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# Criminalising defamation of religion and belief<sup>1</sup>

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## Keywords

Criminalisation; freedom of expression; freedom of religion; ECHR; ICCPR; blasphemy; defamation

## Abstract

This article deals with the role of criminal law in dealing with defamatory expressions about religion or belief. Defamation of religion and belief is a form of indirect defamation ‘via identification’ which, as the discussion about the Dutch group defamation law shows, stretches up the notion of ‘group defamation’ – a crime which requires that (groups of) *persons* are insulted because they belong to a religious group. This contribution investigates whether European states can legitimately criminalise (certain forms of) defamation of religion and belief, in light of the European Convention on Human Rights, the United Nations framework (particularly the International Covenant on Civil and Political Rights) and legal theoretical considerations. The article shows how problematic it is for the criminal law – in light of the rights to freedom of expression and freedom of religion, as well as the *ultima ratio* principle – to combat such speech.

## 1. Introduction

Defamatory expressions about religion have become part of a heated globalised debate with the Rushdie affair, the Danish cartoons and firm criticism of Islam by far right and other political groups. In many

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<sup>1</sup> This article is based on the report *Strafbaarstelling van ‘belediging van geloof’: Een onderzoek naar mogelijke aanpassing van de uitingsdelicten in het Wetboek van Strafrecht, mede in het licht van internationale verdragsverplichtingen* by M. van Noorloos for the Ministry of Security and Justice / WODC ([www.wodc.nl](http://www.wodc.nl)), as published in 2014, Den Haag: Boom Lemma uitgevers. The author wishes to thank Piet Hein van Kempen, Bas van der Leij, Pieter Verrest, Frederik Krips and Paul van Sasse van Ysselst for their valuable comments on that report. Moreover, she would like to thank the reviewers of this article.

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European states, this has engendered a discussion about the role of the law – especially criminal law – in facing such expressions. Nowadays, most European states no longer have a blasphemy prohibition in their criminal statutes. The Netherlands, for instance, decriminalised blasphemy in 2014, whereas England & Wales did so in 2009.<sup>3</sup> Some states do have offences related to blasphemy laws, like ‘insult of religious beliefs or doctrines’. What is more, several European countries, including the Netherlands, France and Spain, have an offence of ‘group defamation’ – or a similarly worded offence – in their criminal code. Such laws deal with defamation or insult of (a group of) *persons* on account of their race, religion, sexual orientation, and/or other characteristics such as physical handicap and are thus different from blasphemy, which is focused on defamation of religion, gods, and/or religious symbols. Finally, most European states have criminalised incitement to hatred, discrimination or violence (often called ‘hate speech’): such crimes are characterised by a more or less direct connection to possible consequences of hatred, discrimination or violence that may result from the expressions – as opposed to group defamation, which is rather based on the idea of protecting the inherent human dignity of (groups of) persons.

Within Europe, various legal frameworks play a role in defining the boundaries of criminalisation in the area of defamation of religion: in particular article 9 (freedom of religion and belief) and article 10 (freedom of expression) of the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR).<sup>4/5</sup> Moreover, the United Nations (UN) legal framework is of relevance to these European states: in particular the International Covenant on Civil and Political Rights (ICCPR) to which they have all acceded.

Besides the various legal frameworks that are applicable, the defamation of religion debate also brings up questions of a legal theoretical kind. What kinds of expressions about religions or beliefs may be legitimately prohibited by criminal law? To what extent is defamation of a religion or belief also a defamation of the persons adhering to that religion or belief?

This article investigates whether European states can legitimately criminalise (certain forms of) defamation of religion and belief, in light of the ECHR, the UN framework (particularly the ICCPR) and

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<sup>3</sup> Venice Commission, *Blasphemy, insult and hatred: finding answers in a democratic society*, 2008, Strasbourg: Council of Europe Publishing, Appendix I.

<sup>4</sup> The CoE’s Additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (2003, ETS no. 189), which also deals with group insult, is less relevant in the context of this contribution, because it only harmonises speech where religion is used as a pretext for what is actually *racial* hatred. The EU’s Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law (OJ L 328/55) does not deal with group insult as such.

<sup>5</sup> See for a comparison with US First Amendment doctrine: R. Post (2007), ‘Religion and freedom of speech: Portraits of Muhammad’, in: A. Sajó (ed.) (2007), *Censorial sensitivities: free speech and religion in a fundamentalist world*, Utrecht: Eleven International Publishing.

legal theory. I will first delve into legal theory about defamation of religion. Next I will shed light on Dutch criminal law, which aptly illustrates the challenges involved in the criminal law on defamation of religion. Finally, I will assess how defamation of religion is dealt with within the ECHR and ICCPR/UN frameworks. This contribution will show how problematic it is for the criminal law – in light of the rights to freedom of expression and freedom of religion, as well as the *ultima ratio* principle – to combat such speech.

## 2. Legal theory

Legal theory about freedom of expression and its restrictions – including the criminalisation debate in general – sheds light on the possible reasons there may be for restricting defamation of religion and belief, and on how these reasons can be assessed in light of the principle of criminal law as *ultima ratio*.<sup>6</sup> What kind of harm can occur, and is this harm sufficiently serious to justify restrictions of the speaker's freedom? The following reasons for criminalising speech are relevant in this debate:

- Countering 'negative imaging' of groups in the eyes of others.
  - This can be related to protecting groups against the violence or discrimination that may occur as a result of people getting negative ideas about those groups. As such, it is also related to protecting public order.
  - It can also be related to the idea of preventing psychological harm or offence to the group members: the idea that others might get a negative image of them, may harm their self-respect, their feelings of self-worth.
  - Finally, the idea that expressions may lead to negative imaging (and, in the end, to discrimination or violence) can be threatening to the group members: it can give them the idea that they will become an easy target.

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<sup>6</sup> E.g. W. Sadurski (1999), *Freedom of speech and its limits*, Dordrecht: Kluwer Academic Publishers; F. Schauer (1982), *Free speech: a philosophical enquiry*, Cambridge: Cambridge University Press; I. Hare and J. Weinstein (ed.) (2009), *Extreme speech and democracy*, New York: Oxford University Press; E. Heinze (2006), 'Viewpoint absolutism and hate speech', *Modern law review*, vol. 69, no. 4, p. 543-582; Th. Rosier (1997), *Vrijheid van meningsuiting en discriminatie in Nederland en Amerika*, Nijmegen: Ars Aequi Libri; B.A.M. van Stokkom, H.J.B. Sackers en J.-P. Wils (2006), *Godslastering, discriminerende uitingen wegens godsdienst en haatuitingen*, Den Haag: WODC.

- Countering psychological harm to group members. Hateful expressions may – when uttered directly against a person, rather than via the media<sup>7</sup> – have an impact on the psychological and even physical state of victims.<sup>8</sup> In the long term, it can lead to stress, oversensitivity and fear.
- Countering offence. Offence can be differentiated from psychological harm, though the distinction is a gradual one.<sup>9</sup> Feinberg identified *harm* as a setback of one’s interests that is a *wrong*: it violates a person’s rights. *Offence*, on the other hand, does not violate a person’s interests: it is an uncomfortable mental state, a temporary experience that is unpleasant, shocking, sometimes disgusting; but it does not *harm* – it does not impede interests.<sup>10</sup> Both offence and harm require a weighing of interests of, amongst other things, the seriousness of the harm or offence and the social utility of the behavior: both should not automatically lead to criminalisation.<sup>11</sup> The problem with offence is that it is very subjective: taking offence is ‘constituted by a set of judgments which only an individual can make.’<sup>12</sup> Prohibition thus gives individuals or groups (whether minorities or the majority) the right to determine what the rest of the people can see or express, on the basis of their own sensibilities. This also involves the risk of violating the legality principle (particularly *lex certa*): how can a speaker be expected to be aware of such sensibilities and to foresee the consequences of his or her behaviour?<sup>13</sup> Besides freedom of expression, the speaker’s freedom to manifest his or her religion or belief can also be compromised by criminalising expressions that are considered offensive by adherents of other beliefs.<sup>14</sup>
- Protecting public order in the sense of preventing that people take the law into their own hands as a result of insults (thus, as a result of offence or psychological harm). The rationale behind many modern blasphemy laws is to protect the religious feelings of the majority of the people against offence and, eventually, to thus protect public order. The problem with this rationale is this: can a speaker be held (criminally) responsible if his or her expressions lead the targeted group to

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<sup>7</sup> J. Vrieling (2010), *Van haat gesproken? Een rechtantropologisch onderzoek naar de bestrijding van rasgerelateerde uitingsdelicten in België*, Antwerpen/Apeldoorn: Maklu.

<sup>8</sup> L. Leets (2002), ‘Experiencing hate speech: perceptions and responses to anti-Semitism and anti-gay speech’, *Journal of social issues*, nr. 2, p. 341-361; L. Leets en H. Giles (1997), ‘Words as weapons: when do they wound?’, *Human communication research*, nr. 2, p. 260-301; Vrieling (2010), p. 389.

<sup>9</sup> Feinberg (1984-88), *The moral limits of the criminal law: Harm to others*, New York: Oxford University Press; J. Feinberg (1984-88a), *The moral limits of the criminal law: Offense to others*, New York: Oxford University Press.

<sup>10</sup> Feinberg (1984-88), p. 47-48.

<sup>11</sup> Feinberg (1984-88), p. 191.

<sup>12</sup> C. McKinnon (2006), *Tolerance: a critical introduction*, London & New York: Routledge, p. 132.

<sup>13</sup> ECtHR *Sunday Times v. United Kingdom* (1), 26 April 1979, appl.nr. 6538/74; ECtHR *Cantoni v. France*, 15 November 1996, appl.nr. 17862/91.

<sup>14</sup> See P.H.P.H.M.C. van Kempen (2012), ‘Freedom of Religion and Criminal Law: a Legal Appraisal. From the Principle of Separation of Church and State to the Principle of Pluralist Democracy?’, in J.A. van der Ven & H.-G. Ziebertz (ed.), *Tensions within and between Religions and Human Rights*, Leiden/Boston: Brill, p. 27-66.

violence (the so-called *hostile audience* problematique)?<sup>15</sup> Whether the receiver of the message will resort to violence, after all, strongly depends on the subjective sensitivities of this person and his or her willingness to use violence. This issue has become particularly pressing in our globalised society where messages easily spread around the world – see the Danish cartoon riots.

The principle of *ultima ratio* – criminal law should be a last resort – necessitates a critical assessment of all of these rationales for criminalisation. Negative imaging may be one of the strongest rationales, but even then, it is important to assess whether expressions really lead to the risk of others acquiring negative ideas – and perhaps, eventually to violence or discrimination against the targeted group. Expressions about a religion or belief will not easily pass that test. Here, again, the social utility of the expression also plays a role. Such utterances often involve criticism of convictions, ideas, institutions and ways of life, so the balancing act between the social value of an expression and its potential harm will often incline towards freedom of expression.

Defamation of something (a religion) or someone (a prophet) that is important or even sacred to an individual, can be comparable to defaming that individual. This can occur through different strands: first, spreading defamatory messages about a religion may lead others to acquire a negative image of the adherents of that religion. Second, such indirect defamation can have effects on the targeted person who identifies with that religion – psychological harm or offence. It is difficult to qualify this as psychological harm, however, because the intervening factor of identification makes things quite subjective – how to assess with what or whom people identify themselves?<sup>16</sup> Third, it is quite clear that such expressions can lead people to take the law into their own hands because they feel offended by defamation of their religion or belief.

Criminalising defamation of religion and belief furthermore necessitates a definition of what ‘religion and belief’ is and which aspects (which gods, symbols, sacred figures, and convictions) are to be protected. A pertinent question is also how much leeway is left to the courts in this interpretation, and vice versa, how much guidance the legislature should give. For both legislature and judiciary this is a difficult task, considering the issue of state neutrality in questions of belief.

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<sup>15</sup> Sadurski (1999), p. 196-197.

<sup>16</sup> See W.B. Irvine (2013), *A slap in the face. Why insults hurt – and why they shouldn't*, New York: Oxford University Press; F.G. Bosman (2012), *God houdt wel van een geintje. Een kleine theologie van de humor*, Zoetermeer: Meinema.

Religion can be defined as ‘those beliefs and practices associated with spiritual or supernatural beings’.<sup>17</sup> Accordingly, it is about belief in ‘something sacred’, something supernatural. This is the core, which is manifested in various practices. Non-religious beliefs do not have a conception of the sacred – according to the ECtHR, a belief refers to ‘views that attain a certain level of cogency, seriousness, cohesion and importance’,<sup>18</sup> such as humanism or atheism. There are different manners in which religion and belief can be insulted:

- expressions about ‘the sacred’ (only for religion, not belief); mostly, this concerns a god, which is actually a personified form of ‘the sacred’ that does not exist in all religions.
- expressions about symbols (including sacred persons); these symbols can be indirect expressions of the sacred – because the sacred is regarded as indescribable, people use the language of symbols to come as close as possible.<sup>19</sup> Almost anything can be a religious symbol: an animal, a temple, a tree, a ritual (the Eucharist), an historical event (the Crucifixion), a book... Sacred figures are actually specific types of sacred symbols – personified symbols<sup>20</sup>, such as prophets or canonised persons. An image of a sacred symbol can in itself be the object of veneration; and in some religious creeds, displaying such images is prohibited.
- expressions about doctrines or tenets pertaining to a religion or belief (such as ‘god is an invention’);
- expressions about religion or belief as an institution or social phenomenon (such as ‘Christianity is the cause of all problems in society’)
- expressions about the practices emanating from religion or belief, such as circumcision or the use of ritual drugs. The problem here is that certain practices may be regarded among the public as emanating from a religion or belief, while this is not necessarily the case (e.g. female genital mutilation).

When criminalising such expressions, several problems rise as regards freedom of expression. For the first two categories – which are commonly referred to as blasphemy – the main problem is the subjectivity: what is sacred and for whom, and what should thus be protected? Even within one religious creed, this can differ greatly among believers – whereas religious symbols are myriad and are continuously subject to change. For the latter three categories, the problems lie mainly in the contribution

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<sup>17</sup> D.L. Pals (1996), *Seven theories of religion*, New York/Oxford: Oxford University Press, p. 271.

<sup>18</sup> ECtHR *Campbell and Cosans v. United Kingdom*, 25 February 1982, appl.nr. 7743/76, par. 36; ECtHR *Valsamis v. Greece*, 18 December 1996, appl. nr. 21787/93, par. 25.

<sup>19</sup> Pals (1996), p. 169, referring to M. Eliade (1949), *Patterns in comparative religion* (translation by R. Sheed 1963), New York: Meridian Books.

<sup>20</sup> Pals (1996), p. 177, referring to Eliade (1949).

that such expressions often make to public debate about important social issues. Governments may even have a duty to counter certain practices (also those emanating from religions or beliefs) that are harmful to other people, such as religiously inspired incitement to hatred.<sup>21</sup> The symbols pertaining to religions or beliefs that have led to human rights violations may, in turn, be offensive to the victims of such violations. For non-religious beliefs such problems may be even more pertinent, because it is more difficult to differentiate them from political ideologies. It is not difficult to think of borderline cases, such as communism. Moreover, one may ask why the sensitivities pertaining to religions or beliefs are, by definition, more worthy of protection than other types of sensitivities – such as historical ones.<sup>22</sup>

### **3.Group defamation laws and defamation of religion in Dutch criminal law**

From the 1970s onwards, the Dutch criminal code (CC) has included the offences of group defamation (art. 137c CC) and incitement to hatred, discrimination or violence (art. 137d CC); both include the ground ‘religion or belief’. Article 137c CC holds liable ‘any person who, publicly – orally, in writing or by means of portrayal – and intentionally, expresses oneself in an insulting manner about a group of persons on account of their race, religion or belief, hetero- or homosexual orientation or physical, psychological or mental handicap’. The rationale behind both offences is to prevent negative imaging about these groups. The concept of ‘defamation’, as laid down in Dutch criminal law, is thus geared towards protecting people’s reputation in the eyes of others rather than protecting people against offence to their sensibilities.

In the 21<sup>st</sup> Century, in the wake of Fortuyn’s criticism of multicultural society and Islam, discussions came up about the question whether expressions about a religion or religious symbols can be equated with defamation of persons on the grounds of their religion. Defamation of religion can be regarded as a form of indirect group defamation: defamation of a common *characteristic* of a group. In the case law on art. 137c, several other types of indirect defamation can be found, such as denial of the Holocaust. The words ‘expressing oneself in an insulting manner about a group of persons *on account of* (their religion, etc.)’ in article 137c CC indicate that there needs to be a causal link between the insulting expression and the group concerned: insulting someone *because* he or she belongs to a certain group. The Council of Europe’s Additional Protocol to the Convention on Cybercrime – which obliges States Parties to criminalise ‘racist and xenophobic motivated insult’ in article 5 – requires such a link as well: it refers to

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<sup>21</sup> Van Kempen (2012), p. 38; see ECtHR *Leela Förderkreis E.V. v. Germany*, 6 November 2008, appl.nr. 58911/00.

<sup>22</sup> See Van Stokkom, Sackers & Wils (2006), p. 64.



insulting persons for the reason that they belong to a group, or insulting a group of persons which is distinguished by certain characteristics.<sup>23</sup> According to the explanatory report, '[i]t should be clear from the expression itself that the insult is directly connected with the insulted person's belonging to the group.'<sup>24</sup> In Dutch law, such a causal link can also be established by looking at the context of an expression: some expressions do not literally mention a group of people, but considering the context they obviously deal with this group (e.g. 'The Netherlands for the Dutch/full is full').<sup>25</sup>

Defamation of religion or belief, as said, is a specific type of indirect defamation: the idea behind such prohibitions is that by defaming the religion or belief with which people are identified or with which people identify themselves, this group of people is also defamed. Accordingly, one may say it is a form of indirect defamation through identification. It can be quite difficult to assess when an expression about a religion or belief can actually, within its context, be regarded as an expression about the adherents of that religion or belief: for instance, (under which circumstances) can the expression 'we want less Islam in the Netherlands' be interpreted as meaning 'we want less Muslims in the Netherlands'?

Until 2009, it remained unclear whether defamation of religion and belief was a criminal offence under art. 137c CC. Then, in the 'Defamation of Islam' judgment in 2009, the Supreme Court quashed a conviction for group defamation for a poster with the words 'Stop the cancer called Islam'.<sup>26</sup> According to the Supreme Court, only 'expressing oneself in a needlessly offensive manner about a group of people, because they adhere to a certain religion' is a criminal offence under article 137c. Expressing oneself in a defamatory manner about a religion is not a criminal offence under art. 137c, according to the Supreme Court, even when it is done in such a manner that the adherents of that religion are thereby offended in their religious feelings. An expression needs to 'unmistakably concern a certain group of persons characterised by their religion', if it is to be considered group defamation. The Supreme Court does not explicitly rule whether expressions about gods, sacred figures or religious symbols (rather than religion as an institution) can still fall under article 137c, but this will be very difficult, because such expressions must then also 'unmistakably concern a group of persons'.

This judgment – which also exercised an influence on the acquittal of MP Geert Wilders for group defamation and hate speech in 2011<sup>27</sup> – was particularly relevant in light of the fact that a few years

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<sup>23</sup> Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, 2003, ETS no. 189.

<sup>24</sup> Explanatory report, par. 36.

<sup>25</sup> See Supreme Court 18 May 1999, *NJ* 1999, 634 m.nt. A.C. 't Hart (Janmaat).

<sup>26</sup> Supreme Court 10 March 2009, ECLI:NL:HR:2009:BF0655, *NJ* 2010, 19 (annotation by P.A.M. Mevis).

<sup>27</sup> Amsterdam District Court, 23 June 2011, ECLI:NL:RBAMS:2011:BQ9001, *NJ* 2012, 370 (annotation by P.A.M. Mevis).

before, political opposition parties had proposed to abolish the offence of ‘scornful blasphemy’ (then article 147 CC), an offence for which nobody had been prosecuted anymore since the 1960s.<sup>28</sup> The judgment suggested that, after abolishing article 147 CC, defamation of religion would probably not be part of the Dutch criminal law anymore. Eventually, the blasphemy offence was abolished in January 2014 under the condition – set by Senators who were critical of abolishing the blasphemy law – that the government would investigate the possibility of amendments to article 137c-137d CC to provide protection against defamation of religion or belief.<sup>29</sup> In light of the results of that investigation, the government concluded that such amendments are not necessary.<sup>30</sup>

Whether the ‘Defamation of Islam’ judgment is equally applicable to article 137d – can expressions about religions or beliefs amount to incitement to hatred, discrimination or violence? – is still a matter of discussion.<sup>31</sup> Extreme utterances about a belief (or about gods, religious figures or symbols) might still be covered by article 137d, but only if such utterances – considering the context – clearly incite to hatred, discrimination or violence about persons (after all, article 137d CC contains the same words ‘on account of’).

The Dutch situation shows the difficulties involved in interpreting the crime of group defamation so as to include defamation of religion and belief, which is relevant outside the Dutch context as well. Such forms of indirect defamation ‘via identification’ stretch up the notion of group defamation: how far can the authorities go in drawing the inference that defamation of a common characteristic is also insulting for the persons concerned? Whether such identification indeed occurs, is very subjective. This is difficult to fit into more objectively denoted laws of group defamation which aim at protecting people’s reputation in the eyes of others rather than protecting their moral sensibilities against offence.

#### **4. The European Convention on Human Rights**

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<sup>28</sup> More elaborately on this point: M. van Noorloos (2011), *Hate speech revisited. A comparative and historical perspective on hate speech law in the Netherlands and England & Wales*, Antwerpen: Intersentia, p. 189 and 217.

<sup>29</sup> *Kamerstukken I (Parliamentary documents - Senate)*, 2013-14, 32203, nr. E (reprint).

<sup>30</sup> *Kamerstukken I (Parliamentary documents - Senate)*, 2013-14, 32203, nr. F. The investigation was conducted by the author of this article – see note 1- and forms the basis for the current contribution.

<sup>31</sup> Utrecht District Court, 26 April 2010, ECLI:NL:RBUTR:2010:BM8138; Annotation Mevis for Supreme Court 10 March 2009, *NJ* 2010, 19, nr. 9; A.J. Nieuwenhuis & E.H. Janssen (2011), ‘De onduidelijke verhouding tussen vrijheid van meningsuiting en discriminatie. Een analyse van de groepsbelediging en het haatzaaien’, *Mediaforum* nr. 4, p. 94-104.

Under the European Convention on Human Rights (ECHR), freedom of expression 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.’<sup>32</sup> Article 10(1) of the European Convention lays down the right to freedom of expression, which according to the second paragraph, ‘carries with it duties and responsibilities’ and may thus be restricted if this is

- prescribed by law;
- in the interests of one of the legitimate aims mentioned (e.g. the protection of the reputation or rights of others);
- necessary in a democratic society. This means that
  - o there is a ‘pressing social need’ for interference
  - o the reasons given by the national authorities are ‘relevant and sufficient’ and
  - o the restriction is proportionate to the aim pursued.

States Parties have a certain margin of appreciation in making this assessment, because the Court holds that states are in principle in a better position to judge the necessity of a restriction. This is especially the case with regard to issues where there is no uniform European conception, such as morals and religion. Article 10 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. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”.’<sup>33</sup> Expressions in the context of public debate – political speech and debate on questions of public interest – deserve a high level of protection under article 10.<sup>34</sup> Governments should be particularly prudent with criminal law restrictions.<sup>35</sup>

Under the Court’s case law, states are allowed (depending on the specific circumstances, such as public order problems) to criminalise certain expressions about *people* on account of their religion, particularly if such expressions amount to incitement to hatred.<sup>36</sup> From *Norwood v. UK* it also appears that expressions about a religion can be prohibited if, considering the context, they actually target a group of people.<sup>37</sup> In that case, a member of the far right British National Party was convicted for displaying in his window a large poster with a photograph of the Twin Towers in flames, the words ‘Islam out of Britain – Protect the

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<sup>32</sup> ECtHR *Lingens v. Austria*, 8 July 1986, appl.nr. 9815/82, par. 41.

<sup>33</sup> ECtHR *Handyside v. United Kingdom*, 7 December 1976, appl.nr. 5493/72, par. 49.

<sup>34</sup> A.J. Nieuwenhuis (2006), *Over de grens van de vrijheid van meningsuiting*, Nijmegen: Ars Aequi Libri, p. 292.

<sup>35</sup> ECtHR *Castells v. Spain*, 23 April 1992, appl.nr. 11798/85, par. 46.

<sup>36</sup> ECtHR *Soulas and others v. France*, 10 July 2008, appl. nr. 15948/03; ECtHR *Le Pen v. France* (dec.), 20 April 2010, appl. nr. 18788/09; ECtHR *Féret v. Belgium*, 16 July 2009, appl.nr. 15615/07.

<sup>37</sup> ECtHR *Norwood v. United Kingdom* (dec.), 16 November 2004, appl.nr. 23131/03.

British People’ and a symbol of a crescent and star in a prohibition sign. He complained before the ECtHR of a violation of articles 10 and 14 (non-discrimination), contending that criticism of a religion is not to be equated with an attack upon its followers. The Court, however, dismissed the applicant’s complaint on the basis of article 17: this article on ‘abuse of right’ is meant to make sure that a person or group cannot use the rights in the Convention – including the right to freedom of speech – to undermine democracy or fundamental rights.<sup>38</sup> According to the Court, the words and images on Norwood’s poster amounted to a ‘public expression of attack on all Muslims in the United Kingdom. Such 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.’ The ECtHR’s inference drawn from religion to religious *persons* – judging that the words and images actually amounted to a verbal attack on *people* – does bring up questions, though. Could the Norwood poster not also be interpreted as a means of drawing attention to the problem of terrorism (albeit in a not too subtle manner), just as the Attorney-General judged that the ‘Stop the cancer called Islam’ poster was meant as a call for resistance against the rise of a religion that the defendant viewed as problematic?<sup>39</sup>

Under article 10 ECHR states also have a rather broad margin of appreciation to criminalise blasphemous expressions. As a general rule, the ECtHR holds that article 10 ECHR also protects expressions that ‘shock, offend or disturb’. In practice, however, the ECommHR and ECtHR do sometimes allow states to provide protection against ‘gratuitously offensive’ expressions about sacred persons and religious symbols.

In *Otto-Preminger-Institut v. Austria* the Court dealt with a satirical film which ‘portrays the God of the Jewish religion, the Christian religion and the Islamic religion as an apparently senile old man prostrating himself before the Devil’ and portrays Jesus Christ as ‘a low grade mental defective’.<sup>40</sup> Following an advertisement for the screening of the film, the Austrian authorities ordered its seizure and forfeiture. The ECtHR found no violation of article 10, judging that

‘the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in

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<sup>38</sup> It reads as follows: ‘Nothing in this 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 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>39</sup> Conclusion Attorney-General Machiels for Supreme Court 10 March 2009, ECLI:NL:PHR:2009:BF0655.

<sup>40</sup> ECtHR *Otto-Preminger-Institut v. Austria*, 20 September 1994, appl.nr. 13470/87, par. 21.

extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them. The respect for the religious feelings of believers as guaranteed in Article 9 can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration (...).<sup>41</sup>

This consideration was not shared by all judges. Three *dissenting* judges found that '[t]he Convention does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom of religion, which in effect includes a right to express views critical of the religious opinions of others.'<sup>42</sup> Indeed, criticism by adherents of other faiths or by atheists may sometimes be offensive to believers, but prohibiting it in turn infringes upon their own freedom to have or not to have a religion.

The ECtHR's ruling in *Otto-Preminger-Institut* should be viewed in light of the large margin of appreciation that states have in the field of morals and religion.<sup>43</sup> In other cases about blasphemy, the Court has held that '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'.<sup>44</sup> In *Otto-Preminger-Institut* the freedom left to the national authorities is particularly large: despite the fact that it concerned a film shown in a small arthouse cinema with age restrictions, there was no violation. After all, the film had been widely advertised so that a large amount of people had become acquainted with its topic and contents and 'for these reasons, the proposed screening of the film must be considered to have been an expression sufficiently "public" to cause offence'.<sup>45</sup> Strikingly, the Court also considered that Roman Catholicism is the religion of the overwhelming majority of Tyroleans, so that '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>46</sup> This consideration has led to criticism, as it implies that the sensibilities of the religious *majority* may be protected for public

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<sup>41</sup> Par. 47.

<sup>42</sup> ECtHR *Otto-Preminger-Institut v. Austria*, 20 September 1994, appl.nr. 13470/87: Dissenting opinion judges Palm, Pekkanen and Makarczyk, par. 6.

<sup>43</sup> See ECtHR *Müller and others v. Switzerland*, 24 May 1988, appl.nr. 10737/84; ECtHR *Wingrove v. United Kingdom* (1), 22 October 1996, appl.nr. 17419/90; ECtHR *I.A. v. Turkey*, 13 September 2005, appl.nr. 42571/98.

<sup>44</sup> ECtHR *Wingrove v. United Kingdom* (1), 22 October 1996, appl.nr. 17419/90, par. 58. See also ECtHR *Murphy v. Ireland*, 10 July 2003, appl.nr. 44179/98, par. 67; ECtHR *I.A. v. Turkey*, 13 September 2005, appl.nr. 42571/98, par. 25; ECtHR *Giniewski v. France*, 31 January 2006, appl.nr. 64016/00, par. 44.

<sup>45</sup> Par. 54.

<sup>46</sup> Par. 56.

order reasons.<sup>47</sup> Should a human rights court not rather strive to protect vulnerable (religious and non-religious) *minorities*, and expressions that deviate from the ideas of the majority?

What is more, the Court ruled that in the context of religious opinions and beliefs, amongst the ‘duties and responsibilities’ that come with the exercise of freedom of expression

‘may legitimately be included 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. This being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration (...).’<sup>48</sup>

This clause about expressions that are ‘gratuitously offensive to others’ also comes back in other cases concerning artistic expressions about religious figures or symbols.<sup>49</sup> In *Wingrove v. United Kingdom*, the authorities refused to grant a classification certificate for the film ‘Visions of Ecstasy’.<sup>50</sup> The film dealt with the life and writings of St Teresa of Avila, the sixteenth-century Carmelite nun and mystic, and showed the ‘mingling of religious ecstasy and sexual passion’ by St Teresa involving the crucified body of Christ. According to the ECtHR, the refusal by the British authorities did not amount to a violation of article 10, as ‘the exercise of that freedom carries with it duties and responsibilities. Amongst them, in the context of religious beliefs, may legitimately be included a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profanatory.’<sup>51</sup> Accordingly, the Court does not easily judge blasphemy restrictions to be in violation of article 10, especially not when religious figures or symbols are placed in relation to sexuality.

The case *I.A. v. Turkey* concerns, more than the cases mentioned above, socio-political criticism of religion.<sup>52</sup> A publisher was convicted to two years’ imprisonment and a fine for publishing the novel ‘The forbidden phrases’, which contained critical statements towards the Islamic religion and the Prophet Muhammed, including passages such as the following:

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<sup>47</sup> T. McGonagle (2010), ‘An ode to contextualization: *I.A. v. Turkey*’, *Irish Human Rights Law Review*, no. 1, p. 251 ; Th. Rosier, (2000), ‘Tolerantie en religie. Over de zaak Van Dijke en de visie van het EVRM inzake godslastering’, *RM Themis*, no. 1, p. 3-14.

<sup>48</sup> Par. 49. See also *ECommHR X Ltd. and Y v. United Kingdom* (dec.), 7 May 1982, appl.nr. 8710/79 (‘Gay News’).

<sup>49</sup> ECtHR *I.A. v. Turkey*, 13 September 2005, appl.nr. 42571/98; ECtHR *Wingrove v. United Kingdom* (1), 22 October 1996, appl.nr. 17419/90; *ECommHR X Ltd. and Y v. United Kingdom* (dec.), 7 May 1982, appl.nr. 8710/79 (‘Gay News’).

<sup>50</sup> ECtHR *Wingrove v. United Kingdom* (1), 22 October 1996, appl.nr. 17419/90

<sup>51</sup> Par. 52.

<sup>52</sup> ECtHR *I.A. v. Turkey*, 13 September 2005, appl.nr. 42571/98.

‘Look at the triangle of fear, inequality and inconsistency in the Koran; it reminds me of an earthworm. God says that all the words are those of his messenger. Some of these words, moreover, were inspired in a surge of exultation, in Aisha's arms. (...) God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual relations with a dead person or a live animal.’

In its judgment the Court once again stressed that there is ‘a duty to avoid expressions that are gratuitously offensive to others and profane’ and that ‘it may be considered necessary to punish improper attacks on objects of religious veneration’.<sup>53</sup> According to the Court, this case involved ‘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>54</sup> Applying these principles to the case at hand, it concluded with reference to the last book passage (see above) that

‘the present case concerns not only comments that offend or shock, or a “provocative” opinion, but also an abusive attack on the Prophet of Islam. (...) 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>55</sup>

As such, an attack on the Prophet can also constitute an attack on believers, according to the Court. Thus, the *manner* is important here: an *abusive* attack.

Yet States Parties are not free to prohibit all kinds of publications that are critical of religion. In *Aydin Tatlav v. Turkey*, where the author of a critical historical study of the Qu’ran was convicted to one year’s imprisonment, the Court found a violation of article 10.<sup>56</sup> The author wrote, for instance, that he found the Qu’ran a rather dull, superficial and primitive book; that religion leads to social injustices; and that

‘Mohamed, qui prend ses rêves pour des réalités, se présente avec ces versets absolument insensés, devant les personnes qui lui demandent de prouver sa prophétie (...). Le fondateur de l’Islam, tantôt adopte une attitude tolérante, tantôt ordonne le djihad. De la violence, il fait sa

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<sup>53</sup> Par. 24-25.

<sup>54</sup> Par. 27.

<sup>55</sup> Par. 29-30.

<sup>56</sup> ECtHR *Aydin Tatlav v. Turkey*, 2 May 2006, appl.nr. 50692/99.

politique fondamentale. Le paradis d'Allah promet aux hommes une véritable vie parasite d'aristocrate (...)'.

Besides the harsh prison sentence, another relevant aspect in this case was that the book had already been published years before and that apparently, it had only recently attracted the authorities' attention. Moreover, the Court found that the publication was mainly a socio-political critique of religion and did not contain a 'ton insultant visant directement la personne des croyants, ni une attaque injurieuse pour des symboles sacrés, notamment des Musulmans', even though it could possibly offend believers.<sup>57</sup>

Criminalising firm criticism of religious institutions can also lead to a violation of article 10. In *Giniewski v. France*<sup>58</sup>, the applicant complained about his conviction for writing a newspaper article that contained 'defamatory statements against the Christian community'. He had stated that

'the Catholic Church sets itself up as the sole keeper of divine truth (...) It proclaims clearly the fulfilment of the Old Covenant in the New, and the superiority of the latter (...) Many Christians have acknowledged that anti-Judaism and the doctrine of the "fulfilment" of the Old Covenant in the New led to anti-Semitism and prepared the ground in which the idea and implementation of Auschwitz took seed.'

The ECtHR considered that

'the applicant sought primarily 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 (...).'<sup>59</sup>

According to the Court, the article did not contain attacks on religious beliefs as such. Even though some conclusions may offend, shock or disturb some people, the Court held that it 'is not "gratuitously offensive" or insulting, and does not incite to disrespect or hatred. Nor does it cast doubt in any way on clearly established historical facts.'<sup>60</sup>

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<sup>57</sup> Par. 28.

<sup>58</sup> ECtHR *Giniewski v. France*, 31 January 2006, appl.nr. 64016/00.

<sup>59</sup> ECtHR *Giniewski v. France*, 31 January 2006, appl.nr. 64016/00, par. 50-51.

<sup>60</sup> Par. 52.



In *Klein v. Slovakia* the Court moreover ruled a conviction for defamation of a religious leader to be in violation of article 10.<sup>61</sup> The author of a satirical piece about the Archbishop of Slovakia (following the Archbishop's public demand to censure a film) was convicted for defaming members of the Roman-Catholic church by insulting the Archbishop (and by questioning, in the same piece, why decent Catholics did not leave a church that was led by somebody like that). For the ECtHR, the fact that some members of the church could have been offended by the applicant's criticism did not justify restrictions on freedom of speech, as 'the article neither unduly interfered with the right of believers to express and exercise their religion, nor did it denigrate the content of their religious faith' (par. 52). Therefore it could not be concluded 'that by its publication the applicant interfered with other persons' right to freedom of religion in a manner justifying the sanction imposed on him' (par. 54).

In its case law on defamation of religion, the ECtHR thus differentiates between, on the one hand, offensive or shocking commentary or provocative ideas, and on the other hand, 'gratuitous' verbal attacks on objects of religious veneration. Whereas the book in *I.A. v. Turkey* also contained socio-political critique, the Court mainly stumbled upon the expressions about the prophet, without which there probably would have been a violation of article 10. It is really about the *manner* in which beliefs are opposed. Provocative artistic expressions about religious figures or symbols, especially when related to sexuality, are easily considered 'gratuitously offensive' – which can be considered problematic: after all, it is not always easy to distinguish form from content, and provocative expressions by minority groups often tend to be considered 'bad form' by the dominant group even if they bring up serious critique. The Court's case law, moreover, can be criticised because it has sometimes given precedence to the majority's sensibilities over the rights of individuals or minorities, and because a 'right to protection of religious feelings' is conceptually flawed. Yet not every offensive expression may be prohibited under article 10 ECHR: there shall be sufficient room for criticism of religion, religious institutions, doctrines or leaders. The fact that such expressions may offend some people, is not necessarily sufficient to prohibit an expression. After all, the ECtHR stresses that utterances in the context of a debate about issues of public interest deserve a high degree of protection. However, if such expressions can also be interpreted as being directed at *people* – see *Norwood* but also *Tatlav*: 'un ton insultant visant directement la personne des croyants' – things become very different. This reveals a certain tension in the ECtHR's case law: when is an expression mainly regarded as socio-political criticism, and when is it actually a means of creating antagonism against people?

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<sup>61</sup> ECtHR *Klein v. Slovakia*, 31 October 2006, appl.nr. 72208/01.

In any case, one may question whether the Court will continue its line of reasoning in cases like *Otto-Preminger-Institut*, *Wingrove* and *I.A.* in the future, considering the many dissenting opinions in this field<sup>62</sup> and considering that other Council of Europe institutions have taken a much more critical stance as regards criminalising defamation of religion. The Parliamentary Assembly and the Venice Commission recommend to abolish offences of blasphemy, defamation of religion and offence to religious feelings.<sup>63</sup> Though it concerns non-binding documents, they do point to a tendency in the Council of Europe's member states – tendencies which the ECtHR may take into account when deciding on the scope of states' margin of appreciation.

## **5. The ICCPR and the UN debate about defamation of religion and belief**

Under article 19 ICCPR (freedom of expression), expressions about religion cannot be prohibited as easily as under the ECHR. The article contains a rather similar restriction clause as article 10 ECHR: interferences with freedom of expression are allowed when provided by law and necessary for one of the aims mentioned. The ICCPR also mentions the 'duties and responsibilities' that freedom of expression involves. The 'necessity' criterion in the ICCPR means that a restriction shall be proportional with regard to the purpose for restriction: it must be interpreted narrowly (restriction may not become the rule).<sup>64</sup>

In its concluding observations as regards states parties' reports, the HRC already appeared critical of blasphemy prohibitions.<sup>65</sup> In its General Comment from 2011, this culminated into a very clear stance against prohibiting defamation of religion or belief:

'Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with

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<sup>62</sup> *Otto-Preminger-Institut*: 6-3; *Wingrove*: 7-2; *I.A.*: 4-3. The cases *Tatlav*, *Giniewski* and *Klein*, where a violation was found, were decided unanimously.

<sup>63</sup> European Commission for Democracy through Law (Venice Commission), *Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred*, 23 oktober 2008, CDL-AD(2008)026; Council of Europe, Parliamentary Assembly, Recommendation 1805 (2007) on Blasphemy, religious insults and hate speech against persons on grounds of their religion.

<sup>64</sup> HRC, General Comment No. 34, Article 19: Freedom of opinion and expression, 2011, CCPR/C/GC/34, par. 21; M. Nowak (2005), *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd Ed., Kehl: Engel, p. 460.

<sup>65</sup> HRC, Concluding Observations, United Kingdom of Great Britain and Northern Ireland, CCPR/C/GBR/CO/6 (2008), par. 4; HRC, Concluding Observations, Ireland, CCPR A/48/40 (1993), par. 587 en 607; HRC, Concluding Observations, Canada, CCPR/C/103/Add.5 (1997), par. 196. See P.H.P.H.M.C. van Kempen (2011), 'Religie in het Wetboek van Strafrecht. Over strafrechtelijke bescherming en beperking van religie, rechtsgrondslagen, wederrechtelijkheid en de neutraliteit van de overheid', in: J.L.W. Broeksteeg & A.B. Terlouw (red.), *Overheid, recht en religie*, Deventer: Kluwer, p. 172.

the strict requirements of article 19, paragraph 3 (...). Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.’<sup>66</sup>

Here, the HRC refers to another key article concerning freedom of expression: article 20(2) ICCPR. This article not only permits, but also *requires* States Parties to prohibit certain behaviour: ‘Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.’ Article 20(2) does not require *criminalisation* of advocacy of hatred; whereas the original drafts required the adoption of a criminal offence, this was later changed into ‘prohibition by law’.

The article was intended to prevent ‘negative imaging’ that may lead to violence. According to Nowak, article 20(2) should be interpreted sensibly in the light of its ‘responsive character’ – its coming into being as a response to the Nazi hatred campaigns and subsequent genocide.<sup>67</sup> The idea behind the provision is to tackle the roots of such horrors. Furthermore, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has stressed that ‘these limitations were designed in order to protect individuals against direct violations of their rights. These limitations are not intended to suppress the expression of critical views, controversial opinions or politically incorrect statements. Finally, they are not designed to protect belief systems from external or internal criticism.’<sup>68</sup> The UN Special Rapporteur on freedom of religion and belief is of the opinion that article 20 shall be interpreted narrowly: ‘expressions should only be prohibited under article 20 if they constitute incitement to imminent acts of violence or discrimination against a specific individual or group.’<sup>69</sup>

In sum, prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with article 19 ICCPR, except in the specific circumstances envisaged in article 20(2). The HRC thus leaves open the possibility that extreme expressions about a belief – one could think of extreme attacks on religions, religious symbols or figures – are covered by art. 20(2) if

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<sup>66</sup> HRC, General Comment No. 34 (2011), par. 48.

<sup>67</sup> Nowak (2005), p. 468.

<sup>68</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambyei Ligabo, 28 February 2008, A/HRC/7/14, par. 85.

<sup>69</sup> Report of the UN Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance, 20 September 2006, A/HRC/2/3., par. 47.

such expressions constitute discrimination, hostility or violence against persons. ‘Classic’ blasphemy cases such as the ECtHR’s *Otto-Preminger-Institut* and *Wingrove* would probably not be covered. How about, for instance, the Danish cartoons? The cartoons have indeed led to public order problems, but these concerned protests by offended believers that occasionally turned violent. That brings up the ‘hostile audience’ problematique. Considering the rationale behind article 20(2), this article seems only to relate to negative imaging *against* the religious group in the eyes of others, and not to expressions that offend the members of that group and thus lead to public order problems (if they take the law into their own hands). Thus in every specific case, it should be assessed whether there is a high risk that expressions will lead to negative imaging – and eventually, discrimination or violence – *against* the persons targeted. This can also depend on the social climate, for instance in a context where there is already much violence against a certain group.<sup>70</sup>

Within more political UN organs – in particular, the Human Rights Council (and its predecessor, the Commission) and the General Assembly – the debate about defamation of religion has been conducted in a very different manner than in the HRC. At the initiative of the Organisation of Islamic Conference – in reaction to increasing stigmatisation of Muslims and Islam in light of terrorist attacks – these institutions issued a number of resolutions about the topic between 1999 and 2010.<sup>71</sup> The resolutions are entitled ‘defamation of religions’ but do not define this concept; however, they speak about ‘deliberate stereotyping of religions, their adherents and sacred persons in the media’ and ‘the targeting of religious symbols and venerated persons’, which indicates the potentially broad scope of the concept.<sup>72</sup> According to these resolutions it is necessary ‘to effectively combat defamation of all religions, Islam and Muslims in particular’. To this end, states should ensure that their national laws protect against ‘acts of hatred, discrimination, intimidation and coercion resulting from defamation of religions’ and should prohibit ‘the dissemination through political institutions and organizations of racist and xenophobic ideas and material aimed at any religion or its followers that constitute incitement to discrimination, hostility or violence’.<sup>73</sup> Because of their accumulation over the years, these resolutions initially gave the concept of defamation of religions a sense of legitimacy.<sup>74</sup> Yet the resolutions have encountered strong criticism and after 2010,

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<sup>70</sup> As regards the importance of the social context, see also the case law of the International Criminal Tribunal for Rwanda on the international crime of ‘incitement to genocide’: e.g. S. Benesch (2007-08), ‘Vile crime or inalienable right: defining incitement to genocide’, *Virginia Journal of International Law* 3, p. 485-528.

<sup>71</sup> S. Parmar (2009), ‘The challenge of “defamation of religions” to freedom of expression and the international human rights’, *European human rights law review* nr. 3, p. 353-375; UN GA Res. 60/150 of 16 December 2005; UN GA Res. 61/164 of 19 December 2006; UN GA Res. 62/154 of 18 December 2007; UN GA Res. 63/171 of 18 December 2008; UN Human Rights Commission Res. 1999/82, 2000/84, 2001/4, 2002/9, 2003/4, 2004/6, 2005/3; UN Human Rights Council Res. A/HRC/4/9 (30 April 2007), A/HRC/RES/7/19 (27 March 2008); A/HRC/RES/10/22 (26 March 2009); A/HRC/13/L.1 (25 March 2010).

<sup>72</sup> E.g. UN Human Rights Council res. A/HRC/13/L.1 (25 March 2010), par. 10.

<sup>73</sup> E.g. UN GA Res. 60/150 of 16 December 2005, par. 8-10.

<sup>74</sup> Parmar (2009), p. 373.

support started to decline and Islamic states dropped their campaign. Instead of adopting a ‘defamation of religions’-resolution, in 2011 the Human Rights Council adopted a widely supported resolution on ‘Combating intolerance, negative stereotyping and stigmatisation of, and discrimination, incitement to violence, and violence against persons based on religion or belief’, shifting the focus to protection of *people*.<sup>75</sup>

What is more, various independent UN Special Rapporteurs have been critical about legislation prohibiting defamation of religion.<sup>76</sup> On the one hand, the Special Rapporteurs Jahangir (on freedom of religion or belief) and Diène (on contemporary forms of racism, racial discrimination, xenophobia and related intolerance), did see a relationship between defamation of religion and discrimination of believers: in a climate where religions are attacked ‘through a deliberate intellectual and/or political discourse which demonises them’, discrimination of *persons* will be more likely as well.<sup>77</sup> On the other hand, they held that the right to freedom of religion or belief

‘does not include the right to have a religion or belief that is free from criticism or ridicule (...) Defamation of religions may offend people and hurt their religious feelings but it does not necessarily or at least directly result in a violation of their rights, including their right to freedom of religion.’<sup>78</sup>

Freedom of religion ‘does not bestow a right for believers to have their religion itself protected from all adverse comment’. Accordingly, it is conceptually flawed to contend that defamation of religion presents a conflict between freedom of expression and freedom of religion or belief *in abstracto*:

‘the question as to whether criticism, derogatory statements, insults or ridicule of one religion may actually negatively affect an individual’s right to freedom of religion or belief can only be determined objectively and, in particular, by examining whether the different aspects of the manifestation of one’s right to freedom of religion are accordingly negatively affected.’<sup>79</sup>

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<sup>75</sup> A/HRC/16/L. 38, 21 March 2011.

<sup>76</sup> UN Special Rapporteurs Jahangir & Diène (2006), par. 36-39 ; Report of the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Githu Muigai, on the manifestations of defamation of religions, and in particular on the ongoing serious implications of Islamophobia, for the enjoyment of all rights by their followers, 12 July 2010, A/HRC/15/53, par. 77 and 79.

<sup>77</sup> UN Special Rapporteurs Jahangir & Diène (2006), par. 15.

<sup>78</sup> UN Special Rapporteurs Jahangir & Diène (2006), par. 36-39.

<sup>79</sup> UN Special Rapporteurs Jahangir & Diène (2006), par. 36-39.

The later Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Muigai, differentiated between negative stereotyping of religions on the one hand, and negative stereotyping of religious adherents and sacred persons on the other hand. As regards criticism of religion, the Special Rapporteur found that

‘Religions as such (...) are subject to vigorous interrogation and criticism regarding their doctrines and teachings in the context of the full exercise of the freedom of expression. (...) [D]omestic blasphemy laws aiming to protect religions per se can prove counterproductive since they could result in de facto censure of robust examination of religious doctrines and teachings and of inter- and intra-religious criticism’.<sup>80</sup>

States may restrict negative stereotyping of religious adherents and of sacred persons, according to the Special Rapporteur; but preferably not through criminal law, an depending on the specific circumstances – ‘[i]n cases concerning sacred persons, the fact that the latter may be fully assimilated with a religion should also be taken into consideration when assessing the case’ (par. 79).

## **6. Conclusion**

Defamation of religion and belief is a form of indirect defamation ‘via identification’ which, as the discussion about the Dutch group defamation law shows, stretches up the notion of ‘group defamation’ – a crime which requires that (groups of) *persons* are insulted because they belong to a religious group. Drawing the inference that defamation of religion is also insulting for believers is problematic. Whether someone really identifies with (certain aspects of) a religion to such an extent is very subjective and is therefore very difficult to fit into objective laws that aim to protect people’s dignity in the eyes of others rather than protecting them against offence.

The same applies to the crime of ‘incitement to hatred/discrimination/violence’ which many states have included in their criminal laws, although it is possible that extreme utterances about a belief (or about gods, religious figures or symbols) could be covered by such an offence. If such utterances – considering the context – advocate religious hatred that constitutes incitement to discrimination, hostility or violence, States Parties to the ICCPR are even obliged to prohibit them (though not necessarily through criminal

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<sup>80</sup> UN Special Rapporteur Muigai (2010), par. 77 en 90.

law) under art. 20(2) ICCPR. Yet less extreme defamation of religion or belief may not be prohibited under article 19 ICCPR.

Under article 10 ECHR states may, under certain circumstances, provide protection against ‘gratuitously offensive’ expressions about religion. States are allowed to prohibit ‘gratuitous’ verbal attacks on religion or belief in itself or about religious figures or symbols, but not every offensive expression may be prohibited. There shall be sufficient room for criticism of religion, of religious institutions, doctrines or leaders. The fact that such expressions may offend some people, is not necessarily sufficient to prohibit an expression. After all, the ECtHR stresses that utterances in the context of a debate about issues of public interest deserve a high degree of protection. It is possible that the Court will become more strict in judging about defamation of religion in the future, considering the many dissenting opinions in this field and the CoE’s Parliamentary Assembly’s and the Venice Commission’s more critical stance as regards criminalising defamation of religion.

In any case, freedom of expression and freedom to manifest one’s religion, as well as the principles of legal certainty and of criminal law as *ultima ratio*, necessitate a critical stance towards criminalising defamation of religion or belief. Whereas the risk that expressions lead to negative imaging against religious groups may be a strong rationale to restrict speech, it is questionable whether defamation of religion easily leads to such risks. Defamation of religion or belief is often prohibited for other reasons: because of the offence it causes, or because of the public order problems that may occur when offended people take the law into their own hands. These rationales make the boundaries of the speaker’s freedom too dependent on the subjective sensitivities of the persons concerned.

Criminalising defamation of religion and belief also brings up the question which aspects of religions and beliefs are to be protected. Prohibition of expressions about gods / ‘the sacred’ or about religious symbols and holy figures, can be problematic because it is so subjective: what is sacred and for whom, and what should thus be protected? With regard to expressions about the doctrines and the practices of religions and beliefs, or about religion or belief as an institution or social phenomenon, the problems lie mainly in the contribution that such expressions often make to public debate about important social issues. When dealing with criticism of convictions, ideas, institutions and ways of life, the balancing act between the social value of an expression and its potential harm will have to incline towards the freedom of the speaker.