

The Fall and Rise

EDITED BY PAUL CLITEUR
& TOM HERRENBURG

of

Blasphemy Law

with a foreword by
Flemming Rose

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THE FALL AND RISE OF BLASPHEMY LAW

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Preface

The troublesome state of affairs concerning freedom of expression in a world of religiously motivated terrorism (“theoterrorism”) is what prompted us to edit *The Fall and Rise of Blasphemy Law*.

In today’s world, we are witnessing two conflicting developments taking place with regard to freedom of expression and religion. On the one hand, we are seeing the continuation of the modernisation project. Influenced by the Enlightenment and critical thinking, laws combatting the defamation of religion (blasphemy laws) are in many parts of the Western world either abolished, or enforced to a far weaker extent in comparison with their historical counterparts. On the other hand, we are seeing a resurgence of religious fundamentalism in extreme forms. The most extreme form is the conviction that the blasphemer, heretic or apostate has to be killed.

This perplexing development gives a whole new dimension to the discussion on freedom of expression. Legal limits on freedom of expression, established by legislators and judges, are now only one part of the picture. Terrorist attacks, which cause fear and, subsequently, self-censorship, have become another part of the picture. The protection of freedom of expression now also depends on the ability of governments successfully to combat theoterrorism.

We thank the contributors to this book. We are also grateful for the two peer reviews that we have received, which have helped us improve this book. We thank the pre-eminent scholars Eric Barendt, Alan Dershowitz, Menachem Mauthner and Bassam Tibi for gracious quotations they allowed us to use as endorsements. And last but not least: we are very happy that Leiden University Press has shown great enthusiasm throughout every stage of this project. It was a privilege to work with such an excellent publisher.

Paul Cliteur and Tom Herrenberg
Leiden University, September 2016

Foreword

Blasphemy: A Victimless Crime or a Crime in Search of a Victim?

Flemming Rose

In the spring of 2015 the Danish centre-left government, with the backing of some opposition parties, decided to keep the country's 150-year-old blasphemy law on the books. It did it in spite of the fact that there had not been a single conviction for blasphemy since 1946, and against the advice of several NGOs and other civil society organisations. A proposal to abolish the blasphemy law had been put forward in 2004 when a group of Muslims wanted to take the Danish Broadcasting Corporation to court for having shown Theo van Gogh's documentary *Submission* in the aftermath of his killing. Why did the government opt for this solution?

Making the government's case, Mette Frederiksen, then the Minister of Justice and current head of the social democratic party, claimed it was a preventive measure to secure public order in the event of blasphemous outbursts. She specifically singled out burning the Bible and the Koran as blasphemous acts that keeping the law would make it possible to punish. "I cannot see how it will strengthen our society or how the public debate would be enriched by legalizing the burning of holy books," she said.

Well, I can think of a lot of speech and other things that to my mind will not benefit or enrich the public space, but does that justify criminalising them?

It is true that book burning provokes the most unpleasant associations and brings to mind terrible episodes in our history, and it is quite rightly seen as an antidote to civilisation. But say your loved ones were killed in a terrorist attack and the terrorists justified their bloody actions with quotations from a holy book, would the burning of such a book not be a quite understandable reaction to express your sense of grief and contempt?

Leaving this point aside, the Danish government was not entirely honest about the state of affairs. Of course, it did not fear violent reactions to copies of the Bible being burned in public. In fact, in 1997 the Danish evening

news, a Danish Broadcasting Corporation programme, showed a Danish artist burning a copy of the Bible while speaking about his coming exhibition at an art gallery in Aarhus, Denmark's second largest city. No death threats followed; there were just a few complaints and a call for the prosecutor to initiate a blasphemy charge. The case was dropped three months later, largely on the basis of the artist's explanation that it was a symbolic act intended to raise public debate about Christianity. In 2006 the Norwegian comedian Otto Jespersen also burned a copy of the Bible in the Christian-dominated town of Aalesund in front of rolling TV cameras. When asked to repeat his stunt with a copy of the Koran, Jespersen refused, saying that he wanted to live longer than another week.

As noted above, in 1997 Danish public broadcasting had no qualms about an artist burning a copy of the Bible on the news. In 2015 the situation was quite different when it came to showing a few cartoons of the prophet Muhammad on a late night news show on the same TV station. I was on the news show *Deadline* after the "Je Suis Charlie" day in France, Sunday, 11 January 2015, following the killing of 12 people at the satirical magazine's offices a few days earlier, to talk about the state of free speech in Europe. The magazine *Charlie Hebdo's* encounter with the Muslim prophet and his adherents started in February 2006 with the republication of *Jyllands-Posten's* cartoons of Muhammed, and so for a few seconds the anchorman showed a page containing the 12 original Muhammed cartoons from my book *The Tyranny of Silence*.

It seemed relevant to the topic at hand. Nevertheless, immediately after the show the host received a reprimand from his boss and was later temporarily removed from the show. He was also criticised by some colleagues for putting them in danger, though they did not say as much in public.

So the issue driving the government's motivation to keep the blasphemy law was the holy book of a specific religion and its prophet, not holy books and prophets in general. Interestingly, the Danish government also reasoned its decision to keep the blasphemy law with a reference to possible international reactions to blasphemous speech in Denmark. The result was that religious fanatics in the Muslim world now have the power to trigger blasphemy charges in Denmark in order to demonstrate to the outside world that the government accepts their threats and violence as the most serious argument for upholding the rule of law. To me this sounds like a very paradoxical understanding of the rule of law in one of the most stable and peaceful liberal democracies in the world.

Two of the essays in this enlightening and thought-provoking anthology describe a similar line of reasoning. In November 2004, a couple of weeks after the killing of the Dutch filmmaker and provocateur Theo van Gogh, the Dutch Minister of Justice, Piet Hein Donner, proposed a revival of the blasphemy law. The logic seemed to be that if the Netherlands had had laws criminalising van Gogh's speech about Islam and Muslims then he would still be alive. In short, blame the victim and make concessions to the perpetrators of violence, then everything will be just fine.

This is one approach to the fact that "God is back," as two former editors and writers for *The Economist* put it in a book title a few years ago. It is popular, especially among Western governments and people who are willing to sacrifice freedom on the altar of diversity, to defend their stand with short-term utilitarian arguments. This highly problematic point of view is analysed and dissected in several of the essays. Another approach was proposed by the Norwegian government when, in the aftermath of the attack on *Charlie Hebdo*, it decided to repeal its blasphemy law. In promoting the abolition of the law, two members of parliament said:

The attack on the French satirical magazine *Charlie Hebdo* in January 2015 was an attack on freedom of the press and freedom of expression. Even though the blasphemy law in and of itself does not legitimise violence, it provides support for the point of view that religious speech and symbols have a right to special protection against other kinds of speech. This embodies an unfortunate message, and it is about time that society stood up for free speech in a clear and unequivocal manner, also when it comes to religious issues.

In fact, several observers have made the point that the severe blasphemy laws in Pakistan serve as an incitement to violence against blasphemers, not as a legal instrument to secure the social peace. In Pakistan, as in several other Muslim-majority countries, blasphemy is a capital offence on a par with a terrorist attack killing hundreds of people. That is part of the reason why there are so many extrajudicial killings of blasphemers in Pakistan. When the government communicates to the public that blasphemy is more or less as evil as killing hundreds of innocent people, it should not come as a surprise that a lot of people are willing to take the law into their own hands. In 2011, Mumtaz Qadri, who worked as a bodyguard for Salman Taseer, the governor of Punjab province, killed the man he was assigned to protect because Taseer had spoken out against the blasphemy laws and defended a Christian woman

who was standing trial on blasphemy charges. Qadri was praised as a hero, even by Pakistani lawyers. He was executed in February 2016.

With this in mind, one may feel tempted to ask: might getting rid of blasphemy laws in the long run pave the way for non-violent reactions to blasphemy?

The Danish and Norwegian reactions to the attacks in Paris and Copenhagen at the beginning of 2015 represent two different approaches to free speech and its limits in a globalised world dominated by digital technology and an increasing diversity of religions and cultures. The debate about free speech and its limits can no longer be confined to homogeneous national spaces. The Danish government's decision to keep the blasphemy law due to threats and violence in countries several thousand kilometres away is a manifestation of this new world. In an important and principled essay about the Terry Jones affair—an American pastor's intention to burn a copy of the Koran and the U.S. government's reaction—Paul Cliteur, Tom Herrenberg and Bastiaan Rijpkema make the point that it may have grave, long-term consequences if liberal democracies are willing to compromise fundamental liberties like freedom of speech in order to manage the forces of globalisation. They write: "In an interconnected world, free speech cannot be studied in the isolation of a single legal order. Terrorists and extremists on the other side of the globe force restrictions on the use of free speech by a U.S. citizen, and coerce the U.S. government to intervene."

We need a serious debate about free speech in a globalised world in order to avoid ad hoc, short-term decisions to calm emotions.

I find it logical and natural that the more diverse a society becomes in terms of culture and religion the more diverse the ways in which people express themselves will be. Public confrontations regarding deeply held beliefs are inevitable if society wants to provide equal space for differing world views in a multicultural society. One has to be honest about the fact that diversity is difficult and painful if people are serious about their cultural and religious affiliations. Unfortunately, the majority of European politicians believe that cultural and religious diversity should be accompanied by less diversity when it comes to speech. They are convinced that the only way to safeguard the social peace is to accept new limitations on speech. I suspect that the pressure on free speech in Europe and beyond will grow in the coming years, and in order to understand what is going on we need historical analysis, perspective and deconstruction of the arguments favouring further limitations on speech. The volume at hand provides the reader with valuable insights.

What is blasphemy? Blasphemy is basically about transgression, about crossing the line between the sacred and the profane in ways that are seen as improper in a specific context. Blasphemy has no consistent and objective meaning independent of time and space. Definitions cover a wide range of speech depending on religious content, social norms and power relations.

Austin Dacey has identified three broad concepts in the history of legal regulation of blasphemy in the West. They have been prevalent at different times throughout history.¹ First, there is an ancient concept of blasphemy as a direct verbal affront to the divine; second, a medieval concept of blasphemy arises as a seditious challenge to the sanctity of law, public order or the common good; and, third, there is a modern notion of blasphemy as an offence against the sensibilities, rights or dignity of individual believers.

The last definition is informing current debates about blasphemy and can be difficult to separate from incitement to religious hatred. Recently, this was demonstrated in a court case in Denmark. In 2016, the city court of Elsinore convicted a man of incitement to religious hatred. He had written on his Facebook page: “The ideology of Islam is as despicable and deplorable, oppressive and anti-human as Nazism. The massive immigration of Islamists to Denmark is the most destructive thing that has happened to Danish society in recent memory. Islam wants to abuse democracy in order to destroy democracy.”

The court deemed these statements to be insulting and degrading to the adherents of Islam, though to some this was not seen as an attack on individuals or a group of people but as criticism of an ideology. The man was acquitted by an appeals court, but the incident shows that it may be difficult even for professional judges to draw clear lines between blasphemy and incitement to religious hatred. This point was reinforced by another case that was unfolding at the same time, in which Denmark’s prosecutor general refused to charge an imam with incitement to hatred. The day before the deadly attacks in Copenhagen in February 2015, in which a film director attending an event centred on blasphemy, art and free speech and a young Jew guarding the synagogue were killed, the imam said:

Our Prophet had Jewish neighbours in Al Medina. Did he want closer relations, harmony and dialogue in the manner of the UN and those who want to unite truth and lies? Or did he preach that they had to

1 Austin Dacey, *The Future of Blasphemy: Speaking of the Sacred in an Age of Human Rights* (New York: Bloomsbury Academic, 2012).

commit themselves to Allah? When they broke their promises and did not accept his call, then you know what he did to them. It says in the Sira that he went to war against the Jews. They were driven into an abyss of resignation and corruption that led them from the level of humans to the level of animals.

To make the situation even more confusing, a Danish citizen was charged with incitement to religious hatred after having burned a copy of the Koran in his backyard. He filmed the episode and posted it on Facebook with the words: “Think about your neighbour; it stinks when it burns.”

I suspect that the lack of consistency and difficulties in classifying speech crimes are not confined to Denmark. They are part of a general European trend. In a chapter dealing with the history of Dutch blasphemy law, Paul Cliteur and Tom Herrenberg analyse the situation and identify a dilemma confronting Europe’s liberal democracies: “What the jihadists of the twenty-first century re-introduced was the implementation of blasphemy laws by extrajudicial execution. Europe is still struggling with how to respond.”

According to Cliteur and Herrenberg there are basically two ways in which multicultural democracies can react to this new situation. Either they can, as a sign of “multicultural etiquette,” outlaw blasphemy and incitement to religious hatred in order to prevent intercommunal strife, and maybe even terrorist attacks. Cliteur and Herrenberg rightly see this as a futile exercise. Or they can—as the Netherlands and Norway did—revoke provisions that protect religion and religious symbols.

Nevertheless, laws against blasphemy or religious insult are still on the books in several European countries. This is of course an act of discrimination against non-believers. It seems to me that blasphemy needs legal protection as a matter of equality before the law and as a precondition for citizens’ right to exercise their freedom of expression and freedom of conscience. At the height of the cartoon crisis, back in 2006, many observers, including people of a liberal persuasion, made the claim that ridiculing Islam’s prophet violated Muslims’ right to freedom of religion. Blasphemy was seen as giving offence to religious sensibilities, and in a time of “grievance fundamentalism” it had to be identified as a criminal offence. Or they interpreted John Stuart Mill’s harm principle as holding that an individual’s freedom of speech stops when it is used to hurt other people’s feelings. This nonsense was repeated by serious people who should have known better. To me it indicated a frightening lack of understanding of the basic principles of a free society.

A few countries have changed their laws in order to make it clear that they cover both religious and secular sensibilities so that they provide legal recourse to those of secular persuasions as well. That is an improvement, but the danger is that it will trigger further limitations on speech along the lines of “if you respect my taboo, I will respect yours.” If it is illegal to mock the Christian faith it should also be illegal to mock secular ideologies like Marxism and liberalism. This has been the case with memory laws. Laws criminalising Holocaust denial have been followed by laws criminalising the denial of the crimes of communism.

The volume at hand makes a convincing case against the West’s concessions to religious fundamentalism over the course of almost four decades. They started in 1980 with an almost forgotten documentary about the execution of a young Saudi princess and her lover for adultery. Back then the Saudi government, with the help of Western governments and oil companies, succeeded in convincing a lot of people that broadcasting the documentary would be an affront to Muslims. My own government and the Danish Broadcasting Corporation caved in to the intimidation and cancelled the broadcast of *Death of a Princess*. The arguments and intimidation employed then were very similar to those used during later confrontations: Yes, we have free speech, but speech has to be responsible, and this is irresponsible. Why insult other people’s religious feelings? Yes, we have our values, but they have theirs, and it is not up to us to pass any judgement on them. Violence has nothing to do with Islam, and so on and so forth. The arguments were repeated after the fatwa against Salman Rushdie in 1989, after the killing of Theo van Gogh in 2004, during the cartoon crisis in 2006, after the killings at *Charlie Hebdo*, and in Copenhagen in 2015. The list goes on and on.

Paul Cliteur, Laetitia Houben and Michelle Slimmen sum it up this way:

Instead of upholding and defending the values European governments have enshrined in their human rights treaties and constitutions, they give in to the unreasonable demands of dictatorships. In the long run this attitude may prove suicidal, and democratic governments should perhaps do some soul searching on how to uphold democratic values in the future.

Indeed.

