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Blasphemy and freedom of expression: comparative,
theoretical and historical reflections after the Charlie Hebdo
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Jeroen Temperman and András Koltay (Eds), *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre* (Cambridge University Press, 2017, xix + 750pp, £140), ISBN 9781108416917 (hb).

Jeroen Temperman and András Koltay's edited collection, *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre*, provides an in-depth and nuanced exploration of the laws regulating blasphemy and related concepts including religious insult, defamation of religions and religious hatred, from the perspective of freedom of expression. Whilst the Charlie Hebdo massacre provides the inspiration behind this timely volume, its treatment of the subject matter extends significantly past this one event to a comprehensive and sophisticated analysis of the often-neglected topic of blasphemy laws in the West. In the introduction, co-authored by Temperman and Koltay, the editors of the volume signal their intention to explore three key themes or issues: first, is the operation of blasphemy laws in the West, 'exactly how "dormant" these laws are' and why States are increasingly repealing these laws (pp 2–4). Second, they seek to explore the fragmentation within international law in relation to the acceptability of blasphemy laws from the perspective of freedom of expression, focusing in particular, on the discrepancy between the approach of the European Court of Human Rights (ECtHR) on the one hand, and other human rights mechanisms on the other, including the UN Human Rights Committee, Special Rapporteurs and the Rabat Plan of Action (pp 4–9). Finally, this volume seeks to unveil the variety of perspectives within 'Western' legal doctrine concerning the acceptability of blasphemy laws (pp 9–12). In so doing, the edited collection provides a comprehensive overview of both the current situation and contemporary debates surrounding blasphemy and freedom of expression in the West.

This volume is comprised of 27 substantive chapters written by leading experts in the field that are divided into 8 sections. Part I focuses specifically on 'The Case of *Charlie Hebdo*', whereas subsequent sections explore the broader topic: Part II 'The Right to Blaspheme', Part III 'On Western Legal Discourse against Blasphemy Laws', Part IV 'European Court of Human Rights and Blasphemy', Part V 'Active Blasphemy/Religious Defamation Laws', Part VI 'Dormant Blasphemy Laws', Part VII 'Recently Abrogated Blasphemy Laws' and, finally, Part VIII 'The Future of Blasphemy Laws'. Needless to say it is not possible within this short review to do justice to all 27 chapters and fully explore their individual contributions to the field. Instead, I will draw out ideas and points of discussion from the collection as a whole.

A considerable amount of academic work has, to date, focused on the oppressive blasphemy laws of Islamic States and the UN defamation of religions resolutions, sponsored by the Organisation of the Islamic Conference (OIC). The overreach of domestic blasphemy laws in Islamic States, as recently highlighted by the case of Asia Bibi in Pakistan, combined in the West, with various flashpoints since the 1980s, including the Rushdie Affair, the Danish Cartoon Crisis and, not least, the Charlie Hebdo Massacre, have led the conversation surrounding blasphemy and freedom of expression to be dominated by a discourse that constructs illiberal Islam in conflict with the liberal West. This volume seeks to move past the usual debates and explore the relationship between blasphemy laws and freedom of expression in the West more generally. In so doing, the breadth of discussion goes beyond traditional 'blasphemy

laws', to contemporary incarnations ranging from defamation of religions, religious insult and religious hatred laws. In this regard, Chapter 4 is of particular note, where Hill QC and Sandberg provide an important counterpoint to discussions by tracing the evolution and contours of blasphemy laws in the UK to reveal the existence of a longstanding and parallel right to blaspheme. Nonetheless, it would be remiss to ignore the context of the collection entirely and, in Chapter 1, Gil explores the evolution of the blasphemy law in France, whereas in Chapter 2 Cox frames the current incompatible positions of the West and Muslim world as 'a clash between public moralities' (p 83). Here, Cox argues, the West finds blasphemy laws unpalatable on the basis that they are based on notions of religious morality rather than the secular morality that has become increasingly dominant in Europe.

The editors' stated 'point of departure' is 'that "the West" in fact is not quite as progressive on this point as often thought or portrayed' (p 2). To this end, the collection takes the reader through the evolution of blasphemy laws in the West (Gil, Chapter 1; Hill QC & Sandberg, Chapter 4; Parts V, VI, VII) as well as the export of blasphemy laws through colonialism (Khan, Chapter 6). As this is very much a live issue in the West, a considerable number of contributions in this collection engage with active blasphemy/religious defamation laws (Äystö, Chapter 11; Cianitto, Chapter 12; Cornils, Chapter 13; Fokas, Chapter 14; Kulesza & Kulesza, Chapter 15), not to mention the European Court of Human Rights' (ECtHR) body of jurisprudence that has (at least in the recent past) accepted the legitimacy of interferences with freedom of expression in order to protect individuals from religious insult (Cumper, Chapter 5; Lewis, Chapter 9; Temperman, Chapter 10). In Chapter 14, Fokas brings into sharp focus the presumption that blasphemy laws are relegated to history in Europe. She provides an examination of how the Greek blasphemy laws, that provide for punishment by imprisonment (albeit rarely) (p 391), serve to protect the majority religion, the Greek Orthodox Church, from criticism but do not afford the same protection to minority religions (p 408).

Here is perhaps where we can perhaps discern a difference between the direction of travel in Europe and the oppressive blasphemy laws found in Pakistan, amongst other Islamic States, that are so often the focus of academic literature. As Khan emphasizes in Chapter 6, while we can agree that restrictions placed on freedom of expression by blasphemy laws are undesirable, it is not accurate nor desirable to speak of all blasphemy laws in the same breath. In distinguishing between different blasphemy laws, Khan suggests that we consider: the penalties; how hard they are to use; whether they require intent by the speaker to cause harm; whether the law is specific and narrow in scope (pp 182–83). Significantly, Khan also highlights that the equal treatment of religious minorities is vital for our consideration of these laws. Not only should blasphemy laws be framed and applied neutrally (pp 184–85) but the motivations of those seeking to punish blasphemous expressions should be considered especially when a connection can be discerned between blasphemy and group identity (pp 189–192). We find a similar concern in Chapter 3, where Cram argues that by privileging Christianity, blasphemy laws have the potential to undermine democracy. Here, he claims that 'where blasphemy laws exist they promote an assimilationist strategy, understood here as enforcing a common set of societal values that necessarily privileges a specific religious narrative on matters of political dispute to the detriment not only of individual speakers but to the broader aim of legitimate informed self-government' (p 90).

Arguably, while in Europe we find no shortage of blasphemy or defamation of religion provisions, increasingly the fact of religious diversity seems to have resulted in a shift from accepting the legitimacy of restrictions on expression to protect the majority religion towards the need to protect religious minorities from hate crimes (although not always, as evidenced by Fokas). As Lewis highlights in Chapter 9, the ECtHR was originally willing to accept, in *Otto-Preminger-Institut v Austria*,¹ *Wingrove v United Kingdom*² and *İ.A. v Turkey*³ that States had a wide margin of appreciation to restrict blasphemous expressions that caused gratuitous offence, in order to protect the rights of others. However, 'in not one of them was it the feelings of marginalized and vulnerable religious minorities that were the object of the state's protective attentions' (p 279). More recently, however, it is possible to discern a shift in the approach of the ECtHR away from permitting States a margin of appreciation in analogous cases towards recognising the value of such expressions. In contrast, whilst outside the scope of Lewis' chapter, it is worth noting that the ECtHR increasingly accepts the legitimacy of restrictions on freedom of expression in cases of hate speech. Furthermore, in the recent case of *E.S. v Austria*, it accepted that criticism of religions amounting 'to generalisations without factual basis' can be restricted in order to protect religious feelings and preserve religious peace in a case concerning Islam.⁴

A similar trend is discernable in European States that have shifted away from majoritarian blasphemy laws, towards non-discriminatory models that seek to protect all from religious hatred (Årsheim, Chapter 21; Howard, Chapter 23). Here it is particularly interesting to compare the Norwegian response to the Charlie Hebdo massacre with the Danish response. Årsheim, in Chapter 21, explores how this event provided the impetus behind the repeal of the Norwegian blasphemy laws (pp 573–4) and how this was made possible by the adoption of anti-hate crime laws, in accordance with international standards (p 573). In direct contrast, in Chapter 16, Binderup and Lassen identify how the Charlie Hebdo massacre resulted in the Danish government's decision not to pursue its plans to repeal blasphemy laws (pp 441–42), in part motivated by concerns 'that the signal sent by an abolition would negatively affect the status of minority religions' (p 453). Consequently, while the West is undoubtedly 'not quite as progressive' in relation to blasphemy laws as one would expect, the restrictions placed on expressions increasingly seek to protect marginalised and minority religious groups rather than majority religions.

A number of contributions analyse the justifications underpinning restrictions placed on freedom of expression in order to protect religion from a doctrinal and/or theoretical perspective. A particular source of consternation for both Lewis and Temperman is the ECtHR's insistence on framing this issue in terms of public debate and democracy (pp 292–93; pp 312–13). Thus, Temperman's exposition of the Russian prosecution of the punk band Pussy Riot for 'hooliganism motivated by religious hatred' reveals precisely how blasphemy laws can be used to shut down political debate, particularly in instances where there is a close connection between

¹ *Otto-Preminger v Austria* Application No 13470/87, Merits and Just Satisfaction, 20 September 1994.

² *Wingrove v United Kingdom* Application No 13470/87, Merits and Just Satisfaction, 25 November 1996.

³ *İ.A. v Turkey* Application No 42571/98, Merits and Just Satisfaction, 13 September 2005.

⁴ *E.S. v Austria* Application No 38450/12, Merits and Just Satisfaction, 25 October 2018 para 57.

the dominant religion and the political sphere (304–5). In contrast, Lewis, through detailed doctrinal analysis, reveals how the ECtHR has retreated from its earlier jurisprudence by broadening what is defined as debate speech rather than recognising the value of artistic speech or speech that does not obviously contribute to public debate. This means that whether the ECtHR permits States a wide margin of appreciation depends on a value judgement regarding the importance of the expression. The consequence of this is that 'innocuous and inoffensive' speech may not find protection under Article 10 ECHR (p 293). Thus, while Cram argues that blasphemy laws are bad for democracy in Chapter 3, both Lewis and Temperman warn against assessing the value of speech purely in terms of the contribution it makes to democracy.

In Chapter 8, Koltay undertakes a detailed theoretical exploration of arguments for and against blasphemy law, in which he distinguishes between restrictions on speech in the name of religions or churches (which cannot be justified) and the more difficult question of limitations on speech in order to protect religious people. Nonetheless, he concludes 'it would be extremely difficult to determine, with respect to freedom of speech, where the border of the mandatory minimum respect for different opinions, lifestyles and exercising liberties lies' and instead, promotes 'responsible free speech and strengthening the ethical foundation of public discourse' (p 255). A similar conclusion is reached by a number of the authors in this volume: that this is not necessarily an area that should be subject to legal regulation and perhaps we should explore ways to reduce the harm of blasphemy without placing limits on freedom of expression (Cumper, Scharffs).

In Chapter 5, Cumper initially cautions against viewing blasphemy purely through the prism of violence as many who eschew violence object to blasphemy (p 139). In contrast to other contributions in this volume, he notes how the relationship between freedom of expression and freedom of religion or belief is sometimes more complex than is usually acknowledged, as what may be considered a manifestation of religion by one group may be considered blasphemous by another (p 142). From this standpoint he explores different models available to protect people of faith from the harm of blasphemy: the blasphemy model; incitement to religious hatred model; and the self-restraint model. In so doing, Cumper argues that while the blasphemy model cannot be justified in Western liberal democracies, the religious hatred model is problematic as the distinction between believers and beliefs is not always as clear cut as presumed (pp 154–58). In contrast, while the self-restraint model has a number of advantages, including the protection of marginalized groups, it also has significant potential to undermine freedom of expression and may exacerbate societal conflict in the longer term (p 161–2).

The need to look beyond the law in order to reduce violent responses to blasphemy is the central focus of Scharffs' contribution in Chapter 27. Here he explores why in some instances blasphemous acts lead to violence, whereas in others they do not. In so doing, Scharffs identifies the vital role played by various actors (the speaker, audience and the victim) in accelerating or decelerating violence. Similarly, in Chapter 25, Limon, Ghanea and Power's exposition of the future of the UN 16/18 process notes that while the process has been beset by difficulties as a result of the incompatible starting positions of the Western group on the one hand and OIC member States on the other (p 678), one of the positive outcomes of the process is 'the

willingness of political leaders to speak out against acts of intolerance and the speed and sophistication with which they do so' (p 679).

This short review has sought to draw out some main themes and issues identified in this comprehensive and thought-provoking volume. Needless to say, it does not do justice to the complexity of arguments presented and has doubtless overlooked countless themes and issues. This is a rigorous edited collection that maintains its coherence throughout. By refocusing the debate surrounding blasphemy and freedom of expression away from the clash of civilisations rhetoric, it makes a valuable contribution to the field and would be required reading for scholars of freedom of religion or belief or freedom of expression.

Stephanie E. Berry
Senior Lecturer in International Human Rights Law,
University of Sussex