

IS BLASPHEMY HATE SPEECH?

Abstract

Religious freedoms create complex problems for modern secular societies given the growing tension between the democratic need to protect differences, the right to freedom of speech, and the vital need for modern democracies to guarantee peaceful coexistence between the majority and minority communities. This is particularly true in regard to the freedom of worship in conditions of cultural and religious pluralism protected from extremist outbursts based on cultural and religious identity.

This text will focus on the issue of blasphemy or more specifically, whether expressions of blasphemy should enjoy protection as part of the fundamental right to freedom of expression, or should such expressions be treated as hate speech, which would mean possibility for their legitimate legal constraint.

Key words: blasphemy; hate speech; religious freedom; freedom of expression

The tension between the right to freedom of expression and the desire of many people and countries to ban blasphemous or religiously abusive speech has become a focal point in the relations between the Western and Muslim world, as well as between religious and cultural groups within the liberal democracies themselves. To put it bluntly, Western states believe that other countries use blasphemy laws and similar measures not in order to protect the right of their citizens to freedom of religion or belief, but more for social control and to discriminate against religious minorities, apostates and those whom they consider heretics. Muslim countries, on the other hand, think that Western countries are not serious about addressing the insults towards their citizens and the beliefs of the wider international muslim community, beliefs they hold close and attacks on which many of them see as attack on their personal identity, such as, for example, the cartoons in Danish Jullands-Posten or in Charlie Hebdo.

In the following part I will move directly to the normative questions as to whether blasphemy constitutes a fundamental violation and whether the violation of religious sensitivities should be prohibited.

I.

Understanding the scope of the freedom of religion (and its protection) from where the text starts is based on the approach of the European Court of Human Rights regarding Article 9 (and 10) of the European Convention on Human

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Rights, that is, it corresponds to the way in which the freedom of religion and belief is currently being treated by the European Court of Human Rights.

Of course, this approach, which can otherwise be designated as a dimension of the "human rights" of the issue, is not the only approach that can be adopted in promoting religious freedom. And the "human rights dimension" do not exhausts the scope of legitimate influences that have a relation to the role that different forms of religious thought or beliefs can play in framing the concept of public good that needs to be reflected within the legal system and respected by it. But this does not mean that the dimension of human rights is not an important element within the overall alignment. So, although we need to guard ourselves from the danger of seeing the freedom of religion only as a matter of Article 9 of the European Convention or only as it is realized through the structures of human rights protection, it remains a protection problem and can be analyzed as such.¹

So, what are the obligations of the state in guaranteeing religious freedoms? While it is true that countries here enjoy a significant margin of appreciation², it can be said that there is a common approach (in solving cases involving religious freedoms), according to which *the state is to be an "impartial and neutral" organizer of the religious life within itself*³.

What does this mean in the context of blasphemy, the subject of our interest here? The extent to which countries and their national legal systems are supposed to protect religious beliefs of persons from humiliation and ridicule by others is causing difficulties because here the right to religious freedom is facing the right to freedom of expression of others. In this context, for example, the European Court of Human Rights is unwilling to interpret Article 9 (religious freedom) in order to ensure that believers have the right to sue those who have allegedly offended their beliefs (*Choudhury v. UK*)⁴. *The European Convention does not guarantee the right to protection of religious feelings. And such a right cannot be derived from the right to religious freedom, which (in effect) includes the right to express views critical towards the religious attitudes of others.*⁵

Additionally, the international legal human rights framework also differentiates between speech that is offensive to religion and one that is offensive to race. And while public criticism of the value of a religious or other belief system (for example, social and political convictions) can legitimately stimulate public debate (whether God exists and similar), making the same criticism regarding racial or ethnic group can not be considered acceptable, at least because

¹ Evans, M. "From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression before the European Court of Human Rights". *Journal of Law and Religion*, 26(1), Cambridge University Press, Cambridge, UK, 2010: 345-370, p. 410

² I refer to the reasoning of the European Court, and this is connected to the different ways of church-state relations and the various perceptions of the role of religion in the life of the community.

³ Evans, M. "From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression before the European Court of Human Rights". *Journal of Law and Religion*, 26(1), Cambridge University Press, Cambridge, UK, 2010: 345-370, p. 411

⁴ CHOUDHURY v. THE UNITED KINGDOM, no. 17439/90, ECHR, Decision of 05.03.1991; <http://freecases.eu/Doc/CourtAct/4537501>

⁵ Mowbray, A. *Cases, Materials, and Commentary on the European Convention on Human Rights*, Oxford University Press, Oxford, UK, 2012, p.606

such criticism is basically founded in the perceived racial superiority of the critic over the group concerned and destroys or undermines the basic social position of its members.⁶ The main difference between the attack on the body of beliefs (the religious creed) and the attack on the basic social position and reputation of a particular group of people is clear. In every aspect of a democratic society, we make a difference between the respect shown to the citizen and the disagreement we may have with regard to his or her social or political beliefs or, in this case, religious beliefs. Political life always includes a combination of the sharpest attacks on people's beliefs and convictions and the most concerned respect for their citizenship status in a given society.⁷

Of course, it can not be said that states allow their citizens to say what they want for religions and believers. States are obliged to prohibit advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence⁸. But the threshold for expression that constitutes such advocacy of religious hatred is high. To be insulting or provocative necessarily does not reach that threshold: it depends on the circumstances of the particular case, the level of hatred, the effects it generates and the intention of its generator or distributor, that are all relevant factors. As noted by Malcolm Evans, such situations (to prohibit the aggravation or abuse of one's religion on the basis of a violation of the rights of others) would require the expression of the views of others to be so convincingly powerful in an act, that makes it unbearable for some believers to continue holding their beliefs, despite their deeply ingrained desire to do so.⁹

Hence, injuries are of the kind that prevent the enjoyment of the right to religion (and would cause responsibility of the state because the state is responsible for ensuring the peaceful enjoyment of the right guaranteed under Article 9) of the followers of those beliefs and doctrines (*Otto-Preminger-Institut v. Austria*)¹⁰. Insulting what one believes in no way necessarily does prevent that person from being able to believe. Insults against believers are certainly more likely to guarantee a ban than insults against religions or beliefs themselves. *Accordingly, the focus is to protect believers more than beliefs themselves.*

This means that blaspheming or blasphemous defamation does not enter the concept of hate speech because it is not interpreted as an attack on believers or attack on their reputation or social status, but as an attack on the very faith. In this sense, Muslims have the right to be protected from defamation, including defamation as Muslims. But this does not mean that the Prophet Muhammad

⁶ Foreign Office Research Analyst, "Hate speech, freedom of expression and freedom of religion: a dialogue", FCO Research Analyst Papers, Research and analysis, Foreign & Commonwealth Office, GOV.UK, 24 March 2014, , pp. 3-4

⁷ Waldron, J. *The Harm in Hate Speech*, Harvard University Press, Cambridge, Massachusetts, London, England, 2012, pp. 120-121

⁸ Article 20(2) of the UN's International Covenant on Civil and Political Rights (ICCPR), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

⁹ Evans, M. "From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression before the European Court of Human Rights". *Journal of Law and Religion*, 26(1), Cambridge University Press, Cambridge, UK, 2010: 345-370, p. 354

¹⁰ OTTO-PREMIINGER-INSTITUT V. AUSTRIA, 295 Eur. Ct. H.R. (ser. A) (1994), at ¶ 47, <http://www.refworld.org/cases,ECHR,3ae6b6f428.html>; види исто и WINGROVE V. UK, ECHR 25 Nov 1996, <http://www.worldlii.org/eu/cases/ECHR/1996/60.html>

should be protected from defamation or the doctrinal religious beliefs of the group. The civic dignity of the members of the group stands apart from the status of their beliefs, no matter how offensive the attack on the Prophet or even on the Koran seems to be. The whole tendency of hate speech laws is (and should be) to protect individuals, not groups as such. It may be difficult to keep this in mind when what we are protecting the individuals from is an attack centered on a group feature. But, ultimately, our concern is the individual dignity, especially of vulnerable individuals belonging to minority groups in a society with a history of repression and discrimination.¹¹

Additionally, the difference between blasphemous speech and attack on dignity made by hate speech sometimes seems very difficult to sustain because of the psychological similarity that makes it appear that in the case of blasphemy, by ignoring the whole complex of anger and anxiety and characterizing it only as "insult", we fail to address the feelings and profound injury that believers actually experience when their faith is being put under attack. However, *this pain is not, by itself, the evil that the hate speech law is trying to address*. Primary care in the case of hate speech is the attack on dignity and the public good of ensuring that dignity or the status of a citizen of a society. Bearing this in mind, we are able to distinguish the emotional complex in the first and the second case, although the psychological aspect of both cases at first glance may seem quite similar.¹²

II.

What critics here pose as problem is whether the term "religion" in the clause of "the right to religious freedom" is simply neutral, capable of absorbing the various concepts of religious life and practice?

The main thesis of critics of Western interpretation or understanding of blasphemy in this regard is that *secular liberal principles of freedom of religion and speech are not neutral mechanisms for negotiating religious differences and they remain quite biased towards certain normative concepts of religion, subject, language, and injury*.

What is the content of this criticism of the presumption of state's neutrality in regard to religion? Namely, according to the general defense of the principle of state neutrality, understood as secular, it is argued that there should be no accommodation of religious sensitivities. In this way, the secular is understood as a practice of state "abstinence" in matters of religious sensitivity. And there are certain modular arrangements and practices that have become identified with modern secularity (such as the ideological separation of church and state or the privatization of religion) which give secularism a certain coherence and structure.

The critics hold that such an understanding of liberal secularism as abstaining from the domain of religious life is wrong. Secularism was, in fact, never neutral in terms of religion, but on the contrary, it was actively involved in regulating and defining the domain of religion. So, contrary to the ideological self-understanding of secularism (as a doctrinal separation of religion and state),

¹¹ Waldron, J. *The Harm in Hate Speech*, Harvard University Press, Cambridge, Massachusetts, London, England, 2012, p. 123

¹² *Ibid.*, p. 122, p.115

secularism, says this critique, historically brings regulation and reformation of religious beliefs, doctrines and practices to produce the specific normative conception of religion (which is largely Protestant-Christian in its outline).

Historically speaking, the secular state does not block religion from its regulatory ambitions, but rather requires reorganization of the religion itself through the agency of law. In other words, the characteristic of modern secular power is to continually regulate, identify, and demarcate or delineate what is "appropriate religious" from what is not.¹³

To sum up, according to this critique, there are structural constraints inherent to secular liberal law and its definition of what religion is, which determine the type of moral and ethical requirements that can be accommodated within a certain semiotic ideology of communication as well as meaning within the judicial language of freedom of speech and religion in European societies.

This rationale is the basis of several further arguments about why blasphemy cases should be treated as hate speech, which would also mean to be subjected to the European hate speech laws. And here we will focus on two arguments as particularly interesting.

1. The first argument challenges the idea that Muslims cannot be objects of racism because of being a religious, and not a racial group. And it seeks to be acknowledged that a form of racism that is associated with, but goes well beyond the critique of Islam as a religion has emerged.

According to this argument, it is important to perceive how the deployment of the Cartoon episode¹⁴ in the European worldview at the same time racializes Muslims and denies such racialization, insisting that religion, and not race, is satirized in the cartoons. Clearly, if the race was taken into question, various national laws and the European Court of Human Rights would act and engage to censor the publication and circulation of the cartoons.¹⁵ In this sense, the cartoons (which portray the Prophet Muhammad as a terrorist) are more defamatory of Muslims than mere critique of Islam. They suggest that most followers of Islam support political and religious violence. As noted by certain authors, "the cartoons connecting the Prophet Muhammad with terror ... tend to diminish the social status of Muslim identity because they impose a negative stigma under which terror is an integral part of Islam".¹⁶

2. Furthermore, this normative conception of the religion as a belief manages other claims of what is considered to be evidence, materiality, and real vs.

¹³ See Asad T., Brown W., Butler J., Mahmood S., *Is Critique Secular? Blasphemy, Injury, and Free Speech*, The Townsend Center for the Humanities, University of California, Berkeley, 2009.

¹⁴ This refers to the cartoons in Danish Jyllands-Posten

¹⁵ Brown W. Introduction in Asad T., Brown W., Butler J., Mahmood S., *Is Critique Secular? Blasphemy, Injury, and Free Speech*, The Townsend Center for the Humanities, University of California, Berkeley, 2009: 7-19, p.17

¹⁶ Pinto, M. "What Are Offences to Feelings Really About? A New Regulative Principle for the Multicultural Era," *Oxford Journal of Legal Studies* Volume 30, Issue 4, 1, Oxford University Press, Oxford, UK, 2010: 695-723, p. 721

psychological harm or injury. And here the second argument focuses on the kind of violation the cartoons caused. This argument refers to the inability to understand the sense of injury expressed by so many Muslims, that is, *the fact that the concept of violation remains incomprehensible in the public debate about blasphemy*. And again the incomprehension of this kind of injury is seen as a diagnostic of the secular.

Namely, it is said that the harm is quite different from the one that the notion of blasphemy involves. It undoubtedly involves the feeling of interference, but this interference does not rise from the assessment that the "law" was violated, but from the perception that someone's being, grounded as it is in this case in the relationship with the Prophet, is being shaken. For many Muslims, the cartoon's violation was not against the moral ban (You must not make images of Muhammad), but against the structure of the feeling or attachment - the habitus, who feels wounded.¹⁷

According to this argumentation, the secular (Christian) understanding of blasphemy cannot guess the violence or moral injury that cartoons inflict to Muslim believers. This is (they say) because of the significant differences in what is called a "reading practices" that emerge from Islamic piety and secular Protestantism, and, more precisely, from the various semiotics of iconography and representation particularly relevant to religious gods and prophets. Protestant Christianity imagines religious authority as remote and based on command/orders, while for Islamic believers the individual absorbs the person of the Prophet, imitating how he dresses, eats, speaks with his friends and enemies ...sleeps, walks, etc.¹⁸ Accordingly, the attack on the person of the Prophet, such as the one of the satire contained in the cartoons, does not apply only to him, but constitutes a direct attack on his followers. This means an attack not on religion, or not just on religion, but attack on the believers themselves.

*What this argument intends to highlight is that the question of what constitutes moral damage is an issue that is sensitive to cultural differences. Different cultural groups reflect different ways of being human and we must not discriminate between the different concepts of good. Our attitudes toward blasphemy cannot be isolated so easily from the fact how our culture understands religion. Because there are differences in how cultures perceive the ridicule of religious beliefs, there is also a difference in the intensity of the injury that the blasphemous speech inflicts on the believers.*¹⁹

And this is crucial for understanding the revolt of Muslims in our case. Without recognizing or taking into account this distinction, the insult and injury that the cartoons have caused for many remain inarticulated and unrecognized.

¹⁷ Mahmood S., Religious Reason and Secular Affect: An Incommensurable Divide? in Asad T., Brown W., Butler J., Mahmood S., *Is Critique Secular? Blasphemy, Injury, and Free Speech*, The Townsend Center for the Humanities, University of California, Berkeley, 2009: 64-100, p. 78

¹⁸ *Ibid.*, p. 75

¹⁹ Михајлова, Е. „Религијата и слободниот говор - случајот на богохулењето“, Меѓународен симпозиум: *Слобода на вероисповед*, 9 декември, 2015 година, Правен факултет „Јустинијан Први“ - Скопје, Скопје, 2015, стр. 6

III.

How could we respond to these arguments?

1. As to the first argument, in order to demonstrate that Danish cartoons and blasphemy can be generally portrayed as hate speech and therefore subjected to the European hate speech laws, it is also considered that the hate speech laws designed to protect racial minorities from discrimination, rely on the distinction between religious and racial minorities. "This presupposition, however, fails to see that religious minorities can undergo racialization, becoming racial minorities. Failure to understand how the process of racialization works undermines the effort to distinguish in clear and timeless terms the difference between religion and race."²⁰

More specifically, with regard to the cartoons depicting the Prophet Muhammad as a terrorist ("the bomb in turban cartoon"), it could be a question of judgment whether such cartoons are also an attack to Danish Muslims, other than an attack on Muhammad²¹. But, as argued by Jeremy Waldon, where there are subtle lines to be drawn, the law should generally remain on the liberal side of them.²²

2. According to the second argument (that is, that secular assumptions are involved in the way we think of images and objects) within Islam, the religious relationship of the subject with the representation of Muhammad creates relations that are inseparable from someone's sense of "the self". And this should suggest that the blasphemy against the image of Muhammad is, accordingly, a violation of the personality of a Muslim, and that the law that demands to distinguish between abusive behavior and degrading expression misinterprets not only the ontology of personality, but also the character of injury.

However, the double idea of the state's neutrality with regard to religion is that: a) religion should be protected as a private matter and that b) none of the religious beliefs should govern public law or public policies. If religion becomes indissolubly bound to personality ("the self"), and abusive behavior against persons is legally prohibited, does this new conception of the ontology of personality require a change in legal reasoning and assessment? In other words, if I identify myself with my (religious) beliefs, then their critique will seem as an attack on me. And is that something in regard to which I have the right to be protected by the law?

²⁰ Butler J., in Asad T., Brown W., Butler J., Mahmood S., *Is Critique Secular? Blasphemy, Injury, and Free Speech*, The Townsend Center for the Humanities, University of California, Berkeley, 2009: 101-136, pp.121-122.

²¹ Waldron notes that in and for themselves, cartoons can be considered a critique of Islam, not a slander of Muslims; they contribute (in their distorted way) to the debate about the connection between the teaching of the Prophet and the more violent aspects of modern jihadism. They, according to Waldon, would have come close to defamation of Muslims if they were calculated to suggest that most followers of Islam support political and religious violence, see Waldron, J. *The Harm in Hate Speech*, Harvard University Press, Cambridge, Massachusetts, London, England, 2012, p. 125

²² *Ibid.*, p.126

As Jeremy Waldon explains, when people point out that they identify with their religious beliefs, they make it difficult to distinguish between an attack on belief and an attack on person, and calls on understanding the irresponsibility of modern identity politics in this context. By saying that we are identifying with some opinion that we have, that it is a part of our identity, we endeavor to raise such an opinion beyond the framework of ordinary politics in the realm of protection of fundamental interests. So, it automatically becomes something that can not be negotiated politically and the modification of our interests, needs and preferences on this issue becomes essential for our respect.²³

There is no doubt that some needs and preferences in relation to religion (such as, for example, the free practice of religion - freedom of worship) are among the individual interests that must receive non-negotiating protection in the modern liberal state. But can each of us, in the same non-negotiating spirit, demand for a social environment in which our religious views will never be opposed or ridiculed?

Administrating such a right would be impossible in a religious plural society, where religious insults always float in the air. Things that look sacred for some are bizarre, distorted, mocked by others. Additionally, rights that are recognized in the society must be "complementary", that is, they must be respected all together. But the only way in which we can provide for the reconciliation of individual rights and not be offended is by suppressing any religious speech, thought, or consideration in public. This argument can not be avoided by joining religious beliefs with identity. On the contrary, identity politics is the one that imposes the difficulty here and makes it much more difficult to administer the society among differences and disagreements.²⁴

To conclude, this article maintains the position according to which blasphemy or blasphemous defamation is not included in the concept of hate speech, ie the violation of religious sensibilities should not be legally banned. The treatment of the issue of blasphemy here goes with the line of position which combines sensitivity towards the attacks on dignity of people, while insisting that people should not seek societal protection for offence. It involves placing the boundary between offending religious feelings and violation of dignity or status of a full member of the given society while maintaining a intelligible view of the things in question. This would also mean taking into account the explanations that try to show that some religions are part of their followers' way of life. This does not mean racialization of religion; it only means accepting that some religions determine a person's life in a more fundamental way, which can lead to a greater injury. However, the protection from this injury is firstly and foremostly issue of mutual tolerance. And this, while not calling for a change in legal treatment, opens up space for a change in the social level of accommodation of these sensitivities.²⁵

²³ *Ibid.*, p. 131

²⁴ *Ibid.*, pp. 129-135

²⁵ Михајлова, Е. „Религијата и слободниот говор - случајот на богохулењето“, Меѓународен симпозиум: *Слобода на вероисповед*, 9 декември, 2015 година, Правен факултет „Јустинијан Први“ - Скопје, Скопје, 2015.

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