whoever publicly manifests a lack of respect for the divine is punishable with imprisonment for a term of up to three months. According to the definition of religious insult, whoever publicly and maliciously insults the Eastern Orthodox Church in Christ, or another religion tolerated in Greece, in any way whatsoever is punishable with imprisonment for a term of up to two years. In relation to the disturbance of religious gatherings, whoever maliciously attempts to prevent or intentionally disrupts a religious worship gathering or ceremony allowed by polity, as well as anyone who, inside a church or a place designated for a religious gathering tolerated by polity, commits insulting and offending acts is punishable with imprisonment for a term of up to two years; a different provision punishes insult against the deceased.

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### Case law

The development of case law on these offences highlights their structurally-ingrained problems. To begin with, according to firmly established case law (Supreme Court 360/64, 666/76, 233/78, 1166/78, 820/81, 928/84, 1869/84, 119/88, 422/98, Admiralty Court of Piraeus sitting as a Board 22/97, Opinion of the Public Prosecutor to the Court of First Instance of Thessaloniki 6/97), blasphemy is any public manifestation whatsoever (oral, in writing, by way of images, symbols and/or gestures) involving mockery, affront, offensive or vulgar expressions against God as the Supreme Being of monotheistic religions or against the divine, including anything that is considered sacred by a recognised religion. A public manifestation is any manifestation that may be perceived by an undetermined number of people irrespective of whether it took place in a public area or was actually perceived by anyone. Religious insult is any public manifestation of contempt by way of vituperative or vile utterances or by the vile abuse of doctrines, symbols or customs in any form whatsoever.

The interpretation of the notion of malice, on the other hand, has evolved in case law: at first, even the intention of derisory use of religious symbols was enough to qualify the offence as malicious. Thus, in the Supreme Court decision 233/78, the derisory use of the Credo led to the condemnation of the authors of the revue *69 ways to laugh* because the target of the satire was obviously the recent junta and the role of the Church during that period (mostly, the Church's indifference to the oppression and violation of human rights: God is depicted as totally oblivious of 21 April, the day of the *coup d'état*, because He was preparing for Easter). In contrast, according to the Supreme Court decisions 928/1984 and 1869/1984 (just six years later), the term "malicious" incorporates a vilifying act aimed directly at offending a religion for the offender's gratification. This line of argument was used to reverse the sentence against the playwright of *The Saint of Preveza*, which satirised the then-recent scandal involving the Metropolitan of Preveza, for lack of motivation in the element of malice.

This turning point in case law significantly restricted the scope of malicious blasphemy and malicious religious insult (see Decision 2058/93 of the Magistrates' Court of Thessaloniki sitting as a Board, Order 47/93 of the Public Prosecutor of Thessaloniki, both cases on the motion picture *Jesus of Montreal*, and Decision 4959/94 of the Magistrate's Court of Athens sitting as a Board in the case of *Black Hole*). But it did not affect the scope of blasphemy *simpliciter*, which is still consistently punished by the courts even when it is obvious that the offender does not express indignation against God or religion but against a specific person (see Supreme Court 119/88, 1046/91, Appellate Court of Athens 5346 -5347/90).

This turnaround led the faithful, who felt scandalised by certain art works, to redirect their efforts from the criminal to the civil courts to obtain injunctions preventing the exhibition of such works, arguing that by offending God and religion the works also offended them personally. At first, the courts upheld such motions (Court of First Instance of Athens 17115/88 in the renowned case of Scorsese's film *The Last Temptation*, based on the book by N. Kazantzakis, who was excommunicated by the Church), arguing that religious insult (qualified as malicious by reference to case law prior to 1978) encroaches upon the religious feelings and the religious freedom of others, both of which are protected as moral-social values, as social and legal interests worthy of protection to the benefit of civilisation and the polity. According to this decision, religion is not a purely personal affair, a wholly inner relationship of the soul with God, irrelevant to the state, but is the foundation of the state, a vector of spiritual civilisation affecting not only the feelings and thoughts, but also the actions, of human beings. The same decision also found that the projection of the motion picture inspired strong protests, demonstrations and discontent, which threatened order and peace among civilians. The decision undertook a flawed balancing exercise between artistic creation and religious feeling, clearly taking a stance in favour of the latter, as an obvious limit

to freedom of art, also arguing that cinematographic representation is perceived as “another reality”.

By contrast, in its decision 5208/00, in the case of the book *M* (*M to the power of n*), the Court of First Instance of Athens found that this allegorical work of literature does not qualify as malicious insult against religion because its target is something else (the condemnation of misogyny in general) and it does not attack religion as such; therefore, it cannot be considered that the personality of the complainants, as reflected in their religious feelings, is offended. Besides, works of literature are protected by the Constitution as works of art and, since freedom of art seeks to protect over-riding social considerations, it can accommodate offences against personality insofar as they do not infringe upon human value. Now, in our opinion, it is questionable whether a work of art can infringe upon human value at all. But there is no doubt that personality cannot possibly be infringed on when the abuse or derision is not directed against a specific person and such person is deemed to be offended indirectly and by reflex (see Supreme Court 1298/2002).

And even in the event of a direct offence of personality, it must be investigated whether freedom of art through satire or criticism prevails (for both the artist and the public enjoying the work). But our intention is not to dwell on this point<sup>66</sup> but to reflect more systematically on the problems arising from the inclusion of these offences in our legal system. Regrettably, this reflection has become very topical lately because the Greek judiciary has reverted all too easily to its former practice, bringing the offences of malicious blasphemy and religious insult to the forefront again (a sign of our times).

On the occasion of the presentation of the painting *Asperges me* by Thierry de Cordier in the Outlook exhibition, the Magistrate’s Court of Athens, in its decision 44540/06, found no malice in compliance with the aforementioned case law of the Supreme Court. This case has left us at the pinnacle of judicial art criticism in the committal, which characterised the work as despicable, offending public decorum and as “an alleged work of art” which is not part of humanity’s artistic creation and does not contribute to promoting human knowledge and propriety. Gerhard Haderer’s cartoon on the life of Jesus, initially the object of a confiscation order, was qualified as malicious religious insult by the Three-Member Magistrates Court of Athens mainly due to the chemical constitution of incense, which was proved not to contain any ingredient similar to hashish (as opposed to a footnote to that effect by the cartoonist). The Athens Appellate Court, in its decision 4532/05, spared the cartoon because of its humorous nature, which excluded malice on part of the cartoonist.

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66. It is thoroughly discussed in the book by Professor S. Tsakyrakis, *Religion v. Art*, Athens: Polis, 2006.

*The reasoning behind these decisions*

A first problem that can be identified is the motivation of related decisions: although the notion of malice is adequately discussed, no consideration is given to what can qualify as blasphemous. All instances of derision, scornful remarks and manifestations of "ill-will" are taken as blasphemous *per se*. Even if we were to assume that what is blasphemous is to be decided each time according to the limits set by the religious community involved, one would still expect discussion of the motivation to make reference to theological texts (the issue is not only theoretical if one takes into account Matthew 12: 31-32: "and whosoever speaketh a word against the Son of man, it shall be forgiven him"). And yet, it does not. For, though the normative scope of the provision encompasses all religions, all court decrees so far issued are for blasphemy against the dominant religion (no-one from the dominant religion or the old-calendar monks has been prosecuted for blasphemy, for instance, for comparing Muhammad or the Pope to Satan) and what counts as blasphemy is taken as self-evident – that is, self-evident to the faithful of the majority, which usually includes the judge giving the judgment.

A more critical stance is to identify the legal good protected by the above provisions. It is acknowledged, and rightly so, by both case law and jurisprudence, that these laws do not protect God, since God does not need protection.<sup>67</sup> Therefore, the protected legal good is to be looked for in the religious feelings of believers, in religious peace as a particular aspect of social peace, in public order and good conduct, and in religion as such.<sup>68</sup> As the recitals of the 1933 draft Penal Code (recital 203) typically point out, it is irrelevant whether the persons who are aware of the affront are scandalised or experience any reaction whatever, because the over-riding public interest here lies in fortifying religious feeling among the people. However, the reason for punishing the act in question is the undermining of religious peace.

If we proceed to examine the above legal goods we will draw these two conclusions.

First, religious feeling does not consist of the actual feelings of any particular believer as a reflection of his/her personality. Blasphemy and insult are treated as distinct offences: blasphemy is prosecuted *ex officio* (there is a direct public interest in prosecuting this offence, as the recitals of the 1933 draft Penal Code put it), whereas insult is prosecuted only on complaint. As a consequence, indictment for the one cannot be converted into indictment for the other (Supreme Court 1112/86) and it is not possible to join the proceedings as a civil party (Supreme Court 1298/2002, Appellate Court of Piraeus 92/2001,

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67. I. Gafos, "Offences against religious peace in our Penal Code", *Penal Chronicles* (1958), p. 513; G. Krippas, "The crime of malicious blasphemy", *Penal Chronicles* (1975), p. 459; M. Albanou, "The crime of malicious blasphemy according to art", 198 PC, *Penal Justice* (2001), p. 878.

68. Gafos, "Offences", p. 515; Ath. Kontaxis, Penal Code, Athens 1991, 1251.

Three-Member Magistrates Court of Athens 18518/97). This view is also correct for the particular reason that for an act to qualify as the offence in question it is not a requirement that an actual person be offended. The public utterance of the blasphemous words or commission of the blasphemous acts in such a way as could be perceived by persons lying outside the immediate surroundings of the defendant suffices. In this way, (religious) feeling is reified. It is immanent in the public domain and can be infringed upon without the intervention of actual people. It is as if there was a legal fiction to the effect that the state itself had religious feelings. This is a blatantly ideological construct and cannot offer sufficient grounds for criminal punishment, as is the case for all non-personalised “feelings” (citizens’ sense of security, for example).

Second, the protection of religious peace seems to have a more substantive basis to it: it can be readily understood that blasphemy creates a risk of arousing passions that may lead the faithful to committing acts that disrupt public order and good conduct.<sup>69</sup> The same point can, of course, be made about arousing political or football passions. The difference is that the notion of religious peace does not require that violent acts be committed in advance, as it does in the case of Article 192 of the Penal Code (causing or inciting citizens to acts of violence) according to its correct interpretation. It is not even necessary that the offender intended to arouse citizens or was aware that his/her acts were capable of arousing citizens. Here again, religious peace is construed as an independent, intangible good – one that may be harmed by the mere utterance of the blasphemous words or the commission of the blasphemous act – as a kind of religious appeasement, a religious calm that is not to be disrupted.

Obviously, this ideological construct is no more able to offer legitimate grounds for specific criminal offences. But something else needs to be underlined: all these crimes of “arousing” citizens – those that do not fall within the scope of instigating crimes against specific material goods (life, physical integrity, property), namely those that do not aim to persuade others to commit acts that they would not have committed otherwise, but instead incite acts of violence indirectly and by reflex (in the sense that a violent act is the reflex response to such incitement) – comprise an oxymoron: their punishment leads to the satisfaction of the perpetrators of violent acts. So this is how the law seems to understand the request of a religious community or, indeed, a request by members of a political party or a football team: do not provoke us or we will attack you or, even worse, we will resort to generalised violence.

Thus, in such cases the protected legal good behind public order (which can be disrupted by acts of violence, and only by such) seems to be the intolerance of others, and in its more vicious form. How such a view might be accepted in the context of a liberal constitution desirous to promote pluralism through freedom of expression, as well as freedom of artistic and scientific endeavour, is utterly

<sup>69</sup>. Gafos, “Offences”, *Penal Chronicles* (1958), p. 516.

baffling. Worse still, if these offences were meant to protect religious peace, the law seems to consider that religious communities are much more willing to resort to acts offending public order than are other communities (political, football) since their peace can be disrupted by blasphemy, which seems to be considered, by definition, capable of inciting violence.

Clearly, this view is not particularly flattering to religious communities and one might expect them to demand the abolition of these offences. It implies a paternalistic logic that sees the state as a protector taking the faithful (independently of creed) under its wing and punishing whoever, by word or symbolic act, instils hatred and discord in their hearts or, worse still, activates triggers of immanent hatred. That very same logic lay behind the Supreme Court decision 208/1991, which upheld as complete and legitimate the motivation of the Appellate Court in convicting candidate MPs, who had circulated a memo characterising the Muslim minority of western Thrace as Turkish, for disturbance of the social peace on the grounds that in this way they consciously sought to instil and sow the seeds of discord, hatred and animosity in the hearts of Greek Muslims against Greek Christians, which soon led to acts of violence (by Christians, for what it's worth ...).

The only provision that could find justification in the protection of religious peace, construed as protection of the right to the unhindered and active celebration of religious convictions, is the offence of disturbing religious gatherings.

## Blasphemy and art

How then is the relationship between blasphemy and art to be treated in the context of criminal law? Jurisprudence is met with strong criticism for failing to consider the perpetration of these offences in the light of the constitutionally-embedded freedom of art. It is argued that freedom of art is safeguarded without reservation in the constitution and, in case of conflict between the two injured rights, freedom of art should prevail.<sup>70</sup> Indeed, this argument is not without foundation.<sup>71</sup> However, in order to proceed to a balancing exercise, there must be a conflict of rights that emanate from constitutionally-protected legal goods.

Freedom of art and religious freedom can be weighed against each other in the context of criminal law only in cases where the exercise of artistic activity disrupts a religious gathering. It is in this context that an eventually extreme aggressive behaviour of artistic activity might be found punishable and the interpreter of the law would then be obliged to balance the two rights. Such a balancing exercise has no place on any other occasion because it would involve a conflict between a constitutionally-protected right and legal good (artistic activity) and

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70. Tsakyrakis, *Religion v. Art*, p. 187f. contra P. Dagtoglou, *Civic Rights*, Athens 1991, p. 924, and Albanou, "The crime of malicious blasphemy", p. 880.

71. Considering, of course, that the unity of Constitution calls for a practical harmonisation of all rights: see G. Theodosis, *Freedom of Art*, Athens 2000, p. 142f., Tsakyrakis, *Religion v. Art*, p. 199f.

a non-protected and constitutionally disapproved practice: the intolerant request to ban the exercise of a constitutionally-protected right.

But let us consider the event of religion itself as the interest that is protected by the offences of blasphemy and religious insult. As decision 17115/88 of the Court of First Instance of Athens typically expounds, religion is the foundation of the state. If this is true, then indeed these offences acquire a peculiar materiality: no-one questions the power of the state to protect itself from internal or external threats against the integrity of the country, its political organisation or its ability to efficiently enforce the state's will; if, by protecting religion, the state ultimately protects itself then the materiality of the protected good becomes crystal clear.

This, however, would entail that irreligious people (and, more so, atheists) cannot be citizens of such a state. Moreover, religion *per se* – not in the sense of the creed of an actual religious community – cannot be conceived as an interest pertaining to one person or group of persons but as pertaining to all people. These “ecumenical goods”, however, are abstract ideological constructs and, when placed under the protection of criminal law, lead to total aberration.<sup>72</sup>

Paradoxically, a liberal view compatible with the Constitution on the materiality of the protected legal good leads to only one – unconstitutional – conclusion: the good protected by blasphemy can only be a particular religion which, if taken as the foundation of the state, places non-followers outside the notion and the capacity of citizenship. Thus, theocracy is the only foundation for penalising blasphemy. In a theocratic regime, paternalism is a logical corollary; the state protects its own foundations: the dominant religious community it is founded upon and identified with. Including any religions it chooses to tolerate ....

It is not even certain that such a regime would be desirable for the dominant religious communities. Too often in Greece, the interweaving of state and Church has proved primarily injurious to the Church because it facilitates all sorts of state intervention in the administration and organisation of the Church. Therefore, there is no reason to maintain it, as there is no reason to maintain the offences of blasphemy (malicious or not) and religious insult in our penal code.<sup>73</sup> The punishment of blasphemers is not the responsibility of the state. Let them be punished in the appropriate quarters ...

72. I. Manoledakis, *The Legal Good*, Thessaloniki 1988, p. 200.

73. “Blasphemy is a pseudo-crime that penalizes beliefs”: G. Kalfelis, Conversion of indictment from malicious blasphemy to insult, Armenopoulos 1987, 812; I. Manoledakis, *Penal Law*, Thessaloniki 1985, p. 214; D. Spatharis, Article 198 of the Penal Code, Armenopoulos, 1988, pp. 102-3.



## 8. Blasphemy and justice in a Greek Orthodox context

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The emphasis of interest in Greek case law on religion and freedom of speech might seem unjustified if findings on the situation of the Greek legal system more or less coincided with the other comparable findings. What needs to be investigated, then, is whether the Greek case is a case apart – provided, of course, this can be argued on verifiable grounds.

In the constitutional doctrine of many European countries, the criminal offence of blasphemy resurfaces today as “an atavistic memory from outdated obscure times”<sup>74</sup> that regains topicality because of the rise of European Islam and that questions the assumptions of the secular state. In contrast, the criminal treatment of blasphemy in Greece – in quantitative-statistical terms, but also in regard to the investigations of jurisprudence – has not waited for the emancipation, or the sensitivities, of any minority; it has always been topical, and the majority religion has always been the one most sensitive to it.

If, temporarily and conventionally, we take the foundation of the Greek State as the starting point of historical research, we find the 1834 Penal Law bearing the clear and significant influence<sup>75</sup> of the Bavarian Code. This is a privilege: the 1813 Bavarian Code was heralded as the first European penal code that no longer entertained offences against God as such, in the spirit of the Enlightenment. The transition from criminal law protecting the divine to its protection of religious peace as a form of social peace is concisely explained by its drafter, Ludwig Feuerbach:<sup>76</sup>

God is not liable to offence; and even if He were offended, He would not under any circumstances wish the punishment of His offenders.

And yet the legislator of the young Greek State chose to diverge from his model example in this particular chapter and afforded increased protection to all

74. Josef Isensee, Preface, in J. Isensee (ed.), *Religionsbeschimpfung*, Berlin 2007, p. 5.

75. Theodoros Papatheodorou, “The 1834 Penal Law and Georg Ludwig von Maurer”, in A. Papageorgiou-Venetas (ed.), *Othonian Greece and the Making of the Greek State*, Athens 2002, p. 156.

76. Ludwig Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen Peinlichen Rechts*, 14th edition (1847), p. 488 et seq., quoted by: Michael Pawlik, “Der strafrechtliche Schutz des Heiligen” in J. Isensee (ed.), *Religionsbeschimpfung*, Berlin 2007, fn.10.

“religions tolerated by government” “for the good of the Nation”.<sup>77</sup> It was precisely in this context that Article 196 of the Penal Law was born, the first criminal provision of the Greek jurisdiction punishing whoever “in public, in writing or by way of symbolic representations attacks by scornful derisions or offending verbalisations the doctrines, provisions and customs” of Christian Orthodoxy or another religion. Naturally, national criminal doctrine was swift in stressing<sup>78</sup> that the object and purpose of such protection

is not religion in the literary sense of the word but the free and unhindered celebration of creed ... the harmonious co-existence of religions and the prevention of eventual mishaps occasioned by religious followers through insults or other unbecoming ways.

Over a hundred years later, the liberal observer might be similarly reassured by the recitals of the Greek Penal Code in force, since they refer only to “social peace” that might be disrupted “by derision and disparagement of the convictions of others.”<sup>79</sup> In construing these provisions, Greek criminal doctrine unanimously insists that the interest protected by the prohibition of blasphemy and religious insult is social peace. As appositely pointed out,<sup>80</sup> however, this view would only be credible if blasphemy had to be heard by at least one believer to be indictable, whereas Article 198 of the Greek Penal Code is satisfied with publicity as a requirement for indictment, even before a religiously indifferent audience. The provision as it stands seems to protect respect for the divine as a legal interest independent of the intermediation of an offended person as the subject of a civil right. The legislator is not content with ensuring a non-scandalised life for believing civilians and peace among them, but reveals himself as a believer.<sup>81</sup>

If it seeks to protect religion and not social peace, oblivious even to the actual impact of the specific verbal abuse, such a provision ought not to be associated with the system of criminal treatment of racial discourse. Therefore, any effort to rescue the penalisation of blasphemy and religious insult by integrating them into modern constructs of indictable hate-mongering<sup>82</sup> would be historically and legally ill-founded. Besides, it would not make sense for religions – *par excellence* power structures characterised by innate dogmatism and intolerance for

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77. Georg Ludwig von Maurer, *Das griechische Volk*, Heidelberg 1835, [Greek edition:] transl. O. Rombaki as *The Greek people*, Athens 1976, p. 643.

78. Konstantinos Kostis, *Interpretation of the Greek Penal Act in Force*, Vol. 2, Athens 1877, p. 181.

79. Georgios Poulis, *Religious Criminal Law*, Athens 1996, p. 24, and the literature referred to by the author.

80. Dimitris Dimoulis, “Blasphemy: a feudal remnant in religious state” in P. Darteville, Ph. Denis and J. Robyn (eds), *Blasphèmes et libertés*, Paris 1993, in the Greek edition: D. Dimoulis (ed.), *The Right to Blasphemy*, Athens 2000, pp. 24-8.

81. Dimitris Dimoulis, *Arguments in favour of the abolition of the offences against religious peace*, available at: [www.hllr.gr/papers/dimoulis0.doc](http://www.hllr.gr/papers/dimoulis0.doc) [in Greek].

82. Vasiliki Christou, *Die Hassrede in der verfassungsrechtlichen Diskussion*, Baden-Baden 2007.

the misled<sup>83</sup> – to seek protection in laws designed for vulnerable minorities, like a wolf seeking protection in the laws protecting sheep.

Court practice does not appear to have contributed in any particular way to modernising the interpretation of this obsolete formulation of the Greek Penal Code. The Appellate Court of Thessaloniki,<sup>84</sup> in the case of the play *The Saint of Preveza* by Dimitris Kollatos, ruled thus:

the theatre setting arranged so as to convey to the audience the impression of a holy place, a church in particular, in that sacred symbols and objects were placed in it; and in this setting male actors were dressed in canonical sacerdotal vestments and cavorted with female actresses in obscene acts accompanied by foul dialogue. ... The defendants maliciously insulted the Eastern Orthodox Church in Christ in that their intention was not to castigate the conduct of specific priests but to attack the above Religion as may be inferred from the fact that all the above acts took place in a setting arranged so as to look like a church.

With arguments drawn from the scenic arrangements, the court concludes that the purpose of the play could not have been other than insult.

The Athens Court of First Instance<sup>85</sup> ruling in the affair of the film *The Last Temptation* by Martin Scorsese further clarified its interpretative choices:

Protection of religious feelings is imperative because they are moral-social values, social and legal interests worthy of protection to the benefit of civilization and polity. Religion is not a purely personal affair, a wholly inner relationship of the soul with God, irrelevant to the state, but the foundation of the state, a vector of spiritual civilization affecting not only the feelings and thoughts but also the actions of human beings.

So feelings are protected objectively, not necessarily in association with actual persons. In the same ruling, the discourse on cinematographic method is equally edifying:

Interspersed with all this and reinforced with the help and force of cinema art as to motion, expression and, generally, photographic representation and *mise en scène*, to the extent that the public accept the motion picture at issue as another reality, Jesus Christ is depicted as weak, a liar, a hypocrite, a magician, inconsistent, sometimes talking about love, sometimes talking about fear or about axe and fire, doubting his mission, indulging in erotic fantasies, unavowed desires and longings, [He] is parodied, vilified and ridiculed in public with intention to express contempt, hence maliciously blasphemed. And all that, even if on this particular occasion the director was driven by artistic creation, contravenes morality which springs from

83. Dimitris Dimoulis, "Religious freedom as a rule of differentiation and notion of exclusion" in D. Christopoulos (ed.), *Legal Issues of Religious Otherness in Greece*, Athens 1999, pp. 149-155; Laurent Jézéquel, *Liberté de croire – liberté de penser*, Paris 1999, in the Greek edition (translated by A. Keramida): *Freedom of Belief – Freedom of Thought*, Athens 2006, pp. 10-44.

84. As quoted in the Supreme Court Decision 928/1984: *Poinika Chronica* [Criminal Annals], Vol. 35/1985, pp. 134-5.

85. Ruling 17115/1988: *Epharmoges Dimosiou Dikaiou* [Public Law Applications], Vol. 2/1989, pp. 216-35, with commentary by Georgios Kaminis; also Gerasimos Thedosis, *Freedom of Art*, Athens 2000, p. 125.

the fundamental political, social and moral principles and precepts that prevail in Greek polity and represent the popular sense of decency.

So here, not only is the mediation of cinematographic art not taken into consideration in favour of the defendant, as a presumption of the exclusion of “malice” or as a pursuit which enjoys constitutional protection in itself but, on the contrary, it counts as an element against the defendant, a misleading, almost satanic, medium by definition. Not even deigning to go through the other legal prerequisites for indictment, the judge is content with establishing the “falseness”, the insulting function and verisimilitude of the proffered interjections, as well as their potential to be believable, as if the judge were called upon to defend a living person who was a victim of insult or libel.

The choice of the above quotations might be accused of arbitrariness and possessing an intention to mislead. True, the verbal aberrations encountered in these, as well as in other court decrees, are the exception in the system of Greek case law as epitomised in the level of last-resort rulings. By entertaining a more systematic and attentive contact with criminal doctrine, the Supreme Court has never deviated into directly questioning the view that the object of protection here is religious peace and not God Himself. However, to restrict ourselves only to the choices of the summit of the judicature would only make sense in the context of a purely legalistic approach where positions and trends are defined and codified only on the basis of last-resort judgments. If, by contrast, we investigate the prevalent ideology of the judiciary, the spontaneous and legally uninformed judgments of trial judges, who are closer in terms of time and merits to both the dispute and the insatiable public opinion, may prove equally, if not more, important. In first and second instance trials adherence to the pre-modern definition of blasphemy remains the rule.

Besides, even if we judge by their impact on the freedom of litigants, trial court decisions are by no means less important. Thus, for instance, the mere commitment of a “heretic” work of art to a criminal trial, even if it does not end in a conviction, is a public act that upsets the lives of people and indirectly leads them to self-censure, if not self-exile, as in the case of Andreas Laskaratos, who was tried in 1869 by the Appellate Court of Corfu<sup>86</sup> for *The Mysteries of Cephalonia*. Zealotical and moralistic, this pervasive ideology redesigns the grammatical dimensions of the applicable provision, which ceases to be a formal rule of “abstract endangerment offences”<sup>87</sup> and becomes itself an actual endangerment of every free intellectual activity.

A civil court decision, issued in relation to the procedure for interim measures or a prosecutor’s confiscation order, can have even more direct implications

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86. Pantelis Ravdas, “With a book in the face of God” in M. Loukidis, V. Papadopoulos and P. Ravdas, *Trials of the Word*, Athens 2002, pp. 216-17.

87. Alexandros Kostaras, “Freedom of art and criminal law” in *Democracy – Freedom – Security: Festschrift for Ioannis Manoledakis*, Vol. 1, Thessaloniki 2005, pp. 427-9.

for actual freedom of speech, as is evident in the case of Gerhard Haderer's cartoons called *The Life of Jesus*, which according to the prosecutor's office<sup>88</sup> "constitute a gross and vulgar manifestation of contempt and affront against the person of Jesus Christ ... with the ultimate goal to earn money". But, in the context of a sober valuation of legal texts, the indictment preceding an acquittal may prove just as interesting, like the committal to trial of the curator of the Outlook exhibition:<sup>89</sup>

an obscene and despicable painting ... the product of a perverted artistic mind ... although aware of the repulsive content of the despicable work, he presented it in a public event directly expressing a malicious will to scorn and ridicule the Eastern Orthodox Church.

If this and other disquisitions by judges or prosecutors point to an endemic confusion between the purpose of the law and the protected legal interest in relation to blasphemy and religious insult, it would be unfair to blame it on the inadequate legal training of responsible officials and it would be sloppy to explain it in terms of less-than-perfect drafting of the relevant law.

To explore the deeper causes, we must take an even greater leap into the past than the one that took us back to 1834. This anachronism is inspired by some of the court decisions in question, which attempt to identify the historic basis of the applicable provisions, referring explicitly to the Byzantine Empire: "whereas under Article 200 of the Penal Code, first introduced by Byzantine Law ...".<sup>90</sup> If this reference back makes sense in matters of civil law, which were governed by the Roman Pandects until 1946, such a reference is paradoxical, to say the least, in matters of Greek criminal law, which were regulated by a modern code right from the start.

And yet the Greek judge is not mistaken in his sense of continuity. However modern on the surface, the penal treatment of blasphemy and religious insult dates back to a clearly discernible legal lore that is nothing other than the articulation of State and Church. A brief kaleidoscopic view into the history of this relationship may prove edifying, even if it does not go back as far as the burning of Jewish books by the emperor Theodosius. As in the medieval west, so too in this part of the world, beginning with a novel of the emperor Justinian in 538,<sup>91</sup> blasphemy was for centuries a crime certified by the Church and punished by the state on ground of the social need to placate divine wrath in order to ward off imminent famines and earthquakes.<sup>92</sup> In those times, the scope of the offence was far-reaching and included even the violation of the Biblical commandment

88. Quoted in decision 882/2003 of the Magistrates' Court sitting as a Board; see Stavros Tsakyarakis, *Religion v. Art*, Athens 2005, p. 71.

89. Arraignment by Prosecutor, Magistrates' Court of Athens, quoted by Tsakyarakis, *Religion v. Art*, pp. 66-8.

90. Decision 95/1971 of the Magistrates Court of Herakleion sitting as a Board: *Poinika Chronica* [Criminal Annals], Vol. 21/1971, p. 498.

91. Pawlik, "Der strafrechtliche Schutz des Heiligen", p. 31.

92. Arnold Angenedt, "Gottesfrevel" in J. Isensee (ed.), *Religionsbeschimpfung*, Berlin 2007, p. 22.

"Thou shalt not take the name of the Lord Thy God in vain."<sup>93</sup> But, whereas elsewhere the Enlightenment gradually permeated the organisation of societies and secularised criminal repression, the Orthodox corner of Europe succeeded in escaping infiltration by Satan. Pre-modern theoretical schemes, like the scheme to ward off famines and earthquakes, have already disappeared from German treatises of criminal law by the late 18th century.<sup>94</sup> Here, by contrast, a court in the late 20th century finds that "religion is the foundation of the state".

A token of the perpetual interweaving of secular and ecclesiastical jurisdiction is the inclusion of the penalty of excommunication into the public arsenal of repression. This post-Byzantine building block survived not only through the long years of the Ottoman Empire, which might be considered reasonable, but even into the modern Greek State – in an irrational fusion of responsibilities or, as it has been brilliantly called,<sup>95</sup> in an exchange of services, whereby the Church submits excommunication to public approval and avails it for extra-religious uses, whilst the state integrates purely religious offences, like blasphemy or proselytism, into the Penal Code.

Thus, in 1837, in response to a government appeal for assistance in the prevention and punishment of animal theft, the Church excommunicated those arrested. Eight years later, responding to a request by the Mayor of Piraeus, the local Bishop of Attica excommunicated those who felled trees in the city garden.<sup>96</sup> No less than one hundred and fifty years later, the Holy Synod officially asks the government to ban *The Last Temptation* by Nikos Kazantzakis and *M'* (*M to the power of n*) by Mimis Androulakis.<sup>97</sup>

So, if one may speak of Greek peculiarity in the matter at hand, this cannot be explained except by going back to the relationships between the state and the Church, the origins of these relationships and the continuing recognition of a "dominant" religion – that is, a state religion – and to the atmosphere of a "natural" alliance between justice and the Church in view of their supposed common moral pursuits. Besides, the taxonomic criterion of state-Church relationships lends itself as the most apposite standard for any typology of criminal treatment of blasphemy throughout the world over, with typical examples found in a series of Islamic countries, at the one end, and of the United States, at the other end.<sup>98</sup>

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93. Bernard Lauret, "Thou shalt not take the name of Lord Thy God in vain" in P. Dartevelle, Ph. Denis and J. Robyn (eds), *Blasphèmes et libertés*, Paris 1993; [Greek edition:] D. Dimoulis (ed.), *The Right to Blasphemy*, Athens 2000, p. 81.

94. Pawlik, "Der strafrechtliche Schutz des Heiligen", fn. 13.

95. Ravdas, "With a book in the face of God", p. 207.

96. Panagiotis Michaelaris, *Excommunication: the Adaptation of a Sanction to the Necessities of the Ottoman Empire*, Athens 1997, pp. 441-2.

97. Ravdas, "With a book in the face of God", pp. 242, 259; Nikos Alivizatos, *Uncertain Modernization and Murky Constitutional Revision*, Athens 2001, p. 293.

98. Tsakyrakis, *Religion v. Art*, pp. 154-68; Stefan Mückel, "Meinungsäußerungsfreiheit versus Religionsfreiheit: Anforderungen aus menschenrechtlicher Sicht" in E. Klein (ed.), *Meinungsäußerungsfreiheit versus Religions- und Glaubensfreiheit*, Berlin 2007, p. 86.

Echoing these comments, the Hellenic League of Human Rights graphically describes the characteristics of the Greek case in a recent announcement:<sup>99</sup>

when entire regiments of the judiciary secretly march through the offices of prelates, the suspicions of those who entrusted the protection of their religious freedom in Greek justice become reasonable ... this consorting of judicial officials with clergymen from the dominant religion is still seen as the corollary of an allegedly natural alliance between these two domains in their assumed attachment to the common pursuits of justice and morality ... the separation of the church from the state is an indispensable prerequisite for gradually instilling religious neutrality into judicial and other public officials.

Nowadays, the penal protection of God in Himself is imaginable only in those countries that place one religion at the foundation of their existence.<sup>100</sup> By contrast, in countries not identified with a specific confession, this protection is unthinkable. Indeed, to a good Christian it would perhaps be more satisfactory to abolish criminal protection rather than maintain it: in the parable of the wheat field,<sup>101</sup> when the servants ask their master if they must uproot the weeds he answers: "Nay, lest while ye gather up the tares, ye root up also the wheat with them. Let them grow together until the harvest".

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99. [www.hlhr.gr/papers/kratos-parakratos-ekklisia05.04.05.doc](http://www.hlhr.gr/papers/kratos-parakratos-ekklisia05.04.05.doc).

100. Josef Isensee, "Blasphemie im Koordinatensystem des säkularen Staates" in J. Isensee (ed.), *Religionsbeschimpfung*, Berlin 2007, p. 116; Georg Küpper, "Zu Notwendigkeit und Umfang strafrechtlichen Schutzes gegen die Beschimpfung von religiösen Bekenntnissen" in E. Klein (ed.), *Meinungsäußerungsfreiheit versus Religions- und Glaubensfreiheit*, Berlin 2007, p. 23.

101. Gospel of St Matthew, 13: 29-30.



## 9. Conflicts between fundamental rights: contrasting views on Articles 9 and 10 of the European Convention on Human Rights

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How are freedom of expression and freedom of conscience to be reconciled? Put in these terms, this apparently simple question is formidable. If I transpose it into the language of the European Convention on Human Rights, we have to find a way of reconciling two rights which the Convention protects equally – the right to freedom of thought, conscience and religion secured by Article 9, and the right to freedom of expression, in particular artistic expression, secured by Article 10.<sup>102</sup> The publication in a Danish newspaper of caricatures of the prophet Muhammad in September 2005 might have given the Court an opportunity to rule on the matter, but the *Ben El Mahi and others v. Denmark* application was declared inadmissible on 11 December 2006 because there was no jurisdictional link (in the sense of Article 1 of the Convention) between Denmark and the applicants – a Moroccan national and two Moroccan associations – living and working in Morocco; moreover, they were not within Danish jurisdiction either, by reason of a possible extra-territorial act.

Even though the problem of conflicts of law is a classic problem that has long preoccupied jurists and philosophers,<sup>103</sup> such conflicts are becoming increasingly frequent in many fields, as both the rights protected by the Convention and states' obligations have evolved. So how are we to judge, how should we assess, these situations of conflict between fundamental rights? In section I (below), I look at the various approaches which the Court takes or can take, indicating their scope and their limitations. It is more and more apparent to me that such conflicts require a new mode of resolution, the basis of which yet has to be constructed, and accordingly I go on in section II to suggest a number of possibilities.

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102. The same conflict may of course arise between Article 9 and Article 11 – European Court of Human Rights ('The Court'), Grand Chamber ('GC'), judgment in *Refah Partisi (Prosperity Party) and others v. Turkey* of 13 February 2003; The Court, GC, judgment in *Hassan and Tchaouch v. Bulgaria* of 26 October 2000 – or Article 2 of the First Protocol to the Convention: The Court, judgment in *Kjeldsen, Busk Madsen and Pedersen v. Denmark* of 7 December 1976, paragraph 52; The Court, judgment in *Campbell and Cosans v. United Kingdom* of 25 February 1982, paragraph 37; The Court, GC, judgment in *Folgerø and others v. Norway* of 29 June 2007, paragraph 84.

103. See Saint James, *La conciliation des droits de l'homme et des libertés publiques en droit français*, Paris: PUF, 1995; R. Alexy, "Balancing constitutional review and representation", *International Journal of Constitutional Law* (October 2005), pp. 572-81; S. Greer, "Balancing and the European Court of Human Rights: a contribution to the Habermas-Alexy debate", *Cambridge Law Journal*, Vol. 63, No. 2 (July 2004), pp. 412-24, in particular p. 417.

However, I confine myself to those cases in which the Court has been faced with situations of genuine conflict between Articles 9 and 10 of the Convention, that is to say situations in which the state cannot uphold one of the rights without infringing the other.<sup>104</sup> For example, in the *Leyla Şahin v. Turkey* judgment of 10 November 2005, the situation is not strictly speaking one of conflict between two rights equally secured by the Convention, but rather one of conflict between a right secured by the Convention – in Article 9 – and an interest recognised in domestic law as having importance but not having the status of a fundamental right within the meaning of the Convention, namely the principle of secularity and neutrality of the state argued by the government.<sup>105</sup>

## I. Traditional methods of resolving conflicts of law

Here I deal with three methods, some of which of course overlap.

### A. The test of necessity

One of the most common ways of resolving conflicts of law is suggested by the actual structure of certain provisions of the Convention – the very ones which concern us here, Articles 9 and 10 – which, on the one hand, recognise a right or a freedom and, on the other hand, add that limitations are allowed on certain conditions. So we are in the field of limitations on the rights secured, which confronts us with the general problem that, in a democratic society, hardly any rights are totally absolute. Moreover, these limitations or restrictions illustrate the classic dialectic, where fundamental rights are concerned, between safeguarding the individual right and defending the general interest.

For example, as regards Article 9, freedom to manifest one's religion or one's religious beliefs is not an absolute right. It may be set against the rights and freedoms of others, which implies, *inter alia*, respect for everyone's beliefs in relation to proselytising<sup>106</sup> and protection of minors,<sup>107</sup> or the protection of public order,<sup>108</sup> security<sup>109</sup> or public health<sup>110</sup> (Article 9.2).

In regard to Article 10, the Court observed in the *Murphy v. Ireland* judgment of 10 July 2003, on prohibiting the television broadcast of a religious advertisement, that "freedom of expression constitutes one of the essential foundations of a democratic society", characterised by pluralism, tolerance and broad-

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104. On this problem area as a whole, see O. De Schutter and F. Tulkens, "Rights in conflict: the European Court of Human Rights as a pragmatic institution", in E. Brems (ed.), *Conflicts between Fundamental Rights*, Antwerp, Intersentia, 2008 (unpublished).

105. The Court, GC, *Leyla Şahin v. Turkey*, judgment of 10 November 2005, paragraph 107.

106. The Court, GC, *Kokkinakis v. Greece*, judgment of 25 May 1993, paragraph 33; The Court, *Larissis and others v. Greece*, judgment of 24 February 1998.

107. The Court, *Dahlab v. Switzerland*, decision of 15 February 2001; The Court, *Ciftci v. Turkey*, decision of 17 June 2004.

108. The Court, *Vergos v. Greece*, judgment of 24 June 2004, paragraph 33 (rational urban planning).

109. The Court, *Phull v. France*, judgment of 11 January 2005, paragraph 21 (wearing of the turban and security at airports).

110. European Commission of Human Rights, *X. v. United Kingdom*, application 7992/77, decision of 12 July 1978 (obligation on motor-cyclists to wear a helmet).

mindedness. So freedom of expression is the cornerstone of democracy and in this sense is a public freedom. More precisely still, freedom of expression is not only a safeguard against interference by the state (a subjective right), but also an objective fundamental principle of life in a democracy; consequently, it is not an end in itself but a means of establishing a democratic society. It was this social function of freedom of expression that led the Court to give a broad interpretation of the scope of Article 10. However, as the second paragraph of Article 10 expressly recognises, the exercise of this freedom carries with it "duties and responsibilities". Among these, in the context of religious beliefs, there is "the general requirement to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of such beliefs".<sup>111</sup>

The method employed by the Court when called upon to judge what are known as relatively protected rights is well known. It proceeds in three stages: interference may be justified if it is prescribed by law, pursues a legitimate aim and is necessary in a democratic society, which implies a pressing social need. The combination of these three conditions opens the way to the irresistible rise of the principle/criterion of proportionality.<sup>112</sup>

### Three significant recent examples

In the case of *Giniewski v. France*, the applicant, a journalist, sociologist and historian, had written a newspaper article on John-Paul II's encyclical "The splendour of truth". An association complained that the article was defamatory of the Christian community, and the domestic courts found that interference with freedom of expression was justified by the need for "protection of the reputation or rights of others" (Article 10.2). In its judgment of 31 January 2006, the Court observed that, although the applicant's article did indeed criticise a papal encyclical and thus the position of the Pope, such an analysis could not be extended to the whole of Christianity, which comprises various strands. It considered above all that the applicant was seeking to develop an argument about the scope of a specific doctrine and its possible links with the origins of the Holocaust. In so doing he had made a contribution, which by definition was open to discussion, to a wide-ranging and ongoing debate, without sparking off any controversy that was gratuitous or detached from the reality of contemporary thought. By considering the detrimental effects of a particular doctrine, the article in question contributed to a discussion of the various possible reasons behind the extermination of the Jews in Europe, a question of indisputable public interest in a democratic society. The Court noted that the search for historical truth is an integral part of freedom of expression and that the article written by the applicant was in no way "gratuitously offensive" or insulting and did not incite disrespect or hatred.<sup>113</sup> Consequently, the applicant's conviction on the charge of public defamation of the Christian community did not meet a pressing social need.

111. The Court, *Murphy v. Ireland*, judgment of 10 July 2003, paragraph 65.

112. P. Martens, "L'irrésistible ascension du principe de proportionnalité", in *Présence du droit public et des droits de l'homme. Mélanges offerts à Jacques Velu*, Brussels, Bruylant, 1992, p. 51 et seq.

113. The Court, *Giniewski v. France*, judgment of 31 January 2006, paragraphs 49 to 53.

In the *Aydin Tatlav v. Turkey* judgment of 2 May 2006, the Court found that the conviction of the author of a book arguing that the effect of religion was to legitimise social injustices by representing them as “the will of God” was a violation of Article 10. In the Court’s view, “this is the critical standpoint of a non-believer in relation to religion in the socio-political sphere”. However, it “[did] not observe, in the disputed utterances, any insulting tone directly aimed at believers in person, nor any insulting attack on sacred symbols, in particular of Muslims, even though the latter, on reading the book, may indeed feel offended by these somewhat caustic comments on their religion”.<sup>114</sup>

In *Klein v. Slovakia*, the applicant had published an article criticising Archbishop Ján Sokol for having proposed in a television broadcast that the film *Larry Flint* should be banned. The article contained strong images referring to an incestuous act committed between a dignitary of the Church and his mother in the film which Monsignor Sokol was seeking to ban. Two associations complained that the article in question had offended the religious feelings of their members. The applicant was found guilty of “defamation of nation, race and belief”. In its judgment of 31 October 2006, the court found that the applicant had defamed the highest representative of the Roman Catholic Church in Slovakia and thereby offended the members of that Church. In particular, the applicant’s statement in which he wondered why decent members of the Church did not leave it had blatantly discredited and disparaged a group of citizens for their Catholic faith. This finding was upheld by the appeal court, which considered that the applicant in his article had infringed the rights, guaranteed by the Constitution, of a group of persons of the Christian faith. In its judgment the European Court considered that the applicant, in his article, did not discredit and disparage a sector of the population on account of their Catholic faith. The applicant’s strongly worded pejorative opinion related exclusively to the person of Mgr Sokol, a senior representative of the Catholic Church in Slovakia. That being so, the Court considered that the applicant had neither infringed the right of believers to express and practise their religion nor disparaged their faith. Consequently, despite the tone of the article, the Court found that it could not be concluded that the applicant interfered with other persons’ right to freedom of religion in a manner justifying the sanction imposed on him. The interference with his right to freedom of expression therefore was not “necessary in a democratic society”.<sup>115</sup>

There are certain limitations on the test of necessity. As E. Brems observes, although the two rights are equally fundamental and carry the same weight *a priori*, they are not put before the courts in equal manner.<sup>116</sup> The right invoked by the applicant receives greater attention, because the question which the court has to answer is whether or not it has been violated. So the test of necessity

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114. The Court, *Aydin Tatlav v. Turkey*, judgment of 2 May 2006, paragraph 28.

115. The Court, *Klein v. Slovakia*, judgment of 31 October 2006, paragraph 54.

116. E. Brems, “Conflicting human rights: an exploration in the context of the right to a fair trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms”, *Human Rights Quarterly*, Vol. 27, 2005, p. 305.

would tend to lean in favour of the applicant's right in so far as any restriction on his right has to be justified by the need to protect the rights of others: this leads implicitly to establishing a presumption in favour of the right of the applicant.

## B. Balancing of interests

Where two opposing provisions of one and the same instrument – Articles 9 and 10 in this case – contradict each other, the principle of proportionality is irrelevant. In this situation, the Court takes a different approach – that of the balancing of interests – to check whether the right balance has been struck between two conflicting freedoms or rights.<sup>117</sup> Looking at it in another way, we are no longer dealing with a freedom and the exceptions to it, but with an interpretative dialectic that must seek to reconcile freedoms. Where does the point of equilibrium lie between freedom of expression and freedom of thought, conscience and religion?

There are those who believe that balancing interests is more a matter of rhetoric than of method. What is the real meaning of this balance metaphor? It is a question of weighing up rights in relation one to another and giving priority to the one to which greater value is attached. Three quite particular difficulties arise here.

The first is what we call incommensurability of rights. The very image of the balance presupposes the existence of a common scale against which the respective importance or the weight of different rights could be measured, which is highly unrealistic. For example, finding the balance between a Church's freedom of religion and its followers' freedom of expression "is more like judging whether a particular line is longer than a particular rock is heavy".<sup>118</sup>

The second is that of subjectivity. By using the metaphor of the balance, in fact one leaves the court great freedom of judgment and this can have formidable effects on judicial reasoning.<sup>119</sup>

The third difficulty lies in the fact that the parties are not in symmetrical positions and so the importance attributed to each of their rights may depend on their relative positions. The *Otto-Preminger-Institut v. Austria* judgment of 24 September 1994 is a good example of this.

The Austrian authorities objected to the showing of a satirical film by a cinema club in Tyrol on the ground that it ridiculed the Christian faith in general. Whereas it was a private association that invoked freedom of expression, the freedom of

117. See F. Rigaux, "Logique et droits de l'homme" in P. Mahoney, F. Matscher, H. Petzold and L. Wildhaber (eds), *Protecting Human Rights: The European Perspective, Studies in memory of Rolv Ryssdal*, Cologne/Berlin/Bonn/Munich, Carl Heymanns Verlag KG, 2000, pp. 1197-1211.

118. *Bendix Autolite Cort. v. Midwesco Enterprises, Inc., et al.*, 486 U.S. 888, 897 (1988) (Scalia, J., diss.). See, *inter alia*, R. Chang (ed.), *Incommensurability, Incomparability and Practical Reason*, Cambridge, MA: Harvard University Press, 1997; and B. Frydman, *Le sens des Lois*, Brussels, Bruylant/LGDJ, 2005, p. 436.

119. The Court, *White v. Sweden*, judgment of 9 September 2006.

religion was that of all persons of the Catholic faith who might feel offended by the images in the film that were considered blasphemous. On the one hand we have a private individual, and on the other a community of believers: the possibility cannot be ruled out that the balance of rights was influenced, more or less consciously, by the impression that an individual's freedom of expression had to be measured or weighed against the interests of all Catholics in the Austrian province of Tyrol.

The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner.<sup>120</sup>

In fact, Roscoe Pound largely anticipated this danger as long ago as 1921 when he wrote:

When it comes to weighing or valuing claims or demands, we must be careful to compare them on the same plane. If we put one as an individual interest and the other as a social interest, we may decide the question in advance of our very way of putting it.<sup>121</sup>

There is yet another example in the *I.A. v. Turkey* judgment of 13 September 2005, concerning the conviction of a publisher on the ground that he had published a novel which the courts considered insulting to Islam. The Court rightly considered that the issue before it

involves weighing up the conflicting interests of the exercise of two fundamental freedoms, namely the right of the applicant to impart to the public his views on religious doctrine on the one hand and the right of others to respect for their freedom of thought, conscience and religion on the other hand.<sup>122</sup>

While pointing out that those who choose to exercise the freedom to manifest a religion must tolerate and accept the propagation by others of doctrines hostile to their faith, the Court considered that "the present case concerns not

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120. The Court, *Otto-Preminger-Institut v. Austria*, judgment of 24 September 1994. See also the Court, *Wingrove v. the United Kingdom*, judgment of 25 November 1996, where the applicant complained of the British authorities' refusal to authorise the distribution, even limited to part of the public, of a video film containing erotic scenes involving St Theresa of Avila and Christ. According to the authorities, the film should be regarded as an insulting or offensive attack directed against the religious beliefs of Christians and therefore constituted an offence against the blasphemy laws. The Court also considered that the state could legitimately have limited the applicant's freedom of expression in order to protect the rights of others, in this case their right of religious freedom. Thus it extends its interpretation of Article 9 by stating that this provision implies the right of believers to be protected from provocative representations of objects of religious veneration. In this case the applicant also stressed that the offence of blasphemy only covered attacks on the Christian faith, and more specifically the Anglican faith, and argued that this offence should therefore be seen as discriminatory. Here, however, the Court refrained from answering that argument, merely pointing out that the degree of protection afforded by the law to other beliefs is not in issue before the Court (paragraph 50). However, the reality is indeed the fact that the film in question was an attack on the dominant religion. As F. Rigaux observes, "it is not freedom of religion but the power of a religion that is threatened" ("La liberté d'expression et ses limites", *Revue trimestrielle des droits de l'homme*, special issue, 1993, p. 411).

121. R. Pound, "A survey of social interest", *Harvard Law Review*, Vol. 57, Nos. 1/2 (1943).

122. The Court, *I.A. v. Turkey*, judgment of 13 September 2005, paragraph 27.

only comments that offend or shock, or a 'provocative' opinion, but also an abusive attack on the Prophet of Islam. Notwithstanding the fact that there is a certain tolerance of criticism of religious doctrine within Turkish society, which is deeply attached to the principle of secularity, believers may legitimately feel themselves to be the object of unwarranted and offensive attacks through [certain] passages".<sup>123</sup> Consequently, it "considers that the measure taken in respect of the statements in issue was intended to provide protection against offensive attacks on matters regarded as sacred by Muslims".<sup>124</sup>

### C. The margin of appreciation

Conflicts of law are often highly controversial situations. Thus, they call for a contextualised assessment which takes into account the sensitivities existing in the societies where these conflicts arise. So it is not surprising that the doctrine of national margin of appreciation is regularly invoked by the Court in cases of this kind.

In the *Wingrove v. the United Kingdom* judgment of 25 November 1996, the applicant's film was banned on the ground that it contained blasphemous scenes offensive to the Christian religion. In general terms, the Court finds that "there is no uniform European conception of the requirements of 'the protection of the rights of others' in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will 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. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the 'necessity' of a 'restriction' intended to protect from such material those whose deepest feelings and convictions would be seriously offended".<sup>125</sup> The Court also considers that its supervisory task may prove difficult because concepts of sexual morality change, there are differing views about the significance of religion in society, and the extent to which a work may give offence is hard to determine.<sup>126</sup>

As with other approaches, the margin of appreciation comes up against limits. Generally speaking, this "self-limitation" which the Court imposes on itself may carry the risk of "reducing the protection of the rights of others to a common denominator far removed from a shared rule of ethics".<sup>127</sup> It may also prove very

123. *Ibid.*, paragraph 29.

124. *Ibid.*, paragraph 30.

125. The Court, *Wingrove v. the United Kingdom*, judgment of 25 November 1996.

126. *Ibid.*

127. In the words of the former Registrar M.-A. Eissen, quoted by P. Lambert, "Les restrictions à la liberté de la presse et la marge d'appréciation des Etats au sens de la jurisprudence de Strasbourg", *Revue trimestrielle des droits de l'homme*, 1996, p. 155.

dangerous in religious matters, in so far as it may prompt a return to medieval measures of surveillance and intolerance. Furthermore, the margin of appreciation may also be merely a deferential attitude toward national authorities, as can be seen, for example, in the *Murphy v. Ireland* judgment of 10 July 2003 in which the Court refused to interfere with a total ban in Irish law on religious advertising in the audio-visual sector, because it noted that religion had been a divisive factor in Northern Ireland and that consequently any advertising of a religious nature might be regarded as offensive to persons belonging to different religions. Lastly, apart from the fact that the margin of appreciation can be variable where fundamental rights are concerned, can it really be argued that states are better placed to strike a balance between conflicting fundamental rights? Yes, perhaps, if one believes that they should be regulated by legislation rather than by the courts.

## II. Towards new approaches

### A. The choice of priorities

As is emphasised by P. Ducoulombier, hierarchy is sometimes taboo in legal thinking, either for philosophical reasons relating in particular to the principle of indivisibility of fundamental human rights or on more methodological or practical grounds, some people thinking that such an approach is naive or pointless;<sup>128</sup> other writers are in favour.<sup>129</sup> Personally, I do not think one can escape the need to try and establish criteria by which this exercise might be guided.<sup>130</sup>

For example, a distinction can be drawn between core rights, those at the heart or centre, and those on the periphery. Freedom of religion has an inner and an outer aspect. Its inner dimension – that is to say, the right of everyone to have a religion and to change it, or to have none at all – would be among the core rights. No limitation or restriction could be placed on it, even if linked to freedom

128. Ph. Frumer, *La renonciation aux droits et libertés. La Convention européenne à l'épreuve de la volonté individuelle*, Brussels: Bruylant, 2001; S. Van Drooghenbroeck, "L'horizontalisation des droits" in H. Dumont, F. Tulkens and S. Van Drooghenbroeck (eds), *La responsabilité, face cachée des droits de l'homme*, Brussels: Bruylant, 2005, pp. 381-2.

129. D. Shelton, "Mettre en balance les droits: vers une hiérarchie des normes en droit international des droits de l'homme" in E. Bribosia and L. Hennebel (eds), *Classer les droits de l'homme*, Brussels: Bruylant, 2004, p. 153 et seq; see also D. Shelton, "Normative hierarchy in international law", *American Journal of International Law*, Vol. 100, No. 2 (April 2006), p. 291 et seq; D. Breillat, "La hiérarchie des droits de l'homme" in *Droit et politique à la croisée des cultures. Mélanges Philippe Ardant*, Paris: LGDJ, 1999, p. 353 et seq; F. Sudre, "Droits intangibles et/ou droits fondamentaux: y a-t-il des droits prééminents dans la Convention européenne des droits de l'homme?" in *Liber Amicorum Marc-André Eissen*, Brussels/Paris: Bruylant/LGDJ, 1995, p. 381 et seq; O. Jacot-Guillermod, "Rapport entre démocratie et droits de l'homme" in *Démocratie et droits de l'homme*, Proceedings of the colloquy organised by the Greek Government and the Council of Europe, Kehl/Strasbourg: N.P. Engel, 1990, pp. 49-72 (the author refers to a material hierarchy constructed by European case law, via the concept of democratic society, p. 69); E. Lambert-Abdelgawad, *Les effets des arrêts de la Cour européenne des droits de l'homme. Contribution à une approche pluraliste du droit européen des droits de l'homme*, Brussels: Bruylant, 1999, p. 323.

130. Donna J. Sullivan, "Gender equality and religious freedom: toward a framework for conflict resolution", *New York University Journal of International Law and Politics* (1992), pp. 795 et seq.

of expression when, for example, the latter entails incitement to hate speech, violence or discrimination, on the basis of religious allegiance. In the *Gündüz v. Turkey* judgment of 4 December 2003, the Court emphasised that “tolerance and respect for the equal dignity of all human beings constitute 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).<sup>131</sup> Conversely, death threats or incitement to violence by religious leaders and groups against persons exercising their right to freedom of expression in religious matters are not acceptable. Here, therefore, the way to ensure real enjoyment of the two freedoms seems to lie in greater respect for what constitutes the hard core of religious freedom (or of freedom of expression) and relaxation of the pressure to protect such peripheral elements as religious sensitivity.

The limits, or the difficulty, of this approach lie in the fact that, over and above certain obvious factors (in particular inalienable rights), it is no easy matter to identify the hard core. On the one hand, doctrinal attempts to establish a hierarchy among the various rights have to date largely failed.<sup>132</sup> On the other hand, the same is true of attempts to identify exactly what the European Court regards as the inviolable essence of each of the rights secured by the Convention.<sup>133</sup>

## B. Practical concordance

This approach based on practical concordance between conflicting rights has been subjected to the most detailed theoretical treatment, by the German constitutionalist K. Hesse,<sup>134</sup> and is to be seen in numerous decisions of the Bundesverfassungsgericht.

The starting-point for this approach is the outright refusal to move in the direction of sacrificing one right to another. In other words, where rights are in conflict, it is not appropriate to turn straightaway to the balance in order to decide which right weighs heavier and deserves to be upheld at the expense of all its competitors. On the contrary, the aim should be, in an imaginative dialectical perspective involving mutual concessions which attenuate contradictory requirements, to delay the inexorable sacrifice until the last possible moment. The novel character of this approach lies in the fact that it fosters solutions that preserve

131. The Court, *Gündüz v. Turkey*, judgment of 4 December 2003.

132. Frumer, *La renonciation aux droits et libertés*, pp. 522-7.

133. S. Van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'Homme. Prendre l'idée simple au sérieux*, Brussels: Bruylant/FUSL, 2001, chapter IV.

134. See K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, Heidelberg: C.F. Müller, 20th edition, 1995, No. 71 et seq. On this practical concordance, see also F. Müller, *Discours de la méthode juridique*, transl. O. Jovanjan [from German], Paris: PUF, 1996, pp. 285-7, and S. Van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme*, Brussels: Bruylant/FUSL, 2001, pp. 212, 709-10.

the two conflicting rights to the maximum rather than simply finding a point of balance between them.

An example of this is seen in the *Öllinger v. Austria* judgment of 29 June 2006. The applicant notified the Salzburg Federal Police Authority that on 1 November 1998 he would be holding a meeting at the municipal cemetery in front of the war memorial in memory of the Jews killed by the SS during the Second World War. He stressed that the meeting would coincide with the gathering of Comradeship IV (Kameradschaft IV) to commemorate the SS soldiers killed during the Second World War. The Salzburg police authority banned the meeting and the public security authority dismissed the applicant's appeal against that decision. Both the police authority and the public security authority considered it necessary to prohibit the meeting planned by the applicant in order to avoid any disturbance to the commemorative meeting organised by Comradeship IV, which was regarded as a popular ceremony for which no authorisation was required. In these circumstances, the Court was "not convinced by the Government's argument that allowing both meetings while taking preventive measures, such as ensuring police presence in order to keep the two assemblies apart, was not a viable alternative which would have preserved the applicant's right to freedom of assembly while at the same time offering a sufficient degree of protection as regards the rights of the cemetery's visitors".<sup>135</sup> In other words, the government presented the conflict as necessary, whereas it could also be regarded as accidental and as originating in the attitude of the authorities.

The limitation on the practical concordance approach is that it lacks a constructive dimension: it does not include the need to try and change the context in which the conflict arose. In other words, it takes no account of the need to develop imaginative solutions in order to limit the conflict itself and prevent it from arising again in the future.

### C. A constructive procedural approach

This final approach operates in two stages. First of all, it takes account of the fact that, in many situations, the conflict between fundamental rights has its origin in the existence of a certain context which creates the conditions for conflict. Conflicts appear inevitable as long as these conditions are not taken into account and those that can be changed are not identified. In concrete terms, the state must explore all avenues that may enable the conflict to be overcome before pleading that it is facing a dilemma – and perhaps also recognise its responsibility in creating the context which gave rise to the conflict.

In the area of concern to us here, the *Otto-Preminger-Institut v. Austria* judgment of 20 September 1994 strikes me as a perfect counter-example. In fact, all the conditions seemed to be present for the persons likely to be offended by the

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135. The Court, *Öllinger v. Austria*, judgment of 29 June 2006.

works at issue not to be exposed to them. The film was intended for showing in a film club to a select audience, its subject had been announced in the programme, and access was denied to minors under the age of 17. So there was no reason for persons who might have been offended to go to the club and see it. The Court states that the very fact of advertising the screening of the film and the nature of it was a sufficiently "public" expression to give offence.<sup>136</sup> Nevertheless, as P. Wachsmann says, that analysis means that in the Court's view the offence lies "not in the fact of exposing them directly to images such as to offend their faith, but in the mere fact of drawing their attention to the existence of a work which they would consider blasphemous", and "ultimately turns against the association the legitimate precautions which it had taken to prevent anyone who might feel his beliefs to be under attack from seeing the film".<sup>137</sup>

The same holds true of the *Wingrove v. the United Kingdom* judgment of 25 November 1996. The possibility was open to the authorities of limiting distribution of the video to licensed sex shops or to persons above a certain age.<sup>138</sup> In the circumstances, one may question the proportionateness of the measure chosen by the authorities, that is to say, the total prohibition on the film's distribution.

Then – this is the second stage – once every step has been taken to avoid a conflict, procedures for settling it should be openly debated. The important thing in this connection, to my way of thinking, is not so much to apply predefined arithmetical formulae or to invent architectural structures of some sort to guide judicial reasoning, but to bring about the conditions for a debate in which all interested parties without exception can express their views, so that everyone's interests can be taken into account and into consideration in the discussion. This is precisely the free-ranging discussion whose prerequisites were stated by Habermas in his *Ethique de la communication*: "Everyone must be able to raise the problem inherent in any statement, whatever it be; everyone must be able to express his views, wishes and needs; no speaker should be prevented by authoritarian pressure, whether from inside or outside the discussion, from exercising his rights [of free discussion]".<sup>139</sup> Furthermore, such procedures offer the advantage of fostering an ongoing re-assessment of provisions, which might make it possible for different rights to be reconciled. This question of reconciliation of rights is to my mind essential, and I believe that open, public debates on issues linked to religion and religious beliefs, in complete objectivity and impartiality, can certainly assist it.

136. The Court, *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994.

137. P. Wachsmann, "La religion contre la liberté d'expression: sur un arrêt regrettable de la Cour européenne des droits de l'homme", *Revue Universelle des Droits de l'Homme*, No. 12 (1994), pp. 445-6. The Court, *Wingrove v. the United Kingdom*, judgment of 25 November 1996.

138. The Court, *Wingrove v. the United Kingdom*, judgment of 25 November 1996.

139. J. Habermas, "Notes programmatiques pour fonder en raison une éthique de la discussion" in *Morale et communication*, Paris: Cerf, 1986, pp. 110-11.



## 10. Reshaping religion and religious criticism in ultramodernity

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Notwithstanding the unquestionable secularisation of populations and institutions, religion has re-emerged in force as a subject of public debate: it is a matter of crucial public concern in national societies and at European level. Modern societies thought they had resolved the issue of religions' place and role in a democracy once and for all, but new issues are arising as a result of growing religious and philosophical pluralism. Relations between different religions, and between religious and secular views of humanity and the world, have become more complicated, and in some cases very hostile, despite the development of numerous forums for intercultural and interfaith dialogue. In the wake of the controversy over the cartoons of the prophet Muhammad, a leading expert on figurative art in Islam made the following statement on a French radio station:

What we are seeing at present is not a clash of civilisations or religions, but a clash of sensibilities and resentments. The slightest provocation is enough to bring them flooding back. This is no accident, but a symptom we must learn how to ease.<sup>140</sup>

The clash of sensibilities is a crucial issue, especially if a religious community feels – whether rightly or wrongly makes no difference – deep resentment towards Western societies. If “the Muslim community’s resentment is at its height”, this is clearly, as François Boespflug points out,<sup>141</sup> a geopolitical factor that must be addressed.

Finding ways to live alongside one another despite our differences is a topical issue in European societies. The approaches adopted by national governments have an international impact (as shown by Sikh demonstrations in India against the prohibition on wearing turbans in state schools in France). Local and regional issues have global resonance, thanks to the internationalisation of religious belief and the power of the media, especially where there are those who strive to ensure that this is the case because it is in their interest to do so. The issue of the demarcation between the rights of different groups, and the relationship between freedom of expression and religious freedom in particular, is therefore arising afresh in the context of globalisation. I would like to start by

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140. Michael Barry, quoted by François Boespflug in *Caricaturer Dieu? Pouvoirs et dangers de l'image*, Paris: Bayard, 2006, p. 181.

141. Boespflug, *Caricaturer Dieu?*, p. 181. Boespflug talks about the “explosive potential of Islam’s narcissistic wound and the accompanying surge in hatred”, p. 182.

giving a brief overview of the socio-cultural position of religious belief in contemporary European societies, and then explore the issue of criticism of religion and religious criticism in the current climate.

## **I. Socio-cultural position of religious belief in contemporary ultramodernity**

Predictions of what will become of religion in modern societies have often been dominated by the concept of a transfer model of secularisation, which extrapolates the historical and legal meaning of secularisation, extending to sociological analysis the concept whereby secularisation denotes the transfer of ownership or supervisory authority from the religious to the secular. Reference has been made, for instance, to the secularisation of science, politics, art, education and the family, designating a process by which these institutions and spheres of activity gain autonomy from religious supervision. The transfer model of secularisation has fostered a representation of modernity as an exit from the religious sphere, as if it were a zero-sum game in which more modernity means less religion. In this scenario, the secular supplants the religious in both its power to lay down rules and its sphere of influence, in such a way that religion's social impact and prescriptive claims become increasingly limited.

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This is the theory, developed in various forms by a number of sociologists,<sup>142</sup> of the individualisation and privatisation of the religious sphere (which may not necessarily coincide) and religion's loss of influence in modern Western society. Although the transfer model of secularisation typified modernity's institutionalisation (the industrial society) and effective realisation (the triumphant modernity of the post-war economic boom), it is the secularisation of secularisation itself that typifies what I call "ultramodernity": an ultramodernity in which hyper-secularisation is coupled with a degree of religious revival. Europe is therefore post-secular as well as post-Christian.

### **The ultramodern age of modernity**

Drawing freely on the work of Anthony Giddens and Ulrich Beck, I have defined ultramodernity as movement plus uncertainty, in contrast to the definition of modernity as movement plus certainty. The modern focus on certainty (encompassing scientific, economic, political, moral and educational progress) has given rise to a clash between the secular and the religious as forms of moral authority and a fairly direct opposition between modernity and religion. The ultramodern focus on uncertainty, for its part, is transforming the secular and religious spheres at the same time, thereby reshaping the relationship between them.

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142. Jean-Paul Willaime, "La sécularisation une exception européenne? Retour sur un concept et sa discussion en sociologie des religions", *Revue Française de Sociologie*, Vol. 47, No. 4 (October-December 2006), pp. 755-83.

I use the term “ultramodernity” to denote a radicalisation of modernity, as opposed to an exit from modernity. The ultramodern age is a period in which modernity is disenchanted and problematic, suffering the repercussions of the systematic, desacralising reflexivity it has triggered: nothing is spared, not even the delight that modernity was able to elicit during its conquering phase. Ultramodernity consequently means that all the secular ideals that, in a critical relationship to religion, were held up as new certainties and served as powerful forces for mobilising society are no longer absolute. Compared with secularisation as the transfer of sacralisation from religion to other spheres (economic, political or moral), which corresponds specifically to the phase of secularising modernity, ultramodernity is a secularised modernity in which the secularising forces themselves undergo secularisation: the demythologisers are demythologised.

### **Religion caught between individualisation and globalisation**

In the current context of ultramodernity, religion in Europe may now be said to be caught between the rationales of individualisation and globalisation. The rationale of individualisation is reflected in a kind of do-it-yourself approach that incites some to abandon all forms of religion, and others to discover or experiment with other religions. The rationale of globalisation throws our perceptions of religion wide open, bringing supposedly distant religions closer together. It is becoming increasingly difficult to assign political and social institutions to a particular religion. It is a time of contact and clashes between humanity’s different forms of religious expression. Such contact may either foster friendly dialogue with a highly intellectual content, or it may fuel fear, stereotypes and antagonism.

This institutional deregulation is resulting in a situation of anomie characterised by the social and cultural fragmentation of religious belief: the symbols, texts and figures specific to a given religion are escaping the latter’s bounds, for they are subject to various kinds of individual and collective appropriation, both private and public, including appropriation for spiritual purposes but also for cultural, artistic, media, advertising, political and satirical purposes. In other words, contemporary religious belief is no longer characterised by symbolic boundaries in which each faith is in charge of its own, but has been thrown wide open: as it has become more difficult to place individuals under ecclesiastical house arrest, the symbols, texts and figures specific to a given religion now circulate, living their own lives, as it were. In such a climate, it has become considerably more difficult to maintain semantic and symbolic order, both socially and culturally speaking.

### **Religions as identity subcultures**

Religions tend to form subcultures that give their members direction, thereby enabling them to find their bearings in a pluralist society, as well as offering reference groups and a defined set of religious beliefs people may choose to

adopt. The same process may be observed in secular humanism, which is undergoing a militant revival in the face of the religious resurgence. Paradoxically, hyper-secularisation reinforces religion's specificity, giving rise to reassertions of identity, including radical forms of fundamentalism. At the same time, this fuels new tensions between religious and secularist conceptions of humanity and of the world. As a result of hyper-secularisation, religious identity is being reconstructed as a minority identity, with religion taking hold in the form of subcultures and sectarian frameworks within a secularised, pluralist global society. This is also generating sectarian niches and various forms of religious radicalism.

In the face of cultural McDonaldisation, it has become trendy to be different, whereas this tended to be labelled "cultural backwardness" during the period of triumphant modernity. Whereas religions might once have been seen as traditional forms of expression, resisting a conquering modernity that tended to perceive them as obsolete realities in an advanced state of decline, they may now be regarded as socially significant reference groups in the context of an ultra-modern society so secularised that it has become powerless to signify collective meaning in the name of a compelling mythology. For both majority and minority religious groups, religious belief is being reconstructed in the form of identifiable subcultures in a pluralist environment, with a more or less significant counter-cultural component. It is also being reconstructed in the form of activist groups, which individuals join out of personal choice rather than being born into them, and thus in the form of individual religions of converts linked to transregional and transnational activist networks rather than to particular geographical areas. It is in this sense that we may now talk about "glocalisation": a combination of the global and the local.

### **Ultramodernity: not less religion, but a different kind of religion**

We are thus seeing an enormous, enduring change in the place of religion and religious practice in modern societies, which goes beyond the evaporation of religious observance. Ultramodernity does not mean less religion, but a different kind of religion. Ultramodern forms of religious belief or non-belief have changed both the way in which we relate to metaphysical truths and our social experience of such religious and philosophical identifications. In a nutshell, religious ultramodernity is shaking up traditional boundaries between believers and non-believers: believers are starting to doubt, while agnostics are taking an interest in spirituality. Among those with no religion, the European Values Study distinguishes between believers and non-believers. It is not so much a case of more people becoming atheists as of a distancing from traditional religious institutions. In the religious sphere, as in other spheres, people want to carve out their own paths independently and be free to have their own experiences. The socialisation of religious and philosophical choices is becoming more flexible, taking place through peer networks and local community involvement rather than membership of vertically regulated institutions.

Significantly, while reference is commonly made to “post-Christian societies”, Jürgen Habermas, for his part, talks about “secularisation in a post-secular society”,<sup>143</sup> which is not incompatible with the former term. This prompts us to wonder what is becoming of religion in “post-Christian” European societies and of secularisation in “post-secular” societies. Secularisation can no longer be analysed in terms of modernity’s triumph over religious traditions regarded as obsolete. The situation is more complicated than that, and consideration must be given to secularisation in the age of what I call ultramodernity.<sup>144</sup> The hyper-secularisation of ultramodernity is thus fostering a degree of religious revival. Except in its extremist expressions, this revival has no impact on the process whereby modern societies are gaining autonomy from religious authorities. In the context of globalisation, it reflects a comprehensive reconfiguration of the religious, political and cultural spheres.

### Universalisation of heresy

We live in liberal societies made up of individuals who regard themselves as emancipated; those people or groups who protest against this state of affairs are soon viewed as backward-looking reactionaries. While ordered societies exclude the errant and the non-conformist, societies that value change tend to exclude those who settle down and resist the pervading wanderlust. The heretics of the 21st century are consequently not the heterodox, but rather the orthodox, in the psychosocial sense of the term. For heresy, in the very sense of a choice, has now become the norm, thanks to the individualisation and subjectivisation of religious belief. That is Peter Berger’s well-known argument:

the modern individual is faced not just with the opportunity but with the necessity to make choices as to his beliefs. This fact constitutes the heretical imperative in the contemporary situation. Thus, heresy, once the occupation of marginal and eccentric types, has become a much more general condition; indeed, heresy has become universalized.<sup>145</sup>

Whereas the focus in previous centuries was on heretics’ errant beliefs and the differing beliefs of the other known religions at the time, 21st-century exclusion targets the various orthodoxies’ strong beliefs and symbolic integration.

The eccentric and marginal are no longer the heterodox, but the orthodox, who set themselves apart from the conformism of universal heresy by referring to a stable belief system. In this respect, it may be argued that one of the leading heretical figures of the 21st century is none other than the Pope. Relativist

143. J. Habermas, *Glauben und Wissen* (Friedenspreis des Deutschen Buchhandels 2001), Frankfurt am Main: Suhrkamp, 2001, p. 12.

144. I refer here to two of my studies: “Religion in ultramodernity” in James A. Beckford and John Walliss (eds), *Theorising Religion: Classical and Contemporary Debates*, Aldershot: Ashgate, 2006, pp. 73-85; “Reconfigurations ultramodernes”, *Esprit* (March-April 2007), No. 3-4 [Effervescences religieuses dans le monde], pp. 146-55.

145. Peter Berger, *The Heretical Imperative: Contemporary Possibilities of Religious Affirmation*, Garden City NY: Doubleday, Anchor Books, 1979, pp. 30-31.

ultramodernity cannot stand the idea of individuals deliberately choosing to join a highly norm-regulated community. In fact, such decisions, which give rise to sectarian individualism, greatly perturb an ultramodernity that tends to identify religion with an intolerable individual dependence on transcendence, and freedom with a total absence of restrictive social ties (as if it meant being free from all ties). In any event, ultramodernity appears to find it incomprehensible, and struggles to accept, that an individual may feel free and autonomous while being committed to a religion and attached to a community.

## **II. Criticism of religion and religious criticism**

### **From an anti-clericalism based on emancipation to one designed to provoke<sup>146</sup>**

Philosophical, scientific and political criticism of religion was once, and to some extent still is, a key structural component of Western modernity. Such criticism went hand in hand with an anti-clericalism based on freedom or emancipation, which did not shy away from attacking religion and making fun of its representatives. Such anti-clericalism was especially prevalent in Catholic countries, targeting priests in particular, and was part of a wider condemnation of religion, which was seen as opposing scientific progress, the development of freedoms and moral advance. It is typical of modernity as a movement seeking to tear down traditions and aspiring to a better future. It attracted considerable support from right- and left-wing ideologies of progress. Criticising the power of the clergy, it desacralised religious representatives rather than religions themselves. It was associated with a view of freedom as a form of fulfilment.

As Philippe Portier points out, however, "freedom's status has changed for a growing segment of the population, particularly among the artistic and economic elites"<sup>147</sup> (and, I might add, the media elite). It used to be seen as a "freedom of fulfilment", which would lead the subject, in a break with his or her "internal self", towards universal reason and an openness to others. It is now increasingly regarded as a "total lack of restrictions, enabling each individual to pursue his or her desires and interests to the full, without a care for his or her fellow human beings". As Philippe Portier explains, the "anti-clericalism of emancipation based on the condemnation of ecclesiastical power" has consequently given way to an "anti-clericalism designed to provoke, which seeks to hijack religious symbols", and ultimately to the transgression of political as well as religious sacredness.

According to Philippe Portier, this "anti-clericalism of derision", which is typical of our ultramodernity, has three components. Firstly, the content has

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146. I owe these ideas to Philippe Portier's perspicacious study "La critique contemporaine du religieux. Essai d'interprétation" in Danielle Corrigan-Carsin (ed.), *La liberté de critique*, Paris: LexisNexis, Litec, 2007, pp. 141-56.

147. Portier, "La critique contemporaine du religieux", pp. 151-2.

changed: in contrast to the past, contemporary Christian anti-clericalism focuses less on ecclesiastical institutions and the greed or fanaticism of the religious hierarchy than on the very figure of Christ, or even God himself. Secondly, whereas anti-clericalism used to be expressed in writing, it is now much more common for it to be expressed through images. "It is designed to provoke, rather than to explain." Thirdly, whereas the main designated enemy used to be Catholicism, it is now Islam that tends to bear the brunt of such anti-clericalism (although a degree of anti-Catholicism is also re-emerging). Advertisers also like to distort the main motifs of eastern religions such as Zen Buddhism.

The anti-clericalism based on emancipation still exists, notwithstanding these developments. Inspiring much of the criticism of religion in general as well as particular religions, it is an intrinsic feature of modern societies that guarantee both religious freedom, within the limits of democracy and human rights, and the freedom to criticise religion, change religion or choose not to belong to any religion. I would simply point out that this form of anti-clericalism has been revived in the face of the reassertion of religious identities (particularly through traditional and/or charismatic movements) and the growing place of some expressions of Islam in international current affairs. The anti-clericalism of emancipation had softened in response to religion's loss of power and the headway made by secularisation; in some quarters, it was even thought that religion was losing momentum for good ("you don't fire at an ambulance").

Confronted with the awakening of religious identities in Europe and the rest of the world, and alerted by the fact that religions are once again emerging as the bearers of ideals and norms different from those of secular society, some even fear a return of clericalism, if not – as is the case in France – a challenge to the secular state. In the face of a secularised religion that kept a low profile, the anti-clericalism based on emancipation had nodded off: it is now waking up alongside the religions it wishes to combat. Disputes over Muslim headscarves in schools are a good example of this trend, particularly given that they involve the issue of women's emancipation, the status of women being a sore point in clashes between religious and secular views of humanity and of the world. In short, the current climate is still characterised by a recurrent conflict between emancipatory modernity and religions. What we are talking about here is more like an anti-clericalism of communication: people do express themselves, but in order to communicate a certain criticism of religion in the context of public debate.

### **The anti-clericalism of derision as iconoclastic criticism of religion**

Yet it is more complicated than that, and therein lies the problem. The anti-clericalism of provocation and derision – typical of the ultramodern individual without any ties who regards his or her freedom, and freedom of expression in particular, as a lack of restrictions and the absolute right to say and do whatever he or she pleases without a care for anyone else – has another side. The

anti-Christianism of some black metal bands may be playful and artistic, but it has also caused churches to be set alight and graves to be desecrated. According to François Boespflug,<sup>148</sup> “in a fairly recent development, French society has decided it is done with, or rather that it would like to be done with, any policing of images, or just about. It now censures the very idea of censorship, regarding the concept of blasphemy as completely obsolete, except – paradoxically – when it comes to vocally asserting the sacred right to utter it in circumstances such as those we now face. Self-censorship is now the only means of avoiding many disastrous confrontations: it is all that is left. Let us hope that it derives from sources other than fear.”

Surely there is a danger here of slipping into “gratuitously offensive” expression, as the European Court of Human Rights describes expression that “does not contribute to any form of public debate conducive to progress in human affairs”.<sup>149</sup> In the anti-clericalism of derision and provocation, is it not a case of expressing oneself rather than communicating, and seeking first and foremost to indulge oneself? Does not this type of anti-clericalism seek to desacralise for the sake of it, just as others seek to profane for the pleasure of transgressing? The anti-clericalism of derision aims to shock; it is a form of criticism that deliberately sets out to be provocative. “One thing is certain,” writes François Boespflug, “Freedom of expression is a caricature of itself when it becomes its own end and, perhaps because it does not know what to express, feels such a compulsive need to assert itself simply for the sake of it”.<sup>150</sup>

If we have moved on from modern, emancipatory criticism of religion to iconoclastic criticism directed at religious sensibilities, have we not also moved on from the reasoned religious criticism of modern secularity to the iconoclastic criticism of ultramodern secularity? In other words, it is not so much a collision between two lines of argument as a clash of sensibilities. The existential insecurity of Western ultramodernity may give rise to gratuitous, provocative criticism of religion, in contrast to the social, political and intellectual criticism of emancipatory modernity.

### The anti-secularism of derision as iconoclastic criticism of secularity

As I was saying, it is more complicated than that. As well as social, philosophical, artistic and other criticisms of religion, which echo Western modernity’s critical relationship to religion in various ways, there is now also religious criticism of Western modernity. According to the British sociologist Grace Davie,

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148. Boespflug, *Caricature Dieu?*, p. 190.

149. See Patrice Rolland, “La liberté d’expression. Sectes, liberté de religion et liberté d’expression (arrêt Paturel du 22 décembre 2005)”, in *La France et la Cour Européenne des Droits de l’Homme. La jurisprudence en 2005. Présentation, commentaires et débats*, Brussels: Bruylant, 2006 (Cahiers du CREDHO No. 12/2006), p. 133.

150. Boespflug, *Caricature Dieu?*, p. 192, who points out, incidentally, that the Danish newspaper that published the cartoons of Muhammad did so “in order to test freedom of expression in Denmark”, p. 12.

for instance, it is just as modern to use the resources of religion to criticise the secular as it is to use the secular to criticise the religious.<sup>151</sup> Furthermore, in the face of forms of religious expression that for a long time were more closely tied to specific cultural spheres, such as Arab-Muslim civilisation, Western modernity is also being challenged and relativised by other cultures' view of it.

Internal and external religious criticism of Western modernity in the ultramodern age is bringing religion back into the public arena, insofar as issues touching on our understanding of individuals' humanity (including gender difference) are increasingly the subject of public debate and political decisions: bioethical issues of the beginning and end of life, cloning, issues around homosexuality and parenting, and so on. Religion's return to the collective decision-making arena again raises the issue of the boundaries of religion and religious freedom, along with the issue of freedom of expression in relation to religion. In the face of a Western hyper-secularity challenged by religion's return to the public arena, and the paradoxical evaporation and resurgence of the sacred, some may find it intolerable to be confronted by enduring systems of meaning to which people are strongly attached. This may give rise to a propensity to gratuitous provocation and reinvention of the sacred through the very transgression of that which others hold sacred.

External and internal religious criticism of Western modernity may also help to safeguard the modernity of emancipation by saving it from a universal relativism that might in fact place it in jeopardy. However, such religious criticism of secularity also derives from the iconoclastic tendency of the ultramodern age of modernity. It seeks to shock Western secularity and ultramodern secular sensibilities by reaffirming traditional approaches to gender relations, for instance: in response to an advertisement showing a priest kissing a nun on the mouth, religious iconoclasm will criticise Western modernity by contrasting veiled women with the sexist portrayal of women in advertising. The contemporary backdrop is not so much a war between gods as a war between religious and secular sensibilities, a war between iconoclasm in a globalised image culture. Radicalisation of the sacredness of transgression is met with radicalisation of the sacredness of prohibition. Such derision and gratuitous provocation can sweep everything away in their wake, including rational and emancipatory aspects of modernity along with religion as a source of wisdom and spiritual elevation.

## Conclusion

In this climate, the need to strike a balance between freedom of expression and freedom of religion is once again a topical issue. Freedom of expression, be it secular or religious, is one of democracy's achievements.<sup>152</sup> However,

151. Grace Davie, *Europe: The Exceptional Case. Parameters of Faith in the Modern World*, London: Darton, Longman & Todd, 2002, p. 161.

152. François Boespflug rightly states: "In any event, it would be extremely helpful, both for world peace and in the very name of intelligence and friendship, if those Western media that claim to be

secularist iconoclasts indulge in provocative criticism of religion that is no credit to modernity in its role as a vehicle for rationality and emancipation that elevates human beings and sets them free. Likewise, religious fundamentalists indulge in provocative criticism of secularity that is no credit to religion in its role as a vehicle for wisdom and spirituality that elevate human beings and set them free.

Freedom of expression must find a middle road between the secular fundamentalists of transgression and the religious fundamentalists of sacralisation, bearing in mind that criticism – however radical it may be, and regardless of whether it is secular or religious – must be permitted in a democracy. Ultramodern reconfigurations of religion clearly encompass the reshaping of both secular criticism of religion and religious criticism of secularism.

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enlightened and to advocate freedom of expression realised that the exercise of the latter, the fundamental goodness of which cannot be overstated, may be ambiguous, if not detrimental. Depending on how it is used, it may in fact drift towards a licence that is by turns provocative and contemptuous, playing along with xenophobia or racism, or, on the other hand, with a modicum of discipline, turn into a culture of difference, respect, unbridled curiosity, pluralistic interpretation and the intermingling of ideas and beings, without which any tradition will wear out, voicing rebellion as and when necessary" (Boespflug, *Caricaturer Dieu?*, pp. 191-2).

## 11. Conclusions

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Pieter van Dijk

*member of the Venice Commission, The Netherlands*

1. This round-table conference was very instructive for the members and staff of the Venice Commission, and assisted them greatly in preparing the Commission's final report on the regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, which will be presented to the plenary session of the Commission in due time.

2. The scopes of the rights of freedom of expression and freedom of religion and belief, and the intersection between those rights, are very topical issues that have raised vehement and even violent discussions, especially in recent years.

In the opinion of some, the protagonists of freedom of expression, including artistic freedom, give too absolute a character to this right, ignoring or even expressly denying the right to have one's religion and religious feelings respected. In the opinion of others, one should not grant so much scope to the protection of freedom of religion and belief that an open, critical debate about religions and religious practices becomes impossible.

It is very difficult to find the right balance between the two rights and the claims they imply in each and every situation. This was the main challenge during the round-table conference. But it is, of course, also the daily challenge that faces national administrative and judicial bodies, international organisations and international judicial bodies, such as the European Court of Human Rights and the United Nations Human Rights Committee. And, indeed, it is the challenge with which the Venice Commission is confronted in preparing its opinion at the request of the Parliamentary Assembly of the Council of Europe. The Commission is, therefore, fortunate to have found highly qualified representatives of some of these bodies, and other experts, prepared to give its research and discussions some guidance.

### **The round-table conference: a summary**

#### **First session: the intersection between freedom of expression and freedom of belief**

3. Judge Tulkens of the European Court of Human Rights addressed the question of how to reconcile two fundamental rights that find both protection in the European Convention on Human Rights, but also conflict in certain aspects. She

pointed, in a more general way, to the issue of the mutual relationship of human rights. She indicated that the traditional methods of solving mutual conflicts, along the lines of necessity and proportionality of restrictions of their full enjoyment, do not always lead to a clear and objective result in the present circumstances, problematic as the balancing of the interests involved appears to be.

Madame Tulkens submitted that we should perhaps have the courage to set priorities within and between human rights, not only according to the categories of absolute ("non derogable") rights and relative ("derogable") rights, but by defining the core of the individual rights and the core rights. On that basis, or failing agreement about that approach, broad deliberations towards consensus should take place about the evaluation or re-evaluation of all aspects involved, in the context of the actual circumstances, enabling a practical co-existence of the different rights in their essence.

4. Mr Pillay, member of the United Nations Committee on Economic, Social and Cultural Rights, emphasised the special responsibility that freedom of expression carries with it. Expressions that show lack of respect for the opinions or convictions of others, especially those that are very valuable to them like religious beliefs, deserve less respect and protection. He referred in that context to the 2007 report of the UN Special Rapporteur on Freedom of Religion or Belief and to the 2006 report of the same rapporteur and the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance. They addressed not only the legal but also the social aspects of tensions in the present world between different ethnic and religious groups.

Mr Pillay also quoted from two decisions of the UN Human Rights Committee on the interplay between the right to freedom of belief and the right to freedom of expression, and the permissible and restricted limitations that may be placed on those rights. In his opinion, blasphemy should be decriminalised, but religious hatred penalised.

5. Mr Gunn of the OSCE/ODHIR Advisory Panel of Experts on Freedom of Religion or Belief introduced into the discussion the aspect of freedom of religion and belief of minority groups. In that connection, he pointed out certain relevant OSCE documents, such as the Vienna Concluding Document of 1989, that included very advanced provisions on freedom of expression and freedom of religion, and their respective limitations.

Mr Garay of the same Advisory Panel proposed, as a method of finding a practical balance, the adoption of codes of conduct by certain professional groups, such as journalists.

### **Second session: immunisation of "art" versus immunisation of "religion"**

6. Professor Alivizatos of the University of Athens drew our attention to the fact that no definition of "art" exists, nor any criteria for determining what is art

and what is not. He indicated the relevance of the context and circumstances in which a certain artistic expression is made, and of the precise contents of the expression concerned and the purpose of the artist. He also pointed out the problem of how to define in what cases and circumstances a person is justified in feeling personally offended or threatened by an expression that does not insult him or her personally but the religion or religious group to which he or she belongs.

7. Mr Willaime, Director of Studies at the Ecole Pratique des Hautes Etudes and Director of the Groupe Sociétés, Religions, Laïcités, France, put his remarks within the context of the growing secularisation of modern society, accompanied by growing anti-clericalism viewing religion as a concept that is opposed to progress in science and freedoms, and opposed to the emancipation of the people. On the other hand, there is, however, an import of religion into our Western societies, and, as a consequence, a growing role of religion in society.

Against that background, Mr Willaime pointed out the vital importance of inter-religious dialogue. In his opinion, a better understanding of each others' beliefs and motives may diminish sensitivity for the expressions of the other. He also indicated that the transnationalisation of certain religions, and the changing sociocultural position of both religion and laicism, make us more familiar with the convictions of others but, at the same time, create more tension because of interferences – and threats – from outside into one's religious beliefs and practices or one's adherence to laicism. Globalisation of convictions and thoughts is accompanied by individualisation.

8. Mr Fahri, founder of the Mouvement Juif Libéral de France, provided very pertinent information about the specific position of art in Judaism, from an historical and a religious perspective. Against that background he explained that for Jews an image may more easily have the character of blasphemy than would seem justified in the eyes of others. He also explained, however, that this specific feature has no static scope and contents, and may and does develop in time. In that context, too, the intention of the artist or maker is of importance.

### **Third session: normative answers to “blasphemy”**

9. Mrs Flanagan, Head of the Office of the Attorney General of Ireland and member of the Venice Commission, provided information, in addition to Professor Christians' comparative survey, about domestic law and legal practice on hate speech and religious insult. She also gave some insight, from her own practical experience, into the various difficulties of prosecuting alleged violations of the prohibition of hate speech and religious insult because of lack of clear definitions, difficulties of proof and possible counter-productive effects. It is a challenge for the Venice Commission, in its opinion, to give both the domestic legislatures and the executing authorities some guidance on how to clarify

and implement existing legislation without ending up in more and more new legislation.

10. Mr Sarafianos and Mr Tzapogas, board members of the Hellenic League for Human Rights, also adding to Professor Christians' survey, provided interesting information about Greek case law. They pointed to the necessity – problematic though it may be – of applying objective criteria and standards, and of finding a balance between respect for individual feelings and the collective character of religions and beliefs. They supported the provisional opinion of the Venice Commission that (lack of) adequate legislation is not the problem. In implementing the applicable legislation, the authorities have to be flexible and take into account actual circumstances and developments in the country and its population. The special situation in Greece, with the dominant position of the Greek Orthodox Church, should be taken into account without however losing sight of European standards on equality and pluriformity.

### **Panel discussions**

The round-table conference ended with two panel discussions.

Panel I addressed the issue "Is there an 'ethics of responsibility' for artists?"

Among the panellists were an art historian, a film director, a poet and a songwriter.

Panel II discussed the question "Is there an 'ethics of responsibility' for journalists?" This panel included a publisher, two journalists, an editor-in-chief and cartoonist of a monthly review and a former minister for media.

Both panels, and especially the very lively discussion among the panellists and between them and the audience, provided a very realistic and practical insight into the conflicting interests and values involved in daily practice at the intersection between freedom of expression and freedom of belief.

### **Concluding remark**

The Venice Commission is much indebted to all those who participated in the round-table conference and offered it very valuable scientific and practical information about the theme of the report it has to prepare.

This holds good, first of all, for the many experts who took the trouble of travelling to Athens and sharing their expertise and practical experience. The large and diverse audience contributed to the exchange of information and experience by their active participation. But this conference could not have taken place without the preparatory work, the organisational achievements and the hospitality of the Hellenic League for Human Rights, which co-chaired it, and the facilities provided by Megaron Plus. Finally, the multi-lingual dialogue was made possible thanks to the able and meticulous efforts of the interpreters.

## **IV. Appendices**



# Appendix I

## Collection of European national laws on blasphemy, religious insult and incitement to religious hatred<sup>153</sup>

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### Summary table

COUNTRY	Blasphemy	Insults to religious beliefs or doctrines	Interfering with religious worship and/or freedom of religion	Sacrilege against an object of worship	Inciting discrimination or religious hatred
Albania			x		x
Andorra		x	x	x	
Armenia					x
Austria	x		x	x	x
Azerbaijan			x		x
Belgium			x	x	x
Bosnia and Herzegovina			x		x
Bulgaria			x		x
Croatia		x			x
Cyprus		x	x		x
Czech Republic		x			x
Denmark	x	x		x	x
Estonia			x		x
Finland	x	x	x	x	x
France			x		x
Georgia			x		
Germany		x	x		x
Greece	x	x	x	x	x
Hungary			x	x	x
Iceland		x	x		x

153. Non-official translation.

COUNTRY	Blasphemy	Insults to religious beliefs or doctrines	Interfering with religious worship and/or freedom of religion	Sacrilege against an object of worship	Inciting discrimination or religious hatred
Ireland	x				x
Italy	x	x	x	x	x
Latvia			x		x
Liechtenstein	x		x	x	x
Lithuania		x	x		x
Luxembourg			x	x	x
Malta					x
Moldova					x
Monaco			x	x	x
Montenegro			x		x
Netherlands	x	x	x	x	x
Norway		x	x		x
Poland		x	x	x	x
Portugal		x	x	x	x
Romania			x		x
Russian Federation		x	x	x	x
San Marino	x		x	x	
Serbia					x
Slovakia		x			x
Slovenia			x		x
Spain		x	x	x	x
Sweden					x
Switzerland		x	x	x	x
"The former Yugoslav Republic of Macedonia"			x		x
Turkey		x			x
Ukraine		x	x	x	x
United Kingdom		x			x

## **Albania**

There is no specific legislation prohibiting blasphemy and/or religious insult. However, the Criminal Code contains a specific section on “Criminal acts against freedom of religion”.

### **Criminal Code**

#### **Article 131 – Obstructing the activities of religious organisations**

Ban on the activity of religious organisations, or creating obstacles for the free exercise of their activities, is sentenced to a fine or up to three years’ imprisonment.

#### **Article 132 – Ruining or damaging objects of worship**

Ruining or damaging objects of worship when it has inflicted partial or total loss of their values is punishable by a fine or up to three years’ imprisonment.

#### **Article 133 – Obstructing religious ceremonies**

Ban on or creating obstacles to participating in religious ceremonies or freely expressing religious beliefs, constitutes criminal contravention and is sentenced to a fine or up to one year’s imprisonment.

#### **Article 265 – Inciting national, racial or religious hatred and conflict**

Inciting national, racial or religious hatred or conflict as well as preparing, propagating, or preserving with the intent of propagating, writings with that content, is sentenced to a fine or up ten years’ imprisonment.

## **Andorra**

### **Criminal Code (1995)**

#### **Article 122**

Anyone who commits a profane, insulting or destructive act in a religious building or during a religious ceremony shall be subject to a maximum prison sentence of four years.

#### **Article 301**

Anyone who insults religious beliefs in public or impedes or disrupts a religious act or ceremony shall be subject to a maximum prison sentence of six months.

## **Armenia**

### **Criminal Code**

#### **Article 226 – Inciting national, racial or religious hatred**

1. Actions aimed at incitement of national, racial or religious hatred, at racial superiority or humiliation of national dignity, are punished by a fine in the amount of 200 to 500 minimal wages or by correctional labour for up to two years or by imprisonment for two to three years.

2. The actions envisaged in part 1 of this Article committed: publicly or by mass media, with violence or threat of violence; by abuse of official position; by an organised group, are punished by imprisonment for a term of three to six years.

## **Austria**

### **Criminal Code**

#### **Section 188 – Disparaging of religious precepts**

Whoever publicly disparages or mocks a person or a thing, respectively, being an object of worship or a dogma, a legally permitted rite, or a legally permitted institution of a church or religious society located in Austria, in a manner capable of giving rise to justified annoyance, is liable to imprisonment for a term not exceeding six months or to a fine.

#### **Section 189 – Disturbance of the practice of religion**

1. Whoever forcibly or threatening with force precludes or disturbs divine service or an act of divine service of a church or religious society located in Austria is liable to imprisonment for a term not exceeding two years.

2. Whoever commits mischief at a place intended for a legally permitted practice of religion or on the occasion of a legally permitted public divine service or with an object directly destined for a legally permitted divine service of a church or religious society located in Austria in a manner capable of giving rise to justified annoyance is liable to imprisonment for a term not exceeding six months or to a fine.

#### **Section 283 – Incitement**

Whoever publicly calls upon or goads to a hostile act against a church or religious society located in Austria or against a group belonging to such a church or religious society, a race, a people, a tribe or a state in a manner capable of endangering public order or incites against or insults or decries in a way which hurts the human dignity a group belonging to a race, a people, a tribe or a state is liable to imprisonment for a term not exceeding two years.

## Azerbaijan

### Constitution (1995)

#### Article 18 – Religion and state

Religion shall be separated from the State in the Azerbaijan Republic. All religions shall be equal by law. The spread and propaganda of religions which humiliate human dignity and contradict the principles of humanity shall be banned. The State education system shall be of secular character.

#### Article 47 – Freedom of thought and speech

Every Person shall have the freedom of Thought and Speech. Nobody shall be forced to identify or refute his/her ideas and principles. Propaganda inciting racial, ethnic or religious animosity or hostility shall be banned.

### Law on Freedom of Religious Belief, No. 281, No. 16: Article 694 in Bulletin of the Supreme Council of the Azerbaijan Republic 1992 (mod. 2001)

#### Article 1 – Freedom of religious belief

Everyone shall determine his attitude to religion independently and shall have the right to practise any kind of religion alone or together with others and to express or disseminate his belief concerning his attitude to religion.

Laying any kind of obstacles to any person in determining his attitude to religion, or in his religious beliefs, worship or participation in execution of religious rituals and ceremonies, shall not be allowed. Propagating of religious beliefs, religious mode of life and worship by using force or with the aim to breed strife among people and enforcing religious beliefs shall be prohibited.

Restrictions on the exercise of freedom of religious belief may be imposed only in such cases as are necessary for considerations of national security and public safety and for the protection of rights and freedoms compatible with the international obligations of the Republic of Azerbaijan.

Carrying out religious propaganda by foreigners and persons without citizenship shall be prohibited (inserted into Article 1 by Law No. 222-IQD of 27 December 1996: Collection of Legislation of the Republic of Azerbaijan, 1997, No. 3, Article 171).

Parents or the persons replacing them may educate their children based on mutual consent, in accordance with their religious belief and attitude towards religion.

**Criminal Code (Collection of Legislation of the Republic of Azerbaijan, 2000, No. 4(II), Article 251, entered into force on 1 September 2000)**

**Article 167 – Interference with religious rituals**

An illegal interference with religious rituals shall be punishable by a fine in the amount of 100 to 500 minimum wages, or community works for a term of 160 to 240 hours, or corrective works for a term of up to one year.

**Article 283 – Instigating national, racial or religious enmity**

1. Actions aimed at instigating national, racial or religious enmity, at debasing national dignity, as well as at restricting the rights of citizens or establishing their superiority based on their national, racial or religious affiliation, if such actions are committed in public or using mass media, shall be punishable by a fine in the amount of 1 000 to 2 000 minimum wages, or restriction of liberty up to three years, or imprisonment for a term of two to four years.

2. The same actions, if committed:

- a. by using force or threatening to use force;
- b. by a person by using his or her official position;
- c. by an organised group

shall be punishable by imprisonment for a term of three to five years.

**Belgium**

**Criminal Code**

**Article 142**

Anyone who uses violence or threats either to force one or more persons to practise a religion, attend religious services, celebrate particular religious festivals, observe particular days of rest – and hence open or close their shops or workshops – or perform or cease certain types of work, or to prevent one or more persons from doing so, shall be subject to a prison sentence of eight days to two months and a 26- to 200-franc fine.

**Article 143**

Anyone who impedes, delays or interrupts an act of worship performed in a place of worship or a place ordinarily used for worship, or as part of a public religious ceremony, by creating disturbance or disorder, shall be subject to a prison sentence of eight days to three months and a 26- to 500-franc fine.

**Article 144**

Anyone who insults a religious object by means of actions, words, gestures or threats, whether in a place of worship or a place ordinarily used for worship

or during a public religious ceremony, shall be subject to a prison sentence of 15 days to six months and a 26- to 500-franc fine.

### Article 145

The same penalties shall apply to anyone who insults a minister of religion, in the exercise of his or her ministry, by means of actions, words, gestures or threats. Assaulting a minister of religion shall carry a prison sentence of two months to two years and a 50- to 500-franc fine.

### Article 146

Should such an assault occasion bloodshed, injury or illness, the perpetrator shall be subject to a prison sentence of six months to five years and a 100- to 1 000-franc fine.

## Anti-Discrimination Act of 25 February 2003, amending the Act of 15 February 1993 on the Establishment of a Centre for Equal Opportunities and Combating Racism

### Section 2

2.6. Harassment shall be held to be a form of discrimination where undesirable behaviour related to the grounds for discrimination set forth in paragraph 1 is intended to violate a person's dignity and create an intimidating, hostile, degrading, humiliating or offensive environment, or has the effect of doing so.

2.7. Any behaviour whereby another person is ordered to practise discrimination against a person, a group, a community or the members thereof, on one of the grounds [set forth in paragraph 1], shall be held to be discrimination within the meaning of this Act.

### Section 6

6.1. A prison sentence of one month to one year and a 50- to 1 000-euro fine, or one of these penalties only, shall be applicable to:

- anyone who, in one of the circumstances set forth in Article 444 of the Criminal Code, incites discrimination, hatred or violence towards a person, a group, a community or the members thereof, on grounds of gender, sexual orientation, civil status, birth, wealth, age, religious or philosophical beliefs, current or future state of health, a disability or a physical characteristic;
- anyone who, in one of the circumstances set forth in Article 444 of the Criminal Code, advertises his or her intention to practise discrimination, hatred or violence towards a person, a group, a community or the members thereof, on grounds of gender, sexual orientation, civil status, birth, wealth,

age, religious or philosophical beliefs, current or future state of health, a disability or a physical characteristic.

## **Bosnia and Herzegovina**

### **Criminal Code of the Federation of Bosnia and Herzegovina (1998)**

#### **Article 150**

1. Whoever publicly incites or fairs national, racial or religious hatred or discord or hostility between constitutional nations and others living in Bosnia and Herzegovina or the Federation, shall be punished by a sentence of imprisonment for a term between one year and five years.

2. If an act referred to in paragraph 1 of this article has been committed by coercion, molestation, jeopardising safety, exposing to derision of national, ethnic or religious symbols, damaging belongings of another, or desecrating monuments or graves, the perpetrator shall be punished by a sentence of imprisonment for a term between one and eight years.

3. Whoever commits an act referred to in paragraphs 1 and 2 of this article abusing his/her position or authority, or if disorder, violence or other grave consequences for the living together of constitutional nations and others living in Bosnia and Herzegovina or the Federation resulted from these acts, shall be punished for the act referred to in paragraph 1 by imprisonment for a term between one and eight years and for the act referred to in paragraph 2 by imprisonment for a term of between one and ten years.

#### **Article 356**

1. Whoever disturbs or prevents performance of religious ceremonies shall be fined or punished by imprisonment for a term not exceeding one year.

2. Whoever commits an offence from paragraph 1 of this article by the use of force, or serious threat of using force, shall be punished by imprisonment of three months up to three years.

### **Criminal Code of the Republika Srpska, Article 390: Inciting National, Racial or Religious Hatred, Discord or Hostility**

1. Whoever incites and inflames national, racial or religious hatred, discord or hostility, or spreads ideas of superiority of one race or nation over another, shall be punished by a fine or imprisonment for a term not exceeding two years.

2. Whoever commits the offence referred to in paragraph 1 of this article by employing coercion or abuse, endangering safety, exposing national, ethnic or religious symbols to derision, damaging other people's belongings, or desecrating monuments or graves, shall be punished by imprisonment for a term between six months and five years.

3. If the offence referred to in paragraphs 1 and 2 of this article resulted in riots, violence or any other serious consequence to the communal life of the constituent peoples and others who live in Republika Srpska, the perpetrator shall be punished by imprisonment for a term between one and eight years.

4. Materials and items containing messages referred to in paragraph 1 of this article and equipment for their production, duplication or distribution shall be forfeited.

### **Criminal Code of Brcko District, Article 160: Inducing National, Racial or Religious Hatred, Discord or Hostility**

1. A person who publicly incites or fans national, racial or religious hatred, discord or hostility between constitutional nations and other residents of the Brcko District, shall be sentenced to prison from one to five years.

2. If the criminal offence referred to in paragraph 1 of this article has been committed by coercion, molestation, jeopardising safety, exposing to derision of national, ethnic or religious symbols, damaging belongings of another, or desecrating monuments, memorials or graves, the perpetrator shall be sentenced to prison from one to eight years.

3. A person who commits the criminal offence referred to in paragraph 1 of this Code through the abuse of his position or authority, or if these offences resulted in disorder, violence, or other grave consequences for the communal life of constitutional nations and others living in the Brcko District, shall be sentenced to prison from one to ten years.

## **Bulgaria**

### **Criminal Code**

#### **Article 162 – Crimes against national and racial equality**

1. Whoever propagates or incites racial or national hostility or hatred or racial discrimination shall be punished by imprisonment of up to three years and by public reprobation.

2. Whoever applies violence against another or damages his property because of his nationality, race, religion or his political conviction shall be punished by imprisonment of up to three years and by public reprobation.

3. Whoever forms or heads an organisation or a group whose goal is the perpetration of an act under the preceding paragraphs shall be punished by imprisonment of one to six years and by public reprobation.

4. A member of such an organisation or a group shall be punished by imprisonment of up to three years and by public reprobation.

5. (New, SG28/82) The court can also rule on a mandatory settlement for crimes under the preceding paragraphs.

#### **Article 164 – Crimes against religious denominations**

Whoever propagates hatred on a religious basis by speech, through the press, by action or in another way, shall be punished by loss of liberty for up to three years or by corrective labour.

#### **Article 165 – Crimes against religious denominations**

(1) Whoever, by force or threat, hinders citizens from professing their faith or carrying out their rituals and services that do not violate the laws of the country, the public peace and good morals shall be punished by imprisonment of up to one year.

1. The same punishment shall be imposed on those who, in the same way, compel another to participate in religious rituals and services.
2. For acts under Article 163 committed against groups, individual citizens or their property in connection with their religious affiliation, the punishments stipulated by that article shall apply.

#### **Article 166 – Crimes against religious denominations**

(Suppl. SG28/82; Amend. SG92/02, Amend. SG103/04) Whoever forms a political organisation on religious grounds or, through speeches, publications, acts or in any other way, uses a church or religion for propaganda against the authorities or their activities shall be punished by imprisonment of up to three years, unless liable to a more serious punishment.

### **Religious Denominations Act (1949)**

#### **Article 4**

1. Every Bulgarian citizen has the right to freely practise his or her religion through words, prints, or images, either individually or with others.
2. The right to practise a religion shall not be restricted by the state unless it is:
  - a. directed against national security, public order, national health, ethics, or rights and freedoms of other citizens;
  - b. used for political ends;
  - c. used for the incitement of racial, ethnic or religious hatred and hostility.

#### **Article 15.1**

The status of religious organisation may be granted when the faith and liturgical practice on the basis of which the religious institution has been founded are not directed against national security, public order, national health, ethics, the rights and freedoms of other citizens or the achievement of political goals, nor at inciting racial, ethnic or religious hatred and hostility.

**Article 38.1**

The status of religious institution may be withdrawn: when the public practice of religion performed by the institution is directed against national security, public order, national health, ethics, rights and freedoms of other citizens, or when the institution uses the faith or its liturgical and ritual practice for political goals, or for the incitement of racial, ethnic or religious hatred and hostility.

**Croatia****Constitution (as amended on 28 March 2001)****Article 39**

Any call for or incitement to war, or resort to violence, national, racial, or religious hatred, or any form of intolerance is prohibited and punishable.

**Criminal Code (as amended on 1 October 2004)****Article 174**

Anyone who publicly speaks and expresses ideas of supremacy of one race over another, of one ethnic or religious group over another, of one gender over another, of one nation over another or one skin colour over another, with the aim of inciting racial, religious, gender, national, ethnic hatred or hatred based on skin colour, or with the aim of belittling, shall be punished by a term of imprisonment of between three months and three years.

**Cyprus****Constitution****Article 18 – Freedom of thought, conscience and religion**

1. Every person has the right to freedom of thought, conscience and religion.
2. All religions whose doctrines or rites are not secret are free.
3. All religions are equal before the law. Without prejudice to the competency of the communal chambers under this Constitution, no legislative, executive or administrative act of the Republic shall discriminate against any religious institution or religion.
4. Every person is free and has the right to profess his faith and to manifest his religion or belief, in worship, teaching, practice or observance, either individually or collectively, in private or in public, and to change his religion or belief.
5. The use of physical or moral compulsion for the purpose of making a person change or preventing him from changing his religion is prohibited.
6. Freedom to manifest one's religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in the interests of the security

of the Republic or the constitutional order or public safety or public order or public health or public morals or for the protection of the rights and liberties guaranteed by this Constitution to any person.

7. Until a person attains the age of sixteen the decision as to the religion to be professed by him shall be taken by the person having the lawful guardianship of such person.

8. No person shall be compelled to pay any tax or duty the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own.

## **Article 19**

1. Every person has the right to freedom of speech and expression in any form.

2. This right includes freedom to hold opinions and receive and impart information and ideas without interference by any public authority and regardless of frontiers.

3. The exercise of the rights provided in paragraphs 1 and 2 of this article may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary only in the interests of the security of the Republic or the constitutional order or public safety or public order or public health or public morals or for the protection of the reputation or rights of others or for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

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## **Criminal Code**

### **Section 47.2, cap. 154**

Whoever enters into an act publicly with the intention to promote feelings of ill will and hostility between different communities or religious groups by reason of his racial or ethnic origin or his religion is guilty of an offence and may on conviction be liable to imprisonment for up to five years.

### **Section 51A, cap. 154**

Whoever publicly in any manner and in any way procures inhabitants to acts of violence against each other; or promotes feelings of ill will and enmity between different classes or communities or persons in the Republic, is guilty of misdemeanour and is liable to imprisonment for twelve months or to a fine of 1 000 pounds or both, and in case of a legal entity a fine of 3 000 pounds may be imposed.

### **Sections 138 to 142 – Offences relating to religion**

– Insult to religions (section 138),

- Disruption of religious gatherings (section 139),
- Unlawful entrance to burial places (section 140),
- Offending religious sentiments by words or conduct (section 141),
- Publications insulting religion (section 142).

**Amending Laws 11/92, 6(III)/95 and 28(III)/99 amending the law ratifying the International Convention on the Elimination of All Forms of Racial Discrimination**

These laws establish that it is a criminal offence:

- To incite acts which are likely to cause discrimination, hatred or violence against any person or group of persons on account of their racial or ethnic origin, or their religion. The offence is committed when a person incites as above in public either orally or through the press or by means of any document or picture or any other means. The sentence is that of imprisonment not exceeding two years, or a fine not exceeding 1 000 pounds, or both;
- To express ideas insulting to any person or group of persons by reason of their racial or ethnic origin, or their religion. The offence is committed when a person acts as above in public either orally or through the press or by means of any documents or pictures or any other means. The criminality is that of imprisonment not exceeding one year, or a fine not exceeding 500 pounds, or both.

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In conformity with a recommendation of the Committee for the Elimination of Racial Discrimination, the 1999 amendments mean that it is no longer necessary that the incitement to racial hatred be intentional for the corresponding offence to be committed.

## **Czech Republic**

### **Criminal Code**

#### **Paragraph 198 – Vilification of a nation, race or belief**

1. A person who publicly defames: any nation, its language or any race, or a group of inhabitants for their political conviction, religion or lack of religious faith, shall be punished by imprisonment for a term of up to one year.

2. A person who commits a crime stated in section 1 together with at least two more persons shall be sentenced to imprisonment for a term of up to three years.

#### **Paragraph 198a – Incitement to national or racial hatred**

1. Whoever publicly incites hatred of another nation or race or calls for restriction of the rights and freedoms of other nationals or their members, shall be sentenced to imprisonment for a term of up to two years.

2. The same sentence shall apply to a person who aids and abets an offender to commit an act mentioned in subsection 1.

**Paragraph 260 – Support or propagation of a movement aiming to suppress the rights and freedoms of citizens**

1. A person who supports or propagates a movement demonstrably aiming at oppressing the rights and freedoms of citizens, or which declares national, racial, class or religious hatred, shall be punished by a custodial sentence from one up to five years.

2. A person shall be punished by custodial sentence up to three years in the following cases:

- a. if he/she commits the act stated in section 1 by means of press, film, radio, television or by similar efficient means,
- b. if he/she commits such act as a member of an organised group, or if he/she commits such act during military preparedness of the state.

**Paragraph 261**

Whoever publicly shows sympathy for fascism or other similar movements stated in paragraph 260, shall be punished by a custodial sentence from six months up to three years.

**Statute No. 40/1995**

An advertisement must not contain material that would be in conflict with morality, especially elements insulting national or religious feeling, menacing morality in general or propagating violence. It must not contain elements belittling human dignity or use a motive of fear.

**Denmark**

**Criminal Code (Consolidated Act No. 1000 of 10 May 2006 – entry into force, 1 July 2006)**

**Paragraph 140**

Any person who, in public, mocks or scorns the religious doctrines or acts of worship of any lawfully existing religious community in this country shall be liable to imprisonment for any term not exceeding four months.

**Paragraph 266.b**

1. Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, scorned or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination shall be liable to a fine or to imprisonment

for any term not exceeding two years. It shall be considered an aggravating circumstance if the conduct can be characterised as propaganda.

2. This provision was inserted in the Criminal Code in 1971 in connection with Denmark's ratification of the International Convention on the Elimination of All Forms of Racial Discrimination, to ensure full compliance with Article 4 of that convention.

## **Estonia**

### **Constitution**

#### **Article 12**

The incitement of national, racial, religious or political hatred, violence or discrimination shall be prohibited and punishable by law. The incitement of hatred, violence or discrimination between social strata shall equally be prohibited and punishable by law.

### **Criminal Code (2000)**

#### **Paragraph 151**

Any person who incites others to hatred or violence on the basis of nationality, race, colour, sex, language, origin, religion, political opinion, financial or social status: up to three years' imprisonment.

#### **Paragraph 154**

A person who interferes with the religious affiliation or religious practices of a person, unless the religious affiliation or practices are detrimental to the morals, rights or health of other people or violate public order, shall be punished by a fine or up to one year of imprisonment.

#### **Paragraph 201**

Violation of public order or attacks against a person or his or her rights in course of exercise of one's religion, by

1. Forming or leading a group whose activities in the course of proclamation of religious doctrine or a religious ceremony are related to violation of public order, damaging the health of persons or other attacks on the life or rights of persons, or inducing a person to refuse to perform his or her civil duties, is punishable by a fine or detention or up to five years' imprisonment.
2. Active participation in the activities of a group specified in subsection 1 of this section, or promotion of the commission of acts prescribed by the religious doctrines or ceremonies of such grouping, is punishable by a fine or detention or up to three years' imprisonment. (Law of 19 May 1993 entered into force 27 June 1993 – RT I 1993, 33, 539)

## **Finland**

### **Criminal Code of Finland as amended by Law 563/1998**

#### **Section 10 – Breach of the sanctity of religion**

A person who

1. publicly blasphemes against God or, for the purpose of offending, publicly defames or desecrates what is otherwise held to be sacred by a church or religious community, as referred to in the Act on the Freedom of Religion (267/1998), or

2. by making noise, acting threateningly or otherwise, disturbs worship, ecclesiastical proceedings, other similar religious proceedings or a funeral,

shall be sentenced for a breach of the sanctity of religion to a fine or to imprisonment for at most six months.

#### **Section 11 – Prevention of worship**

1. A person who employs or threatens violence, so as to unlawfully prevent worship, ecclesiastical proceedings or other similar religious proceedings arranged by a church of religious community, as referred to in the Act on the Sanctity of Religion, shall be sentenced for prevention of worship to a fine or to imprisonment for at most two years.

2. An attempt to employ or threaten violence as in paragraph 1 is also punishable.

#### **Section 8 of Chapter 11**

Covers ethnic agitation and criminalises the spreading of statements or other information among the public where a certain “race”, a national, ethnic or religious group or a comparable group is threatened, defamed or insulted.

## **France**

### **Freedom of the Press Act of 29 July 1881**

#### **Section 23<sup>154</sup>**

Anyone who, through utterances, slogans or threats in public places or meetings, or by way of written or printed material, drawings, engravings, paintings, emblems, images or any other medium of the written or spoken word or image sold or distributed, presented for sale or displayed in public places or meetings, or by means of placards or posters exposed to public view, or by any means of audiovisual communication, directly incites the perpetrator(s) to commit the said offence, where that incitement is acted upon, shall be punished as an accessory

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154. Section 23 as amended by Act No. 72-546 of 1 July 1972, Official Gazette of 2 July 1972, and Act No. 85-1317 of 13 December 1985, Section 18-i, Official Gazette of 24 December 1985.

to an indictable offence. This provision shall also apply where such incitement gives rise only to an attempted indictable offence under Article 2 of the Criminal Code.

## Section 24

A five-year prison sentence and a 300 000-franc fine shall be applicable to anyone who, by one of the means listed in the preceding section, directly incites the commission of one of the following offences, where no action is taken on that incitement: (...)

Anyone who, by one of the means listed in Section 23, incites discrimination, hatred or violence towards a person or group of people on account of their origin, or their membership or non-membership of a particular ethnic group, nation, race or religion, shall be subject to a one-year prison sentence and a 300 000-franc fine, or one of these penalties only.

In the event of a conviction for one of the offences set forth in the preceding subparagraph, the court may additionally order:

- a. forfeiture of the rights set forth in Article 131-26 paragraphs 2 and 3 of the Criminal Code for up to five years, except where the offender is found guilty under Section 42 and Section 43.1 of the present Act or Section 93-3 paragraphs 1-3 of the Audiovisual Communication Act (No. 82-652) of 29 July 1982;
- b. public display or dissemination of the judgment under the conditions set forth in Article 131-35 of the Criminal Code.

## Section 29.2<sup>155</sup>

Any offensive expression, contemptuous term or invective not based on fact shall constitute an insult.

155. On 16 February 2007, the plenary Court of Cassation ruled on the meaning and scope of statements reported in the press and prosecuted as constituting the offence of racial public insults, provided for and punished under sections 29.2 and 33.3 of the Act of 29 July 1881. According to the former provision, as updated, “any offensive expression, contemptuous term or invective not based on fact shall constitute an insult”, while the latter states that “insults ... against a person or group of people on account of their origin or their membership or non-membership of a particular ethnic group, nation, race or religion shall carry a six-month prison sentence and a fine of 22 500 euros”. The trial and appeal courts had on two occasions – the Criminal Division having handed down an initial judgment of condemnation – interpreted the impugned statements (“the Jews are a sect, a fraud”) as being part of a theoretical debate on the influence of religion, given that they had been made in the context of an interview criticising religion, and held that they did not constitute an attack directed at the Jewish community as a human community. The Court of Cassation condemned that interpretation, holding that the statements at issue did not come within the free criticism of religion as part of a debate of general interest, but constituted an insult against a group of people on account of their origin. In addition, it analysed the statements by reference to the freedom of expression guaranteed under Article 10 of the European Convention on Human Rights, which provides that it may be subject to restrictions under certain circumstances. In the light of the European Court of Human Rights’ interpretation of the Convention, the Court of Cassation ruled that punishment of the impugned statements constituted a necessary restriction on freedom of expression in a democratic society (Plenary Court of Cassation,

### **Section 31**

The same penalty shall apply to defamation committed by the same means against one or more ministerial staff members, a member of either House of Parliament, a public officer, a depositary or agent of public authority, a minister of one of the state-funded religions or a citizen asked to perform a public service or hold public office on a temporary or permanent basis, on account of his or her duties or position, or against a juror or witness on account of his or her testimony. Defamation concerning the private lives of such individuals is covered by Section 32 below.

### **Section 32**

Defamation committed against private individuals by one of the means set forth in Section 23 shall carry a fine of 80 000 francs.

Defamation committed by the same means against a person or a group of people on account of their origin or their membership or non-membership of a particular ethnic group, nation, race or religion shall carry a one-year prison sentence and a fine of 300 000 francs, or one of these penalties only.

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In the event of a conviction for one of the offences set forth in the preceding paragraph, the court may additionally order: public display or dissemination of the judgment under the conditions set forth in Article 131-35 of the Criminal Code.

### **Section 33**

Insults delivered by the same means against the bodies or persons mentioned in sections 30 and 31 of the present Act shall carry a fine of 80 000 francs.

Unprovoked insults committed by the same means against private individuals shall carry a fine of 80 000 francs.

Insults delivered under the conditions set forth in the preceding paragraph against a person or group of people on account of their origin or their membership or non-membership of a particular ethnic group, nation, race or religion shall carry a six-month prison sentence and a fine of 150 000 francs.

In the event of a conviction for one of the offences set forth in the preceding paragraph, the court may additionally order: a) public display or dissemination of the judgment under the conditions set forth in Article 131-35 of the Criminal Code.

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## Act of 9 December 1905

### Section 31

Anyone who causes an individual to practise or refrain from practising a religion, to belong or cease belonging to a religious association, or to contribute or refrain from contributing to religious expenses, either by means of assault, violence or threats or by instilling a fear of losing his or her job or putting his or her person, family or wealth at risk, shall be subject to the fine for fifth-class summary offences and a prison sentence of six days to two months or one of these penalties only.

### Section 32

Anyone who prevents, delays or interrupts a religious service by causing disorder or disturbance at the premises used for such services shall be subject to the same penalties.

### Section 33

The provisions of the preceding two sections shall apply only where the nature or circumstances of the disturbance, insults or assault in question do not attract more severe penalties under the provisions of the Criminal Code.

## Criminal Code

### Article 132-76

In the cases provided for by law, the penalties incurred for an offence shall be aggravated where it is committed on account of the victim's actual or supposed membership or non-membership of a particular ethnic group, nation, race or religion.

The aggravating circumstance set forth in the first paragraph shall be established where the offence is preceded, accompanied or followed by statements, writings, images, objects or acts of any kind that undermine the honour or standing of the victim or of a group of people to which the victim belongs, on account of their actual or supposed membership or non-membership of a particular ethnic group, nation, race or religion.

### Article R. 624-3 – Discriminatory defamation

Defamation committed in private against a person or a group of people on account of their origin or their actual or supposed membership or non-membership of a particular ethnic group, nation, race or religion shall carry the fine for fourth-class summary offences.

### **Article R. 624-4 – Discriminatory insults**

Insults committed in private against a person or a group of people on account of their origin or their actual or supposed membership or non-membership of a particular ethnic group, nation, race or religion shall carry the fine for fourth-class summary offences.

### **Article R. 625-7 (Decree No. 2005-284 of 25 March 2005)**

Incitement, committed in private, to discrimination against or hatred or violence towards a person or a group of people on account of their origin or their actual or supposed membership or non-membership of a particular ethnic group, nation, race or religion shall carry the fine for fifth-class summary offences (a maximum of €1 500, which may be doubled in some instances of reoffending, together with any additional penalties).

### **Act No. 90-615 of 13 July 1990 punishing all racist, anti-Semitic and xenophobic acts (Official Gazette of 14 July 1990)**

#### **Section 14**

The Act allows associations working to counter racial and religious discrimination to exercise the right of reply in the audiovisual sector (amendment to Section 6 of Act No. 82-652 of 29 July 1982).

### **Criminal Code of Alsace and Moselle**

#### **Article 166**

Anyone who causes offence by making insulting public statements that blaspheme against God, or publicly insults one of the Christian denominations or a religious community established within the Confederation and recognised as a corporation, or the institutions or ceremonies of these religions, or commits an insulting and offensive act in a church or other place used for religious assemblies, shall be subject to a prison sentence of up to three years.

#### **Article 167**

Anyone who uses assault or threats to prevent a person from practising the religion of a religious community established in the State ..., or who deliberately creates disorder or disturbance in a church in order to impede or disrupt the liturgy or certain religious ceremonies ..., shall be subject to a prison sentence of up to three years.

### **Appeal No. B 05-15822 – GIP (Marithé François Girbaud) v. Croyance et libertés**

French Court of Cassation, Civil Division I, public hearing of 14 November 2006, judgment partly set aside without referral, Appeal No. B 05-15822,

published in gazette: "Considering that the company GIP, owner of the Marithé François Girbaud (MFG) clothing brand, had a poster put up from 1 to 31 March 2005 to coincide with the launch of its spring 2005 collection, covering 400 sq.m of a building façade at Porte Maillot in Neuilly-sur-Seine, consisting of a photograph based on the Leonardo da Vinci painting *The Last Supper*, the participants having been replaced by women wearing clothing produced by the brand in question, in the company of a man with a bare back; that the association Croyances et Libertés, arguing that the advertisement was insulting to the Catholic community, asked the urgent applications judge to prohibit the Air Paris agency and MFG from displaying, disseminating or publishing the impugned photograph on the grounds that it constituted an insult within the meaning of Sections 29.2 and 33.3 of the Act of 29 July 1881 and hence a manifestly unlawful nuisance; that this association subsequently confined its submission to the public display of the impugned photograph; that, by an order of 10 March 2005, the Paris Regional Court, accepting the existence of the alleged insult, prohibited the companies GIP and JC Decaux Publicité Lumineuse from displaying the photograph in any public place, via any medium, ordered that it be taken down, imposed a fine of 100 000 euros and exonerated the other defendants; that the poster was taken down on 11 March 2005 and replaced by an image featuring only the table used in the previous picture, without any people;

Concerning the first ground of Appeal No. B 05-15.822 lodged by GIP and of its cross-appeal to Appeal No. W 05-16.001, which are identical:

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Considering the complaint that the judgment rejected the application to set the proceedings aside on grounds of nullity, even though, in deciding that GIP, on which no writ had been served when it appeared with its director, who had personally been served with a writ, had nevertheless had sufficient time to prepare its defence, irrespective of the conditions of its summons, on the ground that the quality of the intervention by counsel for GIP and its director had demonstrated that counsel was wholly conversant with the case, the Court of Appeal had breached articles 16 and 468 of the new Code of Civil Procedure;

Considering, however, that the Court of Appeal, which noted that, in its appearance before the court, GIP was assisted by a lawyer who had been notified of the case, which the quality of his intervention had demonstrated that he was wholly conversant with, exercised its sovereign power by holding that GIP had had sufficient time to prepare its defence; and that it had concluded that the grounds for ruling the application inadmissible had disappeared, given that they had been rectified at the point when the court handed down its decision;

Whence it follows that the ground must be rejected;

Furthermore, concerning the sole ground of the contingent cross-appeal by the association Croyances et Libertés (No. W 05-16.001): Considering the complaint that the judgment declared the voluntary intervention by the Ligue

Française pour la Défense des Droits de l'Homme et du Citoyen admissible, whereas:

1. in regard to offences established and punished by the Act of 29 July 1881, the capacity to be a party to proceedings is restricted in the circumstances set forth in sections 47, 48 and 48-1, and the only right registered associations may exercise in respect of religious insults is that of instituting an action for damages; by accepting the admissibility of the Ligue's intervention, which was not aimed at securing compensation for the damage caused by insults against a group of people on account of their religion, the Court of Appeal breached Sections 48, 6 and 48-1 of the Act of 29 July 1881;

2. in regard to offences established and punished by the Act of 29 July 1881, the capacity to be a party to proceedings is restricted in the circumstances set forth in sections 47, 48 and 48-1, and registered associations may bring an action in respect of religious insults only if the prosecuted offence pertains to the types of case they are authorised to defend in the courts; given that the Ligue's stated aim was to defend cases other than those of victims of discrimination on religious grounds, whereas the only offence being prosecuted involved insults against a group of people on account of their religion, the Court of Appeal breached sections 48, 6 and 48-1 of the Act of 29 July 1881;

3. without statutory authorisation, an association setting out to defend a collective interest abutting on the general interest does not have an interest in bringing proceedings in order to assert its claims concerning an offence's scope; by accepting the intervention of the association in question solely on the basis that the latter sought to defend the principles of freedom of expression, statutory penalties and freedom of thought, the Court of Appeal breached articles 31, 330.2 and 554 of the new Code of Civil Procedure;

4. by failing to address the ground in which it was argued that the Ligue's intervention did not name the individual representing it, the Court of Appeal breached Article 455 of the new Code of Criminal Procedure;

Considering, however, that the Court of Appeal, which noted that the Ligue pour la Défense des Droits de l'Homme et du Citoyen, which had based its voluntary intervention on articles 7, 9 and 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, sought to defend the principle that there can be no punishment without law, and the principles of freedom of thought and freedom of expression, rather than to assist victims of discrimination, rightly concluded that Section 48-1 of the Act of 29 July 1881 was not applicable;

Whence it follows that the ground, the third and fourth points of which are irrelevant, must be rejected;

However, concerning the second and third grounds of the appeal by GIP and the sole ground of the appeal by the Ligue Française pour la Défense des Droits de l'Homme et du Citoyen:

Having regard to Sections 29.2 and 33.3 of the Act of 29 July 1881, in conjunction with Article 809 of the new Code of Civil Procedure and Article 10 of the European Convention on Human Rights;

Considering that, in prohibiting the display of the impugned photograph in any public place, via any medium, and ordering that it be taken down, the Court of Appeal stated that the poster, the aesthetics of which were not disputed, clearly depicted Jesus Christ's Last Supper and that this founding event of Christianity, during which Christ instituted the sacrament of the Eucharist, was undoubtedly an essential element of the Catholic faith;

that putting the poster, in the form of a giant tarpaulin, up in a place attracting large numbers of passers-by consequently constituted the misappropriation, on a grand scale, of one of the main symbols of the Catholic religion for advertising and commercial purposes, such that the association Croyances et Libertés had good cause to argue that Catholics' religious beliefs and faith were seriously insulted, within the meaning of sections 29.2 and 33.3 of the aforementioned Act, and that this offensive representation of a sacred theme hijacked by a commercial advertisement thereby caused them a manifestly unlawful nuisance, which should be put to a stop by means of the measure sought; that the sole purpose of the said composition was to shock those who saw it in order to draw their attention to the ludicrous misrepresentation of the Last Supper, some of whose characters were placed in a conspicuously ambiguous posture, for the benefit of the commercial brand inscribed above this deliberately provocative picture;

that the artistry and aesthetics strived for in this advertising visual did not prevent it from constituting – even had it not dealt with the institution of the Eucharist – a blatant case of misappropriation of a founding act of the Christian religion, with an element of eye-catching nudity, showing contempt for the sacred nature of the moment depicted;

That by thereby accepting the existence of a manifestly unlawful nuisance, whereas a mere parody of the layout of the painting *The Last Supper*, which was not intended to insult the Catholic faithful or undermine their standing on account of their faith, does not constitute an insult, that is, a direct personal attack on a group of people on account of their religion, the Court of Appeal breached the aforementioned texts;

Furthermore, considering that the Court of Cassation can put an end to the dispute by applying the relevant legal rule; **ON THESE GROUNDS:**

**REJECTS** the contingent cross-appeal by the association Croyances et Libertés;

SETS ASIDE AND DECLARES VOID, except insofar as it has declared the voluntary intervention of the Ligue des Droits de l'Homme et du Citoyen admissible and rejected GIP's application to set the proceedings aside, the judgment handed down on 8 April 2005, *inter partes*, by the Paris Court of Appeal;

Having regard to Article 627.2 of the new Code of Civil Procedure;

HOLDS that there are no grounds for referral;

Dismisses the application by the association Croyances et Libertés;

Awards costs against the association Croyances et Libertés;

Having regard to Article 700 of the new Code of Criminal Procedure, rejects the applications;

States that, through the good offices of the Principal State Prosecutor at the Court of Cassation, the present judgment will be transmitted so that it can be entered in the margin or at the end of the partly set aside judgment;

Done and judged by the Court of Cassation, First Civil Division, and delivered by the President in open court on 14 November 2006."

## Georgia

### Constitution (1995)

#### Article 9<sup>156</sup>

The state recognises the special importance of the Georgian Orthodox Church in Georgian history but simultaneously declares complete freedom of religious belief and confessions, as well as independence of the church from the state.

#### Article 19.1

1. Every individual has the right to freedom of speech, thought, conscience, religion and belief.
2. The persecution of an individual for his thoughts, beliefs or religion is prohibited as is compulsion to express opinions about them.

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156. Forum 18 published this report on 25 May 2005: "Georgia's Constitutional Court today (25 May) ruled that mob attacks violated Pentecostal pastor Nikolai Kalutsky's rights to practise his faith freely, Forum 18 News Service has learnt. Sozar Subari, the Human Rights Ombuds-person, is one of many who state that the mobs are instigated by local Georgian Orthodox priest Fr David Isakadze. Subari witnessed an attack by Fr Isakadze and told Forum 18 that 'a criminal case should be launched against him. However, it will be difficult to prove that he is responsible as he no longer turns up in person'. Fr Isakadze and Archpriest Shio Menabde apparently also led a mob to expel another Orthodox priest, Fr Levan Mekoshvili, from his parish, accusing him of being a 'liberal'. Elsewhere, Baptists and Pentecostals both state that Orthodox priests instigate violence against their congregations. 'Until those responsible for the violence – especially Fr David Isakadze – are brought to justice, the constitutional court ruling in Kalutsky's case will make no difference,' Baptist Bishop Malkhaz Songulashvili told Forum 18. The Georgian Orthodox Patriarchate failed to respond to questions about its responsibility."

3. These rights may not be restricted unless the exercise of these rights infringes upon the rights of other individuals.

## **Criminal Code**

### **Article 59 – Aggravating circumstances of a crime**

Aggravating circumstances of a punishment are ... f. Commission of a crime with a motive of national, ethnic, racial and religious hatred or hostility.

### **Article 114 – Premeditated murder**

I. Premeditated murder is aggravated if based on racial, religious, national or ethnic hatred.

### **Article 122 – Premeditated severe injury to health**

Is aggravated if based on racial, religious, national or ethnic hatred.

### **Article 131 – Torture**

Is aggravated if committed due to national, racial or religious intolerance.

### **Article 142,1 – Racial discrimination**

That is, an act committed for the purpose of inciting to national or racial hatred or conflict, humiliating national dignity or directly or indirectly restricting human rights or granting advantages on grounds of race, colour, social status or national or ethnic origin is punishable by deprivation of liberty for a term not exceeding three years.

Under paragraph 2, certain circumstances lead the penalty to be increased, particularly where the perpetrator uses his official authority or if the act is accompanied by violence or threats of violence (in both cases the penalty is a term of imprisonment not exceeding five years) or if the offence was committed by a group or caused a person's death (in both these cases the penalty is a term of imprisonment of three to eight years).

### **Article 158 – Illegal interference with the implementation of a religious ceremony**

Interference with the implementation of a religious ceremony violently or by threat, or by abusing a believer or a representative of the church, shall be punished by a penalty equal to 50 to 100 times the daily salary, or by penal labour for a period up to one year, or by the deprivation of liberty for a period up to two years.

The same action committed by the use of a weapon shall be punished by a penalty from 100 to 250 times the daily salary, or by the deprivation of liberty for

a period of from one to five years with or without dispossession of the right to work for a period of up to five years.

### **Article 169 – Illegal interference with a political, public or religious union**

Illegal interference with the creation or the activities of a political, public or religious union by violence or threat, or by abuse of authority, shall be punished by a penalty equal to 50 to 100 times the daily wage, or by penal labour for a period up to one year, or by the restriction of liberty for up to two years, or by the deprivation of liberty for up to two years.

## **Germany**

### **Criminal Code (1998)**

#### **Section 130 – Agitation of the People**

1. Whoever, in a manner that is capable of disturbing the public peace:

- a. incites hatred against segments of the population or calls for violent or arbitrary measures against them; or
- b. assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population,

shall be punished with imprisonment from three months to five years.

2. Whoever:

a. with respect to writings (Section 11 subsection 3), which incite hatred against segments of the population or a national, racial or religious group, or one characterised by its folk customs, which call for violent or arbitrary measures against them, or which assault the human dignity of others by insulting, maliciously maligning or defaming segments of the population or a previously indicated group:

- i. disseminates them;
- ii. publicly displays, posts, presents, or otherwise makes them accessible;
- iii. offers, gives or makes accessible to a person under eighteen years; or
- iv. produces, obtains, supplies, stocks, offers, announces, commends, or undertakes to import or export them, in order to use them or copies obtained from them within the meaning of subparagraphs a to c, or facilitate such use by another; or

b. disseminates a presentation of the content indicated in paragraph 1 by radio, shall be punished with imprisonment for not more than three years or a fine.

3. Whoever publicly or in a meeting approves of, denies or renders harmless an act committed under the rule of National Socialism of the type indicated in

Section 220a subsection 1, in a manner capable of disturbing the public peace, shall be punished with imprisonment for not more than five years or a fine.

4. Whoever publicly or in a meeting, violating the dignity of the victims, approves of the National Socialist rule by force and arbitrariness, in a manner capable of disturbing the public peace, shall be punished with imprisonment for not more than three years or a fine.

5. Subsection 2 shall also apply to writings (Section 11 subsection 3) with content such as is indicated in subsections 3 and 4.

6. In cases under subsection 2, also in conjunction with subsection 5, and in cases of subsections 3 and 4, Section 86 subsection 3, shall apply correspondingly.

### **Section 166 – Insulting of faiths, religious societies and organisations dedicated to a philosophy of life<sup>157</sup>**

1. Whoever publicly or through dissemination of writings (Section 11 subsection 3) insults the content of others' religious faith or faith related to a philosophy of life in a manner that is capable of disturbing the public peace, shall be punished with imprisonment for not more than three years or a fine.

2. Whoever publicly or through dissemination of writings (Section 11 subsection 3) insults a church, other religious society, or organisation dedicated to a philosophy of life located in Germany, or their institutions or customs in a manner that is capable of disturbing the public peace, shall be similarly punished.

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### **Section 167 – Disturbing the practice of religion**

1. Whoever:

- a. intentionally and in a gross manner disturbs a religious service or an act of a religious service of a church or other religious society located in Germany; or

157. Interrights Bulletin 19 commented: "For an insult to be punishable under this law 'the manner and content' of the insult must be such that an objective onlooker could reasonably apprehend that the insult would disturb the peace of those who share the insulted belief. (Court of Appeal of Celle, *Neue Juristische Wochenschrift*, 1986, p. 1275.) Moreover, to be convicted, an offender must intend or at least be aware that his or her action constituted an offence. In applying Section 166 to a work of art, the freedom of art as guaranteed by Article 5.3 of the Basic Law must be taken into account. Although the Federal Constitutional Court has not issued a judgment dealing specifically with the freedom of art vis-à-vis the freedom of religious beliefs, various criminal courts have done so. For example, in a 1981 case, the Criminal Court of Appeal of Cologne held that a caricature with words of Maria and Josef, dealing with faecal issues and abortion, did not in all circumstances show hostility to Christians (*Neue Juristische Wochenschrift*, 1982, p. 657). In a 1985 case, the Court of Appeal of Karlsruhe ruled that a printed article that dealt sarcastically with the Last Supper did not constitute an insult. (*Neue Strafrechtszeitung*, 1986, pp. 363ff.) In 1988, the Criminal Court of Bochum held that a leaflet, even if an insult, which addressed 'the Vatican and fascism' and included caricatures, was not of a character to disturb the peace. In considering cases involving religious insult, German courts most probably would not prohibit such displays so long as the viewing was limited to adults who had been informed in advance of the nature and contents of the material."

b. commits insulting mischief at a place dedicated to the religious services of such a religious society,

shall be punished with imprisonment for not more than three years or a fine.

2. Corresponding celebrations of an organisation dedicated to a philosophy of life located in Germany shall be the equivalent of religious services.

### Section 167a – Disturbing a funeral service

Whoever intentionally or knowingly disturbs a funeral service shall be punished with imprisonment for not more than three years or a fine.

## Greece

### Constitution

#### Article 14

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

2. The press is free. Censorship and all other preventive measures are prohibited.

3. The seizure of newspapers and other publications before or after circulation is prohibited.

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

a. an offence against the Christian or any other known religion.

b. an insult against the person of the President of the Republic.

c. a publication which discloses information on the composition, equipment and set-up of the armed forces or the fortifications of the country, or which aims at the violent overthrow of the regime or is directed against the territorial integrity of the State.

d. an obscene publication which is obviously offensive to public decency, in the cases stipulated by law.

5. In all the cases specified under the preceding paragraph, the public prosecutor must, within 24 hours from the seizure, submit the case to the judicial council which, within the next 24 hours, must rule whether the seizure is to be maintained or lifted; otherwise it shall be lifted *ipso iure*. An appeal may be lodged with the Court of Appeals and the Supreme Civil and Criminal Court by the publisher of the newspaper or other printed matter seized and by the public prosecutor.

6. The manner in which full retraction shall be made in cases of inaccurate publications shall be determined by law.

7. After at least three convictions within five years for the criminal acts defined under paragraph 3, the court shall order the definitive ban or temporary suspension of publication of the paper and, in severe cases, shall prohibit the convicted person from practising the profession of journalist as specified by law. The ban or suspension of publication shall be effective as of the date the court order becomes irrevocable.

8. Press offences shall be subject to immediate court hearing and shall be tried as provided by law.

9. The conditions and qualifications requisite for the practice of the profession of journalist shall be specified by law.

10. The law may specify that the means of financing newspapers and periodicals should be disclosed.

## **Criminal Code**

### **Article 198 – Malicious blasphemy**

1. Anyone who insults God in public and with malicious intent, in any way whatsoever, shall incur a prison sentence of up to two years.

2. Anyone who blasphemes in public in circumstances other than those specified in paragraph 1, thereby showing a lack of respect towards God, shall incur a prison sentence of up to three months.

### **Article 199 – Insulting a religion**

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

### **Article 200 – Disrupting a religious assembly**

1. Anyone who deliberately and maliciously attempts to impede or disrupt a religious assembly recognised by the State, during a service or ceremony, shall incur a prison sentence of up to two years.

2. The same penalty shall be applicable to anyone who engages in an unseemly and offensive act in a church or place used for religious assemblies recognised by the State.

### **Article 201 – Insulting the dead**

Anyone who, on his or her own initiative, either desecrates a grave in order to remove a corpse, amputate its limbs or take away its ashes – with the exception of those persons authorised to do so – or engages in an unseemly and offensive act towards the dead or their graves, shall incur a prison sentence of up to two years.

## **Law 927/1979 “on punishing acts or activities aiming at racial discrimination”**

This law criminalises:

a. to wilfully and publicly, either orally or by the press or by written texts or through pictures or any other means, incite to acts or activities which may result in discrimination, hatred or violence against individuals or groups of individuals on the sole grounds of the latter’s racial or national origin or [by virtue of Article 24 of Law 1419/1984] religion; ...

b. to express publicly, either orally or by the press or by written texts or through pictures or any other means offensive ideas against any individual or group of individuals on the grounds of the latter’s racial or national origin or religion.

## **Hungary**

### **Criminal Code**

#### **Paragraph 174 – Violence based on beliefs or origins**

##### *Subparagraph 174A*

Whoever (a) restricts another person by violence or by threats in his freedom of conscience [or] (b) prevents another person from freely exercising his religion by violence or threats, commits a crime, and is punishable by imprisonment extending to three years.

##### *Subparagraph 174B*

1. The person who assaults somebody else because he belongs or is believed to belong to a national, ethnic, racial or religious group, or coerces him with violence or menace into doing or not doing or into enduring something, commits a felony and shall be punishable with imprisonment up to five years.

2. [lists aggravating factors, such as use of arms].

#### **Paragraph 269 – Incitement against a community**

A person who incites to hatred before the general public against (a) the Hungarian nation; (b) any national, ethnic, racial group or certain groups of the population, shall be punishable for a felony offence with imprisonment up to three years.<sup>158</sup>

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158. A proposed amendment to paragraph 269, to punish racist expressions, was adopted by the Hungarian Parliament, but judged unconstitutional by Constitutional Court in May 2004; unamended article still valid.

### Paragraph 269B

[detailed list of symbols which are connected to ideas and events relating to the forceful seizure and dictatorial keeping of power, and therefore represent violence, hate against certain national, ethnic, or religious groups].

### Law on Misdemeanour, paragraph 150 (Article LXIX of 1999)

A fine not exceeding HUF 100 000 may be imposed on whoever causes a public scandal on premises designated for the purposes of the ceremonies of a registered church or desecrates the object of religious worship or an object used for conducting ceremonies on or outside the premises designated for the purposes of ceremonies.

## Iceland

### General Criminal Code

#### Article 124

If anyone disturbs the sanctity of cemeteries or becomes guilty of indecorous treatment of a corpse, this will be subject to fines ... 1) or imprisonment for up to 6 months.\*

The same penalty shall be applied to the indecorous treatment of objects belonging to churches and to be used for ecclesiastical ceremonies.

\*Act 82/1998, Article 47.

#### Article 125

Anyone officially ridiculing or insulting the dogmas or worship of a lawfully existing religious community in this Country shall be subject to fines or [imprisonment for up to 3 months.] Lawsuits shall not be brought except upon the instructions of the Public Prosecutor.\*

\*Act 82/1998, Article 48.

#### Article 233a

Anyone who does by means of ridicule, calumny, insult, threat or otherwise assault [a person or group of persons] on account of their nationality, colour, [race, religion or sexual inclination]\* shall be subject to fines† or imprisonment [for up to 2 years.]‡

\*Act 135/1996, Article 2. 2. †Act 82/1998, Article 126. ‡Act 96/1973, Article 1.

## Ireland

### Constitution

#### Article 40<sup>159</sup>

6.1 The State guarantees liberty for the exercise of the following rights, subject to public order and morality:

- i. The right of the citizens to express freely their convictions and opinions.

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.

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

#### Defamation Act 1961, No. 40

Penalty for printing or publishing blasphemous or obscene libel.

13.1 Every person who composes, prints or publishes any blasphemous or obscene libel shall, on conviction thereof on indictment, be liable to a fine not exceeding 500 pounds or imprisonment for a term not exceeding two years or to both fine and imprisonment or to penal servitude for a term not exceeding seven years.

a. In every case in which a person is convicted of composing, printing or publishing a blasphemous libel, the court may make an order for the seizure and carrying away and detaining in safe custody, in such manner as shall be directed in the order, of all copies of the libel in the possession of such person or of any other person named in the order for his use, evidence upon oath having been previously given to the satisfaction of the court that copies of the said libel are in the possession of such other person for the use of the person convicted.

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159. In *Corway v. Independent Newspapers (Ireland) Ltd* [1999] 4 IR 484, the Supreme Court stated that "the implications of [the constitutional framework] for the crime of blasphemy would need to be worked out in legislation. It is difficult to see how the common law crime of blasphemy, related as it was to an established church and an established religion could survive in such a constitutional framework .... It would appear that the legislature has not adverted to the problem of adapting the common law crime of blasphemy to the circumstances of a modern state which embraces citizens of many different religions and which guarantees freedom of conscience and a free profession and practice of religion." The Supreme Court went on to find that "[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 of what the offence of blasphemy consists. As the Law Reform Commission has pointed out, neither the nor the is clear. The task of defining the crime is one for the legislature, not for the courts. In the absence of legislation and in the present state of the law the Court could not see its way to authorising the institution of a criminal prosecution of blasphemy against the respondents."

b. Upon the making of an order under paragraph (a) of this subsection, any member of the Garda Síochána acting under such order may enter, if necessary by the use of force, and search for any copies of the said libel any building, house or other place belonging to the person convicted or to such other person named in the order and may seize and carry away and detain in the manner directed in such order all copies of the libel found therein.

c. If, in any such case, the conviction is quashed on appeal, any copies of the libel seized under an order under paragraph (a) of this subsection shall be returned free of charge to the person or persons from whom they were seized.

d. Where, in any such case, an appeal is not lodged or the conviction is confirmed on appeal, any copies of the libel seized under an order under paragraph (a) of this subsection shall, on the application of a member of the Garda Síochána to the court which made such order, be disposed of in such manner as such court may direct.

### **Prohibition of Incitement to Hatred Act, 1989**

An act to prohibit incitement to hatred on account of race, religion, nationality or sexual orientation

#### **Section 2**

It shall be an offence for a person:

- to publish or distribute written material,
- to use words, behave or display written material,
  - i. in any place other than inside a private residence, or
  - ii. inside a private residence so that the words, behaviour or material are heard or seen by persons outside the residence, or
- to distribute, show or play a recording of visual images or sounds,

if the written material, words, behaviour, visual images or sounds, as the case may be, are threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred.

In proceedings for an offence under subsection 1, if the accused person is not shown to have intended to stir up hatred, it shall be a defence for him to prove that he was not aware of the content of the material or recording concerned and did not suspect, and had no reason to suspect, that the material or recording was threatening, abusive or insulting.

In proceedings for an offence under subsection 1b, it shall be a defence for the accused person – to prove that he was inside a private residence at the relevant time and had no reason to believe that the words, behaviour or material concerned would be heard or seen by a person outside the residence, or

– if he is not shown to have intended to stir up hatred, to prove that he did not intend the words, behaviour or material concerned to be, and was not aware that they might be, threatening, abusive or insulting.

## **The Censorship of Films Act 1923**

This Act provides for the withholding of a certificate from a blasphemous film.

## **Italy**

### **Criminal Code**

#### **Article 402\* – Insulting the State religion**

Anyone who insults the State religion in public shall be subject to a prison sentence of up to one year.

\*Declared invalid by the Constitutional Court in its judgment No. 508 of 20 November 2000.

#### **Article 403† – Insulting the State religion by insulting individuals**

Anyone who insults the State religion in public by offending those who profess it shall be subject to a prison sentence of up to two years. Anyone who insults the State religion by insulting a minister of the Catholic Church shall be subject to a prison sentence of one to three years.

†Declared invalid by the Constitutional Court in its judgment No. 168 of 18 April 2005, “insofar as it provides for a prison sentence of up to two years, or of one to three years, respectively, for insulting the Catholic religion either by insulting those who profess it or by insulting a minister of religion, rather than a lesser sentence in accordance with Article 406 of the same Code”.

#### **Article 404‡ – Insulting the State religion by offending against property**

Anyone who, in a place of worship, a public place or a place open to the public, insults the State religion by offending against religious property, an object of religion or an object clearly associated with religious practice, shall be subject to a prison sentence of one to three years. Anyone who commits such an offence during a religious service celebrated in a private place by a minister of the Catholic Church shall be subject to the same penalty.

‡The Constitutional Court declared the first paragraph invalid in its judgment No. 329 of 1997, “insofar as it provides for a prison sentence of one to three years, rather than a lesser sentence in accordance with Article 406 of the Criminal Code”.

**Article 405\*\* – Disrupting Catholic religious ceremonies**

Anyone who impedes or disrupts a Catholic service, ceremony or religious practice performed with the assistance of a minister of the Catholic Church, in a place of worship, a public place or a place open to the public, shall be subject to a prison sentence of up to two years. Where such behaviour is coupled with violent or threatening acts towards individuals, it shall be subject to a prison sentence of one to three years.

\*\*Article declared invalid by the Constitutional Court in its judgment No. 327 of 9 July 2002, “insofar as sentences for disrupting Catholic religious services are longer than the sentences stipulated in Article 406 of the Criminal Code for the same acts committed against other religions”.

**Article 406 – Offences against religions recognised by the State**

Anyone who commits one of the offences established under Articles 403, 404 and 405 against a religion recognised by the State shall be punished in accordance with the aforementioned articles, but the sentence shall be reduced.

**Article 724 – Blasphemy and insulting the dead**

Anyone who blasphemes against the Divinity in public, by means of invective or insults, shall be subject to an administrative fine of 100 000 to 600 000 lira. The same penalty shall apply to anyone who publicly insults the dead.

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**Legislative Decree No. 122 of 26 April 1993, converted into Act No. 205 of 25 June 1993 on urgent measures in respect of racial, ethnic and religious discrimination****Section 1 – Discrimination, hatred or violence on racial, ethnic, national or religious grounds**

1. Section 3 of Act No. 654 of 13 October 1975 shall be replaced by the following provisions:

“Section 3.1. Except where the acts in question constitute a more serious offence, the following penalties shall apply for the purposes of implementing Article 4 of the Convention: a) anyone who, by any means whatsoever, disseminates ideas based on racial or ethnic superiority or hatred, or commits or incites others to commit discriminatory acts on racial, ethnic, national or religious grounds, shall be subject to a maximum prison sentence of three years; b) anyone who, by any means whatsoever, commits or incites others to commit acts of violence or acts designed to provoke violence on racist, ethnic, national or religious grounds shall be subject to a prison sentence of six months to four years; 2. [Deleted by the Act]; 3. Any organisation, association, movement or group whose aims

include inciting discrimination or violence on racial, ethnic, national or religious grounds shall be prohibited. Anyone who participates in such an organisation, association, movement or group, or helps it with its activities, shall be subject – solely on account of such participation or the provision of such assistance – to a prison sentence of six months to four years. Anyone who promotes or runs such an organisation, association, movement or group shall be subject – on this account alone – to a prison sentence of one to six years.”

### **Section 3 – Aggravating circumstances**

Where offences carrying a sentence other than life imprisonment are committed for reasons of ethnic, national, racial or religious discrimination or hatred, or for the purpose of facilitating the activities of an organisation, associations, movement or group pursuing these goals, the sentence shall be increased by half.

## **Latvia**

### **Criminal Code (1998)**

#### **Section 78 – Violation of national or racial equality and restriction of human rights**

For a person who commits acts knowingly directed towards instigating national or racial hatred or enmity, or knowingly commits the restricting, directly or indirectly, of economic, political or social rights of individuals or the creating, directly or indirectly, of privileges for individuals based on their racial or national origin, the applicable sentence is deprivation of liberty for a term not exceeding three years or a fine not exceeding 60 times the minimum monthly wage.

For a person who commits the same acts, if they are associated with violence, fraud or threats, or where they are committed by a group of persons, a State official, or a responsible employee of an undertaking (company) or organisation, the applicable sentence is deprivation of liberty for a term not exceeding 10 years.

#### **Section 150 – Violation of equality rights of persons on the basis of their attitudes towards religion**

For a person who commits direct or indirect restriction of the rights of persons or creation of whatsoever preferences for persons, on the basis of the attitudes of such persons towards religion, excepting activities in the institutions of a religious denomination, or commits violation of religious sensibilities of persons or incitement of hatred in connection with the attitudes of such persons towards religion or atheism, the applicable sentence is deprivation of liberty for a term not exceeding two years, or community service, or a fine not exceeding 40 times the minimum monthly wage.

### **Section 151 – Interference with religious ritual**

For a person who commits intentional interference with religious rituals, if such are not in violation of law and are not associated with violation of personal rights, the applicable sentence is community service, or a fine not exceeding 10 times the minimum monthly wage.

### **Section 227 – Causing danger to public safety, order and the health of individuals while performing religious activities**

For a person who acts in the organisation or leadership of a group whose activities, manifested as the preaching of religious doctrine and performing of religious rituals, are associated with causing of harm to public safety and order, to the health of persons or to the rights and interests protected by law of a person, or who participates in such acts, the applicable sentence is deprivation of liberty for a term not exceeding five years or a fine not exceeding 100 times the minimum monthly wage.

## **Liechtenstein**

### **Criminal Code**

#### **Section 126 -Aggravated criminal damage**

1. A person is liable to a term of imprisonment not exceeding two years or to a fine of up to 360 days' pay, if he or she has committed aggravated criminal damage against:

1. an object, which is used for a service or worship in a church or by a religious society located on the territory;
2. a grave, any other burial place, a tombstone or a memorial to the dead, which is in a cemetery or in a place of worship ....

#### **Section 128 – Aggravated theft**

1. A person will be liable to a term of imprisonment not exceeding three years, if he or she committed theft:

1. during a fire, an inundation or in general, during a victim's distress, taking advantage of the victim's state of helplessness;
2. in a place of worship or of an object that is used for a service or worship in a church or by a religious society located on the territory ....

#### **Section 188 – Disparaging of religious precepts**

Whoever publicly disparages or mocks a person or a thing, respectively, being an object of worship or a dogma, a legally permitted rite, or a legally permitted institution of a church or religious society located on the territory in a manner

capable of giving rise to justified annoyance is liable to imprisonment for a term not exceeding six months or to a fine of up to 360 days' pay.

### **Section 189 – Disturbance of the practice of religion**

1. Whoever forcibly or threatening with force precludes or disturbs divine service or an act of divine service of a church or religious society located on the territory is liable to imprisonment for a term not exceeding two years.

2. Whoever commits mischief at a place destined for a legally permitted practice of religion or on the occasion of a legally permitted public divine service or a legally permitted act of divine service or with an object directly destined for a legally permitted divine service of a church or religious society located on the territory in a manner capable of giving rise to justified annoyance is liable to imprisonment for a term not exceeding six months or to a fine of up to 360 days' pay.

### **Section 190 – Desecration of graves**

1. Whoever removes a body or any portion of human remains or the ashes of a deceased person from a place of burial or any interment space, or whoever has abused or has altered the body or the ashes of a deceased person or has desecrated a deceased person's grave, shall be liable to a term of imprisonment not exceeding six months or to a fine of up to 360 days' pay.

2. Whoever removes any ornament from a place of burial or any interment space or memorial of a deceased person shall be liable to a term of imprisonment not exceeding three months or to a fine of up to 180 days' pay.

### **Section 191 – Wilful interference in a funeral**

Whoever wilfully disturbs a funeral service by making noise that causes distress or by other unsuitable behaviour shall be liable to a term of imprisonment not exceeding three months or to a fine of up to 180 days' pay.

### **Section 283 – Racial discrimination**

I. A person shall be punished with imprisonment of up to two years if he or she:

1. publicly incites hatred or discrimination against a person or a group of persons on the basis of race, ethnicity or religion;
2. publicly disseminates ideologies aimed at the systematic disparagement or defamation of members of a race, ethnicity or religion;
3. organises, promotes, or participates in propaganda actions with the same objective;
4. publicly disparages or discriminates against a person or a group of persons on the basis of race, ethnicity or religion in a manner violating

human dignity, by means of spoken words, writing, images, electronically transmitted symbols, gestures, physical violence or any other means;

5. publicly denies, grossly plays down the harm or attempts to justify genocide or other crimes against humanity, by means of spoken words, writing, images, electronically transmitted symbols, gestures, physical violence or any other means;

6. denies a service he or she provides that is meant for the general public to a person or a group of persons on the basis of race, ethnicity or religion;

7. participates as a member in an association whose activities consist of promoting and inciting racial discrimination.

II. A person shall be punished in the same manner, if the person

1. manufactures, imports, stores or distributes, for the purposes of further dissemination, documents, sound or image recordings, electronically transmitted symbols, depictions or other objects of this sort whose content is racial discrimination within the meaning of paragraph I;

2. publicly recommends, exhibits, offers or presents them.

III. Paragraphs I and II do not apply if the propaganda material or the act serves the purpose of art or science, research or education, appropriate reporting on current events or history, or similar purposes.

## Lithuania

### Constitution

#### Article 25

1. Individuals shall have the right to have their own convictions and freely express them.

2. Individuals must not be hindered from seeking, obtaining or disseminating information or ideas.

3. Freedom to express convictions, as well as to obtain and disseminate information, may not be restricted in any way other than as established by law, when it is necessary for the safeguard of the health, honour and dignity, private life or morals of a person, or for the protection of constitutional order.

4. Freedom to express convictions or impart information shall be incompatible with criminal actions – the instigation of national, racial, religious, or social hatred, violence, or

5. discrimination, the dissemination of slander, or misinformation.

6. Citizens shall have the right to obtain any available information which concerns them from State agencies in the manner established by law.

## **Article 26**

1. Freedom of thought, conscience, and religion shall not be restricted.
2. Every person shall have the right to freely choose any religion or faith and, either individually or with others, in public or in private, to manifest his or her religion or faith in worship, observance, practice or teaching.
3. No person may coerce another person or be subject to coercion to adopt or profess any religion or faith.
4. A person's freedom to profess and propagate his or her religion or faith may be subject only to those limitations prescribed by law and only when such restrictions are necessary to protect the safety of society, public order, a person's health or morals, or the fundamental rights and freedoms of others.
5. Parents and legal guardians shall have the liberty to ensure the religious and moral education of their children in conformity with their own convictions.

## **Article 27**

A person's convictions, professed religion or faith may justify neither the commission of a crime nor the violation of law.

## **Article 43**

1. The State shall recognise traditional Lithuanian churches and religious organisations, as well as other churches and religious organisations provided that they have a basis in society and their teaching and rituals do not contradict morality or the law.
2. Churches and religious organisations recognised by the State shall have the rights of legal persons.
3. Churches and religious organisations shall freely proclaim the teaching of their faith, perform the rituals of their belief and have houses of prayer, charity institutions and educational institutions for the training of priests of their faith.
4. Churches and religious organisations shall function freely according to their canons and statutes.
5. The status of churches and other religious organisations in the State shall be established by agreement or by law.
6. The teachings proclaimed by churches and other religious organisations, other religious activities and houses of prayer may not be used for purposes which contradict the Constitution and the law.
7. There shall not be a State religion in Lithuania.

## **Criminal Code**

### **Paragraph 170**

Any person who by public statements orally, in writing or through mass media, mocks, expresses contempt, or incites hatred or discrimination against a group of people or an individual belonging to such group on account of their sex, sexual orientation, race, nationality, language, origin, social status, religion, conviction or belief, shall be punished by fine or restriction of freedom, or arrest, or imprisonment up to two years.

Any person who publicly incites violence or use of deadly physical force against a group of people or an individual belonging to such group on account of their sex, sexual orientation, race, nationality, language, origin, social status, religion, conviction or belief, or provides financial or other kind of material support for such acts, shall be punished by a fine or restriction of freedom, or arrest, or imprisonment up to three years.

### **Paragraph 171**

Prohibition of disturbance of religious services or celebrations of state-recognised religious communities or associations; this paragraph provides for punishment by public works, fine, restriction of freedom or arrest.

### **Law of the Republic of Lithuania of 18 November 1997 on supplementing the Code of Administrative Violations by articles 214.12, 214.13, abolition of Article 214.1 and amendment of articles 224, 259.1, 320.33**

This law introduced definitions of unlawful conduct related to public advocacy of national, racial or religious discord.

#### **Article 214.12 – Production, storage or distribution of information products that advocate national, racial or religious discord**

The production or storage with a purpose of distribution, and the distribution of, printed, visual, audio or other products that advocate national, racial or religious discord incurs a fine from 1000 to 10 000 Litas either with confiscation of such products being produced, stored or distributed and of the means essentially used for production of such products, or without confiscation of the means of production.

#### **Article 214.13 – Establishment of an organisation that advocates national, racial or religious discord or participation in activities of such an organisation**

Establishment of an organisation that advocates national, racial or religious discord, or participation in activities of such an organisation, incurs a fine from 3 000 to 10 000 Litas.

The same conduct performed by a person who had previously been punished by an administrative fine for the offences foreseen in Part 1 of this article incurs a fine from 10 000 to 20 000 Litass.

## **Luxembourg**

### **Criminal Code**

#### **Article 144**

Anyone who insults an object of religion by means of actions, words, gestures or threats, either in a place of worship or a place ordinarily used for worship or during the public ceremonies of the religion in question, shall be subject to a prison sentence of 15 days to six months and a 26- to 500-franc fine.

#### **Article 145**

The same penalties shall apply to anyone who, by means of actions, words, gestures or threats, insults a minister of religion in the exercise of his or her ministry. Assaulting a minister of religion shall carry a prison sentence of two months to two years and a 50- to 500-franc fine.

#### **Article 454 (Act of 28 November 2006)**

Any distinction between individuals on account of their origin, skin colour, gender, sexual orientation, civil status, age, state of health, disability, morals, political or philosophical opinions or trade union activities, or their actual or supposed membership or non-membership of a particular ethnic group, nation, race or religion, shall constitute discrimination.

Any distinction between legal entities or groups or communities of people on account of their origin, skin colour, gender, sexual orientation, civil status, age, state of health, disability, morals, political or philosophical opinions or trade union activities of some or all of their members, or their actual or supposed membership or non-membership of a particular ethnic group, nation, race or religion, shall also constitute discrimination.

#### **Article 455 (Act of 19 July 1997)**

The forms of discrimination covered in Article 454 and committed against an individual, a legal entity or a group or community of people shall carry a prison sentence of eight days to two years and a 251- to 25 000-euro fine, or one of these penalties only, where they consist in:

1. (Act of 21 December 2007) refusing to supply or allow the use of, and/or access to, a good;
2. (Act of 21 December 2007) refusing to supply and/or allow access to a service;

3. (Act of 21 December 2007) making the supply of, and/or access to, a good or service conditional upon one of the aspects covered in Article 454, or practising any other form of discrimination in relation to the supply of a good or service, on account of one of the aspects covered in Article 454;
4. stating in an advertisement one's intention to refuse to supply a good or service, or to practise discrimination in supplying a good or service, on account of one of the aspects covered in Article 454;
5. hindering the normal exercise of any kind of economic activity;
6. refusing to recruit a person, taking disciplinary action or dismissing a person;
7. (Act of 28 November 2006) making access to employment, any kind of vocational training, working conditions or membership of or involvement in a workers' or employers' organisation subject to one of the aspects covered in Article 454 of the Criminal Code.

#### **Article 456 (Act of 19 July 1997)**

The forms of discrimination covered in Article 454 and committed against an individual, a legal entity or a group or community of people by a depository of public authority or a person asked to perform a public service, in the course of his or her duties or responsibilities or in connection with them, shall carry a one- to three-month prison sentence and a 251- to 37 500-euro fine, or one of these penalties only, where they consist in:

1. denying enjoyment of a statutory right;
2. hindering the normal exercise of any kind of economic activity.

#### **Article 457 (Act of 19 July 1997)**

The provisions of Articles 455 and 456 shall not be applicable to:

1. differential treatment on account of a person's state of health, where it pertains to measures to prevent, or insurance cover for, the risks of mortality, bodily injury, incapacity for work or invalidity;
2. differential treatment on account of a person's state of health or disability, where it consists in refusing to recruit the person concerned or dismissing him or her on the ground of his or her medically certified unfitness;
3. differential treatment on the ground of nationality in the context of recruitment, where civil service laws or regulations, regulations on the exercise of certain occupations or labour law provisions stipulate that possession of a particular nationality is a prerequisite for holding a given job or exercising a given occupation;
4. differential treatment on the ground of nationality in the context of entry into the country, residence or voting rights, where the laws or regulations pertaining

thereto stipulate that possession of a particular nationality is a prerequisite for entry into the country, residence or voting rights;

5. [repealed] (Act of 28 November 2006).

**Article 457-1 (Act of 19 July 1997)**

A prison sentence of eight days to two years and a 251- to 25 000-euro fine, or one of these penalties only, shall be imposed on:

1. anyone who, through utterances, slogans or threats in public places or meetings, by way of written or printed material, drawings, engravings, paintings, emblems, images or any other medium of the written or spoken word or image sold or distributed, presented for sale or displayed in public places or meetings, either by means of placards or posters exposed to public view, or by any means of audiovisual communication, incites the acts provided for in Article 455 or hatred or violence towards an individual, a legal entity, a group or a community on account of one of the aspects covered in Article 454;

2. anyone belonging to an organisation whose aims or activities involve the commission of one of the acts covered in paragraph 1 of this article;

3. anyone who prints or has printed, manufactures or has manufactured, holds, transports or has transported, imports or has imported, exports or has exported, distributes in Luxembourg, sends from Luxembourg, deposits with the post office or another professional responsible for postal distribution in Luxembourg, or has transit through Luxembourg, written or printed material, drawings, engravings, paintings, posters, photographs, motion pictures, emblems, images or any other medium of the written or spoken word or image, of a kind to incite the acts covered in Article 455, hatred or violence towards an individual, a legal entity, a group or a community, on account of one of the aspects covered in Article 454.

In any event, the aforementioned objects shall be confiscated.

**Article 457-2 (Act of 19 July 1997)**

Where the offences established in Article 453 are committed on account of deceased persons' actual or supposed membership or non-membership of a particular ethnic group, nation, race or religion, they shall carry a prison sentence of six months to three years and a 251- to 37 500-euro fine, or one of these penalties only.

**Article 457-3 (Act of 19 July 1997)**

Anyone who, through utterances, slogans or threats in public places or meetings, by way of written or printed material, drawings, engravings, paintings, emblems, images or any other medium of the written or spoken word or image sold or distributed, presented for sale or displayed in public places or meetings, either by means of placards or posters exposed to public view, or by any

means of audiovisual communication, disputes, minimises, justifies or denies the existence of one or more crimes against humanity or war crimes as defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945 and committed either by members of an organisation declared to be criminal under Article 9 of the said Charter or by a person found guilty of such crimes by a Luxembourg, foreign or international court shall be subject to a prison sentence of eight days to six months and a 251- to 25 000-euro fine, or one of these penalties only.

Anyone who, by one of the means listed in the preceding paragraph, disputes, minimises, justifies or denies the existence of one or more genocides as defined in the Punishment of Genocide Act of 8 August 1985 and recognised by a Luxembourg or international court or authority shall be subject to the same penalties, or one of those penalties only.

#### **Article 457-4 (Act of 19 July 1997)**

In the cases provided for in Articles 455, 456, 457-1, 457-2 and 457-3, offenders may also be deprived of the exercise of their rights, in accordance with Article 24.

## **Malta**

### **Constitution**

#### **Section 2 – State religion**

1) The religion of Malta is the Roman Catholic Apostolic Religion. 2) The authorities of the Roman Catholic Apostolic Church have the duty and the right to teach which principles are right and which are wrong. 3) Religious teaching of the Roman Catholic Apostolic Faith shall be provided in all State schools as part of compulsory education.

### **Criminal Code**

#### **Paragraph 82A.1**

Whosoever uses any threatening, abusive or insulting words or behaviour, or displays any written or printed material which is threatening, abusive or insulting, or otherwise conducts himself in such a manner, with intent thereby to stir up racial hatred or whereby racial hatred is likely, having regard to all the circumstances, to be stirred up shall, on conviction, be liable to imprisonment for a term from six to eighteen months. Racial hatred is defined in (2) as hatred against a group of persons in Malta defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.

## **Press Act 1974, Article 6**

Whosoever by means of the publication or distribution in Malta of printed matter, or by means of any broadcast shall threaten, insult, or expose to hatred, persecution or contempt, a person or group of persons because of their race, creed, colour, nationality, sex, disability or national or ethnic origin shall be liable on conviction to imprisonment for a term not exceeding three months and to a fine.

## **Moldova**

### **Constitution (1994)**

#### **Article 31 – Freedom of conscience**

1. The freedom of conscience is guaranteed, and its manifestations should be in spirit of tolerance and mutual respect.
2. The freedom of religious worship is guaranteed and religious bodies are free to organise themselves according to their own statutes under the rule of law.
3. In their mutual relationships religious cults are forbidden to use, express or incite to hatred or enmity.
4. Religious cults are autonomous vis-à-vis the State and shall enjoy the latter's support, including that aimed at providing religious assistance in the army, in hospitals, prisons, homes for the elderly and orphanages.

#### **Article 32 – Freedom of opinion and expression**

1. All citizens are guaranteed the freedom of opinion as well as the freedom of publicly expressing their thoughts and opinions by way of word, image or any other means possible.
2. The freedom of expression may not harm the honour, dignity or rights of other people to have and express their own opinions or judgments.
3. The law shall forbid and prosecute all actions aimed at denying and slandering the State or the people. Likewise shall be forbidden and prosecuted the instigations to sedition, war, aggression, ethnic, racial or religious hatred, the incitement to discrimination, territorial separatism, public violence or other actions threatening constitutional order.

## **Criminal Code**

### **Article 346 – Actions deliberately aiming to foment national, racial or religious discord or hatred**

Deliberate actions or public statements spread by means of the mass media, whether printed or electronic, with the aim of fomenting national, racial or religious discord or hatred, attacking national honour and dignity, restricting directly or indirectly the rights of citizens or giving preference, directly or indirectly, to

certain citizens on the basis of their national, racial or religious affiliation, are to be punished by a fine of 250 days' pay and/or up to three years' imprisonment.

### **Press Law, Article 4 – Freedom of expression and the limitation of publicity**

1. Periodicals and press agencies can publish, according to their own discretion, any kind of materials and information, except: a) materials that contain disrespect and defamation against the state and people, urging a war of aggression, national, racial or religious hatred, inciting discrimination, territorial separatism or public violence, as well as other manifestations that violate the present constitutional regime.

## **Monaco**

### **Criminal Code**

#### **Article 238**

Anyone who insults a religious object by means of words or actions, either in a place of worship or a place used for worship at the time or during a religious ceremony performed elsewhere, or insults a minister of religion in the course of his or her duties, shall be subject to a 2 400- to 75 000-franc fine and a prison sentence of 15 days to six months.

### **Freedom of Public Expression Act No. 1.299 of 15 July 2005 (Official Gazette, 2005-07-22, No. 7713, pp. 1426-1436)**

#### **Section 16**

A five-year prison sentence and the fine stipulated in Article 26.4 of the Criminal Code, or one of these penalties only, shall be imposed on anyone who, by one of the means listed in the preceding section, directly incites one of the following offences, where that incitement is not acted upon:

1. intentional homicide, intentional assault causing bodily injury or sexual assault;
2. theft, extortion or intentional destruction or damage putting people at risk;
3. acts of terrorism or attempts to justify such acts.

The same penalties shall apply to anyone who, by one of the means listed in Section 15, incites hatred or violence towards a person or group of people on account of their origin, their membership or non-membership of a particular ethnic group, nation, race or religion or their actual or supposed sexual orientation.

In the event of a conviction for one of the offences covered in the preceding paragraph, it may additionally be ordered that the decision handed down be displayed or disseminated at the offender's expense, whether in full, in part or

in the form of a press release. The victim's identity may be included only with the agreement of the latter or of his or her legal representative or beneficiaries.

#### **Section 24**

Defamation committed, by the same means, against an individual shall carry a prison sentence of one month to one year and the fine stipulated in Article 26.3 of the Criminal Code, or one of these penalties only.

Defamation committed, by the same means, against a person or a group of people on account of their actual or supposed membership or non-membership of a particular ethnic group, nation, race or religion, or their actual or supposed sexual orientation, shall carry a prison sentence of one month to one year and the fine stipulated in Article 26.3 of the Criminal Code, or one of these penalties only.

In the event of a conviction for one of the offences covered in the present section, it may additionally be ordered, in accordance with the conditions laid down in Section 16, that the decision handed down be displayed or disseminated, whether in full, in part or in the form of a press release.

#### **Section 25**

Insults delivered, by the same means, against the bodies or persons designated in sections 22 and 23 of the present Act shall carry a prison sentence of six days to six months and the fine stipulated in Article 26.3 of the Criminal Code, or one of these penalties only.

Unprovoked insults delivered in the same way against individuals shall carry a prison sentence of six days to two months and the fine stipulated in Article 26.2 of the Criminal Code, or one of these penalties only.

Insults delivered, by the same means, against a person or group of people on account of their origin, their actual or supposed membership or non-membership of a particular ethnic group, nation, race or religion, or their actual or supposed sexual orientation, shall carry a prison sentence of six days to six months and the fine stipulated in Article 26.3 of the Criminal Code, or one of these penalties only.

In the event of a conviction for one of the offences covered in the present section, it may additionally be ordered, in accordance with the conditions laid down in Section 16, that the decision handed down be displayed or disseminated, whether in full, in part or in the form of a press release.

#### **Section 43**

Defamation or insults against a public officer, a depositary or agent of public authority, a citizen asked to perform a public service or hold public office on a temporary or permanent basis, a minister of one of the state-funded religions,

or a witness on account of his or her testimony, shall be prosecuted only upon a complaint lodged by the person concerned or, as appropriate, by the Minister of State, the Archbishop, the Director of the Judiciary or the Mayor.

#### **Section 44**

Defamation or insults against an individual shall be prosecuted only upon a complaint lodged by the person defamed or insulted.

However, the prosecuting authorities may automatically bring a prosecution where a person or a group of people are defamed or insulted on account of their origin, their membership or non-membership of a particular ethnic group, nation, race or religion, or their actual or supposed sexual orientation.

### **Montenegro**

#### **Constitution**

##### **Article 43**

Any incitement or encouragement of national, racial, religious and other inequality, and incitement and fomenting of national, racial, religious and other hatred or intolerance, shall be unconstitutional and punishable.

#### **Criminal Code**

##### **Article 161 – Infringement of freedom of confession of religion and performance of religious rites**

1. Anyone who prevents or restricts freedom of confession or performance of religion shall be sentenced to a fine or imprisonment not exceeding two years.
2. Anyone who prevents or disturbs the performance of religious rites shall also be sentenced to the punishment referred to in paragraph 1 of this Article.
3. Anyone who coerces others to declare their religious beliefs shall be sentenced to a fine or imprisonment not exceeding one year.
4. A person acting in an official capacity who commits an act referred to in paragraphs 1 to 3 of this Article shall be sentenced to imprisonment not exceeding three years.

##### **Article 370 – Causing national, race and religious hatred, divisions and intolerance**

Anyone who causes and spreads national, religious or race hatred, divisions or intolerance among people, national minorities or ethnic groups living in Montenegro, shall be punished by imprisonment for a term of six months to five years.

If an act under paragraph 1 of this article is done by coercion, maltreatment, endangering of safety, exposure to mockery of national, ethnic or religious symbols, by damaging another person's goods, or by desecration of monuments, memorial-tablets or tombs, the offender shall be punished by imprisonment for a term of one to eight years.

Anyone who commits an act referred to in paragraphs 1 and 2 of this article by abusing his/her position or authority, or if – as a result of these acts – riot or violence occurs, or other severe consequences for the communal life of people, national minorities or ethnic groups living in Montenegro, shall be punished for an act under paragraph 1 of this article by imprisonment of one to eight years, and for an act under paragraph 2 by imprisonment of two to ten years.

## **The Netherlands**

### **Criminal Code**

#### **Article 137**

##### *Article 137c*

1. 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.

2. If the offence is committed by a person who acts in a professional or habitual manner or by two or more persons who act in unison, a term of imprisonment of not more than two years will be imposed or a fine of the fourth category.

This provision entered into force on 16 July 1934. It has not been changed since November 2003. The renewed provision entered into force on 1 February 2004.

##### *Article 137d*

1. Any person who verbally or by means of written or pictorial material publicly incites hatred against or discriminating of other persons or violence against the person or the property of others on account of their race, religion, convictions, sex, heterosexual or homosexual preference 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.

2. If the offence is committed by a person who acts in a professional or habitual manner or by two or more persons who act in unison, a term of imprisonment of not more than two years will be imposed or a fine of the fourth category.

3. This provision entered into force on 16 July 1934. It has not been changed since November 2003. The renewed provision entered into force on 1 February 2004.

#### *Article 137e*

1. Any person who for reasons other than the provision of factual information:
  - a. makes public an utterance which he knows or can reasonably be expected to know is insulting to a group of persons on account of their race, religion or convictions, heterosexual or homosexual preference, or physical, mental or intellectual disability, or which incites hatred against or discrimination of other persons or violence against the person or property of others on account of their race, religion or convictions, heterosexual or homosexual preference or physical, mental or intellectual disability;
  - b. distributes any object which he knows or can reasonably be expected to know contains an utterance, or has in his possession any such object with the intention of distributing it or making the said utterance public; shall be liable to a term of imprisonment not exceeding six months or to a third-category fine.
2. If the offence is committed by a person who acts in a professional or habitual manner or by two or more persons who act in unison, a term of imprisonment of not more than one year will be imposed or a fine of the fourth category.
3. If the offender commits any of the offences defined in this article in the course of his profession within five years of a previous conviction for such an offence having become final, he may be disqualified from pursuing that profession.

This provision entered into force on 16 July 1934. It has not been changed since November 2003. The renewed provision entered into force on 1 February 2004.

#### **Article 146**

A person by whom, by creating disorder or by making noise, either a lawful public gathering intended to profess a religion or a belief, or a lawful ceremony for the professing of a religion or a belief, or a lawful funeral service is intentionally disturbed, is liable to a term of imprisonment of not more than two months or a fine of the second category.

This provision entered into force on 1 September 1886. It has not been changed since 1984.

### Article 147

A term of imprisonment of not more than three months or a fine of the second category shall be imposed upon:

1. a person who publicly, either orally or in writing or by image, offends religious sensibilities by malign blasphemies;
2. a person who ridicules a minister of religion in the lawful execution of his duties;
3. a person who makes derogatory statements about objects used for religious celebration at a time and place at which such celebration is lawful.

### Article 147a

1. A person who disseminates, publicly displays or posts written matter or an image containing statements that offend religious sensibilities by reason of their malign and blasphemous nature, or who has such in stock to be disseminated, publicly displayed or posted, is liable to a term of imprisonment of not more than two months or a fine of the second category, where he knows or has serious reason to suspect that the written matter or the image contains such statements.

2. The punishment in section 1 is also applicable to a person who, with like knowledge or like reason to suspect, publicly utters the contents of such written matter.

This provision entered into force on 16 July 1934. It has not been changed since 1984.

### Article 429bis

A person who, in a place visible from a public road, places or fails to remove words or images that offend religious sensibilities by reason of their malign and blasphemous nature is liable to a term of detention of not more than one month or a fine of the second category.

This provision entered into force on 1 December 1932. It has not been changed since 1984.

### Additional information

Fine of the 1st category	€335
Fine of the 2nd category	€3 350
Fine of the 3rd category	€6 700
Fine of the 4th category	€6 750
Fine of the 5th category	€67 000
Fine of the 6th category	€670 000

Source: Article 23, 4th paragraph, Penal Code

## Norway

### Criminal Code

#### Paragraph 135a

Any person who wilfully or through gross negligence publicly utters a discriminatory or hateful expression shall be liable to fines or imprisonment for a term not exceeding three years. An expression that is uttered in such a way that it is likely to reach a large number of persons shall be deemed equivalent to a publicly uttered expression, cf. Section 7, No. 2. The use of symbols shall also be deemed to be an expression. Any person who aids and abets such an offence shall be liable to the same penalty.

A discriminatory or hateful expression here means threatening or insulting anyone, or inciting hatred or persecution of or contempt for anyone because of his or her

- a. skin colour or national or ethnic origin,
- b. religion or life stance, or
- c. homosexuality, lifestyle or orientation.

#### Paragraph 138

Any person who causes or is accessory to causing the unlawful prevention or interruption of a public function, public religious meeting, ecclesiastical act, public instruction or teaching in schools, an auction or a public meeting called for a common purpose, shall be liable to fines or imprisonment for a term not exceeding six months.

#### Paragraph 142<sup>160</sup>

Any person who by word or deed publicly insults or in an offensive or injurious manner shows contempt for any creed whose practice is permitted in the realm or for the doctrines or worship of any religious community lawfully existing here, or who is accessory thereto, shall be liable to fines or to detention or imprisonment for a term not exceeding six months.

A prosecution will only be instituted when the public interest so requires.

160. Interrights Bulletin 19 noted: "However, this provision has not been applied by the courts since 1936, when an author, Arnulf Øverland, was acquitted under this provision. More recently, several Muslim leaders brought a lawsuit against the Norwegian publisher of *Satanic Verses*, but withdrew it, apparently in recognition of the fact that they had virtually no chance of success. Indeed, in Norway, the abolition of Section 142 is being debated. The removal of that section from the criminal code is suggested in a report commissioned by the Norwegian Department of Culture in 1993 entitled 'New Threats against Freedom of Information in the Nordic Countries – Diagnosis and Suggestions'. The Report suggests that 'this law implies an unacceptable encroachment on freedom of expression'."

## **Poland**

### **Constitution**

#### **Article 13 – Political pluralism**

Political parties and other organisations whose programmes are based upon totalitarian methods and the modes of activity of Nazism, fascism and communism, as well as those whose programmes or activities sanction racial or national hatred, ... shall be forbidden.

#### **Article 35 – Identity of national and ethnic minorities**

The Republic of Poland shall secure to Polish citizens belonging to national or ethnic minorities the freedom to maintain and develop their own language, to maintain customs and traditions and to develop their own culture. National and ethnic minorities shall have the right to establish educational and cultural institutions, and institutions designed to protect religious identity, and to participate in the resolution of matters connected with their cultural identity.

### **Criminal Code (1997)**

#### **Article 194 – Offences against freedom of conscience and religion**

Whoever restricts another person from exercising the rights vested in the latter, for the reason of this person's affiliation to a certain faith or their religious indifference shall be subject to a fine, or a sentence of restriction of liberty or deprivation of liberty for up to two years.

#### **Article 195**

1. Whoever maliciously interferes with a the public performance of a religious ceremony of a church or another religious association with regulated legal status shall be subject to a fine, or a sentence of restriction of liberty or deprivation of liberty for up to two years.

2. The same punishment shall be imposed on anyone who maliciously interferes with a funeral, mourning ceremonies or rites.

#### **Article 196**

Anyone found guilty of offending religious feelings through public calumny of an object or place of worship is liable to a fine, restriction of liberty or a maximum two-year prison sentence.

#### **Article 256 – Promotion of fascism or other totalitarian system**

An offence is committed by anyone who promotes a fascist or other totalitarian system of state or who incites hatred based on national, ethnic, race or religious differences or for reason of lack of any religious denomination.

Subject to a fine, or the penalty of deprivation of liberty for up to two years.

**Article 257 – Publicly insulting group of people or an individual person by reason of their national, ethnic or racial affiliation**

An offence is committed by anyone who publicly insults a group within the population or a particular person because of his national, ethnic, race or religious affiliation or because of his lack of any religious denomination or for these reasons breaches the personal inviolability of another individual: punishable by imprisonment for up to three years.

**Broadcasting Act of 29 December 1992**

Article 18, paragraph 2, states that programmes or other broadcasts shall respect the religious beliefs of the public and especially the Christian system of values.

**Portugal**

**Criminal Code (Law No.°65/98 of 2 September 1998)**

**Article 240 – Racial or religious discrimination**

2. Anyone who, in a public assembly, in a writing intended to be divulged or by any means of mass communication:

a. provokes acts of violence against a person or a group of persons because of his race, colour, ethnic or national origin or religion; or

b. defames or insults a person or group of persons because of his race or ethnic or national origin or religion, especially through the negation of war crimes or of crimes against peace and humanity, intending to incite to racial or religious discrimination or to encourage it, is punishable with imprisonment from six months to five years.

**Article 251 – Slander because of religious belief**

1. Anyone who publicly offends or derides a person because of his religious belief or function, in a manner sufficient to breach the peace, is punishable with imprisonment up to one year or a fine up to 120 days' pay.

2. The same penalty applies to anyone who desecrates a place or object of cult of religious veneration in a manner sufficient to breach the peace.

**Article 252 – Impeachment, perturbation or slander of an act of a cult**

Anyone who publicly vilifies or derides an act of a cult or religion is punishable with imprisonment up to one year or with a fine up to 120 days' pay.

## **Romania**

### **Constitution**

#### **Article 30**

1. Freedom of expression of thoughts, opinions or beliefs and freedom of any creation by words, in writing, in pictures, by sounds or other means of communication in public are inviolable.
2. Any defamation of the country and the nation, any instigation to a war of aggression, to national, racial, class or religious hatred, any incitement to discrimination, territorial separatism or public violence, as well as any obscene conduct contrary to morality shall be prohibited by law.

### **Criminal Code**

#### **Article 246**

1. The hindrance or disruption of the freedom of exercising of any religion that is organised and functions according to the law is punished with one to six months' jail sentence or with a day-fine.
2. The same sentence is given for the deed of forcing a person by constraint to participate in the religious service of any religion or to perform a religious act connected with the exercise of a religion.

#### **Article 247**

The desecration by any means of a grave, a monument or a funerary urn of a dead body is punished with strict jail sentence from one to five years or with day-fines.

### **Law No. 489/2006 on religious freedom and the general regime of religions in Romania**

This law guarantees, in articles 1 and 2, freedom of thought, conscience and religion, according to the Constitution and the international treaties to which Romania is a party; it sets forth that no one can be prevented from gaining or exercising rights recognised by the said law, nor can one be constrained, put under surveillance or put into a state of inferiority due to one's faith or affiliation to a group, religious association or religion, for exercising religious freedom under the conditions provided by this law. It also provides that religious freedom includes the liberty of any person to manifest one's faith individually or collectively, privately or in public, by religion, education, religious practices and performance of rites, as well as the liberty of changing one's faith, and that the freedom of displaying one's faith cannot be the object of any type of restraints other than those provided by law which constitute necessary measures in a

democratic society for public security, order protection, health, public morality or protection of the rights and fundamental liberties of the human being.

**Law No. 48 of 16 January 2002 for approval of Government Ordinance No. 137/2000 regarding the prevention and punishment of every form of discrimination**

**Article 19**

According to this ordinance, it is a minor offence, unless the deed falls under the sentence of the criminal law, for any conduct to be displayed in public with a character of nationalist-chauvinist propaganda, of instigation to racial or national hatred, or that type of behaviour with the purpose or aim of affecting the dignity or creating an atmosphere that is intimidating, hostile, degrading, humiliating or outrageous, directed against a person, a group of people or a community and connected with their affiliation to a certain race, nationality, ethnic group, religion, social or non-favoured category or their beliefs, sex or sexual orientation.

**Emergency Ordinance No. 31 of 13 March 2002 on banning organisations and symbols with fascist, racist or xenophobic character and banning promotion of the religion of the people guilty of committing crimes against peace and humanity**

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**Article 1**

For the prevention and control of incitement to national, racial or religious hatred, discrimination and the perpetration of crimes against peace and humanity, the present ordinance regulates the banning of organisations and symbols with fascist, racist or xenophobic character and the banning of promotion of the religion of the people guilty of committing crimes against peace and humanity.

It allows the disseminating, selling or manufacturing (or depositing for the purpose of disseminating) of the mentioned symbols, as well as their public use, only if these are for the purpose of art, science, research or education.

**Law on Radio and Television Broadcasting, 1992**

**Article 2**

1. Prohibits broadcasts that are prejudicial to an individual's "dignity, honour, private life or public image." 2. Prohibits "defamation of the country and of the nation, instigation to a war of aggression, national, racial, class or religious hatred, incitement to discrimination, territorial separatism, or public violence."

## **Article 39**

Violations of Article 2.1 are punishable by up to five years' imprisonment and of Article 2.2 by up to seven years' imprisonment.

## **Russian Federation**

### **Constitution (adopted on 12 December 1993)**

#### **Article 13**

5. The establishment and activities of public associations whose goals and activities are aimed at the forcible changing of the basis of the constitutional order and at violating the integrity of the Russian Federation, at undermining its security, at creating armed units and at instigating social, racial, national and religious strife shall be prohibited.

#### **Article 19**

2. The State guarantees the equality of human and civil rights and freedoms regardless of sex, race, nationality, language, origin, material and official status, place of residence, attitude to religion, convictions, membership of public associations, or other circumstances. All forms of limitations of human rights on social, racial, national, language or religious grounds shall be prohibited.

#### **Article 29**

2. Propaganda or agitation that arouses social, racial, national or religious hatred and hostility shall be prohibited. Propaganda of social, racial, national, religious or linguistic supremacy shall also be prohibited.

### **Federal Law on freedom of conscience and religious associations (26 September 1997, as amended in 2002)**

#### **Article 3**

6. Prevention of exercise of rights to freedom of conscience and faith, including that associated with violence against the person, the intentional hurting of feelings of citizens in connection with their attitude to religion, propaganda of religious supremacy, the destruction of or damage to property or a threat of committing such actions shall be prohibited and prosecuted in accordance with the Federal Law. Conducting public events or putting up texts and images that may hurt the religious feelings of citizens close to projects of religious worship shall be prohibited.

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**Federal Law on the basic guarantees of electoral rights and right to participate in referenda of the citizens of the Russian Federation (12 June 2002, as amended in 2006)**

**Article 56 – Limitations during conduct of an election campaign and agitation on the questions of a referendum**

Agitation that arouses social, racial, national or religious hostility, humiliating national dignity, propagating exclusiveness, superiority or deficiency of citizens on grounds of their attitude to religion, or on social, racial, national, religious or language grounds, and also agitation during the conduct of which are propagated and publicly demonstrated Nazi attributes or symbols, or attributes and symbols that are similar to Nazi attributes and symbols to the extent where they may be confused, shall be prohibited.

**Penal Code (16 June 1996, as amended in 2006)**

**Article 148 – Obstruction of the exercise of the right of liberty of conscience and religious liberty**

Illegal obstruction of the activity of religious organisations or of the performance of religious rites shall be punishable by a fine of up to 200 minimum wages, or in the amount of the wage or salary, or any other income of the convicted person for the period of up to one year, compulsory works for a term of up to one year, or arrest for a term of up to three months.

**Article 239 – Organisation of groups that encroach on the person and the rights of citizens**

This article penalises the setting up of a religious or voluntary association whose activities involve violence against citizens or inducement to commit other unlawful acts, specifically those linked to the incitement of racial discord and enmity, and the leading of such a group, taking part in its activities or propagating of aforementioned actions.

**Article 282 – Arousing hatred or hostility, and humiliating human dignity**

Penalises any actions directed at instigating national, racial or religious hatred, belittling national dignity, as well as the propagation of exclusiveness, superiority or deficiency of citizens because of their attitude to a religion, or their national or racial affiliation, if such behaviour is committed in public or using mass media.

**Article 282.1 – Organisation of an extremist community**

This article penalises the organisation of an extremist community, that is, a group organised to prepare or commit, on grounds of ideological, political, racial, national or religious hatred or hostility, or on grounds of hatred or hostility to

any social group, such crimes, in particular, as illegal obstruction of the activity of religious organisations or of the performance of religious rites, arousing racial, national or religious hatred or hostility (articles 148 and 282 of the Penal Code), and penalises also the leading of such a group and taking part in it.

### **Code on Administrative Violations (30 December 2001, as amended in 2006)**

#### **Article 5.26 – Breach of the law on freedom of conscience, freedom of religion and religious associations**

Provides administrative responsibility (a fine) for obstruction of the exercise of the right of freedom of conscience and religious freedom, including adoption of religious or other beliefs or rejection of them, entry to a religious association or secession from one; for hurting the religious feelings of citizens or desecration of their venerated objects, signs and emblems associated with their world-view.

## **San Marino**

### **Criminal Code (1974)**

#### **Article 260 – Religious insult**

Whoever desecrates the symbols or the objects of cult or worship of a religion which is not contrary to morals or publicly mocks the acts of a cult is liable to first-degree imprisonment.

The same penalty is applicable to attacks on the honour or prestige of a priest in or due to the exercise of his functions.

Whoever desecrates the sacred relics of San Marino is liable to second-term imprisonment.

#### **Article 261 – Violation of freedom of religion**

Whoever by violence or threat prevents anyone from practising or promoting their religious beliefs or from taking part in private or public cult is liable to second-degree imprisonment.

#### **Article 262 – Interference with religious ceremonies**

Whoever hinders or interferes with religious rituals, ceremonies or processions which are being carried out with the assistance of a priest is liable to first-degree imprisonment.

If the offence is committed by violence or threat, the penalty is increased by one degree.

### **Article 267 – Blasphemy or contempt for the deceased**

Whoever publicly blasphemes is liable to reprehension or a fine of days of first degree.

Whoever publicly expresses contempt for the deceased is liable to the same penalty, at the request of the close relatives.

### **Former Criminal Code, Article 325 (repealed in 1974)**

Whoever through words or acts mocks or scorns in any manner a ceremony of the Roman Catholic Church is liable to a term of imprisonment from one to three months, or to a fine of 50 to 100 liras, or to a more severe penalty should the contempt degenerate into interference foreseen in the previous article or into a more serious offence.

## **Serbia**

### **Criminal Code**

#### **Article 134**

Whoever provokes or fans national, racial or religious hatred, discord or intolerance among the nations and national minorities living in the Federal Republic of Yugoslavia will be punished by imprisonment of one to five years. If such an offence has been committed by coercion, maltreatment, threat to safety, exposure to derision of national, ethnic or religious symbols, damage to belongings of others, or desecration of shrines, memorials and graves, the perpetrator will be punished by a prison term of one to eight years.

Whoever commits this offence by abuse of official position or powers or if, as a result of these offences, disorders, violence or other serious consequences have affected the communal life of nations and national minorities living in the Federal Republic of Yugoslavia, the perpetrator will be punished by imprisonment of one to eight and/or one to ten years.

## **Slovakia**

### **New Criminal Code (L. 300/2005)**

#### **Paragraph 423 – Defamation of the nation, race and belief**

1. Whoever publicly vilifies:
  - a. any nation, its language, any race or an ethnic group, or
  - b. a group of persons because of their belief or that they are without belief,
 is sentenced to imprisonment of up to one year.
2. If the offender commits an act as stated in 1
  - a. together with two other persons at least,

- b. in connection with a foreign power or a foreign actor,
- c. as a public authority, or
- d. during a crisis situation,

the offender is sentenced to imprisonment of up to three years.

#### **Paragraph 424 – Incitement to national, racial and ethnic hatred**

1. Any person who publicly

- a. threatens an individual or a group of individuals, because of their nation, nationality, race or ethnic group or for the colour of their skin, with restriction of their rights and freedoms, or any person who makes such a restriction, or
- b. incites hatred against a nation or a race, or incites the restriction of rights and freedoms of the members of a nation or race,

shall be liable to a term of imprisonment not exceeding three years.

2. The sentence referred to in paragraph 1 shall be imposed on any person who associates or assembles with others with a view to committing the offence referred to in paragraph 1.

3. The offender shall be liable to a term of imprisonment of one year to three years if he/she commits the offence referred to in paragraph 1 or 2

- a. in association with a foreign power or foreign official/agent;
- b. in the capacity as a public official, or
- c. during a crisis situation.

## **Slovenia**

### **Constitution**

#### **Article 63 – Prohibition of incitement to discrimination or intolerance and prohibition of incitement to violence and war**

All incitement to ethnic, racial, religious or other discrimination, as well as the inflaming of ethnic, racial, religious or other hatred or intolerance, shall be unconstitutional.

All incitement to violence or to war shall be unconstitutional.

#### **Religious Freedom Act (adopted on 2 February 2007), Article 3.1**

All incitement to religious discrimination, inflaming of religious hatred and intolerance is prohibited.

## **Criminal Code**

### **Article 300 – Stirring up hatred, strife or intolerance based on violation of the principle of equality**

1. Whoever provokes or stirs up ethnic, racial or religious hatred, strife or intolerance or disseminates ideas on the supremacy of one race over another or provides aid in any manner for racist activity or denies, diminishes the significance of, approves of or advocates genocide, shall be punished by imprisonment of up to two years.
2. If the offence under the preceding paragraph has been committed by coercion, maltreatment, endangering of security, desecration of national, ethnic or religious symbols, damaging of the movable property or another, desecration of monuments or memorial stones or graves, the perpetrator shall be punished by imprisonment of up to five years.
3. Materials and objects bearing messages from the first paragraph of this article and all devices intended for their manufacture, multiplication and distribution shall be confiscated or their use disabled in an appropriate manner.

## **Mass Media Act (entered into force on 26 May 2001)**

### **Article 8.1 – Prohibition of incitement to inequality and intolerance**

The dissemination of programming that encourages national, racial, religious, sexual or any other inequality or violence and war, or incites national, racial, religious, sexual or any other hatred and intolerance shall be prohibited.

### **Article 47.3 – Advertisements**

Advertising may not:

- prejudice respect for human dignity;
- incite discrimination on grounds of race, sex or ethnicity, or political or religious intolerance;
- encourage behaviour damaging public health or safety or protection of the environment and cultural heritage;
- give offence on the grounds of religious or political beliefs; or
- damage consumers' interests.

### **Article 74**

1. All publishers of radio and television stations shall have under equal conditions the right to make a short report on all important events and other events accessible to the public, with the exception of religious ceremonies.

### **Article 129.1.1 – Penalty provisions**

A fine ranging from 250 000 tolar to 20 000 000 tolar for an infringement shall be imposed upon a publisher if

- through advertisements via its mass medium it harms human dignity, incites discrimination on grounds of race, sex or ethnicity, or political or religious intolerance, encourages behaviour endangering public health or safety or protection of the environment and cultural heritage, gives offence on the grounds of religious or political beliefs or damages consumers' interests.

## **Spain**

### **Act of 9 June 1988**

This Act repealed Article 239 of the Criminal Code, which provided that: "Anyone who commits blasphemy in writing, or in public, or by means of words or acts causing serious public offence shall be subject to a lengthy prison sentence and a 30 000- to 50 000-peseta fine."

### **Criminal Code**

#### **Article 22**

The following shall be considered aggravating circumstances:

4. Commission of an offence for reasons of racism, anti-Semitism or any other type of discrimination based on the victim's ideology, religion or belief, race, national origin, gender, sexual orientation, illness or disability.

#### **Article 510**

1. Anyone who incites discrimination, hatred or violence towards any group or association for reasons of racism, anti-Semitism or on any other grounds based on ideology, religion or belief, civil status, ethnicity or race, national origin, gender, sexual orientation, illness or disability shall be subject to a one- to three-year prison sentence or a six- to twelve-month fine.

2. The same punishment shall be applicable to anyone who, knowing it to be false or showing reckless contempt for the truth, disseminates offensive information about groups or associations in connection with their ideology, religion or beliefs or their members' ethnicity, race, national origin, gender, sexual orientation, illness or disability.

#### **Article 515**

A penalty shall be applicable to any unlawful association, including:

Any association that promotes discrimination, hatred or violence towards other people, groups or associations on account of their ideology or beliefs or the ethnicity, race, nationality, gender, sexual orientation, civil status, illness or

disability of some or all of their members; and any association that incites others to do so.

### **Article 522**

A four- to ten-month prison sentence shall be applicable to:

1. anyone who uses violence, intimidation, force or any other unlawful constraint to prevent one or more members of a religious faith from attending or participating in acts related to the beliefs they profess;
2. anyone who uses the aforementioned means to force one or more other persons to attend or participate in acts of worship or rites, to engage in acts associated with the profession or non-profession of a religious faith or to change religion.

### **Article 523**

Anyone who uses violence, threats, commotion or assault to impede, interrupt or disrupt the acts, functions, ceremonies or celebrations of the religious denominations listed in the relevant Public Register held by the Ministry of Justice and the Interior shall be subject to a prison sentence of six months to six years, where the offence is committed in a place of worship, or a four- to ten-month prison sentence where it is committed elsewhere.

### **Article 524**

Anyone who performs an act of profanation offensive to legally registered religious beliefs in a church or other place of worship or during a religious ceremony shall be subject to a prison sentence of six months to one year or a four- to ten-month fine.

### **Article 525**

1. Anyone who, with the intention of offending members of a religious denomination, mocks their dogmas, beliefs, rites or ceremonies – in public, orally, in writing or in any kind of document – or publicly harasses those who profess or practise their beliefs shall be subject to an eight- to twelve-month prison sentence.
2. Anyone who mocks – in public, orally or in writing – those who do not profess any religion or belief shall be subject to the same penalty.

### **Article 526**

Anyone who, lacking in respect for the memory of the dead, desecrates tombs or graves, defiles a corpse or its ashes or, as an affront, destroys, alters or damages funeral urns, graveyards, tombstones or burial niches shall be subject to a penalty of 12 to 24 weekends of detention and a three- to six-month fine.

## **Article 607**

1. Anyone seeking the total or partial destruction of a national, ethnic, racial or religious group, or guilty of any of the other acts listed below, shall be liable to:

- i. 15 to 20 years' imprisonment for murdering a member of the aforementioned group; where there are two or more aggravating circumstances, the penalty shall be increased incrementally;
- ii. 25 to 30 years' imprisonment for sexually assaulting a member of the aforementioned group or causing one of the injuries listed in Article 149;
- iii. eight to 15 years' imprisonment for subjecting the aforementioned group or any of its members to living conditions that might endanger their lives or seriously damage their health, or inflicting one of the injuries listed in Article 150;
- iv. four to eight years' imprisonment for inflicting any injury other than those mentioned in subparagraphs (ii) and (iii) of this paragraph.

2. Dissemination, by any means, of any doctrine that denies or justifies the offences set out in the preceding paragraph of this article, or attempts to rehabilitate any regime or institution encouraging practices similar to those described in the preceding paragraphs, shall carry a one- to two-year prison sentence.

## **Sweden**

The general law of blasphemy was abolished in 1949 and a narrower crime of religious insult was abolished in 1970.

### **Criminal Code**

#### **Chapter 29, Section 2**

In assessing criminal value, the following aggravating circumstances shall be given special consideration in addition to what is applicable to each and every type of crime:

7. whether a motive for the crime was to aggrieve a person, ethnic group or some other similar group of people by reason of race, colour, national or ethnic origin, religious belief or other similar circumstance.

#### **Chapter 16, Section 8**

A person who, in a disseminated statement or communication, threatens or expresses contempt for a national, ethnic or other such group of persons with allusion to race, colour, national or ethnic origin, or religious belief shall be sentenced for agitation against a national or ethnic group to imprisonment for two years or, if the crime is petty, to a fine. (L 1988:835)

## Switzerland

### Criminal Code

#### Article 261 – Violation of freedom of religion and freedom of worship

Anyone who publicly and basely insults or ridicules other people's beliefs in matters of faith, particularly faith in God, or profanes an object of religious veneration,

anyone who maliciously impedes the celebration of a religious rite safeguarded by the Constitution or disrupts or publicly ridicules such a rite,

anyone who maliciously profanes a place or object used for worship or for a religious rite safeguarded by the Constitution,

shall be subject to a prison sentence of up to six months or a fine.

#### Article 261A – Racial discrimination

Anyone who publicly incites hatred of or discrimination against a person or a group of people on account of their race, ethnic group or religion;

anyone who publicly spreads an ideology aimed at the systematic belittling or denigration of members of a race, ethnic group or religion;

anyone who, with the same intention, organises or encourages acts of propaganda or participates in such acts;

anyone who, by means of words, written material, images, actions, assault or any other means, publicly belittles or discriminates against a person or a group of people on account of their race, ethnic group or religion in such a way as to violate their human dignity, or who, for the same reasons, denies, grossly minimises or attempts to justify genocide or other crimes against humanity;<sup>161</sup>

anyone who refuses to supply a public service to a person or a group of people on account of their race, ethnic group or religion;

shall be subject to a prison sentence or a fine.

This article was inserted under Section 1 of the Federal Act of 18 June 1993, which has been in force since 1 January 1995 (RO 1994 2887 2889; FF 1992 III 265).

161. On 9 March 2007, the Lausanne District Court imposed a suspended sentence of 90 day-fines and a 3 000-franc fine on the President of the Turkish Workers' Party for denying the Armenian genocide. This was the first such conviction under Article 261A.

## **“The former Yugoslav Republic of Macedonia”**

### **Criminal Code (23 July 1996)**

#### **Article 319 – Causing national, racial or religious hate, discord and intolerance**

1. A person who by force, mistreatment, endangering security, ridicule of national, ethnic or religious symbols, by damaging other people’s objects, by desecration of monuments, graves, or in some other manner causes or excites national, racial or religious hate, discord or intolerance, shall be punished with imprisonment of one to five years.
2. A person who commits a crime from paragraph 1 by misusing his position or authority, or if because of these crimes, riots and violence were caused among people, or caused large damage to property, shall be punished with imprisonment of one to ten years.

#### **Article 399 – Hindering a religious ceremony**

A person who unlawfully hinders the performance of a religious ceremony shall be punished with a fine, or with imprisonment of up to one year.

#### **Article 417 – Racial or other discrimination**

1. A person who, based on the difference in race, colour of skin, nationality or ethnic affiliation, violates the basic human rights and freedoms acknowledged by the international community, shall be punished with imprisonment of six months to five years.
2. The punishment from paragraph 1 shall apply also to a person who persecutes organisations or individuals because of their efforts for equality of the people.
3. A person who spreads ideas about the superiority of one race above some other, or who advocates racial hate, or instigates to racial discrimination, shall be punished with imprisonment of six months to three years.

### **Law on Religious Communities and Religious Groups (Official Gazette of the Republic of Macedonia, No. 35/1997)**

#### **Article 18**

Religious activities and religious rituals are performed in churches, mosques and other temples, as well as in yards that are part of these facilities, on cemeteries and other facilities of the religious community or group. Performing religious activities and religious rituals cited in Paragraph 1 of this article cannot disturb public order and peace, nor the religious feelings and other freedoms and rights of citizens who do not belong to the religious community or group.

## Article 30

A fine of the amount of 30 000 to 50 000 denars will be levied on:

- any person who forces or thwarts a citizen in giving contributions intended for religious and humanitarian aims (Article 16, paragraph 2);
- any person who performs religious ritual or activities outside the facilities from Article 18, paragraph 1;
- any person who performing religious rituals or activities violates public order and peace, or the religious feelings and other freedoms and rights of citizens (Article 18, paragraph 2), and
- any person who performs a religious ritual without request on a citizen in his residence, on a person under age without appropriate agreement or in hospitals, homes for old people and like institutions, contrary to the house rules (Article 20, paragraphs 1, 2 and 3).

## Turkey

### Constitution

#### Article 24

Everyone shall have the right to freedom of conscience, faith and religious belief. Prayers, rites and religious ceremonies shall be conducted freely, provided that they do not breach the provisions of Article 14. No one may be compelled to participate in prayers or religious ceremonies and rites, or to disclose his or her religious faith or beliefs; no one may be reprimanded or accused on account of his or her religious faith or beliefs.

### New Criminal Code (2004-2005)

#### Article 125

1. A person who makes an allegation of an act or specific fact about another person's honour, reputation, dignity or prestige shall be sentenced to imprisonment for a term of three months to two years or a judicial fine will be imposed. In order to punish insults in the absence of the victim, the act should have been witnessed by at least three persons.

2. If the act is committed by means of a voiced, written or visual message addressing the victim, the perpetrator shall be sentenced to the penalties set out above.

3. If the offence of defamation is committed:

- a. against a public official or a person performing a public service and the allegation is connected with his public status or the public service he provides,

- b. as a result of expressing, changing or trying to extend one's religious, political, social, philosophical beliefs, thoughts and opinions, one's compliance with the rules and prohibitions of one's religion,
  - c. by mentioning the holy values of the religion the person is a member of, the minimum length of the sentence cannot be less than one year.
4. Where the defamation is committed explicitly, the sentence shall be increased by one sixth; if it is committed through the press and media, the sentence shall be increased by one third.

## **Criminal Code**

### **Article 216 – Inciting people to hatred, hostility and humiliation**

1. Anyone who publicly incites part of the population to hatred and hostility towards another part of the population by means of discrimination based on race, regional origin, religion or social class shall be subject to a one- to three year prison sentence, where his or her actions clearly put the public in direct danger.
2. Anyone who humiliates part of the population on account of social, religious, sexual or regional differences shall be subject to a prison sentence of six months to one year.
3. Openly humiliating a person on account of his or her religious values shall carry a prison sentence of six months to one year where the offence in question might be liable to cause social unrest.

### **Article 301**

1. A person who publicly denigrates Turkishness, the Republic or the Grand National Assembly of Turkey, shall be punishable by imprisonment of between six months and three years.
2. A person who publicly denigrates the Government of the Republic of Turkey, the judicial institutions of the State, the military or security organisations shall be punishable by imprisonment of between six months and two years.
3. In cases where denigration of Turkishness is committed by a Turkish citizen in another country the punishment shall be increased by one third.
4. Expressions of thought intended to criticise shall not constitute a crime.<sup>162</sup>

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162. Article 301 of the Turkish Criminal Code contains provisions aimed at regulating possible restrictions to freedom of speech mentioned in Article 26 of the Constitution. These Article 301 provisions are quite general, though, and leave a wide spectrum of possible interpretations. As in the Constitution, it is not religion, but Turkishness, that is used in this article as a justification for limitations on freedom of speech. Until its reform in 2003, the Turkish criminal code contained a blasphemy paragraph, Article 175, paragraph 3-4: "Quiconque insulte Allah, l'une des religions, l'un des prophètes, l'une des sectes ou l'un des livres sacrés, ou bien vilipende ou outrage une personne en raison de ses croyances, du fait de sa pratique des obligations religieuses ou de son observation des interdits

### Law on Radio and Television, No. 3984 (1994), Article 4

Radio and television broadcasting shall be made, within the concept of a public utility, in Turkish. ... In addition, public and private radio and television institutions may broadcast in various languages and dialects traditionally used by Turkish citizens in their daily lives.

The following principles shall be observed:

b. There shall be no broadcasting that leads society to violence, terror or ethnic discrimination; or incites masses to hatred and antagonism based on class, race, language or religion; or brings about feelings of hatred in society.

d. The masses shall not be accused and offended on grounds of language, race, colour, gender, political opinion, philosophical belief, religion, sect and the like.

s. All elements of programme services shall respect the dignity of the human being and fundamental human rights.

v. Broadcasts shall neither encourage the use of violence, nor shall they be of a nature that provokes feelings of racist hatred.

## Ukraine

### Constitution

#### Article 37

The establishment and activity of political parties and public associations are prohibited if their programme goals or actions are aimed at the liquidation of the independence of Ukraine, change of the constitutional order by violent means, violation of the sovereignty and territorial indivisibility of the State, the undermining of its security, the unlawful seizure of state power, propaganda of war and violence, the incitement of inter-ethnic, racial or religious enmity, and encroachments on human rights and freedoms and the health of the population. Political parties and public associations shall not have paramilitary formations.

The creation and activity of organisational structures of political parties shall not be permitted within bodies of executive and judicial power and executive bodies of local self-government, in military formations, and also in state enterprises, educational establishments and other state institutions and organisations.

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religieux ... sera puni d'une peine d'emprisonnement de six mois à un an et d'une amende lourde de 5 000 à 25 000 livres turques. La peine est doublée lorsque l'acte incriminé prévu dans le troisième alinéa du présent article est commis par voie de publication." In the present Turkish criminal code there is no separate blasphemy law, though Article 125 (paragraphs b and c) prohibits violating a person's honour because of his/her religious beliefs, way of worship etc. Summarising the above observations, it seems that, of the three elements of Turkish identity, two of them – Turkishness and Islamic tradition – may be instrumental in limiting freedom of expression. In this light, a brief survey of the Turkish Government's recent policy on freedom of expression will cast light on the practical implications of the ongoing identity negotiation in Turkey. See [www.trykkefrihed.dk/dokumenter/FreeSpeechTurkishTaboos2.htm/](http://www.trykkefrihed.dk/dokumenter/FreeSpeechTurkishTaboos2.htm/).

Prohibition of activity of associations of citizens is exercised only through judicial procedure.

## **Law on the Freedom of Conscience and Religious Organisations (1991)**

### **Article 4 – Equal rights of citizens regardless of their attitude to religion**

Citizens of Ukraine shall be equal before the law and shall enjoy equal rights in all spheres of economic, political, social and cultural life regardless of their attitude to religion. A citizen's attitude to religion shall not be indicated in official documents.

Any direct or indirect limitation of rights, any establishment of direct or indirect preferences for citizens depending on their attitude to religion, as well as incitement of enmity and hate related thereto, or the offence of citizen's feelings shall result in liability established by law.

No one may evade the performance of constitutional duties by reason of religious convictions. The substitution of one duty for another duty by reason of convictions shall be allowed only in the cases provided for by the legislation of Ukraine.

## **Criminal Code**

### **Article 67 – Circumstances aggravating punishment**

1. For the purposes of imposing a punishment, the following circumstances shall be deemed to be aggravating:

(1) repetition of an offence or recidivism; (2) commission of an offence by a group of persons upon prior conspiracy (paragraph 2 or 3 of Article 28); (3) commission of an offence based on racial, national or religious enmity and hostility; (4) commission of an offence in connection with the discharge of official or public duty by the victim; (5) grave consequences caused by the offence; (6) commission of an offence against a minor, an elderly or helpless person; (7) commission of an offence against a woman who, to the knowledge of the culprit, was pregnant; (8) commission of an offence against a person who was in a financial, official or other dependence on the culprit; (9) commission of an offence through use of a minor, a person of unsound mind or mentally defective person; (10) commission of an especially violent offence; (11) commission of an offence by taking advantage of martial law or a state of emergency or other extraordinary events; (12) commission of an offence by a generally dangerous method; (13) commission of an offence by a person in a state of intoxication resulting from the use of alcohol, narcotic or any other intoxicating substances;

2. Depending on the nature of the offence, a court may find any of the circumstances specified in paragraph 1 of this article, other than those defined in subparagraphs 2, 6, 7, 9, 10 and 12, not to be aggravating, and should provide the reasons for this decision in its judgment.

3. When imposing a punishment, a court may not find any circumstances, other than those defined in paragraph 1 of this article, to be aggravating.
4. If any of the aggravating circumstances is specified in an article of the Special Part of this Code as an element of an offence that affects its treatment, a court shall not take it into consideration again as an aggravating circumstance when imposing a punishment.

#### **Article 161 – Violation of citizens’ equality based on their race, nationality or religious preferences**

1. Wilful actions inciting national, racial or religious enmity and hatred, humiliation of national honour and dignity, or the insult of citizens’ feelings in respect to their religious convictions, and also any direct or indirect restriction of rights, or granting direct or indirect privileges to citizens based on race, colour of skin, political, religious and other convictions, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics, shall be punishable by a fine up to 50 tax-free minimum incomes, or correctional labour for a term up to two years, or restraint of liberty for a term up to five years, with or without deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.
2. The same actions accompanied by violence, deception or threats, and also if committed by an official, shall be punishable by correctional labour for a term up to two years, or imprisonment for a term up to five years.
3. Any such actions as provided for by paragraph 1 or 2 of this article, if committed by an organised group of persons, or where they caused death of people or other grave consequences, shall be punishable by imprisonment for a term of two to five years.

#### **Article 178 – Damage of religious architecture or houses of worship**

Damage or destruction of a religious structure or a house of worship shall be punishable by a fine up to 300 tax-free minimum incomes, or imprisonment for a term of one to three years.

#### **Article 179 – Illegal retention, desecration or destruction of religious sanctities**

Illegal retention, desecration or destruction of religious sanctities shall be punishable by a fine up to 200 tax-free minimum incomes, or imprisonment for a term up to three years.

#### **Article 180 – Preclusion of religious ceremonies**

1. Illegal preclusion of religious ceremonies, where it frustrated or was likely to frustrate a religious ceremony, shall be punishable by a fine up to 50 tax-free

minimum incomes, or arrest for a term up to six months, or restraint of liberty for a term up to two years.

2. Forcing a clergyman, by violence or psychological pressure, into officiating, shall be punishable by a fine up to 50 tax-free minimum incomes, or arrest for a term up to six months, or restraint of liberty for a term up to two years.

### **Article 181 – Trespass against health of persons under pretence of preaching or ministering**

1. Organising or leading a group that operates under pretence of preaching or ministering accompanied with the impairment of people's health or sexual dissipation, shall be punishable by restraint of liberty for a term up to three years, or imprisonment for the same term.

2. The same actions accompanied with involvement of minors in activities of the group shall be punishable by imprisonment of three to five years.

### **Law of Ukraine on Mass Media, Article 3**

This prohibits using mass media for rousing racial, national or religious hatred.

## **United Kingdom**

### **Scotland (HL- Law Commission, 2003)**

The last reported prosecution for blasphemy in Scotland was in 1843. Some writers have argued that blasphemy may no longer be a crime in Scotland (see, for example, G. Gordon, *The Criminal Law of Scotland*, W. Green, 2nd edition, 1978, p. 998). In any event, since Scottish law, unlike English law, requires a personal interest in a matter before there can be any private prosecution, and since the state is unlikely to want to prosecute for blasphemy, a prosecution, even if technically possible, is unlikely to occur. At present Scotland has no special provisions to deal with religious offences that are not found in English law. Indeed some extant English provisions, such as Section 2 of the Ecclesiastical Courts Jurisdiction Act 1860, have no counterpart in Scotland. However, concern over sectarianism in Scotland has led to calls for new legislation. On 20 February 2003, the Scottish Parliament passed the Criminal Justice (Scotland) Bill, which included a section on religious prejudice, originally introduced by Donald Gorrie MSP. The section reads as follows:

### **Criminal Justice Act of 20 February 2003**

#### *Section 59A – Offences aggravated by religious prejudice*

1. This section applies where it is
  - a. libelled in an indictment; or
  - b. specified in a complaint, and, in either case,

proved that an offence has been aggravated by religious prejudice.

2. For the purposes of this section, an offence is aggravated by religious prejudice if

a. at the time of committing the offence, or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice or ill-will based on the victim's membership (or presumed membership) of a religious group, or of a social or cultural group with a perceived religious affiliation; or

b. the offence is motivated (wholly or partly) by malice and ill-will towards members of a religious group, or a social or cultural group with a perceived religious affiliation, based on membership of that group.

3. Where this section applies, the court must take the aggravation into account in determining the appropriate sentence.

4. Where the sentence or decision in respect of the offence is different from that which the court would have imposed had the offence not been aggravated by religious prejudice, the court must state the extent of and the reasons for that difference.

5. For the purposes of this section, evidence from a single source is sufficient to prove that an offence is aggravated by religious prejudice.

6. In subsection 2a, "membership" in relation to a group includes association with members of that group; and "presumed" means presumed by the offender.

7. In this section, "religious group" means a group of persons defined by reference to their

a. religious belief or lack of religious belief;

b. membership of or adherence to a church or religious organisation;

c. support for the culture and traditions of a church or religious organisation; or

d. participation in activities associated with such a culture or such traditions.

## England and Wales

On 5 March 2008, the House of Lords abolished the common law crimes of blasphemy and blasphemous libel.

### Public Order Act, 1986

This Act defined racial hatred as "hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins". By Section 18 of the 1986 Act, it is an offence for a person to use threatening, abusive or insulting words or behaviour; it is also an offence to display any material which is threatening, abusive or insulting if the defendant

does so with intent to stir up racial hatred or if in the circumstances racial hatred is likely to be stirred up. Corresponding offences exist in relation to publishing or distributing written material, theatrical performances, and broadcasting. The 1986 Act did not extend to incitement to religious hatred.

### **Racial and Religious Hatred Act, 2006**

An Act to make provision about offences involving stirring up hatred against persons on racial or religious grounds.

#### *Section 29*

The Racial and Religious Hatred Act 2006 inserts a new part 3A into the 1986 Public Order Act; part 3A is entitled 'Hatred against persons on religious grounds'. Religious hatred means "hatred against a group of persons defined by reference to religious belief or lack of religious belief" (s. 29A). The primary offence (s. 29B) is to use threatening words or behaviour or to display any written material that is threatening, if the defendant thereby intends to stir up religious hatred. It is also an offence (s. 29C) to publish or distribute written material which is threatening, if the defendant thereby intends to stir up religious hatred. Offences of this kind have been created in respect of theatrical performances (s. 29D), broadcasting (s. 29F) etc. There is also an offence of possessing inflammatory material (with a view to publication, distribution etc) which is threatening if the defendant intends religious hatred to be stirred up thereby. An important restriction on proceedings for these offences is that no prosecution for these offences may be instituted except with the consent of the Attorney-General (s. 29L1).

#### *Paragraph 29B – Use of words or behaviour or display of written material*

1. A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.
2. An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.
3. A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.
4. In proceedings for an offence under this section, it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling.

5. This section does not apply to words or behaviour used, or written material displayed, solely for the purpose of being included in a programme service.

*Paragraph 29C – Publishing or distributing written material*

1. A person who publishes or distributes written material which is threatening is guilty of an offence if he intends thereby to stir up religious hatred.

2. References in this part to the publication or distribution of written material are to its publication or distribution to the public or a section of the public.

*Paragraph 29D – Public performance of play*

1. If a public performance of a play is given which involves the use of threatening words or behaviour, any person who presents or directs the performance is guilty of an offence if he intends thereby to stir up religious hatred.

2. This section does not apply to a performance given solely or primarily for one or more of the following purposes a) rehearsal, b) making a recording of the performance, or c) enabling the performance to be included in a programme service;

3. But if it is proved that the performance was attended by persons other than those directly connected with the giving of the performance or the doing in relation to it of the things mentioned in paragraph b or c, the performance shall, unless the contrary is shown, be taken not to have been given solely or primarily for the purpose mentioned above.

4. For the purposes of this section

a. a person shall not be treated as presenting a performance of a play by reason only of his taking part in it as a performer,

b. a person taking part as a performer in a performance directed by another shall be treated as a person who directed the performance if without reasonable excuse he performs otherwise than in accordance with that person's direction, and

c. a person shall be taken to have directed a performance of a play given under his direction notwithstanding that he was not present during the performance; and a person shall not be treated as aiding or abetting the commission of an offence under this section by reason only of his taking part in a performance as a performer.

5. In this section "play" and "public performance" have the same meaning as in the Theatres Act 1968.

6. The following provisions of the Theatres Act 1968 apply in relation to an offence under this section as they apply to an offence under Section 2 of that Act:

- section 9 (script as evidence of what was performed),
- section 10 (power to make copies of script),
- section 15 (powers of entry and inspection).

*Paragraph 29E – Distributing, showing or playing a recording*

1. A person who distributes, or shows or plays, a recording of visual images or sounds which are threatening is guilty of an offence if he intends thereby to stir up religious hatred.

2. In this part “recording” means any record from which visual images or sounds may, by any means, be reproduced; and references to the distribution, showing or playing of a recording are to its distribution, showing or playing to the public or a section of the public.

3. This section does not apply to the showing or playing of a recording solely for the purpose of enabling the recording to be included in a programme service.

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*Paragraph 29F – Broadcasting or including programme in programme service*

1. If a programme involving threatening visual images or sounds is included in a programme service, each of the persons mentioned in subsection 2 is guilty of an offence if he intends thereby to stir up religious hatred.

2. The persons are

- a. the person providing the programme service,
- b. any person by whom the programme is produced or directed, and
- c. any person by whom offending words or behaviour are used.

*Paragraph 29G – Possession of inflammatory material*

1. A person who has in his possession written material which is threatening, or a recording of visual images or sounds which are threatening, with a view to a) in the case of written material, its being displayed, published, distributed, or included in a programme service whether by himself or another, or b) in the case of a recording, its being distributed, shown, played, or included in a programme service, whether by himself or another, is guilty of an offence if he intends religious hatred to be stirred up thereby.

2. For this purpose regard shall be had to such display, publication, distribution, showing, playing, or inclusion in a programme service as he has, or it may be reasonably be inferred that he has, in view.

*Paragraph 29H – Powers of entry and search*

1. If in England and Wales a justice of the peace is satisfied by information on oath laid by a constable that there are reasonable grounds for suspecting that a person has possession of written material or a recording in contravention of Section 29G, the justice may issue a warrant under his hand authorising any constable to enter and search the premises where it is suspected the material or recording is situated.
2. If in Scotland a sheriff or justice of the peace is satisfied by evidence on oath that there are reasonable grounds for suspecting that a person has possession of written material or a recording in contravention of Section 29G, the sheriff or justice may issue a warrant authorising any constable to enter and search the premises where it is suspected the material or recording is situated.
3. A constable entering or searching premises in pursuance of a warrant issued under this section may use reasonable force if necessary.
4. In this section “premises” means any place and, in particular, includes: a) any vehicle, vessel, aircraft or hovercraft, b) any offshore installation as defined in Section 12 of the Mineral Workings (Offshore Installations) Act 1971, and c) any tent or movable structure.

*Paragraph 29I – Power to order forfeiture*

1. A court by or before which a person is convicted of a) an offence under Section 29B relating to the display of written material, or b) an offence under sections 29C, 29E or 29G, shall order to be forfeited any written material or recording produced to the court and shown to its satisfaction to be written material or a recording to which the offence relates.
2. An order made under this section shall not take effect a) in the case of an order made in proceedings in England and Wales, until the expiry of the ordinary time within which an appeal may be instituted or, where an appeal is duly instituted, until it is finally decided or abandoned; b) in the case of an order made in proceedings in Scotland, until the expiration of the time within which, by virtue of any statute, an appeal may be instituted or, where such an appeal is duly instituted, until the appeal is finally decided or abandoned.
3. For the purposes of subsection 2a: a) an application for a case stated or for leave to appeal shall be treated as the institution of an appeal, and b) where a decision on appeal is subject to a further appeal, the appeal is not finally determined until the expiry of the ordinary time within which a further appeal may be instituted or, where a further appeal is duly instituted, until the further appeal is finally decided or abandoned.
4. For the purposes of subsection 2b, the lodging of an application for a stated case or note of appeal against sentence shall be treated as the institution of an appeal.

*Paragraph 29J – Protection of freedom of expression*

Nothing in this part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

**Northern Ireland (HL-Law Commission, 2002)**

Blasphemy was part of the common law of Ireland. In an 1842 judgment, Sir Edward Sugden refers to the successful prosecution in 1703 of Thomas Emlyn, a Unitarian minister who had written a book arguing that Jesus Christ was not the equal of God the Father. This appears to have been the first reported blasphemy prosecution in Irish law. The law would seem to have protected the beliefs of the Church of Ireland. It is therefore arguable that the crime did not survive the disestablishment of the Church of Ireland by the Irish Church Act 1869. There was no reported blasphemy prosecution in the period between 1855 and the creation of the independent state of Ireland. In Northern Ireland, which inherited Irish common law, there has, to date, been no prosecution for blasphemy. However, in Northern Ireland incitement to religious hatred is a criminal offence under the Public Order (NI) Order 1987, although it is rarely prosecuted. From enquiries we made, it would seem that this might be due to the fact that it was difficult to show the necessary intention to incite religious hatred, a disinclination to prosecute sectarian cases or a feeling that the number of cases that could potentially be prosecuted was so large as to make individual prosecutions potentially invidious – or a combination of all three.

## Appendix II

### Analysis of domestic laws on blasphemy, religious insult and inciting religious hatred in Albania, Austria, Belgium, Denmark, France, Greece, Ireland, Netherlands, Poland, Romania, Turkey and the United Kingdom on the basis of replies to a questionnaire

#### Questionnaire

**1.** Is there specific legislation prohibiting blasphemy and/or religious insult in your country? Can this be explained on the basis of:

- a.** historical grounds, and if so which ones?
- b.** doctrinal grounds, and if so which ones?
- c.** other grounds?

**2.** Is there specific legislation prohibiting religious hatred? Is there, in addition or instead, more general legislation prohibiting hate speech and/or incitement to violence, and/or defamation, and/or discriminatory speech? Could this situation be explained on the basis of:

- a.** historical grounds, and if so which ones?
- b.** doctrinal grounds, and if so which ones?
- c.** other grounds?

**3.** Is there, in any of these provisions, a specific freedom-of-speech clause? If not, how do these provisions relate to existing (constitutional) legislative provisions concerning freedom of speech?

**4.** Is there in your opinion/according to the leading doctrine a need for additional legislation concerning:

- a.** the prohibition of blasphemy or religious insult?
- b.** incitement to religious hatred?
- c.** hate speech concerning a group?
- d.** speech or publication with a discriminatory effect?
- e.** negationism (denial of genocide or other crimes against humanity)?

**5.** Is there any case law concerning blasphemy, religious insult and/or incitement to religious hatred?

If so, are there cases which resulted in the conviction of the perpetrator?

What is in such cases the procedural status of the victim(s)?

**6.** Did the distinction between “blasphemy”, “religious insult”, “incitement to religious – or racial – hatred”, “defamation” or “discriminatory speech” play a role in the case law, and was it pertinent to the outcome of the case?

What is the leading opinion in legal doctrine about the current relevance of this distinction?

**7.** What role does the intention of the perpetrator and/or the foreseeability of the (discriminatory) effects play in the formulation of the legal prohibition, and/or in the prospect of a conviction?

**8.** Is the prosecution of the suspect of an act of blasphemy, religious insult or incitement to religious hatred at the discretion of the prosecutor?

Is there any superior supervisor?

Is there any appeal to a court against non-prosecution?

**9.** Does prosecution of these acts depend on a complaint by the victim(s)?

**10.** Have there recently been important incidents of alleged blasphemy, religious insult and/or incitement to religious hatred in your country that caused a lot of public indignation and debate but were not prosecuted or not convicted?

What was the reason for non-prosecution/non-conviction? What role did freedom of speech play in that case?

**11.** What is the attitude of the press in relation to such cases? Do they report with restraint in order not to aggravate the effects? Or do they purport to compensate by publicity for the non-prosecution?

## Albania<sup>163</sup>

**1.** There is no specific legislation prohibiting blasphemy and/or religious insult in Albania. The main reason for this, I think, is the fact that the law during the communist regime prohibited religious belief for more than 25 years. This has unavoidably led to a fear of discussing religious matters and somehow to a weakening of the religious conscience as well. All the religions and believers were considered in the same way during the communist regime – as enemies of the socialist system. Historically, Albanian religious doctrines, either Christian or Muslim, have been very moderate.

After the fall of the communist regime, religious identity was not as evident as before. All the religious groups were much more concerned about the fact of guaranteeing the exercise of their religious beliefs vis-à-vis interventions from state institutions. On the other hand, the atheistic period of more than 25 years contributed to the establishment of social, economic, family and political inter-religious relations. This religious mixed society has not given rise to marked blasphemy, or religious clashes.

The Criminal Code contains a specific section in relation to “Criminal acts against freedom of religion”. This Section X contains three articles: 131,<sup>164</sup> 132<sup>165</sup> and 133.<sup>166</sup> However, these provisions do not specifically foresee cases of blasphemy or religious insult.

**2.** Article 265 of the Albanian Criminal Code provides for “Inciting national, racial or religious hatred or conflict” as a criminal infringement. Its provision foresees:

Inciting national, racial or religious hatred or conflict, as well as preparing, propagating, or keeping with the intent of propagating, writings with that content, is punishable by a fine or up to ten years of imprisonment.

a. The main historical ground for such provision is the Ottoman and communist past of Albania. Under both regimes, religious beliefs and believers were prosecuted. Under the Ottoman Empire, Christian believers were prosecuted if not following the official religion. Under the communist regime, religion was officially prohibited and all believers and religions were persecuted by the state bodies.

163. Reply by Mr Ledi Bianku, former Member of the Venice Commission, Albania.

164. Article 131 – Obstructing the activities of religious organisations: “Ban on the activity of religious organisations, or creating obstacles for the free exercise of their activities, is punishable by a fine or to up to three years of imprisonment.”

165. Article 132 – Ruining or damaging objects of worship: “Ruining or damaging objects of worship, when it has inflicted the partial or total loss of their values, is punishable by a fine or up to three years of imprisonment.”

166. Article 133 – Obstructing religious ceremonies: “Ban or creating obstacles for participating in religious ceremonies, as well as for freely expressing religious beliefs, constitutes criminal contravention and is punishable by a fine or up to one year of imprisonment.”

The risk of this was that the Albanian population and especially young people were educated with the idea of anti-religious and atheistic culture.

b. As explained above, there are four official recognised religions in Albania. Despite the fact that until now there have not been problems as to religious hatred acts between members of different religious groups, I think the inclusion of such provision in the criminal code helps to lead citizens to the tolerant behaviour they should maintain with individuals belonging to other groups.

**3.** The most pertinent provisions we find in the Albanian legislation in this relation are the ones of articles 131 and 133 above-mentioned, which could be interpreted as offering a guarantee for the free expression of religious beliefs.

At first, both provisions give the impression of protecting only religious organisations (Article 131) and ceremonies (Article 133). A teleological interpretation, however, could bring us to the affirmation of a freedom of speech clause in religious beliefs. The provision “creating obstacles for the free exercise of their activities” in Article 131 and especially “Ban or creating obstacles for participating in religious ceremonies, as well as for freely expressing religious belief” in Article 133, I think, offers a guarantee for the exercise by each individual of his/her right for free speech in religious matters.

**4.** The Ministry of Culture in Albania, which covers also relations with religious communities, is actually considering the drafting of a law on religious matters. I think all the questions raised in this report could be considered in the process on the drafting of this law.

**5.** According to the data received by the Ministry of Justice, there is no case law so far in Albania concerning blasphemy.

**6.** As there is no case law in this relation it is not possible to formulate an opinion in relation to this question. Anyway, after conducting a number of informal exchanges of views with several judges and prosecutors on different levels in Albania, it could be asserted that there is no clear distinction between these concepts.

In relation to blasphemy, religious insult and incitement to religious or racial hatred speech, there are no articles in Albanian legal doctrine. This is mostly because the question has not come to the attention of society or lawyers, for the reasons described briefly above, whereas questions of defamation and discriminatory speech, though not specifically in cases related to religious beliefs, have been considered in the doctrine. The main concern was the fact that defamation and discriminatory speech are considered as criminal infractions by the Criminal Code. General opinion in Albania, following Council of Europe and EU recommendations, is for decriminalisation of these acts. But there is no an elaborated doctrine or clear jurisprudence for clarifying what really defamation is and what discriminatory speech means.

**7.** Although the intention is not foreseen specifically as an aggravating circumstance by Article 50 of the Criminal Code, it might be considered as an important element for the court in determining the conviction. Article 47 of the Criminal Code foresees:

“The court determines the punishment in compliance with the provisions of the general part of this code and the limits of punishment on criminal acts provided for by law. In determining the range of punishment against a person the court considers the dangerousness of the criminal act, the dangerousness of the person who committed the act, the level of guilt, as well as both mitigating and aggravating circumstances.”

Considering the intention of a perpetrator as an element (subjective criterion) for determining the level of guilt, it might be asserted it plays an aggravating role in the conviction of the act.

**8.** Prosecution of an act prohibited by articles 131 to 133 of the Criminal Code (which in our opinion could be used for prosecuting the above acts) could start either by indictment by the victim or ex-officio by the prosecutor. According to Article 24 of the Albanian Criminal Procedure Code:

“2. The prosecutor has the discretion to decide whether to not initiate or dismiss the criminal actions in cases provided by this code.”

There is a general supervisory procedure within the Prosecutor office hierarchy. In this relation, Article 305 of the Criminal Procedure Code foresees that:

“1. If the district prosecutor does not exercise the criminal proceedings or does not terminate within the fixed time-limits, the General Attorney, on demand of the defendant, the injured person or even ex-officio orders by a reasoned decision the undertaking of the investigations,

2. The General Attorney carries out the necessary investigations and compiles his requests within thirty days from the decision of the undertaking of investigations.”

Article 24.5 and Article 329 of the Criminal Procedure Code do foresee the entitlement of the injured and the defendant to appeal against the decision dismissing the case in the district court, except when a decision has proved that the fact does not exist. The district court can decide in those cases the continuation of the investigation.

**9.** According to Article 284 of the Albanian Criminal Procedure Code: “1. For the criminal offences provided by articles 85, 89, 102 first paragraph, 105, 106, 130, 239, 240, 241, 243, 264, 275 and 318 of the Criminal Code, the prosecution may start only by indictment brought by the injured, who may withdraw the same at any stage of the proceedings.”

As above asserted, in Albanian legislation, investigation of the acts considered by the questionnaire could be based only on articles 131 to 133 of the Criminal

Code. These articles are not included in the enumeration of Article 4 of the Criminal Procedure Code. Therefore, the investigation of the related acts could start upon either indictment of the victim or ex-officio by the prosecutor.

**10.** There have been three or four cases in Albania during the past three years characterised by religion-related disputes. In 2004 two writers in Albania were threatened by radical Muslim believers for their writings. In 2005 a cross of the Catholic community was destroyed near Shkodra, and in 2006 the Shkodra Muslim community disagreed with the decision of the city council to place a monument to Mother Theresa at the entry to the city. Both incidents were widely condemned by public opinion and also by all religious authorities in Albania, including higher Muslim authorities.

**11.** The press merely reported such cases, without following with a deep and scientific analysis into the situations. Also in the case of the Danish cartoons, the debate was quite weak, descriptive and partisan. The purpose of reporting has been merely commercial, for the newspapers and televisions to attract the public and not really to lead them to a specific idea or behaviour, which should have been tolerance.

## Austria<sup>167</sup>

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**1.** The Austrian legal system does not prohibit any sort of blasphemy or religious insult in a general way. However, the Criminal Code forbids some acts under specific circumstances.

Section 188 of the Austrian Penal Code deals with the offence of disparaging of religious precepts:

“Everyone who publicly disparages or mocks a person or a thing, respectively, being an object of worship or a dogma, a legally permitted rite, or a legally permitted institution of a church or religious society located in Austria, in a manner capable of giving rise to justified annoyance is liable to imprisonment for a term not exceeding six months or to a fine.”

Section 189 of the Penal Code provides for the offence of disturbance of the practice of religion:

1. Everyone who

- forcibly or threatening with force
- precludes or disturbs divine service or an act of divine service of a church or religious society located in Austria

is liable to imprisonment for a term not exceeding two years

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167. Reply by Mr Christophn Grabenwarter, Member of the Venice Commission, Austria.

2. and everyone who commits mischief at a place destined for a legally permitted practice of religion or on the occasion of a legally permitted public divine service or a legally permitted act of divine service or with an object directly destined for a legally permitted divine service of a church or religious society located in Austria in a manner capable of giving rise to a justified annoyance is liable to imprisonment for a term not exceeding six months or to a fine.

Some remarks might be interesting: Penal protection does not only protect legally recognised but all religious societies located in Austria which have at least some believers. Therefore, the faith of the religious individuals is not relevant for the purposes of penal law.

Provisions neither protect any religion itself or any divine authority nor the faith in such an authority. Instead, the law protects religious peace among human beings. The Penal Code does not protect respect for divine authority but respect for human feelings, which forms a condition for peaceful social interaction of different churches, religious societies and those without religious denomination. Thus there is specific legislation prohibiting specific religious insult; whether blasphemy is prohibited as well depends on the interpretation of this term. Insofar as blasphemy causes insult of religious feelings one can assert that it is – under certain circumstances – prohibited as well. Yet one of the provisions mentioned above remains the starting point of any such consideration.

The status quo of the law has historically emanated from the Enlightenment and humanism. In ancient legal systems (e.g. Viennese municipal law in 1221) blasphemy and similar offences were deemed to be the worst crimes, which makes clear the theological basis of criminal law. Religious offences formed a considerable part within the *Constitutio Criminalis Theresiana* of 1768 and were sentenced draconically. Codes between 1803 and 1852 kept religious offences, stipulating much more lenient sentences than before; for the first time faith in God instead of God Himself was subject to protection. These provisions were in force up to a legislative reform in 1975, which established the current provisions aiming merely at securing religious peace. From a historical point of view, gradual penal secularisation has led to a stringent development of legal provisions up to the present date.

Irrespective of this development, legal doctrine justifies a certain extent of penal protection for the constitutional freedom of religion<sup>168</sup> by taking it as both a positive and a negative right vis-à-vis the state. The positive aspect of the freedom leads to a constitutional obligation to protect religious feelings so as to guarantee religious peace (religious protection of personality). Case law of the European Court of Human Rights supports such an interpretation.<sup>169</sup>

168. More precisely Article 14 of the Austrian Basic Law and Article 9 of the ECHR.

169. European Court of Human Rights, judgment of 20 September 1994, *Otto-Preminger-Institut v. Austria*, Series A No. 295A.

**2.** In its Part 20 the Penal Code includes offences which violate the public peace. While its Section 281 prohibits calling for disobedience vis-à-vis any law, Section 282 is more specific: it prohibits most notably calling upon people to violate a penal provision. According to both provisions this has to be effected in a printed medium, broadcast or in any other way reaching a broad public. Finally, Section 283 sets up an even more specific offence: incitement.

“Everyone who publicly

– calls upon or goads to a hostile act against a church or religious society located in Austria or against a group belonging to such a church or religious society, a race, a people, a tribe or a state, in a manner capable of endangering public order, or

– incites against or insults or decries in a way of hurting human dignity a group belonging to a race, a people, a tribe or a state is liable to imprisonment for a term not exceeding two years.”

In this context incitement means trying to evoke hate and disdain. Incitement against other groups than those mentioned in the provision is not prohibited; churches and religious societies are not protected as institutions by paragraph 2 either. Another difference is that only paragraph 1 mentions the possibility of endangering public order whereas paragraph 2 prohibits any public incitement.

The incitement under sections 281 and 282 relates to breaking the (criminal) law whereas the incitement under Section 283 paragraph 1 relates to any hostile act against certain groups. Section 283 paragraph 2 bears no element of calling upon anyone else but punishes plainly the hostile speech.

In addition, Section 317 of the Penal Code prohibits disparaging of symbols, such as flags and other national emblems of a foreign state or an international institution, in a hostile manner, if those symbols have been installed officially and if a broad public is reached.

**3.** None of the mentioned provisions contains a particular freedom-of-speech clause. Freedom of speech is granted in explicit terms only in the Constitution. On the one hand the Austrian Constitution guarantees the freedom to impart opinions<sup>170</sup> and to create, impart and teach art;<sup>171</sup> on the other hand Article 10 of the European Convention on Human Rights (ECHR) provides for freedom of expression. Article 10 paragraph 2 of the ECHR, which forms also part of constitutional law in Austria, enables the legislator to set up certain restrictions necessary in the public interest.

The specific restrictions of freedom of speech in favour of religious feelings appear to be in conformity with the Constitution and the ECHR; the protection of religious peace lies within the scopes of public interest (Article 10 paragraph 2

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170. Article 13 of the Basic Law on Rights and Freedoms of Citizens.

171. Article 17a of the Basic Law on Rights and Freedoms of Citizens.

of the ECHR: prevention of disorder) and proportionality. As to the latter criterion, one can argue that not every expression about God or religion *per se* is penalised; in fact, the expression has to be a disparaging or mocking one and in addition one that is capable of giving rise to a justified annoyance. By means of this open wording, courts can reach a decision after an appreciation of values and therefore reject minor crimes. There is a range of sanctions, but the maximum term of imprisonment of six months is comparatively humble (a similar provision in the German Penal Code provides for a prison term of up to three years).<sup>172</sup>

**4.a.** To my mind there is no lack of such legislation. By virtue of sections 188 and 189 of the Penal Code, acts causing social disorder are caught. In turn, another regime going beyond this extent might be less proportional and thus cross the border of the interference allowed by Article 10 paragraph 2 of the ECHR on freedom of expression.

**4.b.** The same applies to Section 283 of the Penal Code as to sections 188 and 189 of the Penal Code (see a.).

**4.c.** There is no need for such additional legislation.

**4.d.** The prohibitions of Section 283 of the Penal Code appear sufficient to me (see c.). Beyond the limits of Section 283 of the Penal Code there is no provision that prohibits speech or publication with a discriminatory effect related to a group, save the provisions in the context of National Socialism: The *Verbotsgesetz* – the Law on Interdiction [of national socialist organisations and institutions] – forbids calling publicly for the re-establishment of certain national socialist organisations or getting involved with the former National Socialist German Workers Party (Nationalsozialistische Deutsche Arbeiterpartei) or its goals. In addition, the *Verbotsgesetz* provides for a catch-all element prohibiting any act in favour of national socialist ideas. By means of this regime one catches certain speeches or publications with a discriminatory effect (furthermore, see e).

Existing provisions in matters of discrimination established in other laws, such as the law of equal treatment or certain clauses in employment law, do not refer to speech or publication.

**4.e.** As regards negationism, there is only legislation in reference to National Socialism. The Austrian Constitutional Court declared that uncompromising rejection of National Socialism was a fundamental characteristic of the Austrian Republic after the Second World War.<sup>173</sup> This legislation is based on the Austrian State Treaty of 1955 and the *Verbotsgesetz* of 1947. Section 3h of the *Verbotsgesetz* prohibits qualified public denial, considerable belittlement,

172. Section 166 of the German Penal Code.

173. Collection of Decisions of the Constitutional Court 10.705/1985.

endorsement or the attempt to justify national socialist genocide or other national socialist crimes against humanity.

In contrast to this legislation, denial or belittlement of other crimes against humanity is not prohibited. Possibly, Section 283 of the Penal Code might be applied to such cases.

**5.** According to the case law of Austrian courts, freedom of expression and freedom of art have no unlimited scope. Limits consist of “immanent bounds” and bounds arising from the effect of other fundamental rights. In case law, Section 188 of the Penal Code constitutes a necessary condition for efficient use of freedom of religion (see 1); for this reason courts have not yet denied the application of this provision to freedom of expression or freedom of art.<sup>174</sup>

In the event of a conflict between two fundamental rights, one comes to a decision after weighing up the two different aims; to this end the wording of Section 188 of the Penal Code leaves sufficient space for weighing up.

The most important cases in which religious feelings played a crucial role are the following:

### **1. The film *Das Gespenst*, Supreme Court – 1984:**

The movie *Das Gespenst* shows Jesus Christ after having descended from the cross as a drunken and bawling derelict having sexual contact with the matron of a convent; also he scoffs at his own acts without still bearing them in mind. Both the court of first impression as well as the court of appeal considered the movie’s tenor disparaging religious precepts in the sense of Section 188 of the Penal Code. The court of appeal argued that one reaches a fundamental right’s immanent bounds once the regular and tolerance-based human interaction appears violated. The Supreme Court did not decide on the merits due to previous procedural mistakes. Notwithstanding, doctrine has recognised in the assertions of the Supreme Court that it approves the way of tackling the conflict between two fundamental rights; and that it advances the view that freedom of art shall not protect the disparaging of religious precepts in a repeated and sustained fashion in pursuance to Section 188 of the Penal Code.

### **2. The film *Das Liebeskonzil*, Court of Appeal (Innsbruck) – 1987:**

A similar case concerns the film *Das Liebeskonzil*, planned to be shown in a cinema in Innsbruck, the capital of the province of Tyrol, a case which reached the European Court of Human Rights. God the Father is showed as “senile, impotent idiot, Christ as a cretin and Mary Mother of God as a wanton lady with a corresponding manner of expression”. Courts held in 1987 that the showing of the pictures is prohibited under Section 188 of the Penal Code because of the

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174. In the Austrian constitutional system, by appealing to the Constitutional Court in order to open a procedure under Article 140 Federal Constitutional Law, in which it pronounces whether the law is unconstitutional.

massive mockery of religious feelings. It was crucial that a predominant majority of average believers would consider the film disparaging and degrading. The European Court of Human Rights did not find a violation of Article 10 of the Convention in the seizure and forfeiture of the film either. These measures interfered with the right of freedom of expression but were, however, aimed at the protection of the “rights of others” and necessary because these expressions were “gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs”. In weighing up the different interests under articles 9 and 10 of the ECHR, the Court had regard to the fact that the Roman Catholic religion was the religion of the overwhelming majority of Tyroleans.

Both criminal proceedings, concerning *Das Gespenst* and *Das Liebeskonzil*, were conducted as so-called independent procedures not directed towards the conviction of an individual but aimed at the forfeiture of the film.

The film *Das Liebeskonzil* is based on a theatre play from 1894. Theatre performances of this original play took place in Vienna in 1991 and Innsbruck in 1992. Whereas in Vienna the authorities took no action whatsoever, the authorities in Innsbruck discontinued proceedings after preliminary investigations.

### 3. The comic strip *The Life of Jesus* – 2002:

A younger example is the comic strip of Gerhard Haderer who portrayed Jesus Christ, in his book *The Life of Jesus*,<sup>175</sup> as continuously intoxicated as a result of consuming frankincense, which turns him into a sweet-tempered dreamer deriving his divine inspiration from drugs and working wonders rather at random. The apostles exploit the harmless man in order to benefit themselves. Unlike the previous examples the public prosecutor neither opened proceedings pursuant to the Media Act nor indicted the author.

So far there has not been any conviction pursuant to section 188 of the Penal Code.

### 4. Graffiti, national socialism and racism:

A decision of the Supreme Court dealing with the objective characteristics of Section 283 of the Penal Code is not directly connected to religious hatred. The Court did not decide on the merits, but it held that the graffiti on a publicly located building in the shape of a swastika, SS-runes and the words “hatred” and “Turks out” may be prohibited under Section 283.<sup>176</sup>

### 5. Muslim preacher and incitement to religious hatred:

A current case (the public prosecutor is reviewing the facts) matches more precisely the question: allegedly, the *fatwas* (Islamic legal opinions) of a Muslim

175. *Das Leben des Jesus*.

176. A crucial question was whether the perpetrator could be convicted despite a damage-to-property conviction.

preacher of a Viennese mosque contain elements that possibly conflict with Section 283 of the Penal Code. However, there is no precise information about the outcome of the investigation at the moment.

**6.** The distinctions play a role neither in case law nor in leading doctrine because the penal provisions do not use these terms.

**7.** The intention of the perpetrator does not play a specific role; if an offence does not provide for anything else, the law prohibits merely intentional acts/omissions. Since there are no offences of negligent disparaging of religious precepts or negligent incitement, the perpetrator's guilt presupposes his intent. In other words, the perpetrator must consider the realisation of the facts at least possible and accept this realisation (conditional intent). In the case of Section 283 of the Penal Code the intention refers to the act itself (e.g. prompting or goading), the publicity and the possible effect of endangering public order.

This applies specifically to Section 188 of the Penal Code; the perpetrator's intent refers on the one hand to the disparaging or mocking of certain persons, things or institutions and on the other hand to the manner capable of giving rise to a justified annoyance, while there is no necessity of intention as to the blasphemy itself. Whether the perpetrator is willing to act against God or a church does not play any role.

The foreseeability of certain potential effects is an element of the offences: the act is criminal if it is capable of giving rise to a justified annoyance or endangering public order. Whether the annoyance/disorder occurs does not play a role. The intent of the perpetrator has to comprehend this ability.

Both, intention and foreseen and accepted effects, are elements of the offence and are therefore not more and not less than two preconditions for the guilt and the conviction. The Penal Law provides some grounds of aggravation, among which are racist, xenophobic or other particularly condemnable motives of the perpetrator, influencing the sentence. Insofar as such motives are inherent in the formulation of the relevant offences, this ground of aggravation must not have an impact on the sentence.

**8.** When review of the facts gives rise to the assumption that someone has committed a crime and that a conviction appears more likely than an acquittal, the public prosecutor is obliged to indict the person concerned.<sup>177</sup> Hence, he has to assess the facts, the legislation and the case law. This procedure is not a discretionary decision.

Within the Austrian constitutional system the public prosecutor is an administrative agency, so there is supervision in the fact that the Minister of Justice may give directives. There are neither appeals nor other remedies against non-prosecution.

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177. Or to open a "diversional procedure" pursuant to Section 90a of the Penal Procedure Law.

**9.** No contribution whatsoever by the victims is required.

**10.** The only recent example of incitement to religious hatred which aroused a lot of public indignation was *The Life of Jesus* in 2002. Mr Haderer, the author, was not indicted because the public prosecutor found that he had not committed a crime by writing his book. Freedom of speech played no (obvious) role because the public prosecutor has only to assess the likeliness of a conviction; irrespective of the case law weighing up freedom of speech and freedom of religion, which has to be taken into account, freedom of speech is not relevant at this stage of the proceedings.

**11.** The recent attitude of the press refers (for lack of national cases) to foreign events such as, for instance, the conflict on the Danish cartoon. In this matter, reports have been neutral whereas comments have referred to freedom of expression on the one hand and respect for religious feelings on the other hand. The tenor was mainly the necessity in a secular society to respect the freedom of expression, including the right to produce cartoons. This freedom must exist in a legal and a de facto way; for this reason the press should not shy at any publications due to possible implications. Notwithstanding, most newspapers did not reprint the Danish cartoons so as not to intensify the debate or to draw it to Austria.

The public discussion on the occasion of *The Life of Jesus* (see 5) was more lurid. The book in question with cartoons was subject to a discussion with intense argument on both sides in all the media. The Archbishop of Vienna commented on the pictures in an important daily paper, provoking a reply from the author. Other comments were dependent on the political alignment of the respective medium or the respective commentator.

## Belgium<sup>178</sup>

**1.** It seems important to associate with religious insults some offences protecting the peaceful practice of religious rituals. These are the main provisions of the Belgian Criminal Code in this field.

Article 142: Anyone who uses violence or threats either to force one or more persons to practise a religion, attend religious services, celebrate particular religious festivals, observe particular days of rest – and hence open or close their shops or workshops – or perform or cease certain types of work, or to prevent one or more persons from doing so, shall be subject to a prison sentence of eight days to two months and a 26- to 200-franc fine.

Article 143: Anyone who impedes, delays or interrupts an act of worship performed in a place of worship or a place ordinarily used for worship, or as part of a public religious ceremony, by creating disturbance or disorder, shall be

<sup>178</sup>. Reply by Mr Louis-Léon Christians, Professor, Catholic University of Louvain, Belgium.

subject to a prison sentence of eight days to three months and a 26- to 500 franc fine.

Article 144: Anyone who insults a religious object by means of actions, words, gestures or threats, whether in a place of worship or a place ordinarily used for worship or during a public religious ceremony, shall be subject to a prison sentence of 15 days to six months and a 26- to 500-franc fine.

Article 145: The same penalties shall apply to anyone who insults a minister of religion, in the exercise of his or her ministry, by means of actions, words, gestures or threats. Assaulting a minister of religion shall carry a prison sentence of two months to two years and a 50- to 500-franc fine.

Article 146: Should such an assault occasion bloodshed, injury or illness, the perpetrator shall be subject to a prison sentence of six months to five years and a 100- to 1 000-franc fine.

**2.** The extension in 2003 of the previous racist hate-speech legislation to a protection against religious discrimination and religious hate speech was very controversial and difficult during the debate in Parliament. The main arguments were the danger of religious extremisms and the democratic necessity for the civil society to be able to use fighting words against these religious abuses (especially against Islam and "cults"). But finally, in order to respect the EU Directive 78/2000, the 2003 law has been actually extended to cover religious discrimination and hate. Since January 2007, a new bill has been under discussion in Parliament to replace the 2003 law.

Sections 2 and 6 of the Anti-Discrimination Act of 25 February 2003, amending the Act of 15 February 1993 on the Establishment of a Centre for Equal Opportunities and Combating Racism (Parliament has been debating a new Act since January 2007: see below) provide *inter alia* as follows.

2.6: Harassment shall be held to be a form of discrimination where undesirable behaviour related to the grounds for discrimination set forth in paragraph 1a is intended to violate a person's dignity and create an intimidating, hostile, degrading, humiliating or offensive environment, or has the effect of doing so.

2.7: Any behaviour whereby another person is ordered to practise discrimination against a person, a group, a community or the members thereof, on one of the grounds [set forth in paragraph 1], shall be held to be discrimination within the meaning of this Act.

6.1: A prison sentence of one month to one year and a 50- to 1000-euro fine, or one of these penalties only, shall be applicable to:

- anyone who, in one of the circumstances set forth in Article 444 of the Criminal Code, incites discrimination, hatred or violence towards a person, a group, a community or the members thereof, on grounds of gender, sexual

- orientation, civil status, birth, wealth, age, religious or philosophical beliefs, current or future state of health, a disability or a physical characteristic;
- anyone who, in one of the circumstances set forth in Article 444 of the Criminal Code, advertises his or her intention to practise discrimination, hatred or violence towards a person, a group, a community or the members thereof, on grounds of gender, sexual orientation, civil status, birth, wealth, age, religious or philosophical beliefs, current or future state of health, a disability or a physical characteristic.

Bill No. 2722 on Combating Certain Forms of Discrimination (tabled on 26 October 2006) attempted to define the scope of religious grounds and the concept of hatred thus.

Scope of the religious ground: “In its aforementioned opinion of 11 July 2006, the Council of State held that the ground of professing ‘any other opinion’, set forth in Section II-81, could not be omitted from the list without an objective, reasonable justification for doing so. It may be argued, however, that this reference was unnecessary, bearing in mind that the concepts of religious or philosophical beliefs and political beliefs are now interpreted very broadly under international human rights law.”

Scope of the concept of hatred:

- incitement to hatred or violence towards a person on account of one of the protected grounds, in the circumstances set forth in Article 444 of the Criminal Code (= public arena), even where it does not concern the aspects covered in Section 5 of the Bill;
- incitement to discrimination against or segregation of a group, a community or the members thereof on account of one of the protected grounds, in the circumstances set out in Article 444 of the Criminal Code, even where it does not concern the aspects covered in Section 5 of the Bill;
- incitement to hatred or violence towards a group, a community or the members thereof on account of one of the protected grounds, in the circumstances set forth in Article 444 of the Criminal Code, even where it does not concern the aspects covered in Section 5 of the Bill.

The Federal Centre for Equal Opportunities and Combating Racism – at [www.diversite.be](http://www.diversite.be) – supplied a description of religious grounds. The Centre interprets “religious or philosophical beliefs” to mean beliefs concerning the existence or otherwise of one or more deities. They also include philosophical beliefs such as atheism, agnosticism and secularism. Philosophical beliefs unrelated to issues surrounding the existence or otherwise of one or more deities are not covered by the Centre’s work.

**3.** In the Belgian Constitution, freedom of speech and freedom of religion are protected by the same provision, Section 19: Freedom of religion, the freedom

to practise a religion in public and the freedom to express one's opinions on any subject shall be guaranteed, without prejudice to the punishment of offences committed in exercise of these freedoms.

Press and media freedom is protected under Section 25. The press is free; censorship cannot be introduced; and authors, publishers and printers cannot be required to obtain approval. Where the author is known and resident in Belgium, the publisher, printer and distributor cannot be prosecuted.

**4.** There is no debate in Belgium in favour of a new offence of "religious insult". The bill now being discussed in Parliament would confirm some new offences related to religious hatred and group hate speech.

The offence of negationism enacted in Belgian law in order to protect the historicity of the Jewish Shoah is often discussed as discriminatory, because of the lack of protection for the historicity of the Armenian genocide.

**5.** The relevant case law is as follows:

- Court of Appeal of Ghent, 2 May 1988, judgment not published, about some sexual perversity of Jesus Christ and Virgin Mary, no conviction of the perpetrator.
- Court of Appeal of Liege, 28 November 2001, *Journal des Tribunaux* (2002), p. 308, about some fighting words from the Raelian Movement against the Catholic clergy, conviction of the perpetrator.
- Criminal Court of Brussels, 11 April 1991, *JLMB – Revue de jurisprudence de Liège, Mons et Bruxelles* (1991), p. 804, about the expression "juif persona non grata", conviction as racial offence.
- Civil Court of Brussels, 25 July 2001, (2001), p. 1575, about some polemical accusations against the Raelian Movement, no conviction.
- Council of State, 28 August 2000, about the refusal by the Post Company to distribute some discriminatory advertising, conviction as unlawful censure.

**6. and 7.** Insufficient data.

**8.** Prosecutions of these offences are at the discretion of the public prosecutor. Criminal procedure enables also some kind of *citation directe* by victims for different types of offence.

**9.** Only common harassment offences exclusively depend on a complaint by the victim.

**10.** Three recent public debates and attempt of prosecutions:

- During an art exhibition Europalia Poland, a Catholic priest accepted a display of some "artistic" photos in his church. These pictures (a naked Virgin Mary etc.) offended some parishioners, but not the priest in charge of the parish. These parishioners tried to stimulate a public prosecution.

But, in review, they failed in their attempt because no church authorities (the Bishop) confirmed a hypothesis of sacrilege (provided by the penal code).

- In another art exhibition, a large picture of a quasi-naked woman was placed on the main entrance of an (ancient) church, just near a statue of the Virgin Mary, and this provoked a large public debate, but no prosecutions.
- In a public oration, a very well-known Oriental Catholic priest (revoked previously by his bishop) affirmed that a true understanding of the *Qur'an* (Koran) shows that Islam is more dangerous for Europe than Hitler himself. A public prosecution for racial (and not religious) hatred has been opened.

**11.** One of the most influent and progressive French-speaking newspapers decided in February 2006 not to publish the Danish cartoons. This was the editorial comment on page 5 of *Le Vif/L'Express* (10 February 2006):

#### Continental Drift

Pencil strokes can be deadly, as the astonished Western world has discovered in totting up the number of deaths already caused by the demonstrations in Lebanon and Afghanistan. A few poor drawings of the prophet Mohammed, published in Denmark more than four months ago now, are all that was needed to set ablaze much of the Arab Muslim world. Public apologies have made no difference; anger has spread like a raging pandemic, setting embassies alight, sacking a church and tearing up co-operation agreements.

The violence of what we Westerners regard as an insane response must be unequivocally condemned by all those who reject obscurantism, terror and hate-fuelled radicalism. The latter, it must be emphasised, are not confined to one side of the planet. Although they are finding it more difficult to make themselves heard amid the current commotion, there are Muslims in both Brussels and Beirut who reject such violence, calling for calm. This does not mean they themselves are any less offended by the cartoons, which make a ludicrous connection between Islam and terrorism.

The West has been taken aback by both the demonstrators' over-reaction and the extent to which it has spread. In actual fact, the reasons for this anger are not identical everywhere, and nor is its degree of sincerity. Some governments have exploited the protests for purely political ends. Nor can Fatah's electoral frustrations in the Palestinian territories and the tension between Islamists and Christians in Lebanon be overlooked as factors contributing to the radicalisation on the street. In Iran, Iraq and Afghanistan, Europe has taken over the role of great Satan normally assigned to the United States. Yet in the European Union, which is home to 15 million Muslims, many of the latter have simply expressed their exasperation in the face of an Islamophobia that caricatures them as bomb-layers and continually condemns them to blanket rejection.

With its sacked consulates and calls to murder, the "Mohammed affair" evokes the terrifying spectre of a "clash of civilisations". Accepting the latter as inevitable would be the worst possible attitude, prompting all sides to prepare for it mentally. Yet it can hardly be denied that relations between the West and the Arab Muslim world appear to be worse than ever. This time, the clamour is being caused not by

the marching armies led by Bush senior or junior, but simply by a few little drawings. This illustrates the widening gulf between the two worlds: it is as if they were being dragged apart by a slow continental drift. When it comes to religious expression, media irreverence, the image culture and the role of satire, de-Christianised Europe is now utterly at odds with those nations that are (re-)Islamised right to the very core of the state.

How can they be persuaded to accept, over there, that cartoonists in a free press exercise a salutary occupation, guarding against the homogenisation of thought? Cartoonists do not like excessive politeness. Yet they share two responsibilities with journalists, which are not necessarily entirely compatible. On the one hand, they must uphold freedom of expression by exercising it, since it will be worn down only if it is not used. On the other hand, they must respect people and their beliefs, race and dignity. The latter responsibility is not simply the coward's version of the former. Here too, it may take courage to refrain from howling with the pack or to avoid easy effect. From this perspective, portraying Mohammed with a bomb in his turban is clearly a *faux pas*. It is one thing to scoff at the statements, decisions or weaknesses of dignitaries, even religious dignitaries. It is quite another to stigmatise a religion by attacking its foundations. This is the same kind of despicable generalisation used to caricature the Jews in the past and immigrants today, fuelling anti-Semitism and xenophobia. In a strange reversal, however, the Danish cartoonists and subsequently many other newspapers have merely strengthened that which they sought to weaken. Freedom of the press is scoring fewer points here than freedom-busting religious fundamentalism.

*Le Vif/L'Express* has therefore opted not to publish the impugned drawings, and will not do so. Nevertheless, its visceral attachment to freedom of opinion, including the right to irreverence, remains intact. In order to emphasise this, we have specially invited seven cartoonists from other Belgian media to address various topics in this issue. Pencils are essential, provided they are used only to make us laugh or think.

Jean-François Dumont

The same journal regularly published all kinds of religious satirical cartoons, without any public discussion.

## Denmark<sup>179</sup>

1. There exists a specific prohibition regarding blasphemy in the Criminal Code, namely Section 140. The section prohibits blasphemy, which is defined as acts which publicly ridicule or insult in Denmark legally existing religious communities' dogmas or worship. In addition Section 139, subsection 2, prohibits indecent use of items belonging to the Church.<sup>180</sup> The Criminal Code in force dates back to 1930, when it replaced the Criminal Code of 1866.

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179. Reply by Mr Christoffer Badse, Researcher, Danish Institute for Human Rights.

180. As a primary source of information for the historical description of sections 140 and 266.b, and for historical references to explanatory notes, the author has primarily made use of Appendix 1 – J.nr. RA-2006-41-0151 of 15 March 2006 "Gennemgang af relevante retsregler mv." Published by the Director of Public Prosecutions.

Danish Criminal Code Section 140 (Prohibition against blasphemy) reads: Any person who, in public, mocks or scorns the religious doctrines or acts of worship of any lawfully existing religious community in this country shall be liable to imprisonment for any term not exceeding four months.<sup>181</sup>

### Historical background

Blasphemy was criminalised in Danish Law (Danske Lov) in Book Six dating from 1683 on misdeeds, chapter 1, provision 7 (6-1-7 and 6-1-8), where blasphemy was considered a capital crime. This piece of legislation was primarily a codification of existing law and was considered a major achievement during the period of absolute monarchy. However, new laws such as the provision against blasphemy were also introduced. The inspiration and structure of the criminal provisions can be traced back to the Decalogue and Mosaic Law, which were common sources of inspiration at the time. The result was that blasphemy was judged very harshly, up until the introduction of the Criminal Code of 1866, which was influenced by the period of the Enlightenment and the philosophy of natural law. It should be mentioned that there is no record that acts of a blasphemous character actually resulted in an execution.

### The Criminal Code of 1866

The provision on the prohibition of blasphemy in the Criminal Code of 1866 was maintained in the Criminal Code of 1930 in the chapter on crimes against public order and peace, which also included a ban on instigation of public disorder. Hence, religious peace is considered part of the peace of society (according to the explanatory notes to the first draft of a new criminal code in the report on the provision from 1912). This is contrary to the prohibition against hate speech, which is located in the chapter on crimes against peace and honour, which includes for example the prohibition against defamation of character (see below). The Criminal Code of 1866 is very similar to the Criminal Code of 1930; however the provision in the 1866 code also covered the prohibition of non-public blasphemous statements.

### The Criminal Code of 1930

In preliminary work before the introduction of the Danish Criminal Code of 1930 the majority of the Commission which prepared the draft bill stated in a report (Straffelovskommissionen of 9 November 1917, 1923, sp. 244-245):

Where the limits of freedom of expression are overstepped in this area in an indecent way, the denunciation which is expressed in public opinion is much more efficient and natural than punishment. In relation to persons who find the religious feelings of value, it is presumed that there is no wish for punishing blasphemous statements or acts. And on the other hand, for those persons who find the protection

181. Source: Consolidated Act No. 1000 of 10 May 2006, the Criminal Code (Lovbekendtgørelse 2006-10-05 nr. 1000). Entry into force: 1 July 2006.

of religious feeling of a foreign nature, the use of punishment will in general be felt as an absurdity.

The provision on blasphemy was not included in the first draft bill for a new criminal code that was put forward in Parliament. The Ministry of Justice and the Ministry of Ecclesiastical Affairs concurred with the majority of the commission in their reasoning for abolition of the provision.

However, the Bill was not adopted. In 1928 a new government included a prohibition against blasphemy in the Bill for a new criminal code. The government referred (*Rigsdagstidende 1927/28, Tillæg A, sp. 5363*) to the views of the minority on the commission, which stated in the report:

In relation to ridicule and scorn of the religious feelings of the individual, there exists a vivid sensation of the indecency in such behaviour. Such acts of indecency are contradictory to the interests of society, which should be shown by making such acts liable to punishment in serious cases. The minority has limited the criminal responsibility to public expressions. For among numerous people both outside and within religious communities it would be offensive if the State did not express its definite disapproval.

Furthermore, the minority stated that there was no risk that the provision in its current form would include religious criticism and expressions of religious doubt. In the parliamentary debates it was also put forward that a large part of the population would feel insulted by acts of a blasphemous character, hence a prohibition was perceived to be in order. This supported the interpretation that the prohibition is not as such introduced out of concern for the minority. Rather it is perceived as a protection of the prevailing social order and peace.

After various proposals, amendments and discussions on the necessity of such a provision, the Criminal Code of 1930 was adopted (Act No. 126 of 15 April 1930), including a prohibition against blasphemy. The provision retained the original wording, except for three amendments of a technical character. There have since been various discussions on its abolition.

### **Discussions on the abolition of the blasphemy law**

In the parliamentary year 1972-73 the Minister of Justice proposed abolition of the provision, stating that public condemnation would be sufficient and no criminal sanction was necessary. Further it was argued that the provision had been used to prosecute acts of alleged blasphemy in only three cases (one acquittal and two convictions). There was no general agreement on this issue in Parliament and the proposal was postponed and not reintroduced.

In Report 1424 in 2002, the Council for the Criminal Code (*Straffelovsrådet*) recommended a critical review of various sections in the Criminal Code including Section 140 and its relation to, for example, Section 266.b prohibiting hate speech.

In 2004 in Parliament an opposition party, the Socialist People's Party (SF) proposed a Bill to abolish Section 140 in the Criminal Code (Folketingstidende 2004/2005, 1. samling – L 156), arguing that the section was obsolete and there existed a sufficient and better protection in the Criminal Code's Section 266.b on hate speech.

Also, in 2004, a party supporting the government, the Danish People's Party (DF), proposed a Bill to abolish Section 140 (Folketingstidende 2004/2005, 1. samling – Tillæg A page 4704), arguing that in principle and from a religious point of view it was a complete misunderstanding to have a provision on blasphemy in a Christian country. Furthermore, it was stated that the original meaning of the provision was to protect ordinary decency, but now it had become a matter of protecting religious feelings, which was a bad criterion for the rule of law. Finally, the proposal was linked to the Danish broadcasting of Theo van Gogh's film *Submission*, criticism of religion, freedom of speech and the complaint by some Muslims to the police on the movie's alleged blasphemous content.

None of the proposals was adopted.

**2. A:** The Danish hate-speech provision in the Criminal Code includes the protection of a group of people who are degraded etc. on account of their religion etc. In addition there exists Section 81 of the Criminal Code.<sup>182</sup> Section 266.b (Hate speech) reads:<sup>183</sup>

1. Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, scorned or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding two years.

2. It shall be considered an especially aggravating circumstance if the conduct can be characterised as propaganda.

### Historical background

Section 266.b of the Criminal Code (*straffeloven*) prohibits the dissemination of degrading etc. statements and propaganda. The group of people protected includes individuals defined according to their religious worship. The provision was inserted in the Criminal Code by Act No. 87 of 15 March 1939. The original wording of the provision prohibited "by dissemination of false accusations or rumours to persecute or incite hatred against a group of the Danish

<sup>182</sup>. In other criminal acts with a racist motive, it is an aggravating circumstance, when the courts are punishing an offence in the Danish Criminal Code, cf. section 81(1) No. 6, if the criminal act was motivated by others' ethnic origin, beliefs or sexual inclination. This section covers all criminal acts (violence, threats, homicide etc.). This aggravating circumstance is mentioned in the same provision as other aggravating circumstances.

<sup>183</sup>. Source: Consolidated Act No. 1000 of 10 May 2006, the Criminal Code (Lovbekendtgørelse 2006-10-05 nr. 1000), entry into force: 1 July 2006.

population on the basis of their faith, origin or citizenship". The reason for the introduction of the new provision was, according to the explanatory notes, the (at the time) recent persecution of racial and religious communities. The provision on defamation in the Criminal Code was rightly perceived not to be a sufficient safeguard, since the group of people who fell victim to such an attack could be unspecified to such a degree that the expression would fall outside the legislative protection from defamation of each and every individual belonging to the group in question.

### **The temporary wording**

The provision got its temporary wording by Act No. 288 of 9 June 1971 amending the law prior to Denmark's ratification of the UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of 21 December 1965. This may be compared with Administrative Order No. 55 of 4 August 1972, to ensure full compliance with Article 4 of ICERD, which required immediate and positive steps to combat all incitement and practice of racial discrimination. The amendment was based on Report No. 553/1969 on Prohibition of Racial Discrimination. By introducing the word "scorn" it was intended to expand the scope of protection compared to the original wording and the intention was also to criminalise ridicule. In addition the amendment removed the criteria of "false accusations and rumours", since other statements as well were intended to be prohibited, though with due regard to the freedom of speech. Furthermore it was explicitly mentioned that it was only public statements or dissemination in a wider circle that were banned and the wording "degrading [in Danish: *nedværdigende*] treatment or comments" indicated that statements of less severity should be exempted from punishment.

The initial proposal suggested the wording "being the subject of derogatory statements", but the latter formulation was perceived to be interfering with freedom of speech. The report rightly points out that the ratification of ICERD does not require "religion" to be included in the provision, but including this ground of discrimination was perceived as unobjectionable, since it was also in the original version. This solution solved the issue of other international obligations as well, namely the requirement to prohibit religious hatred as stipulated in the International Convention on Civil and Political Rights (ICCPR) Article 20.

Certain amendments to the provision have been made. "Sexual orientation" was inserted in the provision by Act No. 357 of 3 June 1987. The provision was amended by Act No. 309 of 17 May 1995, where subsection 2 on "propaganda" was inserted. According to the explanatory notes, the reason for the amendment was the increased intolerance, xenophobia and racism both in Denmark and abroad. Furthermore, it was stated that Denmark should not be perceived as a safe haven for dissemination of literature containing racism and Nazism. The subparagraph can also be used in incidents where statements are aimed against sexual orientation or religious beliefs. The word "especially" was

inserted in subparagraph 2 of Section 266.b by Act No. 218 of 31 March 2004; however there was no intention of changing the measurement of sentencing.

**3.** Part 8 (citizens' rights and freedoms) of the Danish Constitution (Grundloven), Section 77 says:

Anyone is entitled to publish his ideas in print, in writing and in speech, subject to the authority of the Courts. Censorship and other preventive measures may never be reintroduced.

Although the Constitutional Act guarantees freedom of expression for all, it may be limited in some situations, including: prohibition against hate speech, slander, prohibition against blasphemy, the obligation of confidentiality and security of the state.

The general opinion is that Section 77 contains a protection of formal freedom of expression, including a prohibition against prior restraint. The provision does not protect substantive freedom of expression, that is to say the content of the expressions. However, the section is considered a fundamental value or principle – guiding the legal interpretation unless other important considerations indicate otherwise. Section 77 should be interpreted in the light of ECHR Article 10, that is, prescribed by law and deemed necessary in a democratic society and hence providing substantive protection of freedom of expression. Freedom of expression is primarily considered a guiding principle and the section is rarely directly invoked in courts or used in argument in public debate. However, this guiding principle has a significant impact on the application of, for instance, criminal provisions limiting the freedom of expression.

Other relevant provisions include Section 70 of the Danish Constitution, which provides that “no person shall be denied the right to full enjoyment of civil and political rights by reason of his creed or descent; nor shall he for such reasons evade any common civil duty”.

There exists no explicit clause on freedom of speech in these two provisions. But explicit considerations regarding the wording and interpretation of especially section 266.b, but also Section 140 have been done in the explanatory notes.

**4.a.** Having European history and the period of the Enlightenment in mind, it is important to differentiate between minority protection and the question of the necessity to have a prohibition in the Criminal Code against blasphemy.

Incitement to religious hatred, intolerance and discrimination, should be prohibited, but this should not lead to less criticism of religious doctrines. In a liberal democracy it should not be necessary to have this prohibition in a Criminal Code.

**4.b.** In the wording of the Danish provision, Section 266.b goes beyond what is required in accordance with international obligations in regard to protection from incitement to religious hatred, and one should be very careful not to

prohibit or severely limit a necessary discussion in relation to how a religion should fit in a modern secular society.

However, the most vulnerable group at the moment is the Muslim minority, which is very exposed in the public debate and in general as mentioned in the ECRI Report on Denmark, Recommendation No. 89. Special initiatives should be introduced to help this minority to integrate successfully, but special accommodation in the Criminal Code and in restricting fundamental rights should not be among them. Single cases have shown that religion, without a firm reference to a religious group of people, is also covered by Section 266.b. Again, widening the scope would be problematic in accordance with the arguments raised under 4a. On the other hand there is a risk of a strategy of evasion by a perpetrator by attacking the religion rather than the religious group. Therefore, cases should be liable to the utmost scrutiny of the motives of the alleged perpetrator and a very circumstantial assessment by the courts and prosecutors, leaving room for critique of religious doctrines and practices.

**4.c.** According to the CERD Committee's latest Concluding Observations on Denmark, the state party should increase its efforts to prevent racially motivated offences and hate speech, and to ensure that relevant criminal law provisions are effectively implemented. Furthermore, it was requested that the state party remind public prosecutors and members of the prosecution service of the general importance of prosecuting racist acts, including minor offences committed with racist motives, since any racially motivated offence undermines social cohesion and society as a whole.<sup>184</sup>

These recommendations indicate that it is actually more the effective implementation, rather than new provisions, that is required. One could mention two aspects, namely the size of the fines for violating Section 266.b, that could be more significant. Also, the public prosecutor could initiate more proceedings in relation to the provision, the awareness by the Director of Public Prosecutions could lead to a uniform application of the provision, and the obligation to submit information on discontinued cases is a step in the right direction.

Finally one could echo the CERD Committee in *M. Gelle v. Denmark*:

[That] statements were made in the context of a political debate does not absolve the State party from its obligation to investigate whether or not her statements amounted to racial discrimination. It reiterates that the exercise of the right to freedom of expression carries special duties and responsibilities, in particular the obligation not to disseminate racist ideas.

**4.d.** Other grounds of discrimination could be included in Section 266.b, but this is at the moment not perceived to be necessary. One could also wish for a more fundamental debate on whether religion, which at the moment is often

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184. CERD/C/DEN/CO/17.

linked to ethnicity, should rather be perceived to some extent as similar to having a certain political opinion.

**4.e.** According to the explanatory notes to Section 266.b, it is not the intention that scientific theories on racial, national or ethnic differences should fall within the scope of the offences described in Section 266.b of the Criminal Code; and statements not made in an actual scientific context but which otherwise form part of a serious debate should, according to the circumstances, be exempted from punishment.

Furthermore, Holocaust denial is not as such prohibited in Denmark. The ECRI in the latest report on Denmark has indicated that it regretted that Holocaust denial and revisionism are not crimes in Denmark and urged the Danish Government to forbid the public denial, trivialisation, justification or condoning of Holocaust denial and revisionism as well as the production, publication and dissemination of Nazi memorabilia and revisionism material, as recommended in its General Policy No. 9 on the fight against anti-Semitism (Recommendation Nos. 85 and 86 in the ECRI's third report on Denmark, published in May 2006).

In the opinion of the author, criminalising such statements would obviously limit freedom of expression and would in a Danish context not be the proper way to combat anti-Semitism. The success of a prohibition is also a highly doubtful way of dealing with the problem, since Holocaust deniers in Denmark are already a marginalised group. Rather it is important that students and others are aware of the history, for example, by maintaining Auschwitz Day on 27 January.<sup>185</sup>

**5.** Please see above on the authority of initiating proceeding. The case law regarding the prohibition of blasphemy is very limited. Since the adoption of the Criminal Code of 1930, there have been only three indictments and two convictions, namely:

UfR 1938.419Ø (1938) – Four men were convicted of the publication of anti-Jewish posters. This would probably today be assessed to be a violation of Section 266.b on hate speech, rather than a violation of Section 140.

J.nr. 824/46 (1946) – A person was convicted of blasphemy because during a masquerade he was dressed as a priest and he and his spouse performed a baptism of a doll.

Gladsaxe Criminal Court (1971) – Two persons employed by the Danish National Broadcasting Company were indicted for the broadcasting of a song with alleged blasphemous content. They were acquitted, since the court found the song to be a contribution to the debate on the religious views of the sexuality of women.

185. Further information is available at [www.diis.dk/sw12806.asp](http://www.diis.dk/sw12806.asp) and [www.folkedrab.dk/](http://www.folkedrab.dk/).

The Director of Public Prosecutions has also in various cases decided and rejected criminal proceedings, especially on the depicting of Christ in films and paintings.

The case law is significantly larger when it comes to Section 266.b on hate speech.

From 1 January 2001 to 31 December 2003, the Danish courts considered 23 cases of violation of Section 266.b of the Danish Criminal Code, which prohibits the dissemination of racist statements and racist propaganda. In some of the cases more than one person was indicted. In one case, the court acquitted the person indicted and in another case the court acquitted one of the two persons indicted. In the remaining 21 cases, the courts convicted all the persons indicted.

As to the manner in which the statements/propaganda were disseminated, four cases concerned private persons shouting at someone in a public place like the street, a shop or a bus; seven cases concerned statements published on the Internet; two cases concerned statements published as advertisements; and two cases concerned statements expressed at political party conferences. In three cases, the statements were given to the press during interviews or sent to the press as a press release. In three further cases, the statements were sent by e-mail or by ordinary mail to a number of politicians. As to the persons expressing these statements, 10 cases concerned statements/propaganda from politicians (one of whom was acquitted) and one case concerned a spokesperson for a religious movement, whereas the majority of the rest concerned statements expressed by private persons.

The public prosecution service decided to withdraw charges for violation of Section 266.b of the Criminal Code in six cases in 2001, seven cases in 2002 and six cases in 2003 pursuant to Section 721 of the Administration of Justice Act, *inter alia* because of lack of evidence.<sup>186</sup>

Two convictions in relation to religion and Section 266.b can be found cf. U.2002.2575 Ø and U.2002.1947 Ø, where the expression is to a larger extent aimed at the religion rather than the religious group as such.

**6.** Not as such. In a Danish context, it is a matter of either Section 140 on blasphemy or Section 266.b on hate speech against a certain group of people, or the prohibition of defamation as stipulated in Section 267 in the Criminal Code.

The prevailing opinion seems to be an acknowledgement of a differentiation between protection of vulnerable groups of people, which to a significantly larger extent should be protected, vis-à-vis the protection of religious dogmas, which should endure criticism, almost without limits. Generally, religious insult is not a term which is used in a Danish context, where the focus is on the protection of tangible interest and not feelings, dogmas or ideas.

A practical issue is, however, that it is possible indirectly to harass minorities by aiming the criticism at the religion and not at the people. By making a concrete

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186. Sixteenth and Seventeenth Periodic Report on Denmark concerning the International Convention on the Elimination of All Forms of Racial Discrimination, June 2005.

assessment of the motives as seen in the two convictions in relation to Section 266.b, this issue can be limited.

**7.** In relation to *mens rea*, the alleged perpetrator must have an intention to publish or disseminate to a wider circle the statements, that is, he or she must be aware that a journalist is recording or quoting his or her statements. He must have intent to all parts of the crime.

In relation of the content of the statement, that is, whether the statement is severe enough to violate the provisions, the practice is more of an "objective" assessment on whether the statement generally can be characterised as being degrading. However, in relation to Section 266.b, in a recent publication<sup>187</sup> from the Director of Public Prosecution it is recommended that the person who has expressed himself in an alleged derogatory way should be questioned to uncover the motives behind the expression,, unless the complaint is manifestly ill-founded. This administrative change of procedure was due to the opinion of the CERD Committee Communication No. 34/2004, *Mohammed Hassan Gelle v. Denmark*.

**8.** According to the Danish Act on the Administration of Justice, the police referring to Section 749, subsection 2 of the Administration of Justice Act can decide to discontinue an investigation. According to this provision it may be decided to discontinue an investigation, if there is no reasonable suspicion that a criminal offence indictable by the state has been committed.<sup>188</sup>

Prosecuting authority: According to Section 719, subsection 2, No. 3 in the Act on the Administration of Justice, offences committed in relation to (for example) sections 140 and 266.b are liable to public prosecution only (by the regional public prosecutor). This is an exception from the normal rule, where it is the Chief of Police that decides whether to initiate proceedings. The reason behind this specific authority is the consideration of the importance of these cases in relation to civil liberties in the Danish constitution.

The Director of Public Prosecutions in September 1995 stipulated that he must be notified of all violations of Section 266.b of the Criminal Code that are dismissed by the police on the grounds that no offence is assumed to have been

187. Director of Public Prosecutions, Meddelelse No. 9/2006 of 14 December 2006.

188. See also Section 721.1 of the Administration of Justice Act, which provides: "Charges in a case may be withdrawn in full or in part in cases: (i) where the charge has proved groundless; (ii) where further prosecution cannot anyway be expected to lead to conviction of the suspect; or (iii) where completion of the case will entail difficulties, costs or trial periods which are not commensurate with the significance of the case and with the punishment, the imposition of which can be expected in case of conviction." Section 722.1.iv of the Administration of Justice Act provides that: "Prosecution in a case may be waived in full or in part in cases ... where Section 89 of the Criminal Code is applicable when it is deemed that no punishment or only an insignificant punishment would be imposed and that conviction would not otherwise be of essential importance." Section 89 provides: "Where a person already sentenced [for another offence] is found guilty of another criminal offence committed prior to the judgment, an additional sentence must be imposed provided that simultaneous adjudication would have resulted in a more severe sentence."

committed. It is further stipulated that all cases in which a charge has been made must be submitted to the Director of Public Prosecution together with a recommendation on the question of prosecution.

With the aim of achieving a uniform application of Section 266.b the Director of Public Prosecutions in December 2006 stipulated that all cases on complaints and investigations are initiated in relation to Section 266.b, should be submitted to the Regional Prosecutor, before a case is closed. Cases where a charge has been raised should still be submitted to the Director of Public Prosecution.

In relation to Section 266.b the police have full (however, see above) discretion whether or not to open criminal proceedings, subject to appeal to the Regional Public Prosecutor, whose decision is final and cannot be appealed against to another administrative authority (cf. Section 101 of the Act on the Administration of Justice).<sup>189</sup> The Regional Public Prosecutor can request the Police Chief to carry out further investigations

The public prosecutors supervise the processing of criminal cases by the chiefs of police and hear complaints of decisions made by the chiefs of police concerning prosecution. The decision is final and cannot be appealed against in the administrative system (cf. Section 101.2, second sentence, of the Administration of Justice Act).<sup>190</sup>

The Director of Public Prosecutions hears appeals against decisions made by the public prosecutors as first instance. A decision made in an appeal by the Director of Public Prosecutions cannot be appealed against to the Minister of Justice (cf. Section 99.3 of the Administration of Justice Act).

According to the Act on the Administration of Justice, Section 98, the Minister of Justice acts as the superior and supervises the public prosecutors and can (cf. subsection 3) order the prosecutor in a specific case to initiate, continue, omit or stop prosecution.<sup>191</sup> The instruction has to be in writing, stating the reasoning for the decision. Furthermore, the Chairperson of Parliament has to be informed (this safeguard was introduced in 2005). The potential political interference in prosecution and in specific cases has rightly been criticised by legal scholars; however the actual use of the provision is very limited.

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189. Section 101, paragraph 2, of the Administration of Justice Act reads, in pertinent parts: "The decisions of the Regional Public Prosecutors on appeals cannot be appealed to the Director of Public Prosecutions or to the Minister of Justice."

190. Section 101, paragraph 2, of the Administration of Justice Act reads, in pertinent parts: "The decisions of the Regional Public Prosecutors on appeals cannot be appealed to the Director of Public Prosecutions or to the Minister of Justice."

191. Section 98 of the Administration of Justice Act reads, in pertinent parts: "The Minister of Justice is the superior of the public prosecutors and supervises these. (2) The Minister of Justice may lay down conditions governing the execution of the work of the public prosecutors. (3) The Minister of Justice may issue orders to public prosecutors concerning the processing of specific cases, including whether to commence or continue, refrain from or end prosecution. (4) The Minister of Justice hears appeals of decisions made by the Director of Public Prosecutions as first instance."

Section 63 of the Danish Constitution enables decisions of administrative authorities, including the Director of Public Prosecutions and the Ministry of Justice, to be reviewed as to their lawfulness before the courts. A person can apply to the courts for a review of whether the Director of Public Prosecutions' view of the scope of Section 266.b.1 or of the Ministry's view of his standing is correct.

Obviously there exist complaints mechanisms at the European Court of Human Rights and the individual complaint system in the UN Committee system. There have been several cases before the UN CERD committees on the Danish approach and administrative tradition of being somewhat restrained about initiating proceedings in relation to Section 266.b.1,<sup>192</sup> and the alleged lack of effective action and investigation of racial discrimination. The reasoning behind this interpretation can be summed up by the following quotation from the decision by the Regional Public Prosecutor who, on 18 November 2004, upheld the decision of the Copenhagen police in a case which later was decided upon at the UN CERD Committee:

Although the statements are general and very sharp and may offend or outrage some people, I have considered it essential ... that the statements were made as part of a political debate, which, as a matter of principle, affords quite wide limits for the use of unilateral statements in support of a particular political view. According to the preliminary work on section 266.b of the Criminal Code, it was particularly intended not to lay down narrow limits on the topics that can become the subject of political debate, or on the way the topics are dealt with in detail.<sup>193</sup>

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**9.** If the public is entitled to take proceedings and if it is suspected that a crime has been committed, for example in cases described in the media, the police can on their own initiative start investigations (cf. the Act on the Administration of Justice, Section 742, subsection 2). Section 275, paragraph 1, of the Criminal Code reads: "The offences contained in this Part shall be subject to private prosecution, except for the offences referred to in sections ... 266.b."

If prosecution under Section 266.b.1 of the Criminal Code has not been pursued, a private prosecution under Section 267 of the Criminal Code (7) protecting personal honour is available.<sup>194</sup> The plaintiff must in such a case convince the court that he has an essential, direct and individual interest in the case to be considered as an injured party. This criterion can be somewhat difficult if the alleged violation is abstract, or the target aimed at is the group or the religion.

192. This was acknowledged in the explanatory notes to the Act amending the Criminal Code in 1995 (No. 3009 of 17 May 1995), introducing Section 266.b.2 on propaganda, recommending the prosecutor to show less restraint in severe cases.

193. Communication No. 34/2004, submitted by Mohammed Hassan Gelle to the UN CERD Committee.

194. Section 267, paragraph 1, of the Criminal Code reads: "Any person who violates the personal honour of another [person] by offensive words or conduct or by making or spreading allegations of an act likely to disparage him in the esteem of his fellow citizens, shall be liable to a fine or to imprisonment for any term not exceeding four months."

**10.** In the case of the twelve cartoons published in a Danish newspaper, the above-mentioned approach according to Section 267 of the Criminal Code protecting personal honour was tried in Aarhus district court, where various Muslim organisations sued the editors for violation of Section 267. According to the judgment some of the plaintiffs could not be considered injured parties, since the founding documents of some associations were not submitted; hence it could not be assessed whether they had a real legal interest in the case. For the other organisations, the court concluded that the motive behind the publication could not be assessed as being aimed at degrading Muslims in the public eye. The editors were acquitted.<sup>195</sup>

Sections 140 and 266.b of the Criminal Code were also invoked. *Jyllands Posten* printed the twelve cartoons of the Muslim prophet Muhammad on 30 September 2005. According to the newspaper, the aim of the publication was to raise debate about a growing self-censorship in Denmark and abroad, which, according to the newspaper, threatens freedom of expression. The publication of the drawings was perceived as offensive by the Danish Muslim community and occasioned response not only in Denmark among Muslims but also in the rest of the world. The newspaper was reported to the district attorney for having violated provisions in the Criminal Code 266.b regarding hate speech and provision 140 regarding blasphemy.

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The Regional Public Prosecutor did not find that there was a reasonable suspicion that a criminal offence indictable by the state had been committed. In his decision the Regional Public Prosecutor stated that he attached importance to the fact that the article in question concerns a subject of public interest, which means that there is an extended access to make statements without these statements constituting a criminal offence. Furthermore, according to Danish case law, journalists have extended editorial freedom when it comes to subjects of public interest. For these reasons the Regional Public Prosecutor did not find a basis for concluding that the content of the article constituted an offence under Section 140 or Section 266.b of the Criminal Code.

The Regional Public Prosecutor stated that, when assessing what constitutes an offence under sections 140 and 266.b, the right to freedom of speech must be taken into consideration and the right to freedom of speech must be exercised with the necessary respect for other human rights, including the right to protection against discrimination, insult and degradation.<sup>196</sup>

The Director of Public Prosecutions concluded on 15 March 2006 that there was no basis for instituting criminal proceedings and therefore rejected the com-

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195. Aarhus District Court Judgment BS 5-851/2006. October 26; 2006.

196. Copenhagen 23 January 2006, Response by the Danish Government to letter of 24 November 2005 from UN Special Rapporteur on Freedom of Religion or Belief, Ms Asma Jahangir, and UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Mr Doudou Diéne, regarding cartoons representing the Prophet Muhammad published in a newspaper.

plaints. The Director of Public Prosecutions did not find any basis for changing the decision made by the Regional Public Prosecutor and therefore concurred in the decision and stated, in relation to Section 140:

Also taking into account that, according to the legislative material and precedents, section 140 of the Danish Criminal Code is to be interpreted narrowly, the affront and insult to the Prophet Muhammed, which the drawing may be understood to be, cannot accordingly with the necessary certainty be assumed to be a punishable offence under section 140 of the Danish Criminal Code.

In the same decision, the Director of Public Prosecutions stated in relation to Section 266.b:

The text section of the article does not refer to Muslims in general, but mentions expressly "some" Muslims, i.e. Muslims who reject the modern, secular society and demand a special position in relation to their own religious feelings. The latter group of people must be considered to be comprised by the expression "a group of people" as mentioned in section 266.b, but the text in the article cannot be considered to be scornful or degrading towards this group – even if seen in the context of the drawings.

(...) [A]ccording to the heading, the drawings in the article depict Muhammad. The drawings that must be assumed to be pictures of Muhammad depict a religious figure, and none of them can be considered to be meant to refer to Muslims in general. Furthermore, there is no basis for assuming that the intention of drawing 2 [the face of a grim-looking bearded man with a turban shaped like an ignited bomb] was to depict Muslims in general as perpetrators of violence or even as terrorists.

The drawings depicting persons other than Muhammad do not contain any general references to Muslims. Furthermore, the depiction of Muslims in these drawings is not scornful or degrading. Not even when the drawings are seen together with the text section of the article is there any basis to assume that the drawings make statements referring to Muslims in general. Accordingly, the Director of Public Prosecutions does not find that in the case of the article "The Face of Mohammed" there has been any violation of section 266.b of the Danish Criminal Code. Based on this the Director of Public Prosecutions also concurs in the decision to discontinue the investigation with regard to violation of section 266.b of the Danish Criminal Code.

Finally it was stated that:

Although there is no basis for instituting criminal proceedings in this case, it should be noted that both provisions of the Danish Criminal Code – and also other penal provisions, e.g. about defamation of character – contain a restriction of the freedom of expression. Section 140 of the Danish Criminal Code protects religious feelings against mockery and scorn and section 266.b protects groups of persons against scorn and degradation on account of their religion. To the extent publicly made expressions fall within the scope of these rules there is, therefore, no free and unrestricted right to express opinions about religious subjects. It is thus not a correct description of existing law when the article in *Jyllands-Posten* states that it is incompatible with the right to freedom of expression to demand special consideration for

religious feelings and that one has to be ready to put up with “scorn, mockery and ridicule”.<sup>197</sup>

In an appendix to the actual decision there is an assessment of the historical legal traditions and legal interpretation, as well as reference to the following case law from the European Court of Human Rights on freedom of expression and religious feelings: *I.A v Turkey*, judgment of 13 September 2005; *Wingrove v. the United Kingdom*, judgment of 25 November 1996 and *Otto-Preminger-Institute v. Austria*, judgment of 20 September 1994.

**11.** Generally the media do not restrain themselves in the coverage of significant news events. For example, all of the cartoons in the above-mentioned case have been re-published in other newspapers and media, typically not as an act of support but rather as part of the news coverage. However, there has generally not been an agreement on the wisdom of the original publication and during the last year there has been an extensive public debate on freedom of speech, minority rights and the scope of freedom of religion.

In relation to ordinary coverage of crime-related news, some newspapers abide more strictly by the press ethical rules than others. The rules of the Danish Press Council, Press Ethical Rules, National Code of Conduct on Court Reporting, stipulate that the mention of persons’ family history, occupation, race, nationality, creed or membership of organisations should be avoided unless this has something directly to do with the case.

In criminal cases against journalists and editors, the courts have made a specific assessment of the purpose of reproducing racist statements, including whether the protection of persons who are exposed to gross contempt by the statements reproduced is stronger than the need for conveying the statements to the public. However, the European Court of Human Rights judgment of 23 September 1994 in the case *Jersild v. Denmark* made a significant impact in Denmark and in the country’s jurisprudence. It is now generally accepted that the press enjoys a wide freedom of expression when reproducing racist statements, given its role as a “public watchdog”.

## France<sup>198</sup>

**1.** France does not have any specific legislation in this area. In respect of eight criminal offences, however, religion is a factor that establishes a generic offence on the same basis as other grounds of discrimination, such as origin, ethnic group and race.

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197. File No. RA-2006-41-0151, 15 March 2006: Decision on possible criminal proceedings in the case of the *Jyllands-Posten* article “The face of Muhammed” at: [www.rigsadvokaten.dk/media/bilag/afgorelse\\_engelsk.pdf](http://www.rigsadvokaten.dk/media/bilag/afgorelse_engelsk.pdf).

198. Reply by Mr Yves Charpenel, Solicitor General at the Court of Cassation.

Inciting discrimination, in private, on grounds of origin, ethnic group, nationality, race or religion	Petty offence	R 625-7.1 Criminal Code
Discriminating on grounds of religion in respect of the supply or provision of a good or service	Misdemeanour	Article 225-1,4 Criminal Code
Publicly insulting an individual on account of his or her race, religion or origin	Misdemeanour	Sections 23, 29, 33 Act of 29 July 1881
Defaming an individual on account of his or her race or religion	Misdemeanour	Sections 23, 32, 42 Act of 29 July 1881
Violence on grounds of religion, not causing unfitness for work	Misdemeanour	Article 222-13 Criminal Code
Violence on grounds of religion, causing unfitness for work	Misdemeanour	Article 222-12 Criminal Code
Desecrating a grave and interfering with a corpse on grounds of race, religion, ethnic group or nationality	Misdemeanour	Article 225-18 Criminal Code
Publicly inciting discrimination, hatred or violence on grounds of race, religion, ethnic group or nationality	Misdemeanour	Section 24 Act of 29 July 1881

Two courts of appeal, those of Colmar and Metz (Alsace and Moselle), have special legislation deriving from the German Criminal Code of 1871, the validity of which was endorsed by an Act of 17 October 1919 and a decree of 25 November 1919, under which “public blasphemy against God” is an offence (Article 166).

The comprehensive database held by the national criminal records office contains no trace of any convictions on this count; it may be said to be a local historical relic without practical effect. The Court of Cassation has acknowledged its applicability (FROMM judgment of 30 November 1999) to the two courts in question by endorsing a conviction based on Article 167, under which interference with freedom of religion is an offence.

**1a.** The offence of blasphemy disappeared from French positive law in 1791. Reintroducing it would conflict with the provisions of the Separation of Church and State Act of 9 December 1905, which enshrined in France the secular principle, deriving from the constitutional principle of freedom of conscience, which

has been part of our law since the Declaration of the Rights of Man and of the Citizen of 26 August 1789 (articles 10 and 11).

The fact that Alsace and Moselle retain a relic of a specific law inherited from the German period (1871-1918) does not seem to give rise to much debate at national level in this respect.

**1.b.** Legal writers all agree on the need to maintain the separation between church and state, given that secularism remains a founding principle of the French Republic; see Article 1 of the 1958 Constitution:

France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.

For its part, in a decision of 31 May 2000, the Conseil d'Etat laid down conditions for recognising religious associations:

- their sole purpose must be to practise a religion;
- all their activities must be related to that purpose;
- they must not be involved in activities that might interfere with public order.

**1.c.** The establishment of the Equal Opportunities and Anti-Discrimination Commission (HALDE) in 2005, under the Act of 30 December 2004, reinforced this traditional approach, which reflects a consensus on the necessary relationship between equality, secularism and freedom of conscience.

**2.** An Act of 1 July 1972 inserted a provision into the general Freedom of the Press Act of 29 July 1881, prohibiting incitement to hatred or violence towards a person or a group of people on account of their origin or their membership or non-membership of a particular ethnic group, nation, race or religion (Section 24 of the 1881 Act). Here, too, religion is just one of the elements establishing the general offence of discrimination. In respect of discrimination, defamation, insults and violence, French positive law establishes a general offence that may be aggravated by specific circumstances, of which religion is just one example.

As in respect of the first question, the existence of offences involving religion is meaningful only in the context of the exercise of freedom of conscience: both the legislature and the courts are guided by the need to balance the primacy of secularism with freedom of conscience; what is prohibited is not attacks on religion as such, but rather the hurtful, intolerable impact that religious criticism can have on others by interfering with their freedom of conscience, within the limits of freedom of expression.

The principle that has been established for two centuries is that of general legislation subject to strict interpretation by the courts; specific laws, including those that broaden the scope of discrimination, simply afford updated indications of individual or collective interests which, for historical and sociological reasons,

warrant particular vigilance in the light of the continual reaffirmation of the need to safeguard freedom of expression.

Successive amendments to the Press Act, which contains the bulk of the provisions pertaining to religion, were consequently incorporated in the wake of topical events that had had a significant public impact, such as “targeted” profanation of graves or violence against representatives of a specific community.

**3.** Criminal law does not contain any specific references to a constitutionally guaranteed principle that systematically guides the judgments handed down in such cases: the principle is that of freedom; the exception to it is the prohibition of discriminatory, insulting or defamatory behaviour or expression; accordingly, in order to make a conviction, the case law requires an extremely detailed charge sheet, and restricts the right to bring a prosecution to a very short limitation period of three months (compared with three years for ordinary offences) where such offences are committed through the press.

Under the Court of Cassation’s supervision, judges are instructed to examine the evidence in each case in the light of the principle that the prohibition is subsidiary to freedom of expression. This approach was endorsed by the Act of 15 June 2000, which inserted a preliminary article at the start of the Code of Criminal Procedure, recalling the primacy of the principles guaranteed by the European Convention on Human Rights.

**4.a.** A private member’s bill on the trivialisation of blasphemy in cartoons, tabled by an MP in 2006, was not passed; both legal writers and representatives of most denominations appear to agree that the current balance established by law and its application by the courts suffice to prevent the proliferation of incidents involving religious criticism.

**4.b-d.** The above offences attract a similar response; they have all been addressed by means of specific legislative amendments, the courts’ approach to which always generates interest (see, for example, the proceedings under way in Paris concerning the cartoons of Muhammad), but without any objections being raised in respect of legislation that is regularly applied, thereby giving rise to judgments that are made public. The courts’ long-standing, flexible practice in relation to the law on the press, which covers most offences pertaining to religion, contributes to the general climate of confidence in this legal approach to what is an extremely sensitive issue impinging on freedom of thought, in which the courts’ role is paramount.

**4.e.** The prohibition of “negationism” was inserted into the French Criminal Code under the Act of 13 July 1990 (Article 24bis of the Act of 29 July 1881) with reference to Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945.

The passing of the Recognition of the Armenian Genocide Act sparked a debate on the possibility of extending the offence of “negationism” to include that

genocide, but Parliament has not taken any action to date. With the exception of this idea of broadening the concept of “negationism” to include all forms of genocide, the existing legislation is not being challenged to any great extent.

**5.** There are naturally no established precedents in respect of blasphemy, since it is not an offence under criminal law.

It is impossible to distinguish offences involving religious insults or defamation, or incitement to religious hatred, from the generic offence (see above). Conviction statistics do not include a separate total for the religious ground, which is bundled together with the grounds of origin, race, ethnic group and nationality. Nevertheless, figures for the offences of discriminatory insults and defamation and incitement to hatred show that they are prosecuted and do result in convictions. The table gives the latest available figures from the Justice Ministry’s database.

Offence prosecuted	2004 convictions	2005 convictions
Violence on religious grounds	3	3
Discriminatory defamation (including on religious grounds)	3	8
Discriminatory insults (including on religious grounds)	162	193
Inciting discrimination (including on religious grounds)	16	53
Discrimination (including on religious grounds)	6	6
Inciting hatred during sporting events	2	3
“Negationism”	1	1

**6.** Aside from the fact that blasphemy is not an offence and that insults, defamation, incitement and discrimination on religious grounds are meaningful only in the context of the generic offence to which they pertain, on the same basis as the concepts of race, ethnic group, origin and nationality, the distinctions established under criminal law between different forms of discrimination have at least two advantages. Firstly, they make it easier to identify various situations and types of infringement and thus to fulfil the requirement that the application of the law be tailored to individual circumstances, by clarifying its relationship to the legitimate interests harmed and thus enhancing public understanding of the ensuing exceptions to freedom of expression. Secondly, they require more precision from judges when they charge suspects with the offences in question, thereby affording an additional motivation to give reasons for decisions to

convict, which is consistent with the principle that the prohibition is subsidiary to freedom of expression.

Through, *inter alia*, the various publications aimed at law students, prevailing opinion emphasises the legitimacy of specific legislation dealing with what amounts to abuses of freedom of expression. It notes that the establishment of the generic offence (insults, defamation, incitement or discrimination), in accordance with the normal rules for assessing whether the constituent elements have been established in each case, must be subject to the greatest possible scrutiny, and that aggravating circumstances (such as religious or racial grounds) must be assessed only once the general offence has already been established (see *Juris-Classeur Périodique (JCP)* 1998, Vol. 70; *JCP* 2005, Vol. 110; *Eerera Gazette du Palais*, 1995, No. 697; and Lesclous and Marsal, *Droit Pénal*, 1998, Chronicles 21 and 23).

Legal writers regularly recall that, particularly in respect of legislation restricting freedom of expression, the rule of law requires that the latter may be limited only by an explicit legal provision (see Burgelin submission, *Dalloz*, 1998, p. 154; Régis de Gouttes, *Gazette du Palais*, *Doctrine Spécial Droits de l'Homme*, communication of 23 May 2000; Thierry Massis, *Dalloz*, 1992, p. 113, "La liberté de conscience, le sentiment religieux et le droit pénal").

**7.** Since the overall reform of the French Criminal Code in 1994, the element of intent has had to be established in respect of all offences (Article 121-3 of the Criminal Code). This means that the court must establish its existence before it can find a suspect guilty. Intent is often inferred from the circumstances of the case, but the decision must still demonstrate it.

With regard to the foreseeability of the effects of the offences in question, it depends whether they are committed in public (including by electronic means), in which case they attract a more severe penalty on the grounds that the damage to the victim's legitimate interests is disseminated more widely.

Simply establishing that the offence was committed suffices to make it punishable, without any need to establish that specific damage was actually caused: a breach of the law may be found even where no complaint is lodged by an individual victim.

**8.** It follows from the preceding principle that the prosecution of such offences is not subject to a complaint being lodged by a victim able to demonstrate a direct personal interest. Such offences are therefore subject to the general principle governing French criminal procedure, which allows the public prosecutor to prosecute any breach of criminal law *proprio motu*.

This is the meaning of articles 31 et seq. of the Code of Criminal Procedure, and Article 40-1 in particular, which deals with the expediency of prosecution, that is, the scope for the public prosecutor to decide whether or not to prosecute

breaches that come to his or her notice. This freedom is subject to a number of conditions:

- Should the public prosecutor decide not to prosecute, he or she must notify the victims and the persons targeted, where the latter are identified (Article 40-2);
- The person having reported the offence may appeal against a decision to refrain from prosecuting (Article 40-3). Such appeals are lodged with the Attorney-General, who may decide to order the public prosecutor to prosecute;
- The public prosecutor may opt for an alternative to prosecution or non-prosecution (Article 41-2), such as penal mediation, a “penal arrangement” or reparation measures;
- He or she may receive written instructions, which go on file, from his or her immediate superior (the Attorney-General) to prosecute, but not to refrain from prosecuting (Article 36);
- The Attorney-General may take action *proprio motu* on the instructions of the Minister of Justice (Article 30) or in response to an appeal lodged by the complainant;
- The victim may bring criminal proceedings in his or her own right (Article 1.2), either by lodging an application for damages with the investigating judge (Article 85) or by bringing a private prosecution before the court (Article 392).

Accordingly, such offences are not prosecuted solely at the public prosecutor’s discretion: where the public prosecutor decides not to take any action, the victim can either bring a prosecution *proprio motu* or challenge that decision before the prosecutor’s immediate superior.

**9.** See above: criminal offences, particularly those with religious overtones, are normally subject to the principle of expediency of prosecution available to the public prosecutor; the principle is therefore that the prosecuting authorities are free to prosecute or to refrain from prosecuting, irrespective of the victim’s attitude.

This follows from the rules governing public prosecutor’s offices, which are responsible for upholding the public interest (within the meaning of Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe) rather than individual interests. Only in a few exceptional cases does the law make prosecution subject to the lodging of a complaint; these are explicitly and exhaustively stipulated by law, for instance in the customs and taxation fields.

With regard to the press, the specific status of the persons or institutions concerned gives rise to a number of exceptions under Section 48 of the 1881 Act, where the insults or defamation in question are directed at a corporate body,

a court, a member of parliament, a public officer, a juror, a witness, a head of state or a foreign diplomat. In such cases, the prosecution is valid only if a complaint is first lodged, or the offence explicitly reported, by the person or institution concerned. On the other hand, it should be noted that where an individual is defamed on account of his or her religion, *inter alia*, the prosecuting authorities can prosecute *proprio motu*. The principle is therefore that offences involving religious discrimination are not subject to the lodging of a complaint.

Except where the impact or unusual nature of the breach in question requires the prosecuting authorities to take action in order to uphold the public interest, the application of the principle of expediency of prosecution often prompts the public prosecutor to opt, at least in the case of general offences involving insults or defamation against individuals, to leave it up to the latter to initiate a prosecution. On the other hand, where the offence involves one of the forms of discrimination specifically covered by law, the public prosecutor will generally initiate a prosecution *proprio motu*.

By and large, this dual stance derives from general instructions on prosecution policy, issued by the Ministry of Justice (see the table) and implemented by the principal public prosecutor's offices, aimed at encouraging public prosecutors to tailor their procedural decisions to the seriousness of criminal offences.

Circular of 16 July 1998	Action against Racism and Xenophobia
Circular of 13 October 2000	Judicial Responses to Urban Violence with Racist or Anti-Semitic Overtones
Circular of 2 March 2002	Judicial Responses to Urban Violence with Racist or Anti-Semitic Overtones
Circular of 18 April 2002	On Racist and Anti-Semitic Acts
Memorandum of June 2002	Evaluation of Measures to Test for Racial Discrimination
Circular on the Act of 3 February 2003	Establishment of Racism, Xenophobia and Anti-Semitism as Aggravating Circumstances
Fact sheet of May 2002	Discrimination in the Workplace
Circular of 18 November 2003	Judicial Responses to Anti-Semitic Acts
Dispatch of 13 August 2004	Profanation of Graves
Dispatch of 21 March 2003	Racist, Anti-Semitic and Xenophobic Acts

Annual summary sheets of April 2004	Definitions of Anti-Semitic Acts Guide to Criminal Provisions on Racism, Anti-Semitism and Discrimination Appointment of Referring Prosecutors in Principal Public Prosecutor's Offices
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On several occasions in recent years, the growing number of offences involving discrimination, including on religious grounds, has prompted the Minister of Justice to issue numerous instructions aimed at ensuring more consistent action by the French Republic's 35 principal public prosecutors and 182 public prosecutors in respect of what is regarded as a sensitive issue, which brings into play important democratic interests and strikes a deep chord with the public. Likewise, the annual report on prosecution policy, which is compiled at the local, regional and national levels, includes a section on such offences, thereby affording an annual overview of both preventive and punitive policies (see dispatch of 21 December 2006 in relation to the compilation of the 2007 report).

**10.** Like other European countries, France regularly experiences such incidents, which may involve sporting fixtures, desecration of graves, urban violence or the publication of opinion pieces or cartoons.

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The degree of public emotion is reflected in both the increasing number of specific legal provisions making the most unacceptable forms of such discrimination an offence and the growing number of cases leading to a prosecution and/or a conviction, although the latter account for just a tiny fraction of the cases brought before the criminal courts each year: some 5 400 000 complaints and police reports, resulting in 450 000 convictions. The fact remains that such offences are systematically investigated. Thanks to the careful, targeted prosecution policy pursued by the prosecuting authorities, the mobilisation of victims, individuals and associations and the fact that the perpetrators are frequently identified, the proportion of such cases on which no action is taken is estimated to be considerably lower than for criminal offences in general (about 25% of those cases in which prosecution is an option), while the ratio of acquittals to convictions is estimated to be higher than for other offences, precisely because of the greater need for particular formalities and the statement of specific facts in order to outweigh the higher principle of freedom of expression. Moreover, it is significant that neither the principal state prosecutors' reports nor legal or media commentators make any allusion to major trends in public opinion or waves of appeals against court decisions pertaining to the prosecution or judgment of such offences.

A significant recent example is the judgment handed down by the plenary Court of Cassation on 16 February 2007 in response to a complaint from the Central Consistory of the Union of Jewish Communities of France against the humorist

Dieudonné, which noted that, while there could be “free criticism of religion during a debate of general interest”, punishment of the statements complained of (“the Jews are a sect, a fraud”) “constituted a necessary restriction on freedom of expression in a democratic society”; in this case, the conviction was justified solely on the ground of an intolerable attack on the honour and standing of a group of people on account of their origin.

**11.** Court cases have traditionally attracted significant media coverage in France, and are currently estimated to account for nearly 20% of prime-time broadcasting.

Court cases with a religious dimension do not stand out against this general background, although cases of religious intolerance are regularly given news coverage as and when they occur. On the whole, media coverage of such cases focuses on social, political and sociological issues rather than purely judicial aspects.

Given that they feel strongly about respect for freedom of expression, quality journalists working for major media outlets have little inclination to criticise a judicial approach that clearly weighs the legitimacy of protecting religious interests against that of rejecting punishment of any attack on religious sensibilities.

The tempered attitude adopted by judges appears to be matched by relatively tempered media coverage, in which one senses the same cautious resolve to avoid fuelling an inherently heated debate on a subject that involves deeply-held beliefs, between people who are extremely committed to those beliefs. Accordingly, the idea that the media might step up their coverage in order to offset or counter judicial inaction does not appear to reflect the current situation, at least in the field covered by the questionnaire.

## Greece<sup>199</sup>

**1.** Chapter 7 of the Greek Penal Code, entitled Plots against Religious Peace, contains four articles. According to Article 198 on Malicious blasphemy:

1. One who publicly and maliciously and by any means blasphemes God shall be punished by imprisonment for not more than two years.

2. Except for cases under paragraph 1, one who by blasphemy publicly manifests a lack of respect for the divinity shall be punished by imprisonment for not more than three months.

<sup>199</sup>. Reply by Mr Dimitris Christopoulos, Associate Professor, Department of Political Science and History of the Panteion University.

According to Article 199 on Blasphemy concerning religions:

One who publicly and maliciously and by any means blasphemes the Greek Orthodox Church or any other religion tolerable in Greece shall be punished by imprisonment for not more than two years.

According to Article 200 on Disturbance of a religious assembly:

1. One who maliciously attempts to obstruct or intentionally disrupts a religious assembly for service or ceremony permitted under the Constitution shall be punished by imprisonment for not more than two years.

2. One who commits blasphemous, improper acts in a church or in a place devoted to a religious assembly permitted under the Constitution shall be subject to the same punishment.

According to Article 201:

One who wilfully removes a corpse, parts of a corpse or the ashes of the dead from those who have lawful custody thereof, or one who commits an offence with respect to a corpse or acts blasphemously and improperly toward a grave, shall be punished by imprisonment for not more than two years.

Chapter 7 of the Greek Penal Code is a rather obvious indication that the Greek criminal order is a religionist one. The Greek legal order is marked by a very high level of religious devotion, a result of the particular position of the Greek Orthodox Church in the state, according to the Greek Constitution. Furthermore, the solid historical links between Eastern Orthodox Christianity and the emergence of the Greek nation are used to justify a high level of interference of the Church in state affairs, at all levels. The very existence of Chapter 7 of the Greek Penal Law can be seen as solid evidence of the integration of Orthodox religion into the penal machinery. It should not be regarded as accidental, therefore, that the Greek case law related to crimes contained in Chapter 7 of the Code is non-existent when it comes to condemnation of blasphemous acts against "any other religion tolerable in Greece".

It should be noted finally that the target of punishing blasphemy in Greek penal law is neither the protection of religious feeling nor the protection of social peace, as is often alleged in parts of the legal doctrine. Article 198 of the Penal Code does not refer to the victim of the insult nor to the religious convictions of third parties witnessing a blasphemous act. The object of the penal interest here is solely the concept or the existence of God, as a value *per se* deserving penal protection regardless of the sacred beliefs of any individual. This rather peculiar situation for penal law means that God's protection by penal means is recognised as an independent legal value, integrated in the state's order, regardless of the persons' beliefs. The victim of the crime of blasphemy is not a specific religion, an individual believer or a group of believers but the divine, as such.

**2.** Article 192 of the Greek Penal Code reads as follows: “One who publicly and by any means causes or incites citizens to commit acts of violence upon each other or to disturb the peace through disharmony among them shall be punished by imprisonment for not more than two years unless a greater punishment is imposed by another provision.”

Furthermore, special criminal legislation – L.927/1979 amended by Article 24 of L.1419/1984 – punishes acts aiming at racial discrimination. According to L.927:

Article 1.

1. One who publicly, orally or through the Press or written texts, pictures or by any means intentionally incites to acts or actions potentially able to cause discrimination, hatred or violence against persons or groups of persons on the sole basis of their racial or national origin shall be punished by imprisonment for not more than two years or pecuniary penalty or both.

2. With the above-mentioned penalties is punished anyone who forms or participates in organisations that intend to organise propaganda or activities of any kind aiming at racial discrimination.

Article 2.

One who publicly, orally or through the Press or written texts, pictures or by any means, expresses insulting ideas against persons or groups of persons on the sole basis of their racial or national origin, shall be punished by imprisonment for not more than one year or pecuniary penalty or both.

Article 24 of L.1419/1984 adds the word “religion” next to racial or national origin.

According to leading scholars of Greek penal law, the normative content of the articles belonging in Chapter 6 on Plots against the public order (where Article 192 belongs) of the Greek Penal Code was extensively used by the Greek State immediately after the civil war (1946-49) against political dissidents. After the fall of the dictatorship in 1974, they were used less and less.

The special “anti-racist” legislation of the late 1970s should be regarded as an element of modernisation of Greek penal law, in line with other similar developments aiming to amplify the anti-racist legislative arsenal in western Europe and combat anti-Semitic discourse.

**3.** There is no specific freedom-of-speech clause in the above-mentioned provisions. Law 1419 has only been applied twice in its existence against actions inciting to religious violence, whereas Article 192 has been rather inactive

since the 1980s. Case law applying Article 192 and punishing perpetrators is generally perceived by the doctrine as a potential threat to the constitutionally enshrined freedom of expression and Article 10 of the ECHR.

**4.** Although there are conflicting views in the doctrine of penal law, one could give “no” as a general answer to this question. Very few scholars advocate the need for additional legislation on negationism, especially in the light of the procedural and substantial developments in the crime of “incitement to genocide” before the International Criminal Court. On the contrary, there is a tendency towards abolition of the crime of blasphemy, as advocated by some senior scholars of criminal law and parts of civil society.

**5.** Trials related to the crime of blasphemy are rather frequent in Greece. The most famous among them have concerned public spectacles, works of art, films and books that generally address the divine in a humiliating way in order to provoke the public’s sacred beliefs. In general, these cases become very popular: they create scandals and are followed intensively by the media and public opinion. However, they have become rather exceptional in the new millennium and occur less and less. Examples are M. Scorsese’s film *The Last Temptation*, the novel *M* by M. Androulakis, Haderer’s comic *The Life of Jesus Christ* and a painting by the Belgian painter Thierry de Cordier. On the contrary, the majority of trials for blasphemy remain far from the public eye since they are not related to works of art but to ordinary verbal insults to God, Christ or the Madonna, very frequent in Greek daily life. In these cases, ordinary linguistic forms of modern Greek are used to insult a specific individual by insulting his sacred beliefs. Most of these “anonymous” trials lead to acquittal of the accused.

The procedural status of the victim(s) is the ordinary status that the Greek penal procedure accords to any accused individual.

**6.** All cases of blasphemy that have been brought before the Greek judicial authorities (articles 198 and 199 of the Penal Code) concern insults against the Eastern Orthodox Christian religion whereas, as stressed above, the so-called anti-racist legislation of 1979 has been applied twice against anti-Semitic speech. Therefore, one could convincingly argue that the distinction in question plays a role in the case law, since there has never been any incident in Greek jurisprudence where the term “blasphemy” was used in order to proscribe insulting acts against any other “tolerable” religion. Additionally, it should not be considered accidental that the use of terms such as “religious insult”, “incitement to religious – or racial – hatred”, “defamation” or “discriminatory speech” is not frequent and, when used, they concern minority religious dogmas rather than the “dominant” religion (the term “dominant” is used in the Greek Constitution). The whole issue has not considerably attracted the attention of the leading opinion of legal doctrine in the country.

**7.** The Code uses the term “maliciously” in order to put emphasis on the intention of the perpetrator. When first-instance criminal courts condemn perpetrators,

they always refer to their “malicious intention”. However, as is indicated by the case law and relevant doctrine, the “intention” is always obscure and therefore hard, not to say impossible, to identify: how can one presume the “malicious” intention of a work of art and prove it in the framework of a judicial procedure?

**8.** Yes.

No.

**9.** No, it can equally result from an *ex officio* investigation carried out by the prosecutor.

**10.** As a rule, incidents of alleged blasphemy (cf. answer 5) are sent before the first-instance criminal court, which regularly punishes the perpetrator, which could be the artist, the novelist or the artistic director. Interim measures have equally been imposed on a few occasions in recent years in order to ban the circulation of a book or forbid showing of a film. However, it must be noted that the appeal courts have always acquitted the perpetrators in the name of the constitutionally enshrined principles of freedom of speech or freedom of art, offering liberal answers to blasphemy in the Greek jurisprudence. Of course, acquittal of the accused some months or even a year later cannot do much to bring things back to their previous state of affairs. The censorship damage is already done. As a rule, these cases provoke tensions in Greek society and attract the interest of the electronic media. In such cases, private TV channels always find a good occasion to see their viewing figures rise by triggering the religious feelings of public opinion.

In contrast, a current case of incitement to religious hatred against a novelist of a negationist book (the only such case pending before the Greek judiciary) has not attracted equal interest from the public or the press.

**11.** The Greek press does not have a uniform position vis-à-vis such cases. One could argue that populist right-wing papers and tabloids always report them, in order to aggravate the feelings of religious sensitivity of the religious majority whereas in contrast most of the papers report such cases with restraint, trying to balance between the two values in question. A considerable part of the Greek press addresses cases of prosecution of blasphemous acts with indignation against censorship. These are the only newspapers that also report the few judicial cases of incitement to religious hatred. In general, the reporting problem has more to do with private TV coverage than the press, which has proved to be much more responsible.

## Ireland<sup>200</sup>

**1.** Although Article 40.6.1 of the Constitution declares that the publication or utterance of blasphemy is an offence, neither the Constitution nor legislation

200. Reply by Ms Finola Flanagan, Member of the Venice Commission, Ireland.

provides any definition of blasphemy. This is the only crime expressly created in the Constitution. Section 13.1 of the Defamation Act 1961 creates the criminal offence of “blasphemous libel”. Section 7.2 of the Censorship of Films Act 1923 provides for the withholding of a certificate from a film with blasphemous content.

In *Corway v. Independent Newspapers (Ireland) Ltd* [1999] 4 I.R. 484, the Supreme Court held that in the absence of a statutory definition of the offence of blasphemy it was impossible to define what the offence of blasphemy consisted of. This task of defining the crime was found to be one for the legislature and not for the courts. In fact, no legislation had ever been enacted creating the “crime” of blasphemy. At common law, blasphemy involved only attacks on the established Church, namely the Anglican Church, and it did not apply to other religions.<sup>201</sup> Initially, the offence involved the mere denial of Christianity, in England at least, and scurrilous language was considered essential to constitute the offence. In *Bowman* it was said that “to constitute blasphemy at common law there must be 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”. In the absence of Irish authority on what constitutes the *actus reus* in Irish law, this definition in *Bowman* might well have passed into Irish law and therefore an essential factor in the offence would be the tone of the language. An attack in temperate terms would not constitute blasphemy.

This can be explained on the basis of historical grounds.

Firstly, Article 44 of the Constitution, deleted by referendum in 1972, recognised the Catholic Church as having a “special position” and also “the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland as well as the Jewish congregations and other religious denominations existing in Ireland” being all the religious denominations existing in the state when the Constitution came into operation. While to a contemporary eye Article 44 appears anachronistic, in 1937 it represented a skilful endorsement of religious pluralism. In *Quinn’s Supermarket Case* [1972] I.R. at 23 it was said that this “deletion ... has done nothing to alter [the] acknowledgement that, religiously speaking, the society in which we live is a pluralist one.”

Secondly, at common law, blasphemy consisted only of attacks on the doctrines of the established Anglican Church and so did not embrace attacks on other Christian denominations or other world religions. Given its discriminatory nature, it is difficult to see how the common law offence of blasphemy could have survived the enactment of the Constitution having regard to the constitutional ban on religious discrimination in Article 44.2.3.

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201. *Bowman v. Secular Society* [1917] AC 406.

**2.** An attack on religion might, depending on the circumstances, constitute an offence under Section 2 of the Prohibition of Incitement to Hatred Act 1989, which criminalises actions likely to stir up hatred against a group of persons on account of, *inter alia*, their religion.

Other general legislation that might be used to combat racial hatred includes the Criminal Justice (Public Order) Act 1994, which deals with offences such as disorderly conduct in a public place; threatening, abusive or insulting or obscene material in a public place; riot; violent disorder, and so on.

The long title of the Prohibition of Incitement to Hatred Act, 1989, calls it “an act to prohibit incitement to hatred on account of race, religion, nationality or sexual orientation.” This is a specific anti-hate speech law. Section 2 provides as follows:

It shall be an offence for a person

(a) to publish or distribute written material,

(b) to use words, behave or display written material,

(i) in any place other than inside a private residence, or

(ii) inside a private residence so that the words, behaviour or material are heard or seen by persons outside the residence,

or

(c) to distribute, show or play a recording of visual images or sounds, if the written material, words, behaviour, visual images or sounds, as the case may be, are threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred.

In proceedings for an offence under subsection 1, if the accused person is not shown to have intended to stir up hatred, it shall be a defence for him to prove that he was not aware of the content of the material or recording concerned and did not suspect, and had no reason to suspect, that the material or recording was threatening, abusive or insulting.

In proceedings for an offence under subsection 1.b, it shall be a defence for the accused person

(i) to prove that he was inside a private residence at the relevant time and had no reason to believe that the words, behaviour or material concerned would be heard or seen by a person outside the residence, or

(ii) if he is not shown to have intended to stir up hatred, to prove that he did not intend the words, behaviour or material concerned to be, and was not aware that they might be, threatening, abusive or insulting.

This situation can be explained by 1.c: other grounds. The Prohibition of Incitement to Hatred Act 1989 was passed for the purposes of incorporating the

obligations under the International Covenant on Civil and Political Rights. The race and religious make-up of the population in Ireland has changed dramatically since the time of drafting the 1989 Act.

**3.** The Irish Constitution (1937) provides at Article 40.6.1 for the right of citizens to express freely their convictions and opinions subject to public order and morality.

It was considered that the Prohibition of Incitement to Hatred Act 1989 met both international obligations and domestic needs to protect the input of free speech and recognised that the right to free speech was not an absolute one.

Ireland, having ratified the European Convention on Human Rights in 1957, gave effect to it in domestic law by the European Convention on Human Rights Act 2003. This was expressed as being subject to the Constitution. The Act requires that statutory provisions must be interpreted and applied insofar as possible in a manner compatible with the state's obligations under the Convention. In *Murphy v. Independent Radio and Television Commission* [1997] 2 ILRM 467, it was stated that the rights protected by Article 10 of the Convention are for the most part protected by the Constitution, and the limitations on the exercise of those rights under the Constitution largely correspond to the limitations expressly permitted by the Convention.

**4.** In general the legislation provides adequately for these matters. The criminal law, together with the Prohibition on Incitement to Hatred Act and the Criminal Justice (Public Order) Act, provide for appropriate offences. In addition to the legislation outlined above, there is equality legislation which prohibits discrimination on grounds of religious belief (or the absence of belief) and on grounds of racism.

A view has been expressed that the lack of prosecutions under the Prohibition on Incitement to Hatred Act 1989 is due to difficulties with standards of proof. Prosecutions may also be made under the Criminal Justice (Public Order) Act 1994. Since prosecutions under the 1994 Act do not require an intention to stir up hatred but only an intent to cause a breach of the peace or being reckless as to whether one may be caused, they are more likely to be successful than prosecutions under the 1989 Act.<sup>202</sup> In the circumstances, it is important that existing legislation be utilised.

In its Report on the Crime of Libel, in 1991, the Law Reform Commission concluded "that there was no place for an offence of blasphemous libel in a society which respects freedom of speech. The argument in its favour that the publication of blasphemy causes injury to feelings appeared to [the Commission] to be a tenuous basis on which to restrict freedom of speech. The argument that freedom to insult religion would threaten the stability of society by impairing the

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202. David Cowhey, Racist hate speech law in Ireland: the need for reform, *Cork on-line Law Review* 2006 IV.

harmony between groups seemed highly questionable in the absence of any prosecutions.<sup>203</sup> The Commission recommended that in any revision that might be undertaken by referendum of the Constitution so much of Article 40.6.1 as renders the publication or utterance of blasphemous matter an offence should be deleted. The Law Reform Commission recommended that, in the event of that recommendation not being accepted, a new offence entitled “publication of blasphemous matter” should be created governing both Christian and non-Christian religions. Blasphemous matter, they recommended, should be defined “as matter the sole effect of which is likely to cause outrage to a substantial number of the adherents of any religion by virtue of its insulting content concerning matters held sacred by that religion.” No such offence has been created.

An all-party Committee of the Oireachtas was established in 1994 to review the Constitution in its entirety. This Review Group also recommended that “the retention of the present constitutional offence of blasphemy is not appropriate”. They noted particularly that there had been no prosecution for blasphemy in the history of the state. They commented that “insofar as the protection of religious beliefs and sensibilities is necessary, this could best be achieved by carefully defined legislation along the lines of the Prohibition of Incitement to Hatred Act 1989 which applies equally to all religious groups, but which at the same time took care to respect fundamental values of free speech and freedom of conscience.”

There is no “negationism” or crime of denial in Irish law.

**5.** There have been very few blasphemy prosecutions in Ireland and none since independence in 1922. The only case in Ireland on the offence of blasphemy is *Corway v. Independent Newspapers (Ireland) Ltd* [1999] 4 I.R. 484. The applicant sought leave under the Defamation Act 1961 to institute criminal proceedings for blasphemous libel against the respondents following a cartoon and caption accompanying a newspaper article on the implications of a divorce referendum. The Supreme Court held that, in the absence of any legislative definition of the constitutional offence of blasphemy, it was impossible to say of what the offence of blasphemy consisted. The Court found that whilst the cartoon in question may have been in bad taste no insult to the Blessed Sacrament was intended and no jury could reasonably conclude that such insult existed or was intended to exist.

I am not aware of any case brought before the Irish courts on the issue of incitement to religious hatred. In such a case any victim would appear in court as a prosecution witness.

**6.** The distinction between “blasphemy”, “religious insult”, “incitement to religious or racial hatred”, “defamation” and “discriminatory speech” did not play a role in the *Corway* case.

203. *The Crime of Libel*, Law Reform Commission (1991) at paragraph 17.

**7.** Under the Prohibition of Incitement to Hatred Act 1989, the accused will be guilty of an offence if the written material, words, behaviour, visual images or sounds, as the case may be, are threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred. It is to be noted that the Prohibition of Incitement to Hatred Act 1989, Section 2.2, does not rely on actual harm being caused and only requires intention. Therefore a lack of intention is a defence. Section 4 creates an offence of preparation or possession of material with a view to its distribution, broadcasting, etc. Not only must the words be "threatening, abusive or insulting", they must also be intended or likely to stir up hatred. Defences include where an accused is not shown to have intended to stir up hatred, or that he or she was not aware of the content of the material and did not suspect that the material was threatening, abusive or insulting. It is a defence in relation to threatening, abusive or insulting words, behaviour or material delivered inside a private residence that the accused had no reason to believe that they would be seen or heard outside the private residence.

This is in contrast to the Criminal Justice (Public Order) Act 1994 (see paragraph 18 below) which, by contrast, does not require an intention to stir up hatred but only an intent to cause a breach of the peace or being reckless as to whether one may be caused. The point is made that prosecutions are more likely to be successful pursuant to the Criminal Justice (Public Order) Act 1994 than the 1989 Act.<sup>204</sup>

**8.** Leave of the court is required under the Defamation Act 1961 in order to institute criminal proceedings for blasphemous libel. However, as previously stated, the offence of blasphemy is not statutorily defined in Ireland.

Offences under sections 2, 3 and 4 of the Prohibition on Incitement to Hatred Act 1989 may be tried summarily or on indictment. In general, a file is sent to the Director of Public Prosecution's Office by the Gardaí Síochana on all indictable offences where a decision has to be taken whether to prosecute summarily or on indictment. Subject to the right of the presiding judge to refuse jurisdiction, cases may be prosecuted summarily. However, the Gardaí Síochana are directed to refer any file to the DPP if they consider trial on indictment is warranted. The Gardaí are free to refer any prosecution to the DPP for legal advice. It appears that most offences under Section 2 are dealt with summarily.

There is no appeal against non-prosecution.

**9.** While prosecutions are most likely to take place if there are victims who make complaints to the Gardaí it would also be open to the Gardaí to initiate criminal proceedings themselves.

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204. David Cowhey, Racist hate speech law in Ireland: the need for reform, *Cork on-line Law Review*, 2006 IV.

**10.** There have been no such recent incidents in Ireland.

**11.** There have been no such recent incidents for the press to report on in Ireland.

### The Netherlands<sup>205</sup>

**1.** In the Netherlands there is specific legislation prohibiting blasphemy and religious insult. The relevant provisions are to be found in the *Wetboek van Strafrecht*, the Dutch Penal Code (hereinafter: PC).

Article 147 PC provides that a term of imprisonment of not more than three months or a fine of the second category shall be imposed upon: (1) a person who publicly, either orally or in writing or by image, offends religious sensibilities by malign blasphemies; (2) a person who ridicules a minister of religion in the lawful execution of his duties; (3) a person who makes derogatory statements about objects used for religious celebration at a time and place at which such celebration is lawful.

The second part of this provision (sections 2 and 3) stems from the year 1886. The first part, however, was adopted as late as 1932. In 1886, Minister of Justice Modderman, a liberal, found there was no need for legislation on blasphemy.<sup>206</sup> In the 1930s, however, the so-called *Lex Donner* was adopted after left-wing anti-religious propaganda was felt to have become a serious threat to the peace of the land.

Article 429bis PC provides that a person who, in a place visible from a public road, places or fails to remove words or images that offend religious sensibilities by reason of their malign and blasphemous nature is liable to a term of detention of not more than one month or a fine of the second category. Whereas Article 147 PC is regarded as a serious offence against public order, Article 429bis PC counts as a lesser offence related to public order. This provision also entered into force in 1932.

With regard to blasphemy, one may also refer to Article 147.a PC. This article provides, *inter alia*, that a person who disseminates, publicly displays or posts written matter or an image containing statements that offend religious sensibilities by reason of their malign and blasphemous nature, or who has such in stock to be disseminated, publicly displayed or posted, is liable to a term of imprisonment of not more than two months or a fine of the second category, where he knows or has serious reason to suspect that the written matter or the image contains such statements.

Religious insult is regarded as a serious offence against public order. The main provisions are articles 137.c and 137.e PC. They were inserted into the Penal

205. Reply by Mr Pieter van Dijk, Member of the Venice Commission, the Netherlands.

206. A.L.J. Janssens and A.J. Nieuwenhuis, *Uitingsdelicten* ['Crimes of expression'], Deventer: Kluwer 2005, p. 197.

Code in 1934, especially in order to protect Jewish and Roman Catholic citizens.<sup>207</sup> In 1971, some amendments were made in order to comply with the International Convention on the Elimination of all Forms of Racial Discrimination. It must be stressed that these provisions do not aim specifically at the prohibition of religious insult, but at all kinds of discriminatory acts.

Article 137.c 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.

Article 137.e PC provides, *inter alia*, that any person who for reasons other than the provision of factual information makes public an utterance which he knows or can reasonably be expected to know is insulting to a group of persons on account of their race, religion or convictions, heterosexual or homosexual preference, or physical, mental or intellectual disability, or which incites hatred against or discrimination of other persons or violence against the person or property of others on account of their race, religion or convictions, heterosexual or homosexual preference or physical, mental or intellectual disability, shall be liable to a term of imprisonment not exceeding six months or to a third-category fine.

For the prohibition of religious insult, one does not have to rely on the general provisions on defamation, since articles 137.c and 137.e deal with specific cases of discrimination.<sup>208</sup> One could refer, though, to articles 146 and 148 PC, which are highly relevant to this topic. Besides, they have been part of Dutch law since 1886. According to Article 146 PC, a person by whom, by creating disorder or by making noise, either a lawful public gathering intended to profess a religion or a belief, or a lawful ceremony for the professing of a religion or a belief, or a lawful funeral service is intentionally disturbed, is liable to a term of imprisonment of not more than two months or a fine of the second category. Article 148 PC provides that a person who intentionally prevents or obstructs lawful access to a cemetery or crematorium, or the lawful transport of a dead human body to a cemetery or a crematorium, is liable to a term of imprisonment of not more than one month or a fine of the second category.

**2.** There is no specific legislation prohibiting religious hatred. Hate speech is covered by Article 137.c PC. There is, however, an article which prohibits incitement to hatred. The first paragraph of Article 137.d PC stipulates that any person who verbally or by means of written or pictorial material publicly incites

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207. B. van Stokkom, H. Sackers and J-P Wils, *Godslastering, discriminerende uitingen wegens godsdienst en haatuitingen; een inventariserende studie* ('Blasphemy, discriminating utterances on the basis of religion and hate utterances: an inventory') [WODC-rapport], Nijmegen: Radboud University 2006, p. 36.

208. See A.L.J. Janssens, *Strafbare belediging* ['Punishable insult'], Amsterdam: Thela Thesis 1998.

hatred or discrimination against other persons or violence against the person or the property of others on account of their race, religion, convictions, sex, heterosexual or homosexual preference 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. This provision, too, was adopted in 1934, for the same reasons as articles 137.c and 137.e PC and amended in 1971 in order to make Dutch law compatible with international law binding on the Netherlands.

In 1992, a new provision, relating to incitement to (religious) hatred, was adopted. Article 137.f stipulates that any person who participates in, or provides financial or other material support for, activities aimed at discrimination against persons on account of their race, religion, convictions, sex, their heterosexual or homosexual preference or physical, mental or intellectual disability, shall be liable to a term of imprisonment not exceeding three months or to a second-category fine.

**3.** None of the provisions mentioned contains a specific freedom-of-speech clause. Article 7 of the Constitution guarantees the right to freedom of speech. The first paragraph holds that no one shall require prior permission to publish thoughts or opinions through the press, without prejudice to the responsibility of every person under the law. The second paragraph provides that rules concerning radio and television shall be regulated by Act of Parliament. There shall be no prior supervision of the content of a radio or television broadcast. The third paragraph determines that no one shall be required to submit thoughts or opinions for prior approval in order to disseminate them by means other than those mentioned in the preceding paragraphs, without prejudice to the responsibility of every person under the law. The holding of performances open to persons younger than 16 years of age may be regulated by Act of Parliament in order to protect good morals. According to the fourth and last paragraph, the preceding paragraphs do not apply to commercial advertising.

The words 'under the law' in the first paragraph refer to provisions of primary legislation. However, the same words in the third paragraph are given a broader meaning in legal doctrine and practice, including delegated legislation and legislation adopted by provincial and municipal councils. Some of the provisions of the Penal Code discussed in sections 1 and 2 are examples of primary legislation restricting the right to freedom of speech, such as Articles 137c,d,e PC.

According to Article 120 of the Constitution, courts do not have power to review the compatibility of primary legislation with the Constitution. They do have the power, though, and even the obligation to review the conformity of Dutch law and its application with self-executing provisions of treaties and of decisions of international organisations. This is where, *inter alia*, Article 10 of the European Convention on Human Rights [hereafter: ECHR] comes into play. Consequently, Article 7 of the Constitution is not the only relevant freedom-of-speech clause to be looked at by the courts.

Freedom of speech is one of the factors which may need to be taken into account by the court when adjudicating on the question whether an offence under Article 137.c PC has been committed. The same applies to freedom of religion, laid down in Article 6 of the Constitution. So the relation between the relevant provisions in the Penal Code and the right to freedom of speech is not a one-way route.

**4.** Legal doctrine is very much intrigued by the question of whether there is a need for more (or even less) legislation on religious insult and blasphemy; so are politicians and members of the public.

Simultaneously, much doctrinal debate focuses on the question of what should be the policy of the *Openbaar Ministerie*, the Dutch Public Prosecution Service, in cases in which the relevant provisions of the Penal Code restrict freedom of speech. If threats are made in a case of incitement to violence, attacks on human dignity or verbal abuse, penal law may come into play.<sup>209</sup> In a publication issued by the WODC (the Research and Documentation Centre affiliated to the Ministry of Justice) it has been argued that incitement to violence should be the key criterion when it comes to determining the question whether offences under article 137.c PC or 137.d PC have been committed.<sup>210</sup>

Although Article 147 PC does not play a role of importance in the case law,<sup>211</sup> it now is at the centre of public attention after the Dutch film maker Theo van Gogh was brutally, ritually murdered by a religious fundamentalist on 2 November 2004. He was soon to become the symbol of freedom of expression.

In reaction to the murder, Prime Minister Balkenende pleaded for a more restrictive approach towards freedom of speech, in the sense that an increased awareness of the suffering caused by certain expressions is desirable. The Minister of Justice at the time felt it was possible to recommend initiating new, stricter legislation. The Minister for Immigration and Integration, however, said there was no need to do so. On the contrary, more effort should be made to integrate those who are new to the country. In short, the debate on whether legislation ought to be changed was said to be very much influenced by the alleged clash between cultures.<sup>212</sup>

The necessity of new legislation is a much debated topic, both in and outside The Hague. In relation to the blasphemy clause, proponents of abolition of

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209. A. Nieuwenhuis, "Tussen godslastering en kerstgedachte" ['Between blasphemy and Christmas thoughts'], *Mediaforum* 2005-1, p. 1.

210. A. Ellian, in *Vloeken, schelden en schimpen* ['Swearing, name-calling and scoffing'], *Justitiële Verkenningen* 3|03, Den Haag: WODC 2003, p. 35.

211. See below, under point 5.

212. See for instance 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, pp. 2328-2335.

Article 147 PC combat advocates of more strict application and extension of the said article.

Among the questions raised by MPs, there are often questions asked by members of the small Christian parties which have to do with blasphemy.<sup>213</sup> Two MPs have suggested introducing an alternative to the legal protection provided by the courts.<sup>214</sup> Their fellow members of Parliament have been critical of this idea.<sup>215</sup> The same two MPs also declared themselves in favour of adaptation of Article 137.d PC, since they found that this provision was interpreted too narrowly by the courts.

In a recent WODC report, researchers from the University of Nijmegen give an overview of the doctrine.<sup>216</sup> Bills that aim to restrict freedom of speech usually raise much public indignation. For this reason, researchers are of the opinion that initiating new legislation or abolishing existing laws has no prospect. The existing legal provisions should be better used. First, existing legal provisions and case law offer sufficient scope for prosecuting outspoken racists and experienced hate-mongers. In those cases a more strict prosecution policy might be initiated. Secondly, they argue that the case law of the European Court of Human Rights provides opportunities to reconsider prosecution policies.<sup>217</sup> Since the government has just tendered its resignation, it is for the new government to respond to this report.<sup>218</sup>

Recently a bill concerning negationism was introduced by a Member of Parliament.<sup>219</sup> Since, as said before, Article 120 of the Constitution provides that the constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts, constitutional review in the (pre-) parliamentary process is of imminent importance. The opinion of the Council of State of August 2006 on the initiative has not been made public yet, and nothing else has been heard about the fate of the initiative.

**5.** On the one hand, there have been very few cases concerning blasphemy tried in Dutch courts. In 1968, a prosecution against the well-known author Gerard van het Reve (alias: Reve) failed.<sup>220</sup> The writer had presented God as

213. See, for instance, *Questions II* 2006/2007, No. 2060705680; *Second Chamber* (Annex) 2005-2006, No. 2019; *Second Chamber* (Annex) 2004-2005, No. 1993.

214. *Second Chamber*, 2005-6, 30 448, No. 1, Initiative memorandum by MPs Koopmans and Van Haersma Buma, "Alles van waarde is weerbaar; vrijheid is een verantwoordelijkheid" ('Everything of value is defensible; freedom is responsibility').

215. *Second Chamber*, 2006-7, 30 449, No. 3, pp. 13-14.

216. Van Stokkom, Sackers and Wils, *Godslastering* ('Blasphemy').

217. See also *Second Chamber*, 2004-2005, 29 800 VI, No. 41; *Second Chamber* 2006-2007, 30 800 hoofdstuk VI, No. 2, p. 217; *Second Chamber*, 2005-2006, 30 800 hoofdstuk VI, No. 2, p. 236.

218. *Second Chamber*, 2006-2007, 30 800 VI, No. 38

219. *Second Chamber*, 2005-2006, 30 579 (initiative by MP Huizinga-Heringa).

220. See E.J. de Roo, *Godslastering: rechtsvergelijkende studie over blasfemie en religiedelicten* ('Blasphemy: comparative legal study on blasphemy and delicts relating to religion'), Deventer Kluwer 1970, pp. 113-25.

a donkey. The Supreme Court held that only a person who had had the intention to express himself with regard to a particular religion in a contemptible and humiliating manner was guilty of blasphemy in the sense of Article 147 PC. According to the Supreme Court the words “malign<sup>221</sup> blasphemies” did not merely have the function to describe a certain form of expressions which were capable of hurting religious feelings; they also implied a subjective element of an intention to show contempt for the Supreme Being.<sup>222</sup> Ever since this judgment, no prosecutions on the basis of Article 147 PC have been made,<sup>223</sup> allegedly for the reason that accusations are hardly ever reported to the police.<sup>224</sup>

On the other hand, many cases concerning discriminatory insult on account of race and/or religion have been tried in court and so have some cases concerning incitement to racial and/or religious hatred or discrimination. In the vast majority of these cases, the perpetrator has been convicted, at least since the year 2000. However, the discrimination clauses appear not to really bite, when discriminatory acts or expressions merely relate to religions or religious convictions.<sup>225</sup> And in cases where insults or incitements to hatred or discrimination concerned homosexuality, acquittals have been reached.<sup>226</sup>

Only in two cases of racial insult have acquittals been upheld by the Supreme Court in appeal in cassation. First, this is what happened in the Somali case concerning racist remarks in an interview, in which the Supreme Court on appeal in cassation quashed a judgment made by the Den Bosch Court of Appeal.<sup>227</sup>

Secondly, the prosecution failed in a case in which it argued that Jewish citizens had been intentionally insulted on account of their race and religion, in a novel.<sup>228</sup>

The majority of convictions concern Article 137.c PC. Intentional public expressions were said to be punishable where they were felt to be insulting to Jewish citizens on account of their race<sup>229</sup> and religion,<sup>230</sup> to foreigners on account of their

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221. Malign, or scornful.

222. Court of Cassation 2 April 1968, 1968/373, annotated by Bronkhorst (Donkey case).

223. On 29 January 2007, the Public Prosecution Office announced its decision not to prosecute pop singer Madonna, who had posed as a crucified Christ figure on a larger-than-life, lit cross in her latest concert tour. The youth section of a Christian political party had reported offences under Article 147 PC and Article 137c PC.

224. Van Stokkom, Sackers and Wils, *Godslastering* ('Blasphemy'), p. 59.

225. *Second Chamber*, 2003-2004, 29 614, No. 2, p. 14, *Grondrechten in een pluriforme samenleving* ('Basic rights in a pluriform society').

226. The most notorious is the *Van Dijke* case (Court of Cassation 09-01-2001, case 00945/99, *Nederlandse Jurisprudentie* (NJ) 2001, 203; Court of Appeal The Hague 09-06-1999, case 2200278098), see under point 7; Court of Appeal Arnhem 26-06-2001, case 21-000117-00 (minister). This judgment was upheld by the Court of Cassation (14-03-2003, case 01977/01, 2003, 261). Also see District Court Rotterdam 08-04-2002, case 10/040070-01 (Imam).

227. Court of Cassation 30-09-2003, case 01752/02, 2004, 189, annotated by PMe (Somalias).

228. Court of Cassation 09-10-2001, case 01012/00, 2002, 76, annotated by JdH (dance lessons). See point 7.

229. District Court Zutphen 18-07-2006, case 06/460548-05, NJ 2005, 419.

230. District Court Amsterdam 27-01-2005, case 13/037899-04 (Parnassus road, Amsterdam); District Court 30-11-2006, case 11/500277-06 (Hardinxveld-Giessendam).

race<sup>231</sup> and to asylum seekers on account of their race.<sup>232</sup> Religious insult through the Internet was also deemed punishable on the basis of Article 137.c PC.<sup>233</sup>

In October 2006 Dordrecht District Court found a young woman and a young man guilty of the criminal offence laid down in 137.e PC. Wearing t-shirts, they made public an utterance which they knew or could reasonably be expected to know was insulting to Jewish citizens on account of their race.<sup>234</sup> Article 137e was also the basis of a conviction pronounced by Haarlem District Court in February 2006. Among other things by keeping emblems with swastikas, they were said to have made public an utterance which they knew or could reasonably be expected to know was insulting to Jewish citizens on account of their race.<sup>235</sup>

Den Bosch District Court found a young man guilty of the offence of Article 137.c PC but not of Article 137.d. In this case the suspect had given intentional public expression to views insulting to a group of persons on account of their religion, in this case Islam.<sup>236</sup> It was held that the exercise of freedom of expression is subject to restrictions that are necessary in a democratic society for the prevention of excesses of intolerance.

There have been convictions of suspects for incitement to hatred against refugees and asylum seekers on account of their race<sup>237</sup> or religion,<sup>238</sup> and for incitement to discrimination against foreign workers on account of their race.<sup>239</sup> Incitement to hatred through the internet is also punishable on the basis of Article 137.d PC. This conclusion was reached by Dordrecht District Court in 2002.<sup>240</sup>

The prosecution based on Article 137.d PC against the so-called Hofstad group may be regarded as remarkable from a legal point of view. Members of this group had been prosecuted on suspicion of many criminal offences, among them membership of a criminal organisation (Article 140 PC) and a terrorist

231. Court of Appeal Amsterdam 11-09-2003, case 23-001934-01; District Court 30-11-2006, case 11/500277-06 (Hardinxveld-Giessendam); District Court Zwolle 03-01-2006, case 07.400643-05 (Portuguese).

232. Court of Appeal 's-Hertogenbosch 29-04-2003, case 20.000199.02 (Echt); District Court Leeuwarden 08-06-2000, case 17/085214-00 (Kollum). Also see Court of Appeal Leeuwarden 18-10-2001, case 24-000544-00 (Kollum).

233. District Court Amsterdam 25-01-2006, case 13/463305-05 (Periodic Internet System). Appeal dismissed by Amsterdam Court of Appeal (17-11-2006, case 23-000547-06). Also see District Court 's-Hertogenbosch 21-12-2004, case 01/040521-04 (Rosmalen).

234. District Court Dordrecht 05-10-2006, case 11/500399-06 (Papendrecht I) and District Court Dordrecht 05-10-2006, case 11/500398-06 (Papendrecht II).

235. District Court Haarlem 20 February 2006, case 15/034067-04 (Schiphol).

236. District Court 's-Hertogenbosch 19-07-2005, joint cases 01/826234-05, 01/820106-05 (Valkenswaard).

237. Court of Appeal 's-Hertogenbosch 29-04-2003, case 20.000199.02 (Echt). This judgment was partly quashed by the Court of Cassation (08-06-2004, case 02328/03, 2004, 413), though not in relation to this part of the judgment. Also see District Court Assen 14-02-2001, case 19.830195-00 (Roden).

238. Court of Cassation 02-04-2002, case 00106/01 (Dordrecht).

239. Court of Appeal 's-Hertogenbosch 11-10-2004, case 20.001264.04. See also Court of Appeal Amsterdam 11-09-2003, case 23-001934-01.

240. District Court Dordrecht 11-06-2002, case 11/010053.02 (NNP).

organisation (Article 141 PC). The Rotterdam District Court found that the organisation they belonged to aimed to incite hatred on account of people's religion or their homosexual preference.<sup>241</sup>

If victims of a crime have suffered loss, they may initiate civil proceedings against the suspect or apply for a one-off payment from the Criminal Injuries Compensation Fund. They may also attempt to obtain compensation by requesting the public prosecutor to claim their loss. However, blasphemy, religious insult and incitement to religious hatred are all offences against the public order. Besides, the offences laid down in articles 137.c and 137.d demand insult or incitement to hatred of a group of persons. In many cases it is not possible to specify a particular victim. This may explain why there have not been many such requests in the cases discussed. In some of the above-mentioned cases, though, victims have requested the public prosecutor to claim their loss. In the so-called *Papendrecht* cases such claims were declared inadmissible in the absence of direct loss.<sup>242</sup> In the *Portuguese* case a claim was successful, though it had not been made in relation to the offence of Article 137.c PC.

**6.** The distinction between blasphemy, religious insult and incitement to religious – or racial – hatred does play a role in the case law, for these three punishable offences are regulated in distinct provisions of the Penal Code, though the provision on blasphemy currently is de facto a dead letter. In some cases both (religious) discriminatory insult and incitement to hatred or discrimination have been prosecuted in combination, but they have always been dealt with separately. The distinction does not seem to be an issue in legal doctrine.

**7.** With regard to the blasphemy clause (Article 147 PC), the intention of the perpetrator plays a minor role in the formulation of the legal prohibition, but a major role in the prospect of a conviction. The foreseeability of the discriminatory effects, on the contrary, seems to follow from the text of the provision concerned. Despite this fact, it was given a very narrow interpretation in the *Donkey* case (see above, under point 5).

At first sight, things seem less complicated in regard to the law on religious (discriminatory) insult and incitement to hatred or discrimination. Intent is a requirement in both descriptions of the offence. However, in order to be qualified as an offender, the intentions of the suspect play an important role. Here the applicable freedom-of-speech clauses come into play (see point 3). If the perpetrator intends to give a scientific (biological) explanation for certain differences between races, he may be exculpated. Likewise, exculpation may follow in the case of a comedian who intends to expose abuses or to point out social injustices of which followers of a certain religion would make themselves

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241. District Court Rotterdam 10-03-2006, joint cases 10/000322-04, 10/000328-04, 10/000396-04, 10/000393-04, 10/000323-04, 10/000395-04 (Hofstad group).

242. In the second Papendrecht case the claim was partly admissible, but not in respect of the 137.e PC offence.

guilty.<sup>243</sup> The context in which something is said or done is vitally important for the prospect of conviction.<sup>244</sup>

**8.** Dutch criminal law acknowledges the right to exercise prosecutorial discretion: it is up to the Public Prosecution Service to decide whether to prosecute or not if offences of blasphemy, religious insult or incitement to religious hatred have been committed. The Public Prosecution Service is not a government department. Together with the courts, it forms what is known as the judiciary, the authority responsible for the administration of justice. The Minister of Justice carries political responsibility for the department's conduct and performance and he may be called upon to render account to both Houses of Parliament. The minister supervises general policy on investigation and prosecution. Only rarely does he intervene in individual cases, though he may issue instructions to the department's officers after consulting the Board of Procureurs-General.

There is a right to appeal to the Court of Appeal against non-prosecution, laid down in Article 12 of the Criminal Procedure Code.<sup>245</sup>

**9.** A complaint, in the sense of reporting an offence, by the victim(s) is certainly helpful, but prosecution of blasphemous acts *et cetera* does not depend on such complaints. If the complaint merely relates to religion, it is in all practical fact bound to fail. The case law discussed under point 5 shows that the prosecution has a much stronger case when the victim has been discriminated against in respect of race, too.

**10.** The most controversial cases concerning the discrimination clauses have to do with alleged discrimination against homosexuals in which freedom of religion was invoked as a ground for the exclusion of liability of punishment. These cases have been discussed above and they are not of direct relevance to this questionnaire, since they do not directly concern religious insult and incitement to religious hatred.

An important recent case deserves to be mentioned in this respect. In 2003, the former Member of Parliament Ayaan Hirsi Ali said in a national newspaper, among other things, that Islam had "in certain respects" to be regarded as "retarded" and the prophet Muhammad as a "pervert". The public prosecutor decided not to prosecute, although 600 complaints had been made.

Later on, Hirsi Ali and the above-mentioned film maker Van Gogh made the film *Submission*. The latter was murdered and the former was put under strict security

243. C.P.M. Cleiren *et alii* (eds), *Strafrecht: tekst en commentaar: de tekst van het Wetboek van Strafrecht en enkele aanverwante wetten voorzien van commentaar* ('Criminal law: text and commentary; the text of the Criminal Code and some related laws with commentary'), Deventer: Kluwer 2004, pp. 704-5.

244. See Court of Cassation 09-01-2001, case 00945/99, 2001, 203 (van Dijk).

245. See, for instance, the appeal brought by the List Pim Fortuyn after non-prosecution of an alleged Article 137d PC offence (though not on account of race or religion): Court of Appeal Den Haag 19-05-2003, case 02075.K10, 2003, 382.

surveillance. Some members of the public were evidently trying to take the law into their own hands. It was then that the debate discussed above (under point 3) started. And it is still going on.

**11.** The Dutch press acts in a rather independent way. In the *Van Gogh* saga, reporters may be said to have held back a bit. The crime concerned was a very serious offence against public order indeed. After the tragic events had taken place, many people – politicians and members of the public alike – felt public order was in acute danger. By no means, though, has this sentiment stood in the way of a broad and balanced discussion in the media and elsewhere of the question whether legislation in this field needed to be changed or even partly abolished.

## Poland<sup>246</sup>

**1.** The relevant legislation is found in the Criminal Code and the Broadcasting Act.

Criminal Code in the part on “Offences against freedom of conscience and religion”

### Article 194

Whoever restricts another person from exercising the rights vested in the latter because of this person’s affiliation to a certain faith or their religious indifference shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to two years.

### Article 195

paragraph 1: Whoever maliciously interferes with a public performance of a religious ceremony of a church or another religious association with regulated legal status shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to two years.

paragraph 2: The same punishment shall be imposed on anyone who maliciously interferes with a funeral, mourning ceremonies or rites.

### Article 196

Anyone found guilty of offending religious feelings by public calumny of an object or place of worship is liable to a fine, restriction of liberty or a maximum two-year prison sentence.

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246. Reply by Ms Hanna Suchocka, Member of the Venice Commission, Poland.

## Broadcasting Act of 29 December 1992

Article 18, paragraph 2, states that programmes or other broadcasts shall respect the religious beliefs of the public and especially the Christian system of values.

**1.a,b,c.** The abovementioned legislation points to the recognition by Polish legislators not only of freedom of speech, but also of the right to protection of the religious aspect of individuals' rights. The category of freedom of conscience and confession is based on the principles of international human rights law. The shape of the legal provisions is dependent on our historical tradition: for many centuries Poland was a multi-religious state with a very strong role for the Catholic Church.

**2.** The Polish Constitution contains general provisions that can be seen as a basis for the prohibition of religious hatred.

## Article 13 of the Polish Constitution – Political pluralism

Political parties and other organisations whose programmes are based upon totalitarian methods and the modes of activity of nazism, fascism and communism, as well as those whose programmes or activities sanction racial or national hatred, ... shall be forbidden.

## Article 35 of the Polish Constitution – Identity of national and ethnic minorities

The Republic of Poland shall secure to Polish citizens belonging to national or ethnic minorities the freedom to maintain and develop their own language, to maintain customs and traditions and to develop their own culture. National and ethnic minorities shall have the right to establish educational and cultural institutions, and institutions designed to protect religious identity, and to participate in the resolution of matters connected with their cultural identity.

The Polish Criminal Code contains these specific provisions:

### Article 256 – Promotion of fascism or other totalitarian system.

An offence is committed by anyone who promotes fascist or other totalitarian systems of state or incites hatred based on national, ethnic, race or religious differences or for reason of lack of any religious denomination. Subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to two years.

### Article 257 – Publicly insulting a group or individual for national, ethnic or racial reasons

An offence is committed by anyone who publicly insults a group within the population or a particular person because of his national, ethnic, race or religious

affiliation or because of his lack of any religious denomination or for these reasons breaches the personal inviolability of another individual. Imprisonment for up to three years.

### **Article 119 – Use of violence or threat because of national, ethnic, racial or religious hatred**

An offence is committed by anyone who uses violence or makes unlawful threats towards a group of persons or a particular individual because of their national, ethnic, political or religious affiliation, or because of their lack of religious beliefs. Imprisonment for between three months and five years.

### **Article 118 – Homicide or harm because of national, ethnic, racial or religious hatred**

An offence is committed by anyone who acts with intent to destroy in full or in part any ethnic, racial, political or religious group, or a group with a different perspective on life, commits homicide or causes a serious detriment to the health of a person belonging to such a group. Penalty of the deprivation of liberty for a minimum term of 12 years, the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life.

**2.a,b,c.** The existence of the aforementioned legal provisions can be to some extent explained on the basis of different factors:

- the recognition by Polish legislators not only of the freedom of speech, but also of the right to protection of the religious aspect of individuals' rights,
- history (the Second World War, the Holocaust, communism),
- the category of freedom of conscience and confession, and protection from any form of attack caused by religious beliefs, is based on the principles of international human rights law,
- the protected values of religious feelings and beliefs are of great importance for the Catholic Church (over 90% of Polish society belongs to the Catholic Church).

**3.** Generally we won't find any specific freedom-of-speech clause in the above-mentioned provisions. However, such freedom-of-speech provisions do exist in the Polish legal system. The main correlation between those two kinds of provisions is based on the conviction that the freedom of one person is limited by the freedom of other person, in this specific situation understood as a limitation to blasphemy or religious insult. Not only freedom of speech, but also religious feelings and beliefs are in the Polish legal system a value protected by law.

The main controversy appears to be caused by the interpretation of Article 196 of the Polish Criminal Code. The religious feelings of the different members of one specific Church or confession are very diverse. The question is: whose level

of religious sensibility should we treat as the average level – the sensibility of a group of fundamentalist or tolerant members?

Another controversy relates to the limit between freedom of speech (including the criticism of religious rules, dogmas, ways of acting) and insulting religious feelings. Lech Gardocki, President of the Supreme Court, opts for allowing an unrestricted range of substantial analysis and criticism. However, he underlines the existence of limits of forms in which the analysis and criticism are presented. Those forms (of an action or a statement) must have the features of an insult. The estimation, if the form is an insult, must appeal to the majority of public opinion's views in that aspect.

**4.** The existing legislation concerning the above-mentioned regulations seems to be mostly adequate and appropriate. However, according to the European Commission against Racism and Intolerance (ECRI) General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, adopted by the ECRI on 13 December 2002, the law should penalise, *inter alia*, public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, with a racist aim, of written, pictorial or other material containing manifestations such as:

- public incitement to violence, hatred or discrimination, public insults and defamation or threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;
- public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;
- public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes.

Another postulate concerns the change in the legal interpretation of Article 257 of the Polish Criminal Code. The postulated interpretation shall assure that not only a member of insulted group, but also every Polish citizen could feel insulted by hate speech contents and could bring an action at law.

The third element concerns the need of ratification by Poland of the Additional Protocol to the Council of Europe Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, signed by Poland on 21 July 2003.

The general conclusion indicates that the most important aspect of the existing legislation (especially articles 256 and 257 of the Criminal Code) is a great need of more effective application and exercise of the provisions already existing.

**5.** The most important cases of alleged blasphemy, religious insult and/or incitement to religious hatred in Poland that aroused a lot of public indignation and debate and were prosecuted or convicted were these.

### **1. Nieznalska case**

In December 2001, members of the League of Polish Families attacked the Polish artist Nieznalska verbally in the Gdańsk venue where her 'Passion' installation was exhibited. The work, an exploration of masculinity and suffering, consisted of a video close-up of the face of an exercising bodybuilder together with a cross on which a photograph of male genitalia had been placed. Coupling the cross with the genitalia was regarded as a violation of this provision of Article 196 of the Criminal Code. In July 2003, the Provincial Court in Gdańsk found Nieznalska guilty of "offending religious feelings," a violation of the Article 196 ban on blasphemy. The court sentenced her to a half-year "restriction of freedom" and ordered her to do community work and pay all trial expenses. The gallery was closed as a punishment. On 28 April 2004 the District Court in Gdańsk quashed the previous judgment, in particular on the grounds of criminal procedural violations: limitation to the right to defence, and lack of a proper explanation and reasons for the judgment.

### **2. Bubel case**

Leszek Bubel is the owner of the Goldpol company, a publisher of hundreds of anti-Semitic publications: magazines and books. For many years he had been accused of anti-Semitism and the crime described in Article 257 of the Polish Criminal Code. However, efforts to prosecute and convict him had brought no positive result. On 27 July 2005 in the Provincial Court of Warszawa Praga, a lawsuit against Leszek Bubel was started. He was accused of committing a crime under Article 257: publicly insulting a group of people or an individual person by reason of their national, ethnic or racial affiliation. The statements made by Bubel included "their brains have been circumcised", of students who sued the priest Jankowski, and "the Jewish seed is deceitful". On 28 October 2005 the Court stated it had no doubts that Leszek Bubel had exceeded the limits of freedom of speech. However, the Court refrained from inflicting deprivation of liberty, which the prosecutor demanded. Leszek Bubel was sentenced to a pecuniary penalty. On 28 August 2006 the District Prosecutor from Białystok laid a charge against Bubel. He was accused of committing a crime of publicly insulting a group of people or an individual person by reason of their national, ethnic or racial affiliation. On 16 November 2006, ten famous Polish intellectuals, including Władysław Bartoszewski, Jacek Bocheński, Kazimierz Kutz, Janina Ochojska, Adam Szostkiewicz and Paweł Śpiewak, sued Leszek Bubel. They claimed that Bubel insulted them with his anti-Semitic statements. On 7 December 2006 Leszek Bubel was detained by the ABW (Internal Security Agency).

Detention was connected with Bubel's case in Białystok. Bubel was taken to a mental hospital in Tworki in order to undergo mental examination.

The procedural status of the victim is described in the Code of Criminal Procedure. The victim can join the procedure as an subsidiary prosecutor, as below.

### Article 53

In cases of indictable offences, the injured person may participate in the judicial proceedings as a party thereto, by assuming the role of subsidiary prosecutor, alongside the public prosecutor or instead of him.

### Article 54

paragraph 1. If the indictment has been filed by the public prosecutor, the injured person may, before the commencement of the judicial examination in the main trial, file a statement in writing of his intention to act as subsidiary prosecutor.

paragraph 2. The public prosecutor's withdrawal of the indictment shall not deprive a subsidiary prosecutor of his rights.

### Article 57

paragraph 1. In the event that the subsidiary prosecutor waives his rights he shall not be allowed to re-enter the proceedings.

paragraph 2. In a case where the public prosecutor does not participate, the court notifies the state prosecutor of the withdrawal of the indictment by the subsidiary prosecutor. Failure to file an indictment by the state prosecutor within 14 days of receiving such notification will result in discontinuance of the proceedings.

**6.** The distinction between the concepts mentioned is decisive for categorising the particular crime. Crimes of religious insult belong to Chapter XXIV of the Polish Criminal Code: Offences against freedom of conscience and religion (confession). Incitement to religious or racial hatred is included in Chapter XXXII: Offences against public order. It is also critical for the possible kind of punishment. It should be noted that prosecution of "defamation", in the meaning of Article 212 of the Polish Criminal Code, occurs upon a private charge. It cannot be decidedly stated that, for example, crimes under Article 257 have been prosecuted and sentenced more seldom than crimes under Article 196. However, it is to be observed that the pressure of public opinion is stronger in cases of blasphemy and religious insult.

**7.** Article 196 of the Polish Criminal Code describes a material crime, which appears in the form of insulting the religious feelings of at least two persons. The action/statement of a perpetrator must be of a public nature. The insult can be expressed by words or action showing disregard, abuse and derision with

an intention of insulting religious feelings of other people. This crime can be committed only intentionally.

A crime under Article 256 (“Promotion of fascism or other totalitarian system”) has also, in the leading opinion of legal doctrine, the character of an intentional crime, which can be committed only when a perpetrator acts with a direct intention. The essence of the direct intention is the perpetrator’s will to commit a crime. The perpetrator should be aware of a crime and he should want to fulfil the hallmarks of a crime.

Article 257 of the Criminal Code (“Publicly insulting a group of people or an individual person by reason of their national, ethnic or racial affiliation”) also has the character of an intentional crime. However (though the views on this question differ), in a case of defamation on the ground of national, ethnic, race or religious affiliation or because of the lack of any religious denomination, a perpetrator can act with a direct intention as well as with an indirect intention. According to Article 9 of the Criminal Code, an indirect intention takes place when a perpetrator, foreseeing a possibility of committing a crime, agrees with it. As far as an indirect intention is concerned, the intention of the perpetrator does not include the result being a crime. It is a matter of indifference to the perpetrator whether the result is a crime or not, because he accepts both of those possibilities. An example given in some commentaries states that an indirect intention can take place when, for instance, a perpetrator, giving a speech in public, uses words that he can suppose to be insulting for other people.

**8.** The abovementioned crimes are to be prosecuted by indictment (public prosecution). There is also a possibility of bringing a private accusation. The specific provisions on superior supervision and ways of appeal are included in the Polish Code of Criminal Procedure:

### **Article 306**

paragraph 1. The injured person and institution specified in Article 305.4 shall have the right to bring interlocutory appeals against an order refusing to institute an investigation or inquiry, and the parties shall have such a right with respect to the order for discontinuance. Those having a right to bring an interlocutory appeal shall have the right to inspect the case files.

paragraph 2. The interlocutory appeal shall be brought to a state prosecutor who is superior to the state prosecutor who issued or approved the order. If the superior prosecutor does not grant the appeal it shall be brought to the court.

paragraph 3. A person or institution that submitted a notice of offence and who has not been notified within six weeks about the institution of or refusal to institute an investigation or inquiry shall have a right to bring an interlocutory appeal to the superior state prosecutor or one authorised to supervise the agency to which the notice has been submitted.

## Article 330

paragraph 1. Revoking an order for discontinuance of preparatory proceedings or for refusal to institute them, the court shall indicate the reasons thereof and, when necessary, also the circumstances that should be clarified or actions that should be conducted. These indications shall be binding on the state prosecutor.

paragraph 2. If the state prosecutor still does not find grounds to bring an indictment, he again issues an order for the discontinuance of proceedings or a refusal to institute it. This order is subject to interlocutory appeal only to a superior state prosecutor. In the event of upholding the order appealed against, the injured party that invoked the rights provided for in Article 306 paragraphs 1 and 2 may bring an indictment set forth in Article 55.1 and he should be so instructed of this right.

paragraph 3. In the event that the injured party has brought an indictment, the president of the court transmits a copy of it to the state prosecutor summoning him to deliver the files of the preparatory proceedings within 14 days.

## Article 460

Interlocutory appeals should be filed within seven days from the date of the announcement of the order or, if statutory service of the order is required by statutory provisions, within seven days from the date on which the service occurred. This also covers the interlocutory appeals against decisions pertaining to costs and charges included in a judgment. However, when an appellant submits a motion for preparation of the reasons for the judgment in writing and for the service thereof, the interlocutory appeal may be brought within the time-limit prescribed for filing an appeal.

**9.** The prosecution of an act of blasphemy, religious insult or incitement to religious hatred depends on the decision of the prosecutor to institute or not to institute proceedings in a particular case. The particular case is first brought to the Public Prosecutor's Office by the "victim's" notification, or anybody's notification, of the fact that a crime has been committed.

As far as an indictable offence is concerned, notification of a crime having been committed is necessary to start the prosecution of the crime. It should be notified to the District/Regional Prosecutor's Office for the place of committing the crime. The notification should include: name, surname (names and surnames of members of the group, the name of a Church) notifying the crime, description of the crime and facts, the names of the perpetrators with their description or identification (number of the magazine/newspaper, title of the article, radio broadcast, date of the edition/broadcast).

**10.** There have been six notable cases where there was no prosecution or no conviction.

### The Michałkiewicz case

On 27 March 2006 in a Radio Maryja broadcast, the commentator, Stanisław Michałkiewicz, attacked Holocaust restitution efforts and questioned the existence of two well-known Second World War-era massacres of Jews by non-Jewish Polish citizens. On 29 August 2006, Polish prosecutors dropped a case brought on 14 April 2006 by the Jan Karski Association, an anti-racism organisation, against a Catholic radio station accused of anti-Semitism. They accused Michałkiewicz of “public defamation of Jewish people” and “Holocaust denial” (Article 257 of the Polish Criminal Code; Article 55 of the Act on the Institute of National Remembrance).

Prosecutors in Toruń, where the station is based, dropped the case after ruling that Michałkiewicz had not broken any existing Polish laws banning Holocaust denial or insulting Jews. According to the Public Prosecutor’s Office, the broadcast did not constitute an intentional action ridiculing or denigrating the Holocaust, and Michałkiewicz “did not refute and did not deny Nazi crimes.” The case was also examined by the Polish National Broadcasting Council, which found no violation of its statute and adequate legal provisions. The Council of Media Ethics took a completely different standpoint and stated that Michałkiewicz’s broadcast was “extremely anti-Semitic”.

### The *Machina* case

In February 2006, after four years of absence from the Polish press market, a new edition of *Machina* magazine appeared in the bookshops. The cover of the first edition caused great controversy and protests. It showed a picture of the Virgin Mary with the child Jesus – but the face of the Virgin Mary was replaced by the face of Madonna, a pop star and singer. Many companies, to manifest their protest against the cover, decided to stop advertising their products in *Machina*.

The case was notified to the District Prosecutor’s Office in Warsaw Ochota in February 2006. On 5 October 2006, the District Prosecutor’s Office decided to bar the investigation into the case of insulting religious feelings by the offending image of the Virgin Mary and child Jesus in *Machina* magazine in February 2006 on the ground that it lacked the hallmark of a crime.

### The *Dogma* case

In October 2001 the Public Prosecutor in Kraków decided to remit proceedings in the case of the film *Dogma* by Kevin Smith. The prosecutor found no violation of Article 196 of the Polish Criminal Code.

From December 2000 to March 2001 the Kraków prosecutor had received a mass of information about an offence of insulting religious feelings from all around Poland. The information came from private persons, societies, social and Catholic organisations, and even members of the Catholic Church hierarchy.

The investigation showed that, of over a thousand people who informed about the crime, only twelve people had actually seen the film.

The prosecutor took into consideration the opinion of two researchers who stated that even though the film included allusions to the Virgin Mary, God and the Apostles, there were no insulting images. The prosecutor decided that the negative moral estimation of the film was not sufficient to accuse the people who distributed *Dogma* in Poland.

### The *Wprost* cover case

The Regional Prosecutor's Office in Poznań closed the investigation into the case of *Wprost* magazine's cover from August 1994. The cover showed the Virgin Mary and child Jesus wearing gas masks.

The investigation was started after information about an offence of insulting religious feelings came from a group of Świebodzin citizens. The editor-in-chief of *Wprost* magazine stated that the only intention of *Wprost* was to direct public opinion's attention to the problem of the extremely bad condition of the natural environment in Częstochowa and its precincts; there was an extensive article about this problem in the August edition of *Wprost*.

After a group of people insulted by the *Wprost* cover had lodged a complaint on the decision to remit proceedings in this case, the decision was reversed by a Provincial Prosecutor's Office. The Regional Prosecutor was obliged to question over 10 000 people. However, a great part of the alleged victims expressed their unwillingness to be questioned, giving the explanation that their only intention was to show the size of a problem of insulting Catholics. Finally, the Regional Prosecutor's Office in Poznań again found no intention by the editors of *Wprost* to insult religious feelings.

### The Antyk bookshop case

In December 2003, a group of Catholics protested against what they considered to be anti-Semitic literature sold in a bookshop in the basement of a Warsaw church. The group called for the church authorities to close the bookshop, which was run by a private company renting the basement space, and for the state authorities to prosecute the bookshop owner for hate crimes. The state prosecutor's office examined the case and found no basis for prosecution. Catholic Church authorities stated that they could not take action due to the bookshop's lease.

The Antyk bookshop, which quietly closed in October 2006, had become a symbol of some of the last remaining vestiges of Jewish-Catholic tension. It had been opened by an extreme right-wing politician in the basement of All Saints Church, directly across from Warsaw's Nozyk synagogue, in 1997.

In the end it wasn't the years of lawsuits and pressure from Catholic and Jewish groups that caused the demise of Poland's best-known haven of anti-Semitic literature, but a newly appointed parish priest who decided to stop this, saying: "The bookshop should have been closed a long time ago because it did not represent contemporary Catholicism." As a result of a press article in *Rzeczpospolita* describing the sale of anti-Semitic literature at Antyk, an inquiry into violation of articles 256 and 257 of the Polish Criminal Code had been instituted.

On 30 June 2003, a prosecutor from the Regional Prosecutor's Office, delegated to the District Prosecutor's Office, decided to remit the investigation. During the preliminary proceeding, the prosecutor received expert opinion on some of the books sold in Antyk with the conclusion that the examined books contained openly anti-Semitic contents. Despite this opinion, the prosecutor found no basis for prosecution. A complaint against this decision had been lodged. The complaint questioned, *inter alia*, the credibility of the Antyk owner's testimony (for instance, he stated that he didn't read the books he was selling) and the expert opinion being ignored.

On 9 September 2003, a prosecutor from the Appeal Prosecutor's Office decided not to take into consideration the complaint and she directed it to the Regional Court of Warsaw with a motion to reject the complaint. On 31 October 2003 the Court decided to reject the complaint and to uphold the previous decision to remit the investigation.

### The Kozyra case

In 1999, Katarzyna Kozyra's photo-piece "Blood Ties" (*Więzy krwi*) was to be exhibited as public art on municipal billboards as part of an outdoor gallery project by the Art Marketing Syndicate, a Poznań-based company that owns billboards. "Blood Ties" comprised four square photographs. Each of the panels featured a naked woman – the artist herself and her disabled sister (with an amputated leg) – on the backdrop of a red cross or crescent surrounded in the two bottom panels by cabbages and cauliflowers. Only the two more colourful bottom panels were allowed exhibition on billboards. The intention of both the artist and the Art Marketing Syndicate was to bring into focus women's suffering inflicted by the clash of religions and nationalisms in the Kosovo war, hence the use of the cross and crescent, symbols of Christianity and Islam, as well as emblems of two major charities, the Red Cross and the Red Crescent, founded to bring relief to war casualties.

Due to a flood of letters expressing pleas and demands, the image nonetheless became subject to censorship. With the artist's consent, the work was expurgated: the nude women were blue-pencilled in such a way that the cross and crescent became indecipherable. The reason for this censorship was an allegedly unholy use of religious symbols: because naked female bodies supposedly

profaned both the cross and the crescent, it was a blasphemy against both Christianity and Islam.

**11.** In cases of alleged blasphemy, religious insult and/or incitement to religious hatred, the reaction of particular newspapers, magazines and TV stations depends foremost on the ideological option “represented” by them. Some media (more liberal) focus on the great value of freedom of speech, freedom of opinion and the right of an artist to express his/her artistic visions in any form (see Nieznalska case). Some (more conservative) media, defending the value of freedom of expression, try to underline also the value of religious feelings and beliefs, which deserve to be protected.

However, the main and most important result of media reports and relations was the public discussion on the question of blasphemy, religious insult and/or incitement to religious hatred, which should be considered as a positive effect.

## Romania<sup>247</sup>

**1.** According to Article 13 of Law No. 489/2006 on religious freedom and the general regime of religions in Romania, all forms, means, acts or actions of slander and religious feud, as well as public offence to religious symbols, are forbidden. This piece of legislation does not provide sanctions for breaching the above provision. The prohibition of public offence to religious symbols was introduced during the parliamentary debates on this piece of legislation (the draft law, which was proposed by the government and subjected to the opinion of the Venice Commission – see Opinion 354/2005, adopted at the 64th plenary session of October 2005 – did not include it); apparently, its inclusion was influenced by European debates on the matter<sup>248</sup> following an express request of the Muslim religious denomination, supported by commissions of Parliament. Also, the same article provides that hindering or disturbing the freedom of exercise of any religious activity is punished according to the criminal legal provisions in force. The Criminal Code (Law No. 301/2004) sets forth the crimes of hindering freedom of religion and profanation of tombs (including monuments).

**2.** The Romanian Constitution sets forth, in its Article 29, that freedom of religious beliefs can not be hindered in any form, and, in Article 30.7, that incitement to religious hatred is prohibited by law.

The Criminal Code (Law No. 301/2004) sets forth the crime of incitement to discrimination, which includes, *inter alia*, incitement to religious hatred.

Government Ordinance No. 137/2000 regarding the prevention and punishing of all forms of discrimination (subsequently modified and completed) provides that any publicly manifested behaviour which has as its purpose or targets the harming of dignity or the creation of an intimidating, hostile, degrading,

247. Reply by Mr Bogdan Aurescu, Substitute Member of the Venice Commission, Romania.

248. The debate following the Prophet Muhammad caricatures issue.

humiliating or offensive atmosphere against a person, group of persons or community and related to (*inter alia*) their belonging to a certain religion represents an offence (if it does not amount to crime under the criminal law). A special body, the National Council for Combating Discrimination, has been created to implement this law.

Government Emergency Ordinance No. 31/2002 on the prohibition of organisations and symbols with a fascist, racist or xenophobic character and prohibition of the promotion of the cult of persons guilty of committing crimes against peace and humanity defines these organisations as groups “promoting fascist, racist or xenophobic ideas, concepts or doctrines, such as hatred and violence based on ethnic, racial or religious motives ... anti-Semitism”. This piece of legislation prohibits, *inter alia*, such organisations from disseminating, selling or manufacturing (or depositing for the purpose of disseminating) the said symbols, and their public use. A separate article provides that publicly contesting or denying the Holocaust is a crime (punished by imprisonment of 6 months to 5 years and suspension of certain rights).

These provisions can be explained by the need to align domestic legislation with a number of international instruments, and by historical reasons related to the conduct of the totalitarian regimes in power in Romania immediately before and during the Second World War.

**3.** Freedom of speech is guaranteed by the Constitution by the same Article 29 which provides for the freedom of religious beliefs:

1. Freedom of thought, opinion and religious beliefs may not be restricted in any form whatsoever. No one may be compelled to embrace an opinion or religion contrary to his own convictions.
2. Freedom of conscience is guaranteed; it must be manifested in a spirit of tolerance and mutual respect.
3. All religions shall be free and organised in accordance with their own statutes, under the terms laid down by law.
4. Any forms, means, acts or actions of religious enmity shall be prohibited in relations among the cults.
5. Religious cults shall be independent of the State and shall enjoy support from it, including the facilitation of religious assistance in the army, hospitals, prisons, homes and orphanages.
6. Parents or legal guardians have the right to ensure, in accordance with their own convictions, the education of the minor children whose responsibility devolves on them.

All mentioned pieces of legislation are to be applied in conformity with the Constitution and the international treaties on human rights, which according to Article 20 of the Constitution have express priority over domestic legislation.

Law No. 489/2006 on religious freedom and the general regime of religions in Romania guarantees, in articles 1 and 2, freedom of thought, conscience and religion, according to the Constitution and the international treaties to which Romania is a party; it sets forth that no one can be prevented from gaining or exercising rights recognised by the said law, nor can one be constrained, put under surveillance or put into a state of inferiority due to one's faith or affiliation to a group, religious association or religion, for exercising the religious freedom under the conditions provided by this law. It also provides that religious freedom includes the liberty of any person to manifest one's faith individually or collectively, privately or in public, by religion, education, religious practices and performance of rites, as well as the liberty of changing one's faith, and that the freedom of displaying one's faith cannot be the object of any type of restraints other than those provided by law which constitute necessary measures in a democratic society for public security, order protection, health, public morality or protection of the rights and fundamental liberties of the human being.

Government Emergency Ordinance No. 31/2002 on the prohibition of organisations and symbols with a fascist, racist or xenophobic character and prohibition of the promotion of the cult of persons guilty of committing crimes against peace and humanity allows the disseminating, selling or manufacturing (or depositing for the purpose of disseminating) of the mentioned symbols, as well as their public use, only if these are for the purpose of art, science, research or education.

**4.** According to my view, the Romanian legislation is quite complete in this field. During the debates on the draft law on religious freedom and the general regime of religions in Romania, the representatives of religious denominations were against new/supplementary criminal provisions in this field; they rather stressed that the climate of inter-confessional peace should be based on mutual good understanding, and not on state coercion.

**5.** To my knowledge, there are no such cases, as – with the exception of the mentioned provisions of the Criminal Code – blasphemy (public offence to religious symbols) is not set forth in the Criminal Code. There were only very few cases based on Government Emergency Ordinance No. 31/2002 prohibiting organisations and symbols with a fascist, racist or xenophobic character and the promotion of the cult of persons guilty of committing crimes against peace and humanity, but they do not relate to the subject of the questionnaire.

**10.** An interesting case, with no criminal implications, is related to a complaint forwarded by E.M., a Romanian philosophy college professor, to the Buzau County Tribunal, and to the National Council for Combating Discrimination (see point 2 above). E.M. complained that the fact that Orthodox Christian icons were displayed on the walls of halls, classrooms and chancelleries of education institutions violated the freedoms of conscience, thought and religious

belief, and constituted discrimination against his daughter, a student attending the courses on religion.

The County Tribunal decided in March 2005 – and the Ploiesti Court of Appeal, answering to the recourse initiated by the claimant, upheld, by final and irrevocable decision, the judgment of the County Tribunal in July 2006 – that there was no breach of the mentioned freedoms, and that there was no discrimination against the daughter of E.M.

On 14 July 2006, the claimant asked the National Council for Combating Discrimination (1) to establish whether the mentioned situation represented “discrimination against agnostic persons or those having a different confession than the one to which the displayed religious symbols belong, thus creating a hostile and degrading atmosphere which affects the right to personal dignity (and implicitly the right to education) of children, as well as the process of formation of the creative and autonomous human personality”; he also claimed that, through this state of fact, public education institutions assumed the transmitting of “values promoting the state of inferiority of women practised by the said religion”. He also asked the Council (2) to “annul the discriminatory situation created by the presence of religious symbols” in the college where his daughter was a student, “the withdrawal of religious symbols from public education institutions with the exception of courses on religion” and “to admit the presence of religious symbols only during the optional courses on religion”.

The Council asked for the opinions of the State Secretariat for Religious Denominations, the Ministry of Education and Research and the Commission on Human Rights, Religious Denominations and National Minorities Issues of the Chamber of Deputies of the Romanian Parliament.

The State Secretariat for Religious Denominations expressed the view that in all states there is a certain symbolism having its roots in the history of that people, and which is not deemed at odds with fundamental human rights. It is ascertained that many states (such as Denmark, Sweden, Greece, Great Britain) include the cross in their national flag or in the official coat of arms. Similarly, the Romanian coat of arms includes the cross, and references to the Christian religion can be found in the Romanian national anthem. The State Secretariat invoked a decision issued in February 2006 by the State Council of Italy, which found that the presence of crucifixes in public schools constituted no discrimination against non-Christians, but symbolised a cultural and national tradition.

The Ministry of Education and Research showed that no document issued by this institution imposes the display of icons or of other religious symbols in school classes and that there is no reference in the domestic legislation in force regarding the presence or absence of icons or other religious symbols in public places or in public institutions. In its view, the decision to display icons in school classes, which is not a general situation, is taken by the educational community of

professors, students and parents belonging to various religions, and not through the imposition of any administrative decision.

The Commission on Human Rights, Religious Denominations and National Minorities Issues of the Chamber of Deputies of the Romanian Parliament informed the Council that, in its view, the discrimination invoked by the claimant does not exist, taking into account that the decision to display religious symbols is taken with the agreement of the professorial councils and the parents.

On the first request (to conclude that there is or not a case of discrimination), the Council did not adopt any standing: taking into account the *res iudicata* rule, it took note of the above mentioned judgment of the Ploiesti Court of Appeal.

On the second request, after analysing international case law and practice on the matter and the constitutional relationship between the state and religious denominations in Romania, the Council concluded that the state must be neutral and impartial in relation to religious denominations, including as far as public education institutions are concerned. So the uncontrolled and unlimited presence of religious symbols, such as icons, in public education institutions represents a violation of the mentioned neutrality principle. The Council found that, by omitting to regulate on the matter (the display of religious symbols in schools), the state (through the Ministry of Education and Research) did not observe the positive obligation incumbent on it to create the framework necessary to protect pluralism and (religious) beliefs, and to allow the liberty to opt among them. The non-observing of this obligation might be conducive to discriminatory situations. It also concluded that the presence of religious symbols (of worship) in public schools might affect the laic character of the state and might breach the principle of equal treatment of citizens by the state. The decision of the Council considers that religious symbols may be displayed in public education institutions only in spaces dedicated to teaching courses on religion. The works of art created by students of art schools, which include religious symbols, may be displayed as they are artistic creations.

In consequence, the Council recommended that the Ministry of Education and Research draft and implement a regulation on the matter, based on the following principles: the exercise of the right to education and access to culture of children to be ensured in conditions of equality, the right of the parents to provide education for their children according to their religious and philosophic beliefs to be respected, the laic character of the state and the autonomy of religious denominations to be observed, the freedom of religion, conscience and convictions of children to be ensured in conditions of equality, religious symbols to be displayed only during courses on religion or in spaces exclusively dedicated to religious education.

The reactions of public opinion, NGOs, state institutions and religious denominations were very vivid. The very large majority of opinions criticised the decision

of the Council and a lot of NGOs declared their intention to appeal against it. The appeal is not yet decided upon.

The Ministry of Education and Research considered that its intervention to ban the display of religious symbols in schools would be excessive and would hinder the free choice principle. It noted that the decision to display religious symbols is an option of the parents, the local community and the professors, and that in a democratic society this option cannot be restricted, with the condition that such option does not violate the norms prohibiting religious proselytism in schools. A similar position was expressed by the commissions on education of both the Chamber of Deputies and the Senate of the Parliament. The representatives of the major religious denominations, including the Muslim one, expressed their reservation concerning the decision of the Council.

**11.** The press commented a lot on the case presented at point 10 above, and contributed to enlarging the debate, by presenting various points of view. On the other hand, the Romanian media reported with moderation and equidistance on the Danish case of the caricatures of the Prophet Muhammad, which were not reproduced in Romanian journals.

Another public debate concerned a theatrical play, *The Evangelists*, because certain commentators considered that some scenes represented blasphemy to the Christian religion, but there was no trial (either criminal or civil). The press adopted two different stances – one focusing on the absolute freedom of expression, the other stressing the view that such attitudes might offend the religious beliefs of the majority of the population (86.7% of the population declared their belonging to the Orthodox Church). But the predominant view was rather permissive. Anyway, just as in the case of the caricatures, the press focused much less on the texts of the said play, but rather on the debate of ideas and principles.

## Turkey<sup>249</sup>

**1.** Turkish legislation contains no provisions on the prohibition of blasphemy as such, since as a secular state Turkey affords the same kind of constitutional protection to non-believers as to believers of different religions.

On the other hand, there are provisions in the Turkish Criminal Code which went into effect on 1 April 2005 on religious insult and incitement to religious hatred. Religious insult is regulated in Article 125 of the Code under the title of “insult”. Paragraph 3b of the article provides that, if the act of insult is committed because of someone’s “expressing his/her religious, political, social, philosophical thoughts and opinions, of changing them or trying to disseminate them, or of conforming to the rules and injunctions of the religion of which he/she is a member”, the lower limit of the prison term cannot be less than one year. In other words, the Turkish Code considers religious insult a more serious offence

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249. Reply by Mr Ergun Özbudun, Member of the Venice Commission, Turkey.

than ordinary insult. The subsequent section of the article (3c) also makes insult “in reference to the values held sacred by one’s religion” an aggravated form of insult subject to the same penalty.

This article is similar to Article 175.3 of the old Criminal Code. The only difference is that in the previous code the article was in the section entitled “Crimes against freedom of religion”, whereas in the present text the title of the section is “Crimes against honour”. However, the new formulation better expresses the doctrinal grounds behind the criminalisation of religious insult. Here what is meant to be protected is personal honour rather than a religion or religions *per se*.

There is no distinction between different religions as regards the protection afforded by the Criminal Code. Thus, in 1986 the Constitutional Court found Law No. 3255, which purported to make insulting monotheistic religions a more aggravated form of insult, unconstitutional. The Court ruled that in a secular state no distinction can be made between monotheistic and other religions (Constitutional Court Reports, Vol. 22, p. 314).

**2.** Incitement to religious hatred is regulated in Article 216 of the Criminal Code (Article 312 in the old code), according to which “those who incite a segment of people bearing different characteristics in terms of social class, race, religion, sect or region to hatred and hostility against another segment” shall be punished “provided that this causes a clear and present danger to public security”. Paragraph 2 of the same article punishes those who “publicly insult a segment of people on the basis of differences in social class, race, religion, sect, sex or region”. Finally, paragraph 3 makes into an offence “publicly insulting the religious values of a segment of people, provided that such action is likely to disturb public peace”.

Article 216 represents a considerable improvement over the former Article 312 in that criminality is made conditional on the existence of a “clear and present danger” to public security. As such, the main purpose of the article is to protect minority groups against hate speech and insult.

**3.** Although freedom of expression is recognised and guaranteed under Article 26 of the Constitution, hate speech is not considered to be protected by that article.

**4.** No such need.

**5.** As to whether there is any case law concerning blasphemy, religious insult and/or incitement to religious hatred, under the old Article 312 many cases resulted in conviction, including those of leading political personalities like the former prime minister Erbakan and the present prime minister Erdoğan. However, after the introduction of the “clear and present danger” criterion, the number of such convictions dropped sharply.

7. The intention of the perpetrator is a *sine qua non* condition for all criminal offences under Article 21 of the Criminal Code.
8. Prosecution is at the discretion of the prosecutor.
9. No.
10. See No. 5 above.

## United Kingdom<sup>250</sup>

1. Although there is no legislation by Parliament creating the offence of blasphemy, it is under common law in England and Wales an offence to utter or publish blasphemous words and writings, but the scope of that offence has been narrowed in the last 150 years. It is not blasphemy to deny the truth of the Christian religion or the existence of God. But in 1977 the publication of a poem linking homosexual practices with the life and crucifixion of Christ was held to be blasphemous; the offence did not depend on proof that the defendants intended to blaspheme (*R v. Lemon* [1979] AC 617). The offence was held to consist of the publication of material that was “calculated to outrage and insult a Christian’s religious feelings” and it did not require proof that the publication might lead to a breach of the peace. The law of blasphemy was also applied in film censorship, and a censorship decision on this ground was upheld at Strasbourg (*Wingrove v. the United Kingdom* [1996] 24 EHRR 1).

Although the scope of blasphemy as an offence has been narrowed, and prosecutions are very rare, its scope is limited to Christianity and does not extend to protect other religions, such as Islam (*Ex parte Choudhury* [1991] 1 QB 429). For this reason, it has often been proposed that the offence of blasphemy at common law should either be abolished or widened to include all religions. In 2006, the Racial and Religious Hatred Act (summarised below) was enacted to create new offences that involve stirring up hatred against persons on religious grounds. This Act did not amend or abolish the offence of blasphemy at common law.

The common law has evolved over centuries and thus the present state of the law of blasphemy is to be explained on historical grounds. To an ever-increasing extent in the last 150 years, British culture has manifested a widespread belief in the importance of freedom of religion, and with this the ability to discuss matters of religion without legal restrictions. There would have been doctrinal reasons in the 16th and 17th centuries for the existence of the offence of blasphemy. Religious leaders of the main branches of Christianity in the United Kingdom have in more recent times not felt the need for their faith to be protected by the criminal law.

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250. Reply by Mr Anthony Bradley, Substitute Member of the Venice Commission, United Kingdom.

**2.** There has long been legislation dealing with conduct that seeks to incite or provoke breaches of public order, and the police and magistrates have long had power to deal with disorder in public places. The first legislation on racial discrimination was enacted in 1965, when an offence of incitement to racial hatred was created that did not depend on there being an immediate threat to public order. The reason for this extension of the criminal law was an argument from public order, namely that racial hatred itself was believed to contain the seeds of violence and eventual disorder. The law on incitement to racial hatred was widened by the Public Order Act 1986. This Act is the source of the present law. It defined racial hatred as "hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins". By Section 18 of the 1986 Act, it is an offence for a person to use threatening, abusive or insulting words or behaviour; it is also an offence to display any material which is threatening, abusive or insulting if the defendant does so with intent to stir up racial hatred or if in the circumstances racial hatred is likely to be stirred up. Corresponding offences exist in relation to publishing or distributing written material, theatrical performances and broadcasting. The 1986 Act did not extend to incitement to religious hatred. Problems arose in that some racial groups (e.g. Sikhs) were protected against abuse on religious grounds but persons of many other faiths (e.g. Muslims) were not so protected because they did not form a single racial group.

The Racial and Religious Hatred Act 2006 inserted into the 1986 Public Order Act a new part 3A, entitled "Hatred against persons on religious grounds". Religious hatred means "hatred against a group of persons defined by reference to religious belief or lack of religious belief" (Section 29A). The primary offence (Section 29B) is to use threatening words or behaviour or to display any written material that is threatening, if the defendant thereby intends to stir up religious hatred. It is also an offence (Section 29C) to publish or distribute written material that is threatening, if the defendant thereby intends to stir up religious hatred. Offences of this kind have been created in respect of theatrical performances (Section 29D), broadcasting (Section 29F) and so on. There is also an offence of possessing inflammatory material (with a view to publication, distribution etc.) that is threatening if the defendant intends religious hatred to be stirred up thereby. An important restriction on proceedings for these offences is that no prosecution for these offences may be instituted except with the consent of the Attorney-General (Section 29L.1).

It will be evident from this brief summary that the new offences in the 2006 Act on religious hatred are significantly narrower than the offences of incitement to racial hatred contained in the 1986 Act. In particular, the new offences are limited to material that is "threatening" and not to material that is "abusive" or "insulting". (In debate in Parliament, it was said that vigorous criticism of another religion's beliefs should be permitted even if was "abusive" or "insulting" of those beliefs; and it was also said that beliefs could be "insulted" without

the holder of those beliefs being insulted.) Moreover, the defendant's intention of stirring up religious hatred is an essential element of the offences. The view taken in Parliament was that there would otherwise be a risk of unduly limiting the freedom of debate about religious practices and beliefs.

This answer to the questions posed above does not deal with the law of defamation (the law of defamation is for all practical purposes a matter of civil law; the offence of criminal libel continues to exist in English law but it is almost obsolete), and nor does it deal with the general criminal law on incitement, conspiracy, attempts and the like, which would apply to specific acts like plotting to burn a religious building or assault a religious leader, or to an incitement to kill persons because of their beliefs. This answer is also limited to the law of England and Wales, and does not deal with the position in Scotland or Northern Ireland.

**3.** The Racial and Religious Hatred Act 2006 contains a specific freedom of speech clause, namely Section 29J. This states:

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

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No such provision is contained in the Public Order Act 1986. However, both the 1986 Act and the 2006 Act must be read subject to the Human Rights Act 1998, which gives effect in national law to rights guaranteed by the European Convention on Human Rights. It is therefore open to a defendant charged with incitement to racial or religious hatred to argue that a conviction would breach his or her rights under Articles 8, 9, 10 or 11 of the Convention.

**4.** In this brief report, it has not been possible to summarise the complex political and legislative history of the significant change in the law that was enacted in 2006. It is sufficient to say that the upper house in Parliament was instrumental in causing the government in 2006 (against the government's wishes) to accept some very significant modifications in the proposed legislation, and that two earlier attempts by the government to create an offence of incitement to religious hatred had not been successful. Because of the prolonged attention that was given to this matter in Parliament, the general opinion in Parliament and in government is probably that no further legislation in this area is needed. It is however to be hoped that at some future date the common law offence of blasphemy will be abolished, since it serves no useful purpose today. There is very little evidence in the United Kingdom of any demand for criminalising denials of the Holocaust, genocide and the like.

**5.** The answer to question 1 above mentions some recent case law on blasphemy. Successful prosecutions under the 2006 Act will depend (a) on the decision of the Attorney-General to consent to proceedings and (b) on the willingness

of a jury to convict. It is too early for such convictions to have been recorded. The law makes no provision for the victims of religious hatred to play any part in the criminal process or criminal trial, except where they are required to give evidence of the defendant's conduct.

**6.** As already stated, a distinction was drawn in some of the legislative debates between the broader scope of the 1986 Act, dealing with incitement to racial hatred, and what eventually prevailed in the 2006 Act, dealing with insulting material that was likely to stir up hatred against persons on religious grounds. The concept of "discriminatory speech" did not feature much in the legislative debates, probably because (although the term may be used loosely in a non-legal sense) the legislation against discriminatory conduct (unequal treatment in various contexts like employment or education) does not deal with "discriminatory speech" at large.

**7.** As stated in the summary of the new offences created by Parliament in 2006 (see answer to question 2 above), the intention of the defendant is an important element of the offence. It is also a defence, in the case of the use of threatening words or behaviour inside a dwelling, that the defendant had no reason to believe that the words or behaviour would be seen or heard by a person outside that or any other dwelling (Section 29B.4).

**8.** As stated above, no prosecution for offences under the Act of 2006 may be brought without the consent of the Attorney-General. This means that the ordinary prosecutor of criminal offences (the Crown Prosecution Service or CPS) is not at liberty to institute proceedings, but must send the papers (via the Director of Public Prosecutions, who is head of the CPS) to the Attorney-General (A-G), who is the chief law officer of the government. The requirement for the A-G's consent also means that there can be no private prosecution (that is, brought by a member of the public).

There is no right of appeal to a court against non-prosecution for any criminal offence. However, by means of the procedure of judicial review, the Administrative Court does have power on the application of an interested person (e.g. a victim) to review a decision by the CPS not to institute proceedings, and the court may in exceptional circumstances require such a decision to be taken properly and in accordance with law (see for example *R. v. DPP, ex parte C* [1995] 1 Cr App R 136). The 2006 Act does not expressly exclude judicial review of a decision taken by the A-G not to give consent to criminal proceedings for material that is likely to stir up religious hatred. However, the fact that consent of the A-G is required by the Act indicates that Parliament intended a broad discretion to be exercised at this very senior level; it therefore must be extremely doubtful whether the Administrative Court would be prepared to intervene in any case where it was complained that the A-G had not exercised that discretion properly (particularly in the light of earlier case law that limited the scope of judicial review in respect of discretionary decisions made by the A-G: see *Gouriet v.*

*Union of Post Office Workers* [1978] AC 435). As a member of the government, the A-G is accountable to Parliament for his or her decisions, but there is no legal obligation on the A-G to give full reasons for such decisions.

**9.** No. Moreover, as stated already, the requirement for consent of the A-G means that a victim may not bring a private prosecution against the defendant. The possibility of a private prosecution in some areas of criminal law may in very rare cases still be important in practice, although such prosecutions are very far from being frequent.

**10.** The 2006 Act has been enacted too recently for there to have been prosecutions under the Act. Under the 1986 Act, the leader of a far-right party (the British National Party) was in November 2006 found not guilty by a jury of using words or behaviour intended to stir up racial hatred in the course of a speech made in 2004. Inevitably in such a case, the jury's perception of the permissible limits of freedom of speech would have played a part in the decision. Some critics of the result called for more changes of the law, and overlooked the fact that the acquittal was by decision of a jury. More recently, prosecutions were brought in respect of some extremely inflammatory placards carried by demonstrators in London protesting at the publication in Denmark of cartoons that were considered to be offensive to the Muslim faith. In that case, criminal liability might have been established as a matter of the general criminal law or under the Public Order Act 1986.

**11.** It is not possible to generalise about the press in the manner suggested by the questions. Some of the press report the issues responsibly, others do not. Some sections of the press are committed to certain predictable positions (e.g. being inclined to attribute many ills in Britain to ethnic minorities), and others are not. It is however the case that such cases tend to attract a lot of interest in the media. The fact that the 2006 Act requires the consent of the Attorney-General to be given to prosecutions under the Act does not resolve all the potential problems.

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