

RELIGIONS AND LEGAL BOUNDARIES
OF DEMOCRACY IN EUROPE:
EUROPEAN COMMITMENT TO DEMOCRATIC PRINCIPLES

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5. FREEDOM OF EXPRESSION VERSUS FREEDOM OF RELIGION AND DISCUSSION OF THE ESSENCE OF DEMOCRACY

5.1. INTRODUCTION: THE STRUGGLE BETWEEN FAITH AND REASON AND BETWEEN FAITHS

It has been almost 150 years since John Stuart Mill, one of the founders of what is contemporarily considered a model of a liberal democracy, published his essay *On Liberty*³⁴⁸ in which he deplored the fact that still in the year 1857 “an unfortunate man” was sentenced to 21 months of imprisonment for writing some offensive words against Christianity³⁴⁹. In his essay, Mill portrayed, bringing the examples of Socrates and Saint Paul, how easily the protection of a religion can change into persecution and on the other hand how easily the persecutor can become the persecuted during the same lifetime³⁵⁰. Yet, still 150 years after, in liberal and secularised Europe, the offence of blasphemy has not everywhere been discarded as a legal archaism. On the contrary, together with a religious resurgence, the debate on the limits of freedom of expression and its borderline with freedom of religion gained new importance.

While in some of the European countries, those who speak against religion or speak critically of religion, still meet prosecution³⁵¹, in others, those who pursue their religious goals and speak against issues they consider as improper or immoral, meet the same consequences. The legal standards applied in the case of pastor Åke Green are in vivid contrast

348. Mill J.S., 1859.

349. Ibid., p 30.

350. Ibid., pp. 25-30.

351. See: following chapter concerning the cases after the year 2000.

to legal standards applied, for example, in Haderer's conviction for blasphemy in Greece for the publication of his caricature book *The life of Jesus*. Whereas Swedish hate-speech bans aim to protect all groups in society from discrimination, the Greek ban still protects the deity from offense.

The attempt at replacing the offence of blasphemy with an offence of hate speech has also entered the realm of legal dispute. While some countries are eager to extend the hate speech bans in order to protect a possibly wide range of persons from discrimination, others are not willing to give up their blasphemy laws. Although the COE Parliamentary Assembly recommended replacing blasphemy with hate speech bans, hate speech in itself has also been treated critically. As shown below, commentators have approached it as another potential impediment to freedom of expression and a likely pretext for instrumental usage in the struggle between faiths³⁵².

Both blasphemy and hate speech can result in a struggle between those who dismiss religious arguments as irrelevant and irrational, and believers. They can as well provoke tensions between those who hold beliefs incompatible with the dominant religious views present in a society and the religious majority. In this struggle the question at this moment is not only whether religion as such or religious believers should be or should not be protected, but whether the dominance of secular reason in public law over religion is justified? Post-secular debate begins to question whether the liberal state is in a position to impose the secular humanist view over the religious views of people. Whom to censor and why to censor any speech at all? The debate concerning these issues in particular puts forward questions of how far liberalism can go and what the essence of democracy is.

In this chapter, I deal with the issue of blasphemy and hate speech. I analyse first older blasphemy cases including their critique and later discuss the new European approach towards blasphemy and speech against religion. Later I will the offence of hate speech and discuss whether blasphemy or hate speech offences are necessary in a democratic society. I will compare the essence of the two offences and analyse their

352. See: Heinze E., 2007, pp. 295-309.

effect on both religious and non-religious individuals. Finally, I try to answer the question if and why a common European approach is welcome and needed for achieving the goal of a religiously plural Europe.

5.2. OLDER BLASPHEMY AND MORALITY CASES - THE JUDICIAL PRINCIPLES OF THE ECTHR

Blasphemy on a European-wide level has been approached strictly from the perspective of human rights. For that reason, the principles of the European approach have been shaped by the case law of the ECTHR.

In order to trace current changes in the European approach, it is necessary first to describe briefly the 'old' blasphemy cases that were brought before the ECTHR³⁵³ and the arguments of the State Parties accepted by the Court. Only later do I proceed chronologically to today's new approach. In all of the older cases, the Court allowed for a wide margin of appreciation of the member states and let them decide in matters of morals. The key cases concerning blasphemy included *Wingrove vs. the United Kingdom*, *Gay News and Lemon vs. the United Kingdom*, *Otto-Preminger Institut vs. Austria* and *Choudhury vs. the United Kingdom*. Similar principles concerning other forms of offensive expression were established in *Müller and others vs. Switzerland* and *Handyside vs. the United Kingdom*.

In *Wingrove*³⁵⁴ the decision of the British Board of Film Classification preventing a blasphemous film from distribution was found lawful and compliant with the principles of the Convention. The film *Visions of Ecstasy* portrayed a woman dressed as a nun and having erotic experiences with the body of Christ. There was also another almost naked woman appearing in the picture. According to the author, the film portrayed St. Theresa of Avila and her Psyche (the other woman) and was a metaphor of St. Theresa's ecstatic visions. The Board did not agree with the author's

353. I use ECTHR to indicate the European Court of Human Rights and in some instances also the European Commission of Human Rights as it existed before the amendment introduced by Protocol 11.

354. *Wingrove vs. United Kingdom*, Application no. 17419/90.

argumentation and prevented the film from being distributed. In the final stage of the proceedings concerning this case, the ECtHR found that the state party had a right to do that in order to protect the religious sensitivities of people. It did not agree with the applicant that the law on blasphemy was impossible to foresee and thus subject to unlimited discretion. The ECtHR did not question the law on blasphemy as such. Quite the opposite, it affirmed that such an offence is by nature subject to a state's discretion and the state was in position to act on this margin of discretion, called hereafter the 'margin of appreciation'³⁵⁵.

In an earlier case, *Gay News and Lemon*³⁵⁶, an issue arose around a poem by James Kirkup *The Love That Dares to Speak Its Name*, imagining a Roman centurion having gay sex with Jesus of Nazareth. The publisher, Denis Lemon, was given a £500 fine and a nine-month prison sentence, suspended for eighteen months by a national court. The proceeding was initiated by a private prosecutor, Mary Whitehouse. The EComHR, deciding back then on the admissibility of the case, found the application of the publisher and the newspaper to be heard by the Court to be inadmissible. In the decision on inadmissibility, the Commission expressed the view that the offence of blasphemous libel is constructed to protect the rights of the private prosecutor not to be offended in her religious feelings. The nature of the offence as such and its possible contradiction with the right to freedom of expression was again not questioned.

In the *Otto-Preminger Institute*³⁵⁷ case, a film, *Das Liebeskonzil* by Werner Schroeter³⁵⁸, was seized and forfeited by Austrian authorities on the grounds of violating section 188 of the Penal Code on the criminal offence of disparaging religious precepts. The film showed God the Father as a senile, impotent idiot, Christ as a cretin and Mother Mary as a wanton who together decided to punish the world for immortality. The punishment was achieved through the devil's daughter, who was

355. Ibid., para 53.

356. X Ltd. and Y vs. United Kingdom, Application No 8710/79.

357. Otto-Preminger-Institut vs. Austria, Application no. 13470/87.

358. The film was based on the play of Oskar Panizza, *Das Liebeskonzil* (The Love Council), 1894.

spreading syphilis by having sexual relations with, among others, leaders of the church. The Commission initially found a possible violation of the freedom of expression but the Court disagreed and found that the state was in the best position to evaluate whether the rights of others required protection. In this case, Austria was allowed to execute a wide margin of appreciation in order to protect the religious feelings of the Tyrolean Roman Catholics, who instigated the proceedings.

Similar conclusions on the 'wide margin of appreciation' were reached in two other cases, which did not deal expressly with blasphemy, but with related offences concerning morally offending art. Both in *Müller and others vs. Switzerland*³⁵⁹ and in *Handyside*³⁶⁰ the Court applied the same rules as in the three cases described above and decided that the state parties had the right to limit freedom of expression on moral grounds. Both of the cases concerned sexually explicit art.

At the same time, in all those cases the Court applied a solution contrary to the proposed principle that, in a democratic society, not only expressions that are favourable but also those which shock and offend should enjoy protection.

In only one case concerning blasphemy that appeared before the ECtHR were the religious feelings of the applicant not given protection. The case of *Choudhury* was found inadmissible. The case concerned the book by Salman Rushdie, *Satanic Verses*. Because British law recognised blasphemy as an offence exclusively directed against Christianity, the claims of the applicant that the book offended Allah, Prophet Mohammed and Prophet's wives and thus interfered with the applicants' freedom of religion were not accepted. The decision of the Commission was correct in the sense of protecting the principle *nullum crimen sine lege*. It did not extend the law to actions that were not covered by the scope of penal prohibition. However, the commentaries on the discriminative nature of the British offence of blasphemy and the necessity of a reform appeared³⁶¹.

359. *Müller and others vs. Switzerland*, Application no. 10737/84.

360. *Handyside vs. United Kingdom*, Application no. 5493/72.

361. More of the critique concerning these issues can be read in articles referred to below. As a natural consequence of the fact that most of the blasphemy cases before

As a consequence of refusing to examine the nature of blasphemy law as such, the Court's jurisprudence created a 'right' – which does not exist in the text of the Convention – the right 'not to be offended' in one's religious beliefs³⁶². The freedom of expression was limited in order to protect national and regional religious sensitivities and particularly Christian religious sentiments. The margin of appreciation of the states became very wide and the rules according to which the countries could use it as an excuse to limit rights difficult to foresee. I agree with the opinion expressed by Judge Spielmann in his dissenting opinion in the case *Müller and others vs. Switzerland*, that the margin of appreciation of countries became too broad and it should not be as wide as to allow any kinds of limitations prescribed by local law, *'otherwise, many of the guarantees laid down in the Convention might be in danger of remaining a dead letter, at least in practice'*.³⁶³ Meanwhile, the 'right' to be offended could be shaped and used rather freely by national authorities, including the choice of which religious groups should or should not enjoy legal protection. Such an authoritative choice as to which denominations should be protected did not lead to the facilitation of religious pluralism.

5.3. LEGAL CRITIQUE CONCERNING THE ECTHR'S JUDICIAL PRINCIPLES IN BLASPHEMY CASES

The commentators of the blasphemy and morality cases in mainly advocated for the revision of the laws, basing their argument on various rationalisations and pointing out various problems. Even authors attempting to find justification for the existence of the offence admitted that contemporary opinion seemed almost uniformly against retaining a legal prohibition against blasphemy³⁶⁴. The critics appealed to various

the ECTHR were directed against the United Kingdom, the critiques dealt largely with the nature of the British law on blasphemy.

362. See: Leader S., 1983.

363. *Müller and others vs. Switzerland*, Application no. 10737/84, Dissenting Opinion of Judge Spielmann.

364. Montgomery, J.W., 2000.

arguments against the offence itself or against the argumentation of the ECtHR, which in practice led to sustaining it.

Shealdon Leader³⁶⁵ in his commentary on blasphemy and human rights pointed out difficulties arising from the above-mentioned cases and the creation of '*the right of citizens not to be offended in their religious feelings*'³⁶⁶. Problems pointed out by Leader included the extension of the interpretation of the 'rights of others' to a right that the convention did not recognise, namely freedom from being offended in one's religious feelings³⁶⁷. The creation of such a right constitutes a dangerous precedent and allows for creating other "rights" not present in the Convention. The creation of such a right is also in visible contrast with another principle recognised by the Court, namely that protection of freedom of expression extends not only to favoured publications 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'"³⁶⁸. Moreover, the justification of the necessity of protection from blasphemy by its mere existence as an offence in the domestic law was also questioned by Leader. "How does one then indentify restrictions arising from successful domestic prosecutions that are not necessary in a democratic society", asks the author?³⁶⁹ If the mere existence of criminal provisions in domestic law is recognised as sufficient justification for limitations of rights, how should one challenge regulations that are essentially unjustified in a democratic society? In this respect, Leader's comment follows the argument of judge Spielmann, mentioned above and is similar to my own concern about the approach of the Court. A too wide margin of appreciation and concentration on procedural grounds solely leads to a situation in which rights become illusory. Leader noticed that problems concerning the legal interpretation arose from the fact that the Court (and before 1998 the Commission) refused to examine the merits of a domestic court's

365. Leader S., 1983.

366. Ibid., p 339.

367. Ibid., p 340.

368. See eg: *Handyside vs. United Kingdom*, Application no. 5493/72, para 49.

369. Leader S., 1983, p 342.

decision in terms of domestic law³⁷⁰. The refusal to examine national law as to its compliance with the standards of the Convention, and basing the arguments solely on procedural grounds, seriously endangers the existence of the rights included in the Convention and may lead to a situation in which they become illusory. The Court in the blasphemy cases examined only whether the application of domestic laws and not their essence was meeting the requirements of necessity in a democratic society³⁷¹. I agree with Leader's concerns regarding the lack of examination of the nature of the domestic law and its impact on the right in question.

Clive Unsworth³⁷² identified the nature of the offence, and the ECTHR's argumentation leading to the prolongation of its existence, as a legal archaism and pointed out that the offence's existence is possible grounds for future cultural conflicts:

"The law of blasphemy provides a coercive weapon which can be deployed in this kind of struggle within and between faiths. It is a legal trump card in a contest over how far the sacred images and myths which are the heritage of different elements within the broader culture can be adapted in the depiction of meaning."³⁷³

He also identified blasphemy as one of the most decisive indicators of the future cultural direction of the British state³⁷⁴. Looking from the perspective of 13 years since the publication of his observations, one can only agree that the case of blasphemy grew to be an indicator of not only the cultural direction of the British state but also Europe as a whole and its approach towards liberalism, secularism, rights and the growing importance of the religious factor on the European cultural stage.

Christopher Nowlin³⁷⁵ in his article concerning the protection of morals under the ECHR system criticised the ECTHR's contrariety

370. Ibid., p 344.

371. Ibid., p 342.

372. Unsworth C., 1995.

373. Ibid., p 677.

374. Ibid., p 677.

375. Nowlin C., 2000.

professing broadmindedness, pluralism and tolerance on the one hand and maintaining legal moralism on the other. Nowlin argued that restricting freedom of expression in order to protect morality was problematic first of all due to the fact that the judges rely upon an ‘undefined, ill-defined, or simply contentious notion of morals’³⁷⁶ that traditionally have a distinctive sexual bearing³⁷⁷. He argues that the Court should rather adopt Mill’s definition of morals, which is concerned primarily with social relations and disassociated from sexual morality³⁷⁸. He relies on Mill’s notion that moral interest is directed to such behaviours that affect others without their free, voluntary and undeceived consent and participation³⁷⁹.

Nowlin firmly disagreed with the argumentation of the Court in the ‘moral’ cases, seeing Mill’s definition of morals as the only option for a pluralist society:

“(...) the ECHR has not clearly rejected legal moralism as being inappropriate to civil and human rights analyses. The Strasbourg Court will not likely do this until it wholeheartedly accepts that in a tolerant and pluralistic society, the very idea of protecting morals can be incompatible with genuine recognition of various rights and freedoms, such as the right to privacy, freedom of expression, and the right to equal treatment under the law.”³⁸⁰

The blasphemy cases before the ECtHR seem to confirm Nowlin’s observation regarding the perception of morality by the Court. The cases discussed above concentrated primarily on sexual notions. I agree with Nowlin on the usefulness of Mill’s approach in a democratic society. Especially in regard to the sphere of sexuality, different moral standards can be found in a modern plural society. What for one religion is sexually immoral and offensive, for a believer of another religion might even be of spiritual or ritualistic value and for a non-believer might be absolutely

376. Ibid., p 265.

377. Ibid., p 265.

378. Ibid., p 270.

379. Mill J.S., 1992, p 54.

380. Ibid., p 285-290.

irrelevant. The value of tolerance and broadmindedness is best applied when the limits of what is permissible protect from deception and abuse but not from facing another point of view or another opinion.

Adhar and Leigh also rejected the existence of the offence of blasphemy on the grounds of its incompatibility with values of tolerance, non-discrimination and religious liberty:

“Our argument... is strongly in favour of free speech. We believe that this is the best defence for a tolerant open society in which diversity of religious expression flourishes. There are clear signs, however, that these values are under threat, both for reasons concerned ostensibly with protecting public order, non-discrimination and paradoxically, religious liberty itself.”³⁸¹

They also found it peculiar that blasphemy is often justified by the protection of religious liberty itself. In fact, they saw the effect of the offence as being exactly opposite and resulting in the loss of religious free speech. They found it essential for liberal democracy to open up the discussion and criticism for everyone³⁸². The abolition of the offence of blasphemy would, according to Adhar and Leigh³⁸³, produce equal treatment of religions, since none would be protected to a greater extent than others and only general laws preserving public order should be applied to the cases of blasphemous expression³⁸⁴. Concerning the offence of incitement to religious hatred, which is postulated to replace the offence of blasphemy, the authors found it to be potential grounds for abuse and silencing free speech. The offence might, they argue, have an effect similar to blasphemy in provoking religious disharmony and silencing religious criticism, dissent and debate³⁸⁵.

Javier Garcia Oliva³⁸⁶, on the other hand, noticed that many morally regrettable practices do not receive criminal punishment, and the law

381. Ahdar R., Leigh I., 2005, pp. 365-366.

382. Ibid., p 396.

383. Ibid., p 374.

384. Ibid., p 374.

385. Ibid., p 374.

386. Garcia O. J., 2007.

is in certain cases not the best regulator of social conduct. Especially in matters affecting freedom of speech, the limitations should be applied extremely carefully and as far as possible freedom of speech should never be compromised³⁸⁷.

I agree with the observations of the majority of critics concerning the older judicial principles of the ECtHR in blasphemy cases. From the point of view of equality of religions and non-religions, I particularly agree with those who find the argumentation of the Court to lead to unnecessary and disproportional differentiation between beliefs and hindering the development of religious pluralism. This differentiation can be seen on two levels. First of all, religious beliefs were given greater protection than non-beliefs. The believers were granted the “right not to be offended”. A similar right could not be practically stretched over to cover non-believers. The justification of such a “right” based on an unequal approach to belief and non-belief by necessity is dubious in a democratic society. Secondly, the Christian belief in particular was given protection. The case of Choudhury, although procedurally correct, showed a reluctance to accept other beliefs than Christian as worthy of protection.

5.4. SILENCE BEFORE THE STORM

– NEW CASES ARISING AFTER THE YEAR 2000

However, in spite of all the arguments of theoreticians, the offence of blasphemy remained in many European states³⁸⁸. After *Otto-Preminger Institut*, no spectacular prosecutions took place for a while. Advocates of free speech seemed to celebrate a victory in events such as re-reading the poem that was in question in the *Gay News* case, in public in Trafalgar Square in 2002³⁸⁹, without facing any legal response or prosecution. The

387. Ibid., p 86.

388. See: Council of Europe Report, Doc. 11296, 08.06.2007 or: European Commission For Democracy Through Law (Venice Commission), Report 17-18.10.2008.

389. This took place on the stairs of St. Martins-in-the-Fields Church, London, on 11.07.2002.

offence seemed obsolete for awhile.

However, quiet always precedes a storm. It was no sooner than 2001 that the prosecution of blasphemy-related offences was revived. Proud of its religious Catholic revival, Poland became a pioneer in the 21st century's growing number of charges and prosecutions on blasphemy in Europe.

In 2001, Dorota Nieznalska exhibited her installation *Pasja* in the gallery *Wyspa* in Gdansk. The installation was composed of a metal cross of equal arm-lengths (Greek). One side of the cross contained a photo revealing the lower part of a male body - stomach, abdomen, loins and genitals. The other part of the installation showed a close-up film of the face of a male exercising in a gym. The film provided a background for the cross, which was suspended by a chain.

The artist was prosecuted and convicted³⁹⁰ of ridiculing and offending an object of worship and the court in its justification of the decision stated that in a Catholic country like Poland, a person with an academic education should be aware what sort of repercussions are connected with placing genitals on a cross. The intent was constructed not as an intent to commit an offence and offend. Instead it was constructed as an awareness of the religious feelings of the audience. The appeal re-directed the case for a new proceeding in the first instance. Nieznalska received support from European artists and artistic associations, who collected signatures on various open letters against the conviction of the artist³⁹¹.

Another prosecution within a very short period followed the Nieznalska case. In 2002, Jerzy Urban, the editor in chief of a critical and often shocking weekly magazine, *NIE*, was charged with offending a head of a state, Pope John Paul II. In one of his articles, Urban described the Pope as *sędziwy bożek* (old worship idol), *gasnący starzec* (fading old man) and *'Breżniew Watykanu'* (Brezhnev of the Vatican)³⁹². The prosecution brought subsequent conviction. Although the legal grounds were the offence against the head of a state, the proceeding had the nature of a blasphemy case.

390. Judgment of a Regional Court in Gdansk, 4K638/02.

391. Art Liberated was one of the organizations collecting signatures of support for the artist, www.artliberated.org.

392. Jerzy Urban znieważył Papieża [Jerzy Urban Defamed the Pope], *Gazeta Wyborcza*, 09.03.2006.

Reporters without Borders, who supported Urban, stated: '*We are perfectly aware that criticising John Paul II is an absolute taboo in Poland*'. The reason why the prosecution was not possible on the offence of blasphemy was that it would have been improper to consider the Pope as 'an object of worship'. Thus, another archaic offence was used as legal grounds in the case.

The year 2005 brought another relevant case in a different part of Europe, also known for its conservatism in religious matters. The case of Gerhard Haderer's comic book *The Life of Jesus* occurred in Greece³⁹³.

"He meant it as a piece of religious satire, a playful look at the life of Jesus. But Gerhard Haderer's depiction of Christ as a binge-drinking friend of Jimi Hendrix and naked surfer high on cannabis has caused a furore that could potentially land the cartoonist in jail. Haderer did not even know that his book, *The Life of Jesus*, had been published in Greece until he received a summons to appear in court in Athens in January charged with blasphemy" summarised the Guardian.

The book was banned in Greece and Haderer received a suspended six-month jail sentence. Like in the Nieznalska case, artistic and writers' associations collected supportive signatures on petitions for the effective exercise of the freedom of expression. Ultimately, the ban and sentence were reversed on appeal.

However, none of these events received any special attention besides artistic and local circles. Those events continued to be considered rather local curiosities than serious legal problems of common European importance.

5.5. THE GROUNDBREAKING CASE – THE MOHAMMAD CARICATURES AND ENDANGERED IDENTITY OF 'EUROPE'

The approach towards the archaic offence of blasphemy was change suddenly by another case from the year 2005. The case did not deal with offending Christianity, but the European religious "other". When the Danish newspaper Jyllands Posten a comic strip featuring the prophet Mohammad, the Islamic community raised a protest, having argued that their religious feelings were offended. Islam does not allow for portraying

393. Cartoonist faces Greek jail for blasphemy, The Guardian, 23.03.2005.

the Prophet and even less ridiculing him. The caricatures brought a wave of protest and became a topic of discussion all around the world. Facing the events following the publication of the cartoons, European countries began to defend almost unconditionally freedom of speech. Freedom of speech suddenly became a symbol of Europe and European democracy. It was because of the impact the cartoons caused. Around 100 people were shot in the resulting protests, European flags were burnt in front of embassies and death threats towards publishers³⁹⁴ eventually opened Europe's eyes to the paradox of sustaining the '*wide margin of appreciation*' of states in matters of morality and professing values of tolerance, pluralism, free speech and broadmindedness at the same time. This uniform European effort for the revision of archaic blasphemy laws and expressing a uniform opinion would likely never been possible without intense feelings connected with the event: Islamophobia versus growing Islamic fundamentalism on the one hand and national religious identities versus a sudden re-affirmation of secularism as a European value on the other hand.

The difference between the former cases and the Mohammad caricature seems obvious. As far as the former cases were concerned, they dealt with offending traditional attitudes and the values professed in the countries concerned and were not perceived as forms of religious oppression but rather mild weaknesses justified by tradition and the 'protection' of religious sensitivities often associated with national identities. Thus, nobody felt in a position to speak against them openly and in a European-wide forum. In the Mohammad caricature crisis, Europe had to face its 'foreign' element — a religion, which was not essentially 'European', with which Europeans did not identify themselves and on which they never built their values. And it was that religion, Islam, that dared to speak its name and appeal for protection equal to other religions that received protection from blasphemy in some European countries. European identity was challenged by the Islamic protest. And as an opposition to it, Europe no longer could appeal to its Christian roots, in times of religious pluralism and professed freedom of religion. It was left with no choice but to embrace pluralism and secularism as a boundary of democracy. It was one of the few instances in which Europe ever expressed as a whole a strong opinion in controversial

394. See e.g.: Storm grows over Mohammad cartoons, CNN, 03.02.2006.

religious matters. Inspired by the Mohammad caricature crisis, The Venice Commission started its work on issues of blasphemy in 2006. As a result of this work, a new report on blasphemy was issued by the Parliamentary Assembly of the Council of Europe in 2007 and a new recommendation was adopted by the Parliament in the same year. In October 2008 the Venice Commission adopted its own report.

5.6. THE NEW APPROACH AND ITS PRINCIPLES

New documents representing a new European approach towards blasphemy issues were created in the aftermath of the Mohammad events. They were the work of the Venice Commission for Democracy and the COE's Parliamentary Assembly.

The new approach is visible in all of the adopted documents, both in the Commission's report as well as in the Parliamentary Assembly's report and recommendation. The new approach acknowledged the previously mentioned theoretical concerns. The change in the approach to blasphemy is substantial and decisive. All the documents agree on the fundamental questions. They underline that a common European approach is necessary with regard to freedom of expression as a value of vital importance for democracy. They advocate revising and abolishing blasphemy laws as reflecting the historically dominant position of certain religions in certain member states. They insist that the public debate must be open for expressions which may offend, shock and disturb and only expressions that incite to hatred and discrimination against a person or a certain group of persons should be penalised. Moreover, they call for greater understanding between members of different religious groups and greater tolerance towards activities which are critical and even offensive. Critical dispute, satire, humour and artistic expression should not be seen as provocation. They uniformly reaffirm and reemphasise the rule established by the ECTHR, which was not sufficiently put into practice:

“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

within the limits of article 10 of the European Convention on Human Rights”³⁹⁵.

The Assembly also drew a line between hate speech and blasphemy and a borderline between what is permissible and what is non-permissible in modern democracies. This approach agrees with critics like Oliva³⁹⁶. The protection of the believer on the non-believer, analogical to protection from discrimination, instead of the protection of belief, should be favoured. To distinguish between blasphemies and hate speech, the report elaborates:

“Hate speech is always directed against persons or a group of persons, but not against a religion or ideas, philosophies, a political party, state organs, a state or nation or mankind as such”.

The new approach underlines the importance of introducing such changes in order to bring to life the ideal of a religiously plural Europe.

5.7. CURRENT BLASPHEMY REGULATIONS IN SOME EUROPEAN COUNTRIES

Regardless of the new recommendations, the offence of blasphemy as such or in similar forms still exists in a few European Union countries. The Venice Commission’s report lists Austria, Denmark, Finland, Greece, Italy, Lichtenstein and the Netherlands as those countries where the blasphemy offence exists. In addition, also Ireland maintains blasphemy bans. Also until recently, the United Kingdom had recognised the offence of blasphemy. However, in 2008 Section 79 of the Criminal Justice and Immigration Act 2008 abolished the offences of blasphemy and blasphemous libel. The Act was adopted by the House of Lords on the

395. Council of Europe, Parliamentary Assembly, Blasphemy, religious insults and hate speech against persons on grounds of their religion, Report, p 1 and e.g. *Handyside vs. United Kingdom*, Application no. 5493/72.

396. Garcia O.J., 2007.

8th of May 2008 and entered to force on the 8th of June 2008. In 2006 the Racial and Religious Hatred Act entered into force, banning hate speech on the grounds of religion or/and ethnic origin.

According to the Commission's report, in Cyprus, the Czech Republic, Denmark, Spain, Finland, Germany, Greece, Italy, Lithuania, the Netherlands, Poland, Portugal, and the Slovak Republic, laws forbidding religious insults or offending religious sentiments exists.³⁹⁷ I have also observed that a similar provision exists in Malta.

Since an exhaustive legal comparison of each European country's legislation is not the focus of this research, below I briefly analyse some examples of contemporary blasphemy laws. I include European Union member countries with legislation that strictly bans blasphemy, those that recognise it in law but not in practice, those with legislation that protects a particular faith and those whose penal provisions have been recently used in front of national courts either as blasphemy laws or religious insult laws. Additional comparative information on the legislation of other European countries is available in the reports of the Venice Commission. The Commission's analysis refers to those countries of the COE where the offence exists; the analysis was created on the basis of a questionnaire delivered by the member states to the Commission.

Due to its placement in the Constitution, Ireland seemingly maintains one of the strongest blasphemy bans. Article 40.6.1.i of the Irish Constitution declares that: "The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law". Section 13.1 of the 1961 Defamation Act provides that every person who composes, prints or publishes any blasphemous libel shall be liable to a fine not exceeding five hundred pounds or to imprisonment for a term not exceeding two years. In addition, section 13(2) allows the court to order the seizure and detention of all copies of the libellous material and members of the Garda Síochána³⁹⁸ may enter if necessary by force and search buildings for copies of the material. In 1991, however, the Irish Law Reform Commission issued a Consultation

397. Venice Commission's Report, par. 27-30.

398. Irish equivalent of police force.

Paper on the Crime of Libel³⁹⁹. The conclusions of the Commission in regard to blasphemy stated the following:

“In Ireland, the abolition without replacement of the offence of blasphemy and blasphemous libel is impossible under the existing constitutional provision. A referendum which had as its sole object the removal without replacement of that provision would rightly be seen as a time wasting and expensive exercise. Our provisional conclusion, however, is that in any more extensive revision that may be undertaken of provisions of the Constitution which, for one reason or another, are generally considered to be anachronistic or anomalous, the opportunity should be taken to delete the provision relating to blasphemy.”

Such a removal of the offence of blasphemy from the Constitution has not yet happened. The last prosecution, which took place in 1999⁴⁰⁰, however, established a precedent of non-prosecution. In *Corway*, after having analysed the successful blasphemy prosecutions from the 19th century, the Court arrived at the conclusion that the law lacks a legislative definition of blasphemy. The judges also added that the task of defining a crime is that of a Legislature, not the Court. Thus, in the absence of legislation defining the crime, the provisions of the Constitution remain void. As a result of *Corway*, legal practices in Ireland do no longer recognise the crime of blasphemy.

Malta is one of the countries where the state religion receives higher protection of the law than other religions. Article 163 of the Maltese Criminal Code provides that anyone who publicly vilifies the Roman Catholic Religion, as the religion of Malta, shall be on conviction liable to imprisonment from one to six months. Such a vilification may be done by any means including in print, speech or even gestures. Also vilifying those professing Roman Catholicism is punishable in the same way. Article 164 extends this protection to “any cults tolerated by law”. The term of imprisonment however, is shorter in the case of “cults” and amounts to

399. The Law Reform Commission, Ireland, 1991.

400. *Corway vs. Independent Newspapers (Ireland) Limited*.

one to three months. The Catholic Religion receives stronger protection on the basis of its status as a state religion.

Also Greece, previously mentioned in the context of Haderer's case, maintains a blasphemy ban. The Greek Penal Code includes a section entitled "Plots Against Religious Peace". The section, in addition to two other offences, contains offences of malicious blasphemy and blasphemy concerning religions. Malicious blasphemy forbidden by Article 198 provides a punishment of imprisonment up to two years for anyone who publicly and maliciously blasphemes God. Showing a public lack of respect towards God is punishable by imprisonment up to three months. Blasphemy concerning religions includes blaspheming the Greek Orthodox Church or any other religion tolerable in Greece. Upon conviction, article 199 provides a punishment of imprisonment of up to two years for blaspheming a religion. As the Venice Commission's report underlines, the object of penal protection in the Greek case is the sole existence of God, regardless of beliefs of any individual. The victim of the crime is not a religion or a believer but the divine. Such a protection is an expression of the dominant position of the Greek Orthodox Church as a state religion and its influence on the state apparatus. Moreover, the report underlines that trials related to blasphemy are rather frequent in Greece.⁴⁰¹

In Poland, where previously mentioned cases occurred, the Criminal Code provides for the protection of the believers and the objects of worship. Article 196 of the Polish Criminal Code provides a punishment of limitation of personal freedom or imprisonment of up to 2 years upon conviction for those who publicly offend others' religious sentiments by ridiculing an object or place of worship. In the year 2007 a few new convictions on the grounds of Article 196 occurred. They included a conviction of the metal band Gorgoroth's producer for organizing a 'blasphemous' concert in Krakow⁴⁰² and a conviction of the creator of a

401. European Commission for Democracy through Law, Annex II: Study no 406/2006.

402. Grzywna za satanistyczny koncert [Fined for a satanistic concert], *Gazeta Wyborcza*, 26.06.2007

programme with an Internet version of the Catholic confession.⁴⁰³ The concert was a typical black metal concert and symbolism typical for the black metal scene was used on the stage. The concert was recorded for television and one of the local television directors informed the Prosecutor's Office about a blasphemy case. The Internet programme, on the other hand, imitated the Catholic confession by asking to write down sins and offering absolution. The proceeding was initiated by a private person, who informed the Prosecutor's Office. Another proceeding before a local court in Torun took place when another two private persons informed the Public Prosecutor's office about a photographic manipulation offending their religious sentiments. The manipulated photograph showed the face of Joseph Stalin on a well-known painting of Jesus. Initially the accused accepted the sentence of 6 months of imprisonment, but finally he was acquitted by the Court, having apologised for insulting religious sentiments.⁴⁰⁴

Also Finland maintains blasphemy laws that have been recently in use. Chapter 17, Paragraph 10 of the Finnish Penal Code⁴⁰⁵ sets out a crime of breaking religious peace. Paragraph 10 declares that anyone who publicly blasphemes God, offends or ridicules what a religious community, including both the Church and other registered religious communities, consider as holy is liable to a fine or imprisonment of up to six months. The same punishment is provided for disturbing religious ceremonies. Preventing religious ceremonies by violence or threats is regulated in paragraph 11 and punishable by imprisonment of up to 2 years.

Although Denmark after the Mohammed caricature crisis took a stance unconditionally protecting freedom of expression, Finnish jurisprudence took a contrary turn. In 2008 two persons in Tampere were convicted of agitating against an ethnic group and defamation as well as disturbing the religious peace in the meaning of Chapter 17, Paragraph

403. Grzywna za parodię spowiedzi w sieci, [Fined for a parody of confession], Rzeczpospolita, Issue 136, 13.06.2007.

404. Przeprosił za fotomontaż Jezusa i Stalina [(The accused) apologised for the photo-manipulation of Jesus and Stalin], Gazeta Wyborcza, 10.02.2007.

405. Rikoslaki, 17 luku, 563/1998.

10.⁴⁰⁶ The crime they committed in 2005 included publishing offensive comments on Internet blogs. They included, in addition to offending particular individuals, hate speech against people of African and Russian origin as well as offensive words against the Prophet Muhammad and “what the Islamic community regards as holy”.⁴⁰⁷ The offensive material included also offensive caricatures of the Prophet. The Court acknowledged that freedom of expression is not limitless and the aim of the blasphemy law is to protect the religious sensitivities of people and maintain religious peace. And religious peace was in the consideration of the Court a higher common good providing safety and order. For that reason, it required protection and limitation of speech.⁴⁰⁸

Also as recently as in the beginning of the year 2009, the Public Prosecutor’s Office in Helsinki issued official charges against another person suspected of hate speech and breaking religious peace.⁴⁰⁹ The charges concerning blasphemy and breaking religious peace regard offensive words against the Prophet Mohammed and Islam. The words used by the accused suggested that Islam and the Prophet himself encourage paedophilia. The case was decided in the local court in Helsinki in September 2009 and the defendant was found guilty of violating religious peace⁴¹⁰.

The Danish Public Prosecutor, on the other hand, took exactly the opposite position. The Criminal Code in section 140 prohibits the mocking or ridiculing of public religious doctrines or acts of worship of any lawfully existing religion. The punishment upon conviction amounts to imprisonment up to four months. Since the 1970s the discussion on the abolition of the offence has been ongoing. In 2004, the Danish People’s Party proposed a Bill of Abolition of section 140. The proposal, however, was not adopted.

When Mohammad caricatures were published in 2005, the Muslim

406. Tampereen käräjäoikeus 30.05.2008.

407. Ibid., par. 6.

408. Ibid., Syytekohta 6.

409. Dnro R 09/8, Syytemääräys, 27.03.2009.

410. Paakkanen M., Halla-aho tuomittiin sakkoihin uskonrauhan rikkomisesta [Halla-aho found guilty of breaking religious peace], Helsingin Sanomat, 10.09.2009.

community informed the police about the crime of blasphemy. After an investigation in March 2006, the Danish Director of the Public Prosecution announced that there was no basis for criminal proceedings in response to the publication. Since the offence of blasphemy is subject to public prosecution only, the decision was final. Even though the Prosecutor observed that freedom of expression is not unlimited, the publication was not found to be sufficiently scornful to fall under the criminal provisions.⁴¹¹ Danish Public Prosecutor, in contrast to the Finnish, did not consider that religious peace is a value of its own that should be protected at the expense of freedom of expression.

5.8. THE IMPORTANCE OF BLASPHEMY ABOLITION FOR RELIGIOUS PLURALISM

As the position of this volume is based on the notion of facilitating religious pluralism and greater religious freedom for everyone, I must agree with the position of the new documents in regard to blasphemy. Freedom of speech is essential for the expression of both religious and non-religious opinions. The protection of certain beliefs, regardless of the broadness of the definition of such beliefs, in every case excludes non-believers in the traditional meaning of atheists and agnostics. First of all, it may be a point of personal belief, that God or any other divinity is the essence of what an atheist or another non-believer considers essentially non-compliant with his or her values. The protection of divinity excludes critique and at the same time excludes the expression of atheistic belief. Even if the blasphemy law were to be stretched to protect typical non-believers, the protection of an atheistic type of belief is impossible due to the lack of the sacred object or symbol that could be ridiculed. Like Smith, I would like to quote Feinberg's thought presented in *The Moral Limits of Criminal Law*:

[...] a sense of fairness has never impelled a legislature to penalize clergymen and their congregations for savage denunciations in their

411. For more details on the decision see: Lagoutte S., 2008.

churches of law abiding atheists [...] the resentment of the atheists at the mockery of their beliefs does not constitute a profound offence since nothing they hold sacred is impugned by it.⁴¹²

Even though the hate speech as shown below has changed these limits slightly in some of the countries, the essence remains the same. There is a fundamental inequality between a belief and a non-belief created by the offence of blasphemy. Whether it is blasphemy against religion or divinity as such, a non-believer cannot be offended in his or her belief and thus remains the religious “other” when the offence of blasphemy is entrenched in national legislation. Similarly to the ban on religious symbols, which creates the “otherness” of religious believers and protects the non-existent “freedom of not being affected by a religion”, the blasphemy ban protects a non-existent “freedom from being offended”. However, if we attempt to justify such bans, from the perspective of religious pluralism, they carry a message of what is “accepted as a religious/non-religious norm” and what “the other” is and condemned as improper. From the point of view of the equality of all faiths and beliefs, such bans create an imbalance based on the core of the person’s convictions and in a democratic society, where religious pluralism and equality are key principles, these bans are nowadays hard to justify.

The protection of the divinity goes even further and undermines the essence of a non-belief as such. Atheism *per se*, by denying the existence of God, offends the divinity and ridicules it. Thus protection of the divinity violates the freedom of non-belief in its essence and compels non-believers to restrain from expressing their sincere convictions in public.

In regard to religious adherents’ arguments that a lack of protection shows the domination of secular beliefs in the society, I must disagree. The neutrality of the state allowing for open debate among all actors on the religious scene allows for the open critique of any kind of faith or view. The state does not choose to favour any worldview, while by choosing to maintain a blasphemy law, a religious option is favoured.

412. See Smith S.D., 1999.

5.9. HATE SPEECH BANS AND RELIGION

A religious or a broader social peace is a value that is considered to be important enough to require special protection from the State in a majority of European countries. Thus the majority of the countries of the European Union and COE include provisions banning hate speech towards different social groups. According to the Venice Commission's report, however, the scope of the offence varies greatly in each of the countries. Whereas in some, incitement to hatred is a necessary element of the offence⁴¹³, in others both incitement and hatred are punishable⁴¹⁴. Moreover, the "incitement" as such is not clearly defined or uniformly understood in Europe. Also the punishable grounds of discrimination and hatred differ. In some countries coverage is wide and includes incitement to religious, racial, ethnic or national hatred as well as hatred based on language, political convictions, disability or social status. Among the European Union countries, only Malta and Slovakia do not include bans on religious hatred⁴¹⁵. In some others, like in the Netherlands, Sweden or Denmark⁴¹⁶, also sexual orientation is one of the forbidden grounds for discrimination and hatred. Denying the Holocaust and glorifying terrorism as forbidden contents of speech belong to a similar category of limitations of speech.

From the point of view of religion, two of these grounds are especially important. The first one is obviously religion and the second, sexual orientation. In regard to religion, it is important to emphasise the legal difference in the protection scope between blasphemy and hate speech on the grounds of religion. Whereas the notion of blasphemy regards religion and religious symbols and their core, the notion of hate speech protects the believer from being ridiculed and offended. As the recommendation on blasphemy and hate speech emphasised, religion or religious symbols cannot be protected as such. But a believer, like other groups in the society, should be protected from discrimination or hatred he or she

413. Austria Cyprus, Greece, Italy, Portugal, source: Venice Commission's Report, par. 33.

414. Lithuania, source: Venice Commission's Report, par. 33.

415. Venice Commission's Report, par. 34.

416. Venice Commission's Report, Annex II, 2008.

could face because of being a believer. Such a distinction is formally clear and constitutes an approach more compatible with the principles of democratic pluralism. In practice, however, it may cause substantial difficulties, which I will analyse below.

In those democracies that forbid hate speech on the grounds of sexual orientation, a few cases including religious individuals speaking against homosexuality have occurred.

In the Netherlands, the Penal Code in Article 137c bans insults or incitement to discrimination or hatred on grounds of sexual orientation. The Dutch Courts dealt with charges based on this article in two well-known cases. The first one from the year 1996 concerned a Dutch politician. Mr Van Dijke expressed publicly, in a weekly magazine, an opinion that homosexuals are no better than thieves in breaking God's commandments. Upon prosecution, Van Dijke was in the first instance convicted. But the Court of Appeal acquitted him and the ruling was upheld by the Supreme Court.⁴¹⁷ Similarly, in the case of Imam El Moumni, who declared in a television broadcast that homosexuality was harmful to the Dutch society, the court of the first instance convicted the accused. Later, however, upon appeal, the Imam was acquitted and the sentence was upheld by the Supreme Court. In both of those cases, the charges concerned speeches made in public and to a wider audience than just a religious congregation.⁴¹⁸

Lately, however, a more interesting case, of Pastor Åke Green, occurred in Sweden. The case considered expressions that the Pastor directed to his own congregation during one of his sermons. It concerned expressions that were supposed to support the religious arguments of the pastor and his teaching on homosexuality to his religious congregation.

Chapter 16, Section 8 of the Swedish Criminal Code criminalises agitation against a group by making a statement or otherwise spreading messages that threaten or express contempt for an ethnic group or any other group of people with reference to their race, nationality, ethnic origin, religious belief or sexual orientation. The amendment protecting from hatred on the grounds of sexual orientation entered into force in

417. Loof J.P, pp. 267-278.

418. Ibid.

January 2003. In the legislative process, the Swedish Council of Free Churches demanded the exclusion of sermons and similar situations from the scope of the amended provision. In response, the government replied, that the purpose of the law was not to restrict free speech in churches or anywhere else any more than in regard to incitement to hatred against an ethnic group, for instance.⁴¹⁹

In July 2003, Åke Green held a sermon titled: "Is homosexuality congenital or the powers of evil meddling with people?" The sermon included statements such as:

"Legalizing partnerships between two men or two women will clearly create unparalleled catastrophes. Already, we are seeing the consequences through the spread of AIDS. Although not all HIV infected people are homosexuals, AIDS once stemmed from homosexuality."

Or:

"The Bible discusses and teaches us about these abnormalities. And sexual abnormalities are a serious cancerous growth on the body of a society".⁴²⁰

In addition, Pastor Green compared homosexuality with paedophilia and bestiality and expressed the opinion that all sexual perversions stem from sinful changes in normal sexual behaviours. In his sermon he widely used references to verses in the Bible.

The Court of the first instance convicted Åke Green of violating Chapter 16, Section 8 by agitating against a group on the basis of their sexual orientation. The Court of Appeal acquitted the defendant and the ruling was sustained by the Supreme Court in November 2005. The Supreme Court in its judgement referred to the case law of the ECtHR and expressed an opinion that limiting Åke Green's freedom of expression

419. Govt. Bill 2001/02:59, p 35, quoted in: The Supreme Court of Sweden, case B 1050-05.

420. Green Å, 2003.

and freedom of religion would be disproportionate. The Court quoted the famous ECTHR declaration repeated in many judgements, that freedom of expression is applicable not only to ideas favourably received but also to those that offend, shock or disturb⁴²¹. The Court considered that even though the Swedish law's intent was to protect from statements such as those expressed in the sermon, the European Convention should be applicable directly and thus it must be possible to depart from the national law in order to secure conformity with the Convention. The Court believed that the ECTHR might find the limitation of Åke Green's speech disproportionate, since the sermon should not be analysed on the basis of exact wording but in a wider context. Even though the words Green used might be considered more derogatory than the verses in the Bible, the preaching was done to his congregation and regarded a theme found in the Bible. And the belief as such should not be analysed in the terms of legal legitimacy or the lack of thereof. Limiting the core of a belief might be considered as a disproportionate limitation on freedom of religion and in connection to it, freedom of expression.⁴²²

5.10. HATE SPEECH – NECESSITY OR ANOTHER FORM OF LIMITING SPEECH?

From the point of view of religious pluralism, hate speech bans constitute a curious example. They are advocated for by the COE in their recommendation and are believed to facilitate religious as well as other forms of pluralism in a democratic society. Looking at the principle itself, that indeed appears to be true at a first glance. Hate speech bans do not differentiate between believers and non-believers and do not resort to the legal "othering" of anyone on religious grounds. Both believers and non-believers are theoretically protected from possible hateful attacks based on their beliefs. Moreover, religion is just one of many grounds of possible discrimination. For that reason, hate speech bans appear more democratic, since they do not favour religious or non-religious aspects in any way.

421. *Handyside vs. UK*, Application no. 5493/72.

422. *The Supreme Court of Sweden*, Case B 1050-05, 29.11.2005.

From this theoretical and seemingly democratic perspective, we should, however, see the possible practical implications. First of all, as the examples of Malta and Slovakia show, it should not be taken for granted that a believer (or a non-believer) is protected from discrimination. For that reason, it might be argued that the hate-speech ban itself is shaped in a discriminatory way. The grounds of possible hate speech may be shaped freely and in fact express an ideological or even religious approach of a state. The lack of protection from hate speech on the grounds of religion and sexual orientation may ideologically mean nothing, but taken in context, may express conservative religious values. A society which will protect against racial or ethnic hatred but will not protect against hatred towards homosexual atheists, for example or any other non-traditional faith adherents, ceases to remain ideologically neutral. In that way, the mere shape of a hate-speech ban may cause the “othering” of non-protected groups.

Secondly, like the cases of Åke Green or Van Dijke and Imam El Mourni showed, either of the social groups will be dissatisfied as a result of the application of the bans. Social equality and protection from discrimination will be always compromised for either side of a conflicting discourse. In the above-mentioned cases, the homosexual minority may argue that their rights have been compromised and a religious outlook on life was favoured. If the outcome had been different, religious individuals could have argued that secular values were given preference. As Leigh put it:

“If non-discrimination law requires the silencing of any views other than those positively approving of homosexual lifestyles, equality has become dominant over freedom of religion and freedom of expression to a remarkable degree.”⁴²³

Either of the arguments puts the state and its neutrality towards religious views into an impossible and inconvenient position. The state is bound to be labelled as either a religious or secular values supporter.

But even if we dismiss this argument, remembering that legal conflicts

423. Leigh I., 2007, p 263.

always favour either of the sides, we should consider other practical issues as well. Can religious freedom grant a leeway to utter any kind of discriminatory speech then? Loof argues that differentiating between religious motives and other motives for speech would be a regrettable development as it would force the courts to decide whether certain opinions could be seen as religious.⁴²⁴ Remembering the difficulty of defining “a religion” and “a belief”, which I discussed in the first chapter of this volume, I believe such a development could lead to an impossible unpredictability of the law. It may cause an absolutely free interpretation of each case unbound by any common standard of rights. In each case the arbitrariness of deciding would be left to the courts. The law and the boundaries of rights would remain absolutely unpredictable.

Another method of balancing conflicting rights might be an approach where religiously motivated discriminatory speech is directed to a religious congregation and not to the general public. Loof, however, again points out the possible difficulties of such an approach. He argues that such an approach negates freedom of religion as such and denies religious speech's place in public debate.⁴²⁵ I disagree with Loof. Religious speech is directed primarily to religious adherents and the mere existence of religious communities, places of worship and confessional schools marks the existence in a public sphere. I find such a solution to be one of the possible ones in which freedom of religion and religious expression does not limit the freedom of others, but still serves its purpose of providing moral standards to those interested. I will also return to the public versus private dichotomy in regard to the place of religion in a society in the theoretical discussion in later chapters.

Some absolutist critics, like Heinze, reject hate-speech bans due to their sole nature as completely unnecessary for a democratic society. Heinze ascertains that hate-speech bans are incompatible with democratic citizenship for two reasons. First of all, they ban speech solely because of the speaker's opinions and secondly, because they produce uncertainty in judicial weighing and balancing. All viewpoints should be allowed to be expressed in a democratic society and a majority of whatever kind

424. Loof J.P., 2007, pp. 276-277.

425. Loof J.P., 2007, p 277.

cannot silence minorities.⁴²⁶ Moreover, Heinze believes that democracy today is able to defend itself, due to substantial changes in education and preparation for democratic citizenship. He believes that there can be no comparison between the seemingly democratic overthrow of democracy in the Weimar Republic and dangers that European democracy meets today.⁴²⁷ At this point, I am bound to disagree with Heinze. I am convinced that while speaking of laws and legal principles, we should refrain from speculations concerning the possible self-destructive force of democracy. It can be argued and speculated, on the contrary, that hate-speech bans are necessary right now, when Europe as a whole is facing the challenge of multiculturalism. When different fundamentalisms collide, prejudices and discriminatory policies are likely to increase intolerance and social conflict and with time grow into a destructive force. It is impossible to estimate whether hate-speech bans facilitate or hinder democracy. Such speculations remain fruitless for the legal argument.

Nevertheless, taking into consideration previous concerns, I must express the opinion that whereas hate-speech bans might improve tolerance and the peaceful coexistence of various social groups in a society, they might as well bring an unnecessary uncertainty to the law. Occasionally, if not shaped with careful enough consideration, or applied without careful balancing, they may act against the principle of democratic pluralism as such and increase religious “othering”. Although I am reluctant to accept complete absolutism as a principle, I do agree with Brandt’s conclusions, expressed in regard to the ban on glorifying terrorism:

“The measure of tolerant society is not how well we co-exist when we all agree, but how we remain inclusive when we don’t. In a democracy, especially one divided along ethnic or religious lines, tolerance of free speech is paramount, for only in ‘relevant discussions about social order’ can divisions become tolerable. Of course there are those who will be insulted, afraid, deeply offended by what may be said on both sides. (...) We must hold on to the idea that both sides are capable of

426. Heinze E., 2007, p 301.

427. Ibid., pp. 306-307.

and have the duty to give a rational, if rigorous response to the other's critique within public debate, without interference by a government telling them what not to say."⁴²⁸

In Europe, scarred by the history of ethnic and religious conflict, hate-speech bans, Holocaust denial bans and similar, appear plausible for the time of growing multiculturalism and pluralism. Their purpose is to increase tolerance, facilitate pluralism and mutual peaceful coexistence and prevent the possible self-destruction of democracy. However, even though the very purpose of maintaining hate-speech bans is increasing pluralism in a multicultural society, the legislators and the courts must remain careful. Hate-speech bans, similar to blasphemy bans or any other bans on speech, may instead of facilitating greater tolerance, bring an effect that is exactly opposite. They may discriminate and chill public debate. A liberal democrat is bound to agree with Mill's claim, that a mature democracy defends itself best when the open market of ideas remains unrestricted.⁴²⁹

5.II. CONCLUSIONS

The Venice Commission's report and recommendation and the COE's Parliamentary Assembly report and recommendation are an important step towards the European common commitment to basic values. In a multicultural era, revoking national sentiments to defend laws and policies incompatible with the ideals of democratic religious pluralism and equality of religions (or non-religions) is no longer plausible. Whereas each country has its own religious traditions, those traditions cannot hinder the facilitation of rights of non-believers. However, a certain cultural relativism of this common European effort cannot go unaddressed. It seems that without the Mohammad caricature crisis, the Venice Commission's work and the Parliamentary Assembly's report and recommendation could have never been possible. As long as blasphemy

428. Brandts Ch., 2007, p 294.

429. Mill J.S., 1869.

was ‘our’ problem, connected with ‘our religious tradition’ it was tolerable. As soon as it became ‘their’ problem, connected with the cultural ‘other’, it had to be immediately examined through the lens of democracy. ‘Our’ fundamentalism was tolerable, ‘theirs’ was not⁴³⁰. The inspiration for the reports and recommendation brought about by the Mohammad caricatures is visible also in the text of the COE’s recommendation, in the deep condemnation of life threats against artists and journalists issued by Muslim leaders. Only such drastic threats could make Europe speak in one voice. This tendency toward democratic “othering”, as will be summarised further in part III of this volume, has been visible in almost each of the example areas chosen in this volume. Only a challenge by a foreign religious identity made Europe notice possible problems and clashes between archaic laws concerning religion and democracy.

In regard to blasphemy and hate-speech bans, the questions for the future are: can the new approach of European institutions influence people and lessen their sensitivities? Can Europeans distance themselves from the offensive works and accept them as representing the freedom of those who do not share their world and religious views? Can the ideal of free speech ever be reached in both theory and practice? Will the offence of hate speech simply replace blasphemy? And will the EU also strengthen its commitment to democratic values, following Danish Prime Minister Anders Fogh Rasmussen’s call to defend freedom of speech⁴³¹?

430. See: European elite scrambles to defuse furore over caricatures of Mohammad, *The Guardian*, 03.02.2006.

431. See: Denmark calls for fight for freedoms after cartoons row, *EU Business*, 07.10.2008.