

Summary

Blasphemy, religion-related discriminatory speech, and hate speech An inventory

After the murder of Theo van Gogh (November 2, 2004) the Dutch minister of Justice announced that a possible extension of the scope of the offences of defamation and blasphemy will be explored. This study deals with this subject and examines the backgrounds of penalization of blasphemy and related offences, both in the Netherlands and in some foreign jurisdictions. Because of the hardening of the public opinion and the need for legal protection in minority communities, it is important to know how to keep hate speech under control. Does law enforcement offer points of departure for tackling hate speech? However, combating hate speech also seems to be an issue of citizens and social organisations themselves. Possibly self regulation offers a way out to this complex problem. So this study also examines whether other instruments – not dependent upon criminal prosecution – might reduce hate speech between sections of the population.

Problem definition

Which position does the penalization of blasphemy, discriminatory speech, and hate speech (directed at religious groups or citizens) have in the penal code, on which grounds the legal provisions involved are justified, and in what ways they are applied and enforced? So the objects of study are: *ratio legis*, normative foundations, case law and enforcement practices. But this study does more. First some recent developments within foreign jurisdictions are explored, and secondly it is examined which non penal regulative instruments are used and could be developed to combat hate speech. The problem definition contains seven research questions:

- What was the nature of blasphemy? What was exactly grieving or damaging? Which historical developments can be discerned?
- Which normative arguments are nowadays relevant to combat hate speech? Are these arguments compatible with freedom of speech? Does the prohibition to use blasphemous words still play a role within these arguments?
- Which legal provisions concerning blasphemy, discriminatory speech and hate speech offers the Dutch penal code? Which penalties and sanctions are used? Which tendencies can be deduced from case law?

- How is blasphemy dealt with in the jurisdictions of some neighbouring countries? How is the offence characterised? Which tendencies can be discerned?
- How are hate speech and hate incidents – especially when disclosing hostility against religious minorities – dealt with in the United States and in England? Which trends in legislation and case law are relevant?
- What are the nature and the scope of recent ethnic-religious hate speech and hate incidents in the Netherlands? Which developments can be perceived in the data of the public prosecution service, statistical information collected by antidiscrimination desks and other relevant data bases?
- How to fight hate speech effectively? What can the police and the public prosecution service do? Is it possible to enlarge the role of civil law? Which tasks and functions can ‘in-between’ institutions and social supervisory bodies like antidiscrimination desks fulfil? Which contributions are to be expected from the ‘social dialogue’?

This complex and multilayered phrasing of questions can only be answered in an inventory way. No detailed answers are offered. The study aims to place hate speech in a wider context and tries to give insight into many involved problems and dilemma's.

Structure

The research questions are elaborated in four parts. In part I the divergent normative perspectives are dealt with. Which function did restrictions of blasphemy have in former times and how is freedom of speech restricted today? This part tries to order the many divergent normative argumentations. Part II is historical-descriptive in nature and offers a legal frame of relevant speech offences in the Dutch penal code. The frame also contains relevant case law related to discriminatory and blasphemous speech. Part III contains some studies in a comparative perspective. First some penal law approaches to blasphemy in some neighbouring countries are described. Next recent developments on hate speech and hate crime in England and the United States are dealt with. In those countries the fight against hate crime has been more developed than in the Netherlands. Part IV concentrates on the recent problems concerning the spread of hate in the Netherlands. Both law enforcement issues and non penal practices in combating hate speech are examined.

Results

Part I. It is stressed that the offence of blasphemy did not have univocal definitions, nor a clear-cut ratio. Many characteristics, among which the fight against apostasy and heresy, did play a role. Many arguments function as ground for penalization, such as Gods honour, religious feelings, *Religionsschutz*, public order, and also freedom of religion. It is argued that the conflict between freedom of speech and its restrictions causes many problems and dilemma's. Each ground for restriction – legal moralism, offending or harm – evokes special problems. Nevertheless, nowadays harm arguments are deemed more convincing. Theoretically some restriction grounds may be successfully raised against blasphemous speech and discriminatory speech against believers, especially threatening public order and utterances in the sense of 'less human' or 'inhuman'.

Part II. In respect to the offence of blasphemy in the Netherlands it is concluded that the relation between religious issues and penal law was subject to various opinions about rights that need to be protected and behaviour that needs to be punished. From 1811 until the introduction of article 147 Sr (Dutch criminal law book) in 1932, blasphemy was not dealt with in Dutch penal law. In 1932, by means of the *lex Donner*, this criminal offence was introduced. The subsequent case law shows many juridical complications, especially with respect to the evidence that must be furnished. These problems did run into the so called 'Ezel-arrest' (Donkey-judgement) by the Supreme Court in 1968. This judgement constitutes the highlight of the legal quarrel; afterwards hardly any prosecutions have been taking place. Article 147 Sr has become a dormant statutory, and has largely lost its relevance in law. The function of article 147 Sr has not been adopted by the prohibition of discriminatory speech in the articles 137c Sr and the following. The Supreme Court stresses that penalization of discriminatory utterances does not hold when statements have been expressed in a context that contributes to public debate. Prosecution is hardly successful, because evidence is difficult to deliver and because it is difficult to show that the defendant had the deliberative intention to insult a certain social group. In some important respects the case law of the European Court on Human Rights deviates from Dutch case law, especially when blasphemous utterances are at stake. More than once the Court did restrict freedom of speech in order to protect religious feelings. In the Netherlands this larger space is not used, and protection of that feelings is more or less ignored.

Part III. It is examined how blasphemy is tackled in some foreign jurisdictions. Religious offences in Germany, Switzerland, Belgium, and England, if subject of criminal law at all, have been influenced

strongly by national developments, and are not really comparable with the Dutch situation. In those countries the grounds for penalization and the resulting case law are too diverse to make convincing comparative conclusions. Subsequently, the most relevant legislative efforts on 'religious hatred' in England and the United States are presented. The United States occupy a special position. The ruling 'First Amendment doctrine' does not give much scope to curtail hate speech. Nevertheless, hate crime legislation has developed rapidly. Many opponents of hate speech 'switched' to the penalization of hate motivated crimes. Certain utterances of hate (threats; intimidation) are now penalized as 'violent crimes'. England has its own statutory regulations that penalize hate incidents. In both countries hate crime legislation has incited many critiques. But nonetheless this complex of legislation has survived. Recent developments in England concerning the bill Racial and religious hatred demonstrate that sensibilities around religion can stir up easily.

Part IV. In the Netherlands the number of anti-Semitic and islamophobic incidents is rising since 1998/1999, although this rise is strongly related to 'backlash events' as (international) terrorist actions and the murder of Van Gogh. The data of antidiscrimination desks reveal an increased proportion of reports in ethnic-religious related categories. Jews and Muslims are far more subject to discriminatory speech and hate speech than the 'white' majority. According to the Dutch Complaints Bureau for Discrimination on the Internet the most flagrant types of hate speech and verbal intimidation are found on radical Muslim sites and ultra-right sites, as well as shocklogs. The bulk of utterances on internet, that is possibly liable for punishment, including direct incitements to violence, is not traced. The police does not give a high priority to the detection of hate speech and hate crime. It is argued that the English and Dutch law enforcement policies in many respects take the opposite directions. The rigorous English approach brings forth many problems. The scope of 'hate' seems to be formulated too wide. Nonetheless, the relations between police and ethnic minorities are improved. In the Netherlands law enforcement in the fields of hate speech has a low status. That might be risky in many ways. The trust of ethnic minorities in the law might evade. Letting hate speech run its course gives rise to the image of 'unequal protection'. Hate speech on Internet should be investigated more seriously. The police could autonomously investigate the upper layer of crude inflammatory and threatening utterances. Next, in many cases civil action might be stimulated. However, in the Netherlands there is no real spirit to develop and facilitate collective actions. (International) networks of hotlines, watchdogs and other 'in-between'-institutions deserve further support. These bodies have proved their worth and live up to expectations. They are well informed, alert, accessible for potential victims, and work relatively fast. Lastly, it is specified that the Muslim

parts of the population do not have social and political organizations that might adequately protect Muslim interests. Although Muslims have to deal with negative images and the rousing of public sentiment, they do not have a national antidiscrimination desk. Such a watchdog institution could be of great importance, not only to bundle forces but also to fight extremism and stimulate democracy within Muslim subgroups.

Perspectives for effective prosecution

If tensions between ethnic-religious groups hold on and the 'epidemic of hate' on internet continues, the need for more 'criminal law'-signs will become urgent. However, bills that aim to restrict the freedom of speech bring about much public indignation. The vicissitudes of the English 'religious hatred'-bill are illustrative. That's why initiating new legislation or abolishing existing laws has no prospect. The existing legal provisions should be better used. But as stated earlier, article 147 Sr appears to be dormant after the 'Ezel-arrest', and the articles 137c-137e Sr are given a very restrictive interpretation by the Dutch Supreme Court. Still, there are starting points to overcome these obstacles. First, existing legal provisions and jurisprudence indeed offer much scope to prosecute outspoken racists and experienced hate mongers. In those cases a strict prosecution policy might be initiated. The restrictive case law is mainly limited to 'border cases', like the El Moumni case, in which hate utterances must be lifted out of their context to be counted as insulting. Secondly, the case law of the European Court provides opportunities to reconsider law enforcement policies. The European Court case law is strictly related to the functionality of words in the public debate. When certain words do not have another function than propagate hate or declare citizens inferior because of their religion, this functionality must be doubted. Existing enforcement instruments might be more targeted on utterances that do not have any sensible contribution to the public debate, and thus are clearly liable to punishment. This is entirely consistent with the guidelines of the European Council on 'hate speech' (1997) and 'racism and xenophobia in cyberspace' (2001).