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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

QUESTIONNAIRE

ON DOMESTIC LAW CONCERNING THE PROHIBITION OF BLASPHEMY, RELIGIOUS INSULTS AND INCITEMENT TO RELIGIOUS HATRED

COLLECTION OF REPLIES

Albania, Austria, Belgium, Denmark, Ireland, the Netherlands, Poland, Romania, Turkey, United Kingdom

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REPLY FROM ALBANIA

By Mr Ledi BIANKU

1. Is there specific legislation prohibiting blasphemy and/or religious insult in your country ? Can this be explained on the basis of :

a) historical grounds, and if so which ones?
b) doctrinal grounds, and if so which ones?
c) other grounds?

There is no any specific legislation prohibiting blasphemy and/or religious insult in Albania. The main reason for this, I think, is the fact that law during the communist regime has prohibited religious belief for more than 25 years. This has unavoidably lead to a fear to discuss religious matters and somehow to a weakening of the religious conscience as well. All the religions and believers were considered the same way during the communist regime – as enemies of the socialist system. Historically, Albanian religious doctrines, either Christian or Muslim, have been very moderated.

After the fall of the communist regime, the religious identity was not as evident as before. All the religious groups were much more concerned about the fact of guarantying the exercise of their religious beliefs vis-à-vis the interventions from the state institutions. On the other hand the atheistic period of more than 25 years has contributed to the establishment of social, economic, family and political inter-religious relations. This religious mixed society has not given rise to marked blasphemy, or religious clashes.

Anyway, in the Criminal Code contains a specific section in relation to "Criminal acts against freedom of religion". This Section X of contains three articles, 131[1], 132[2] and 133[3]. Although not specifically foreseen for cases of blasphemy or religious insult, these provisions

2. Is there specific legislation prohibiting religious hatred? Is there, in addition or instead, more general legislation prohibiting hate speech and/or incitement to violence, and/or defamation, and/or discriminatory speech? Could this situation be explained on the basis of:

Article 265 of the Albanian Criminal Code provides as a criminal infringement the "Inciting national, racial or religious hatred or conflict". Its provision foresees:

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[1] Article 131 - Obstructing the activities of religious organizations
"Ban on the activity of religious organizations, or creating obstacles for the free exercise of their activities, is punishable by a fine or to up to three years of imprisonment."

2 Article 132 - Ruining or damaging objects of worship
"Ruining or damaging objects of worship, when it has inflicted the partial or total loss of their values, is punishable by a fine or up to three years of imprisonment."

3 Article 133 - Obstructing religious ceremonies
"Ban or creating obstacles for participating in religious ceremonies, as well as for freely expressing religious beliefs, constitutes criminal contravention and is punishable by a fine or up to one year of imprisonment."

Inciting national, racial or religious hatred or conflict as well as preparing, propagating, or keeping with the intent of propagating, of writings with that content, is punishable by a fine or to up ten years of imprisonment.

d) historical grounds, and if so which ones?

The main historical ground for such provision is the ottoman and the communist past of Albania. Under both regimes religious beliefs and believers have been prosecuted. Under Ottoman Empire the Christian believers have been prosecuted against if not following the official religion. Under the communist regime religion was officially prohibited and all believers and religions were persecuted by the state bodies. The risk of this being the instruction of Albanian population and especially young people with the idea of anti-religious and atheistic culture.

e) doctrinal grounds, and if so which ones?

As explained above there are 4 official recognized religions in Albania. Despite the fact that until now they have not been problems as to religious hatred acts between members of different religious groups, the inclusion of such provision in the criminal code, I think helps to lead the citizens as to the tolerant behavior they should maintain with individuals belonging to other groups.

f) other grounds?

3. Is there, in any of these provisions, a specific freedom of speech clause? If not, how do these provisions relate to existing (constitutional) legislative provisions concerning freedom of speech?

The most pertinent provisions we find in the Albanian legislation in this relation are the ones of Article 131 and 133 above-mentioned which could be interpreted as offering a guaranty for the free expression of religious beliefs.

At first, both provisions give the impression of protecting only religious organization (Article 131) and ceremonies (Article 133). A teleological interpretation, however, could bring us to the affirmation of a freedom of speech clause in religious beliefs. The provision "…creating obstacles for the free exercise of their activities…" in Article 131 and especially "Ban or creating obstacles for participating in religious ceremonies, as well as for freely expressing religious belief…" in Article 133 I think offers a guarantee for the exercise by each individual of its/her right for free speech in religious matters.

4. Is there in your opinion/according to the leading doctrine a need for additional legislation concerning:

The Ministry of Culture in Albania, which covers also the relations with the religious communities, is actually considering the drafting of a Law in religious matters. I think all the questions raised in this report could be considered in the process on the drafting of this law.

a) the prohibition of blasphemy or religious insult ?
b) incitement to religious hatred?
c) hate speech concerning a group?
d) speech or publication with a discriminatory effect?

e) negationism (denial of genocide or other crimes against humanity)?

5. Is there any case-law concerning blasphemy, religious insult and/or incitement to religious hatred?

According to the data received by the Ministry of Justice, there is no so far in Albania case-law concerning blasphemy.

If so, are there cases which resulted in the conviction of the perpetrator?

What is in such cases the procedural status of the victim(s)?

6. Did the distinction between "blasphemy", "religious insult", "incitement to religious – or racial - hatred", "defamation" or "discriminatory speech" play a role in the case-law, and was it pertinent to the outcome of the case?

As there is no case-law in this relation it is not possible to formulate an opinion in relation to this question. Anyway, after conducting a number of informal exchanges of views with several judges and prosecutors on different levels in Albania, it could be asserted that there is no clear distinction between these concepts.

What is the leading opinion in legal doctrine about the current relevance of this distinction?

In relation to blasphemy, religious insult and incitement to religious or racial hatred speech there are no articles in the Albanian legal doctrine. This mostly because the question has not been to the attention of the society and legal professionals for the reasons described briefly above. Whereas the questions of defamation and discriminatory speech, although not specifically in cases related to religion beliefs, has been considered in the doctrine. The main concern was the fact that defamation and discriminatory speech are considered as criminal infraction by Criminal Code. The general opinion in Albania, following the Council of Europe and EU recommendations, is for decriminalization of these acts. But there is no an elaborated doctrine or clear jurisprudence for clarifying what really defamation is and what discriminatory speech means.

7. What role does the intention of the perpetrator and/or the foreseeability of the (discriminatory) effects play in the formulation of the legal prohibition, and/or in the prospect of a conviction?

Although the intention is not foreseen specifically as an aggravating circumstance by Article 50 of the Criminal Code, it might be considered as an important element for the court in determining the conviction. Article 47 of the Criminal Code foresees:

> "The court determines the punishment in compliance with the provisions of the general part of this code and the limits of punishment on criminal acts provided for by law.
> In determining the range of punishment against a person the court considers the dangerousness of the criminal act, the dangerousness of the person who committed the act, the level of guilt, as well as both mitigating and aggravating circumstances."

Considering the intention of a perpetrator as an element (subjective criterion) for determining the level of guilt, it might be asserted it plays an aggravating role in the conviction of the act.

8. Is the prosecution of the suspect of an act of blasphemy, religious insult or incitement to religious hatred at the discretion of the prosecutor?

The prosecution of an act prohibited by Articles 131-133 of the Criminal Code (which to our opinion could be used for prosecuting the above acts) could start either by indictment of the victim either ex-ufficio by the prosecutor. According to Article 24 of the Albanian Criminal Procedure Code:

> "2. The prosecutor has the discretion to decide whether to not initiate or dismiss the criminal actions in cases provided by this code.
>
> Is there any superior supervisor?

There is a general supervisory procedure within the Prosecutor office hierarchy. In this relation Article 305 of the Criminal Procedure Code foresees hat

> "1. If the district prosecutor does not exercise the criminal proceedings or does not terminate within the fixed time- limits, the General Attorney, on demand of the defendant, the injured person or even ex-officio orders, by a motivated decision, the undertaking of the investigations,
> 2. The General Attorney carries out the necessary investigations and compiles his requests within thirty days from the decision of the undertaking of investigations.
>
> Is there any appeal to a court against non-prosecution?

Article 24/5 and Article 329 of the Criminal Procedure Code do foresee the entitlement of the injured and the defendant to appeal the decision dismissing the case in the district court, except when a decision has proven that the fact does not exist. The district court can decide in those cases the continuation of the investigation.

9. Does prosecution of these acts depend on a complaint by the victim(s)?

According to Article 284 of the Albanian Criminal Procedure Code:

> "1. For the criminal offences provided by articles 85, 89, 102 first paragraph, 105, 106, 130, 239, 240, 241, 243, 264, 275 and 318 of the Criminal Code, the prosecution may start only by indictment brought by the injured, who may withdraw the same at any stage of the proceedings."

As above asserted, in the Albanian legislation, the investigation of the acts considered by the questionnaire could be based only in Articles 131-133 of the Criminal Code. These Articles are not included in the enumeration of Article 4 of the Criminal Procedure Code. Therefore, the investigation of the related acts could start upon either indictment of the victim either ex-ufficio by the prosecutor.

10. Have there recently been important incidents of alleged blasphemy, religious insult and/or incitement to religious hatred in your country that caused a lot of public indignation and debate but were not prosecuted or not convicted? What was the reason for non-prosecution/non-conviction? What role did freedom of speech play in that case ?

There have been 3-4 cases in Albania during the past 3 years characterized by religious related disputes. In 2004 two writers in Albania have been threatened by the radical Muslim believers for writing In 2005 a cross of the catholic community has been destroyed near Shkodra,

whereas in 2006 the Shkodra Muslim Community disagreed with the decision of the City Council to place a monument of Mother Theresa at the entry of the city. Both incidents were widely condemned by public opinion and also by all religious authorities in Albania, including higher Muslim authorities.

11. What is the attitude of the press in relation to such cases?

Do they report with restraint in order not to aggravate the effects? Or do they purport to compensate by publicity for the non-prosecution?

The press merely reported such cases without following with a deep and scientific analysis into the situations. Also in the case of the Danish cartoons the debate was quite week, descriptive and partisan. The purpose of reporting has been merely commercial, for the newspapers and televisions to attract public and not really lead them to a specific idea or behavior, which should have been the tolerance.

REPLY FROM AUSTRIA

By Mr Christoph GRABENWARTER

1. Is there specific legislation prohibiting blasphemy and/or religious insult in your country? Can this be explained on the basis of:

a) historical grounds, and if so which ones?
b) doctrinal grounds, and if so which ones?
c) other grounds?

The Austrian legal system does not prohibit any sort of blasphemy or religious insult in a general way. However, the Criminal Code forbids some acts under specific circumstances.

Section 188 of the Austrian Penal Code deals with the offence of *disparaging of religious precepts:* everyone who

- publicly disparages or mocks a person or a thing, respectively, being object of worship or a dogma, a legally permitted rite, or a legally permitted institution of a church or religioussociety located in Austria in a manner capable of giving rise to a justified annoyance

is liable to imprisonment for a term not exceeding six months or to a fine.

Section 189 of the Penal Code provides for the offence of *disturbance of the practice of religion:*

(1) everyone who

- forcibly or threatening with force
- precludes or disturbs divine service or an act of divine service of a church or religious society located in Austria is liable to imprisonment for a term not exceeding two years

(2) and everyone who

- is up to mischief at a place destined for a legally permitted practice of religion or on the occasion of a legally permitted public divine service or a legally permitted act of divine service or with an object directly destined for a legally permitted divine service of a church or religious society located in Austria in a manner capable of giving rise to a justified annoyance

is liable to imprisonment for a term not exceeding six months or to a fine.

Some remarks might be interesting: Penal protection does not only protect legally recognized but all religious societies located in Austria which have at least some believers. Therefore, the faith of the religious individuals is not relevant for the purposes of penal law.

Provisions do neither protect any religion itself or any divine authority nor the faith in such an authority. Instead, the law protects religious peace among human beings. The Penal Code does not protect respect for divine authority but respect for human feelings which forms a condition for peaceful social interaction of different churches, religious societies, and those without religious denomination. Thus there is specific legislation prohibiting specific religious insult; whether blasphemy is prohibited as well depends on the interpretation of this term. Insofar as blasphemy causes insult of religious feelings one can assert that it is – under certain circumstances – prohibited either. Yet one of the provisions mentioned above remains starting point of consideration.

The status quo of the law has historically emanated from Enlightenment and humanism. In ancient legal systems (e.g. Viennese municipal law in 1221) blasphemy and similar offences were deemed to be the worst crimes which makes clear the theological fundament of criminal law. Religious offences formed a considerable part within the Constitutio Criminalis Theresiana of 1768 and were sentenced draconically. Codes between 1803 and 1852 kept religious offences stipulating much more lenient sentences than before; for the first time faith in God instead of God Himself was subject to protection. These provisions were in force up to a legislative reform in 1975 which established the current provisions aiming merely at securing religious peace.

From a historical point of view gradual penal secularisation has arisen a stringent development of the provisions to date.

Irrespective of this development doctrine justifies a certain extent of penal protection referring to the constitutional freedom of religion[4] by taking it as both a positive and a negative right vis-à-vis the state. The positive aspect of the freedom leads to a constitutional obligation to protect religious feelings in order to guarantee religious peace (religious protection of personality). The case law of the European Court of Human Rights supports such an interpretation.[5]

2. Is there specific legislation prohibiting religious hatred? Is there, in addition or instead, more general legislation prohibiting hate speech and/or incitement to violence, and/or defamation, and/or discriminatory speech? Could this situation be explained on the basis of:

a) historical grounds, and if so which ones?
b) doctrinal grounds, and if so which ones?
c) other grounds?

In its Part 20 the Penal Code includes offences which violate the *public peace*. While its section 281 prohibits calling upon to disobedience vis-à-vis any law, section 282 is more specific: it prohibits most notably calling upon to violate a penal provision. According to both provisions this has to be effected in a printed medium, broadcasted, or in any other way reaching a broad public. Finally, section 283 sets up an even more specific offence: *incitement.* Every one who publicly

- calls upon or goads to a hostile act against a church or religious society located in Austria or against a group belonging to such a church or religious society, a race, a people, a tribe, or a state in a manner capable of endangering public order or
- incites against or insults or decries in a way of hurting human dignity a group belonging to a race, a people, a tribe, or a state is liable to imprisonment for a term not exceeding two years.

In this context incitement means trying to evoke hate and disdain. Incitement against other groups than those mentioned in the provision is not prohibited; churches and religious societies are not protected as institutions by paragraph 2 either. Another difference is that only paragraph 1 mentions the capability of endangering public order while paragraph two prohibits any public incitement.

[4] More precisely Article 14 of the Austrian Basic Law and Article 9 ECHR.

[5] ECtHR, Judgment of 20/09/1994, Otto-Preminger-Institut vs. Austria, Series A no. 295 A.

The incitement under sections 281 and 282 relates to break the (penal) law whereas the incitement under section 283 para. 1 relates to any hostile act against certain groups. Section 283 para. 2 bears no element of calling upon anyone else but punishes plainly the hostile speech.

In addition section 317 of the Penal Code prohibits disparaging of symbols as flags and other national emblems of a foreign state or an international institution in a hostile manner if those symbols have been installed officially and if a broad public is reached.

3. Is there, in any of these provisions, a specific freedom of speech clause? If not, how do these provisions relate to existing (constitutional) legislative provisions concerning freedom of speech?

None of the mentioned provisions contains a particular freedom of speech clause. Freedom of speech is granted in explicit terms only in the Constitution. On the one hand the Austrian Constitution guarantees the freedom to impart opinions[6] as well as to create, impart and teach art;[7] on the other hand Article 10 ECHR provides for the freedom of expression. Article 10 para. 2 ECHR which forms also part of constitutional law in Austria enables the legislator to set up certain restrictions necessary in the public interest.

The concrete restrictions of the freedom of speech in favour of religious feelings appear to be in conformity with the Constitution and the ECHR; the protection of religious peace lies within the scopes of public interests (Article 10 para. 2 ECHR: prevention of disorder) and proportionality. As to the latter criterion, one can argue that not every expression about God or religion per se is penalised; in fact, the expression has to be a disparaging or mocking one and in addition one that is capable of giving rise to a justified annoyance. By means of this open wording courts can reach a decision after an appreciation of values and therefore reject minor crimes. Range of sanctions with a maximum term of imprisonment of six months is comparatively humble (a similar provision in German Penal provides for a prison term of up to three years[8]).

4. Is there in your opinion/according to the leading doctrine a need for additional legislation concerning:

a. the prohibition of blasphemy or religious insult?
To my mind there is no lack of such legislation. By virtue of sections 188 and 189 of the Penal Code acts causing social disorder are caught. In turn, another regime going beyond this extent might be less proportional and thus cross the border of the interference allowed by Article 10 para. 2 ECHR of the freedom of expression.

b. incitement to religious hatred?
The same applies to section 283 of the Penal Code such as to sections 188 and 189 of the Penal Code (see a.).

c. hate speech concerning a group?
There is no need for such an additional legislation.

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[6] Article 13 of the Basic Law on Rights and Freedoms of citizens.

[7] Article 17a of the Basic Law on Rights and Freedoms of citizens.

[8] Section 166 of the German Penal Code.

d. speech or publication with a discriminatory effect?

The prohibitions of section 283 of the Penal Code appear sufficient to me (see c.). Beyond the limits of section 283 of the Penal Code there is no provision which prohibits speech or publication with a discriminatory effect related to a group save the provisions in the context of National Socialism: The *Verbotsgesetz* (Law on Interdiction [of national socialist organisations and institutions])forbids calling upon publicly to reorganise certain national socialist organisations or to get involved with the former National Socialist German Workers Party (Nationalsozialistische Deutsche Arbeiterpartei) or its goals. In addition, the *Verbotsgesetz* provides for a catchall element prohibiting any act in favour of national socialist ideas. By means of this regime one catches certain speeches or publications with a discriminatory effect (furthermore, see e).

Existing provisions in matters of discrimination established in other laws such as the law of equal treatment or certain clauses in employment law do not refer to speech or publication.

e. negationism (denial of genocide or other crimes against humanity)?

As regards negationism, there is only legislation in reference to National Socialism. The Austrian Constitutional Court declared that uncompromising rejection of National Socialism is a fundamental characteristic of the Austrian Republic after Second World War.[9] This legislation is based on the Austrian State Treaty of 1955 and the *Verbotsgesetz* of 1947. Section 3h Verbotsgesetz prohibits qualified public denial, considerable belittlement, endorsement and the attempt of justification of national socialist genocide or other national socialist crimes against humanity.

In contrast to this legislation, denial or belittlement of other crimes against humanity is not prohibited. Possibly, section 283 of the Penal Code may be applied to such cases.

5. Is there any case-law concerning blasphemy, religious insult and/or incitement to religious hatred?

If so, are there cases which resulted in the conviction of the perpetrator?
What is in such cases the procedural status of the victim(s)?

According to the case-law of Austrian Courts freedom of expression and freedom of art have no unlimited scope. Limits consist as so called immanent bounds as well as bounds arising from the effect of other fundamental rights. According to case-law, section 188 of the Penal Code constitutes a necessary condition for efficient use of freedom of religion (see 1.), on account of which courts have not yet denied the application of this provision referring to the freedom of expression or freedom of art.[10]
In the event of a conflict between two fundamental rights one comes to a decision after weighing up the two different aims; to this end the wording of section 188 of the Penal Code leaves sufficient space for weighing up .

The most important cases in which religious feelings played a crucial role are the following:

[9] Collection of Decisions of the Constitutional Court 10.705/1985.

[10] In the Austrian constitutional system by appealing to the Constitutional Court in order to open a procedure under Article 140 Federal Constitutional Law in which it pronounces whether the law is unconstitutional.

1. The Film “Das Gespenst”, Supreme Court–1984:
The movie “Das Gespenst” shows Jesus Christ after having descended from the cross as drinking and bawling derelict having sexual contact with the matron of a convent; also he scoffs at his own acts without still bearing them in mind. Both the court of first impression as well as the court of appeal considered the movie’s tenor disparaging religious precepts in the sense of section 188 of the Penal Code. The court of appeal argued that one reaches a fundamental right’s immanent bounds once the regular and tolerance-based human interaction appears violated. The Supreme Court did not decide on the merits due to previous procedural mistakes. Notwithstanding, doctrine has recognized in the assertions of the Supreme Court that it approves the way of tackling the conflict between two fundamental rights; and that it advances the view that freedom of art shall not safeguard disparaging of religious precepts in a repeated and sustained fashion in pursuance to section 188 of the Penal Code.

2. The Film “Das Liebeskonzil”, Court of Appeal (Innsbruck)–1987:
A similar case concerns the film “Das Liebeskonzil”, supposed to be showed in a cinema in Innsbruck, the capital of the province of Tyrol, which reached the European Court of Human Rights. God the Father is showed as “senile, impotent idiot, Christ as a cretin and Mary Mother of God as a wanton lady with a corresponding manner of expression”. Courts held in 1987 that the showing of the pictures is prohibited under section 188 of the Penal Code because of the massive mockery of religious feelings. It was crucial that a predominant majority of average believers would consider the film disparaging and degrading. The European Court of Human rights did not find a violation of Article 10 of the Convention in the seizure and forfeiture of the film either. These measures interfered with the right of freedom of expression but were, however, aimed at the protection of the “rights of others” and necessary because these expressions were “gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs”. In weighing up the different interests under Articles 9 and 10 of the ECHR, the Court had regard to the fact that the Roman Catholic religion was the religion of the overwhelming majority of Tyroleans.

Both criminal proceedings, concerning “Das Gespenst” and “Das Liebeskonzil”, were conducted as so called independent procedures not directed towards the conviction of an individual but aimed at the forfeiture of the film.
The film “Das Liebeskonzil” is based on a theatre play from 1894. Theatre performances of this original play took place in Vienna in 1991 and Innsbruck in 1992. While in Vienna authorities took no action whatsoever, authorities in Innsbruck discontinued the proceedings after preliminary investigations.

3. The Comic Strip “The life of Jesus”
A younger example is the 2002 comic strip of Gerhard Haderer who portrayed Jesus Christ in his book “The life of Jesus”.[11] The book is based on a description of Jesus Christ continuously intoxicated as a result of consume of frankincense which turns him into a sweet-tempered dreamer deriving his divine inspiration from drugs and working wonders rather at random. The apostles exploit the harmless man in order to benefit themselves. Unlike the previous examples the public prosecutor did neither open the proceedings pursuant to the Media Act nor indict the author.

So far there has not been any conviction pursuant to section 188 of the Penal Code yet.

[11] „Das Leben des Jesus“

4. Graffiti and National Socialism, Racism

A decision of the Supreme Court dealing with the objective characteristics of section 283 of the Penal Code is not directly connected to religious hatred. The Court did not decide on the merits but it held that the graffiti on a publicly located building in the shape of swastika, SS-runes, and the words "hatred" and "Turks off" may be prohibited under section 283 of the Penal Code.[12]

5. Muslim Preacher and incitement to religious hatred

A current case (the public prosecutor is reviewing the facts) matches more precisely the question; allegedly, the fatwas (Islamic legal opinions) of a Muslim preacher of a Viennese Mosque contain some parts which possibly conflict with section 283 of the Penal Code. However, there is no precise information about the outcome of the investigation at the moment.

6. Did the distinction between "blasphemy", "religious insult", "incitement to religious – or racial - hatred", "defamation" or "discriminatory speech" play a role in the case-law, and was it pertinent to the outcome on the case?

The distinctions play a role neither in case-law nor in leading doctrine because the penal provisions do not use these terms.

7. What role does the intention of the perpetrator and/or the foreseeability of the (discriminatory) effects play in the formulation of the legal prohibition, and/or in the prospect of a conviction?

The *intention of the perpetrator* does not play a specific role; if an offence does not provide anything else the law prohibits merely intentional acts/omissions. Since there are no offences of *negligent disparaging of religious precepts* or *negligent incitement* the perpetrator's guilt presupposes his intent. In other words, the perpetrator must consider the realisation of the facts at least possible and accept this realisation (conditional intent). In the case of section 283 of the Penal Code the intention refers to the act itself (e.g. prompting or goading), the publicity, as well as the possible effect of endangering the public order.

This applies respectively to section 188 of the Penal Code; the perpetrator's intent refers on the one hand to the disparaging or mocking of certain persons, things, or institutions and on the other hand to the manner capable of giving rise to a justified annoyance, while there is no necessity of intention as to the blasphemy itself. If the perpetrator is willing to act against God or a church does not play any role.

The *foreseeability* of certain potential effects is an element of the offences; the act is criminal if it is capable of giving rise to a justified annoyance/endangering public order. Whether the annoyance/disorder sets in doesn't play a role. Intent of the perpetrator has to comprehend this ability.

Both, intention and foreseen and accepted effects, are elements of the offence and are therefore not more and not less than two preconditions for the guilt and the conviction. The Penal Law provides some grounds of aggravation, one of which are racist, xenophobic, or other particularly condemnable motives of the perpetrator, influencing the sentence. Insofar as such motives are inherent in the formulation of the relevant offences, this ground of aggravation must not have an impact on the sentence.

[12] Crucial question was whether the perpetrator may be convicted in spite of a damage to property conviction.

8. Is the prosecution of the suspect of an act of blasphemy, religious insult or incitement to religious hatred at the discretion of the prosecutor?
Is there any superior supervisor?
Is there any appeal to a court against non-prosecution?

When the review of the facts gives rise to the assumption that someone has committed a crime and that a conviction appears more likely than an acquittal, the public prosecutor is obliged to indict the concerned person.[13] Hence, he has to assess the facts, the legislation, and the case-law. This procedure is not a discretionary decision.

Within the Austrian constitutional system the public prosecutor is an administrative agency so that there is a supervision in the way that the Minister of Justice may give directives.

There are neither appeals nor other remedies against non-prosecution.

9. Does prosecution of these acts depend on a complaint by the victim(s)?

No contribution whatsoever by the victims is required.

10. Have there recently been important cases of alleged blasphemy, religious insult and/or incitement to religious hatred in your country that arose a lot of public indignation and debate but were not prosecuted or not convicted? What was the reason for non-prosecution/non-conviction? What role did freedom of speech play in that case?

The only recent example of incitement to religious hatred which arose a lot of public indignation is “The life of Jesus” in 2002. Mr. Haderer, the author, was not indicted because the public prosecutor found that he had not committed a crime by writing his book. Freedom of speech played no (obvious) role for the public prosecutor has only to assess the likeliness of a conviction; irrespective of the case-law weighing up the freedom of speech and freedom of religion which has to be taken into account, freedom of speech is not relevant at this stage of the proceedings.

11. What is the attitude of the press in relation to such cases?

Do they report with restraint in order not to aggravate the effects? Or do they purport to compensate by publicity for the non-prosecution?

The recent attitude of the press refers for lack of national cases to foreign events such as, for instance, lately conflict on the Danish cartoon. In this matter the reports have been neutral whereas the comments have referred to freedom of expression on the one hand and respect for religious feelings on the other hand. The tenor was mainly the necessity in a secular society to respect the freedom of expression including the right to produce cartoons. This freedom must exist in a legal and in a de facto way; for this reason the press should not shy at any publications due to possible implications. Notwithstanding, most newspapers did not reprint the Danish cartoons not to intensify the debate or to draw it to Austria.

[13] Or to open a so called diversional procedure pursuant to section 90a of the Penal Procedure Law.

The public discussion on the occasion of “The life of Jesus” (see 5.) was more lurid. The book in question with cartoons was subject to a discussion with intense pros and cons within all the media. The Archbishop of Vienna commented the pictures in an important daily paper provoking a reply of the author. Other annotations were depending on the political alignment of the respective medium or the respective commentator.

REPLY FROM BELGIUM

By Mr Louis-Léon Christians

1. Is there specific legislation prohibiting blasphemy and/or religious insult in your country? Can this be explained on the basis of :

(a) historical grounds, and if so which ones?

(b) doctrinal grounds, and if so which ones?

(c) other grounds?

It seems important to associate with religious insults some offences protecting the peaceful practice of religious rituals. These ones are the main provisions of Belgian criminal code in this field.

Code pénal, Article 142.
Toute personne qui, par des violences *ou des menaces*, aura contraint ou empêché *une ou plusieurs personnes* d'exercer un culte, d'assister à l'exercice de ce culte, de célébrer certaines fêtes religieuses, d'observer certains jours de repos, et, en conséquence, d'ouvrir ou de fermer leurs ateliers, boutiques ou magasins, et de faire ou de quitter certains travaux, sera punie d'un emprisonnement de huit jours a deux mois et d'une amende de vingt-six francs à deux cents francs.

Code pénal, Article 143.
Ceux qui, par des troubles ou des désordres, auront empêché, retarde ou interrompu les exercices d'un culte qui se pratiquent *dans un lieu destiné* ou servant habituellement au culte ou dans les cérémonies publiques de ce culte, seront punis d'un emprisonnement de huit jours à trois mois et d'une amende de vingt-six francs à cinq cents francs.

Code pénal, Article 144.
Toute personne qui, par faits, *paroles*, gestes ou menaces, aura outragé les *objets* d'un culte, soit dans les lieux destinés ou servant habituellement à son exercice, soit dans des cérémonies publiques de ce culte, sera punie d'un emprisonnement de quinze jours à six mois et d'une amende de vingt-six francs à cinq cents francs.

Code pénal, Article 145 and 146.
Sera puni des mêmes peines celui qui, par faits *paroles*, gestes ou menaces, aura *outragé le ministre d'un culte, dans l'exercice de son ministère*.
S'il l'a frappé, il sera puni d'un emprisonnement de deux mois à deux ans et d'une amende de cinquante francs à cinq cents francs.
Code pénal, Article 146.
Si les coups ont été cause d'effusion de sang, de blessure ou de maladie, le coupable sera puni d'un emprisonnement de six mois à cinq ans et d'une amende de cent francs à mille francs.

2. Is there specific legislation prohibiting religious hatred? Is there, in addition or instead, more general legislation prohibiting hate speech and/or incitement to violence, and/or defamation, and/or discriminatory speech? Could this situation be explained on the basis of:

(a) historical grounds, and if so which ones?
(b) doctrinal grounds, and if so which ones?
(c) other grounds?

The enlargement in 2003 of the previous racist hate speech legislation to a protection against religious discrimination and religious hate speech was very controversial and difficult during the debate in the Parliament. The main arguments were the dangerousness of religious extremisms and the democratic necessity for the civil society to be able to use fighting words against these religious abuses (especially against islam and « cults »). But finally, in order to respect the EU Directive 78/2000, the 2003 law has been actually extended to religious discrimination and hate. Since January 2007, a new bill is in discussion in the Parliament in order to replace the 2003 law.

Loi du 25 février 2003 tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des changes et la lutte contre le racisme ***(une nouvelle loi est en discussion au Parlement depuis janvier 2007 : cfr.infra)***

Article 2. …/… § **6.** Le harcèlement est considéré comme une forme de discrimination lorsqu'un comportement indésirable qui est lié aux motifs de discrimination figurant au § 1er a pour objet ou pour effet de porter atteinte à la dignité d'une personne et de *créer un environnement intimidant, hostile, dégradant, humiliant ou offensant.*
§ **7.** Tout comportement consistant à enjoindre à quiconque de pratiquer une discrimination à l'encontre d'une personne, d'un groupe, d'une communauté ou de leurs membres pour un des motifs <visés au § 1er> est considéré comme une discrimination au sens de la présente loi.
…/…

Article 6. § 1er. Est puni d'emprisonnement d'un mois à un an et d'une amende de cinquante EUR à mille EUR ou d'une de ces peines seulement :

- quiconque, dans l'une des circonstances indiquées à l'Article 444 du Code pénal, *incite à la discrimination, à la haine ou à la violence* à l'égard d'une personne, d'un groupe, d'une communauté ou des membres de celle-ci, en raison du sexe, de l'orientation sexuelle, de l'état civil, de la naissance, de la fortune, de l'âge, de la *conviction religieuse ou philosophique*, de l'état de santé actuel ou futur, d'un handicap ou d'une caractéristique physique;

- quiconque, dans l'une des circonstances indiquées à l'Article 444 du Code pénal, donne une publicité à son intention de recourir à la discrimination, à la haine ou à la violence à l'égard d'une personne, d'une groupe, d'une communauté ou des membres de celle-ci, en raison du sexe, de l'orientation sexuelle, de l'état civil, de la naissance, de la fortune, de l'âge, de la conviction religieuse ou philosophique, de l'état de santé actuel ou futur, d'un handicap ou d'une caractéristique physique.

Projet de loi 2722 tendant à lutter contre certaines formes de discrimination (déposé 26 octobre 2006)

Etendue du critère religieux : “En son avis précité du 11 juillet 2006, le Conseil d’État a estimé que le critère consistant à professer «tout autre opinion», figurant dans l’article II-81, ne pouvait être omis de la liste, sans justification objective et raisonnable en sens contraire. Il y a cependant lieu de considérer que cette mention n’était pas nécessaire, eu égard à

l'interprétation d'ores et déjà très large que reçoivent, dans le droit international des droits de l'Homme, les notions de convictions religieuses ou philosophique, ou de conviction politique."

Etendue de la notion de haine : – l'incitation à la haine ou à la violence envers une personne sur base d'un des critères protégés dans les circonstances visées à l'article 444 du Code pénal (= caractère public), et ce, même en dehors des domaines visées à l'article 5 de la loi;

– l'incitation à la discrimination ou à la segregation envers un groupe, une communauté ou ses membres, sur base d'un des critères protégés, dans les circonstances visées à l'article 444 du code pénal, et ce, meme en dehors des domaines visés à l'article 5 de la loi;

– l'incitation à la haine ou à la violence envers un groupe, une communauté ou ses membres, sur base d'un des critères protégés, dans les circonstances visées à l'article 444 du code pénal, et ce, même en dehors des domaines visés à l'article 5 de la loi.

Description des cas religieux par le Centre fédéral pour l'égalité des chances et la lutte contre la discrimination www.diversite.be

Le Centre entend par convictions religieuses ou philosophiques les convictions qui concernent l'existence ou non d'un dieu ou de divinités. Sont donc également visées les convictions philosophiques telles que l'athéisme, l'agnosticisme ou la laïcité.

Les convictions philosophiques qui ne concernent pas des questions relatives à l'existence ou non d'un dieu ou de divinités sont exclues du travail du Centre.

3. Is there, in any of these provisions, a specific freedom of speech clause? If not, how do these provisions relate to existing (constitutional) legislative provisions concerning freedom of speech?

In the Belgian Constitution, freedom of speech and freedom of religion are protected by the same provision :

Art. 19. La liberté des cultes, celle de leur exercice public, ainsi que la liberté de manifester ses opinions en toute matière, sont garanties, sauf la répression des délits commis à l'occasion de l'usage de ces libertés.

The freedom of press and media is protected by

Art. 25. La presse est libre; la censure ne pourra jamais être établie; il ne peut être exigé de cautionnement des écrivains, éditeurs ou imprimeurs.

Lorsque l'auteur est connu et domicilié en Belgique, l'éditeur, l'imprimeur ou le distributeur ne peut être poursuivi.

4. Is there in your opinion/according to the leading doctrine a need for additional legislation concerning:

a) the prohibition of blasphemy or religious insult?
b) incitement to religious hatred?
c) hate speech concerning a group?

d) speech or publication with a discriminatory effect?
e) negationism (denial of genocide or other crimes against humanity)?

There is no debate in Belgium in favor of a new offence of « religious insult ». The bill now discussed in the Parliament would confirm some new offences related to religious hatred and group hate speech.

The offence of negationism enacted in Belgian Law in order to protect the historicity of the Jewish Shoah is often discussed as discriminatory, because of the lack of protection of the historicity of the armenian genocide.

5. Is there any case-law concerning blasphemy, religious insult and/or incitement to religious hatred?
If so, are there cases which resulted in the conviction of the perpetrator?
What is in such cases the procedural status of the victim(s)?

- Court of Appeal of Ghent, 2 may 1988, not published, about some sexual perversity of Jesus Christ and Virgin Mary, no conviction of the perpetrator.

- Court of Appeal of Liege, 28 november 2001, JT 2002, 308, about some fighting words from the Raelian Movement against the Catholic Clergy, conviction of the perpetrator.

- Criminal Court of Brussels, 11 april 1991, JLMB, 1991, 804, about the expression « juif persona non grata », conviction as racial offence.

- Civil Court of Brussels, 25 july 2001, JLMB 2001, 1575, about some polemical accusations against the Raelian Movement, no conviction.

- Council of State, 28 august 2000, about the refusal by the Post Company to distribute some discriminatory advertising, conviction as unlawful censure.

6. Did the distinction between "blasphemy", "religious insult", "incitement to religious or racial hatred", "defamation" or "discriminatory speech" play a role in the case-law, and was it pertinent to the outcome of the case?
What is the leading opinion in legal doctrine about the current relevance of this distinction?

No sufficient data.

7. What role does the intention of the perpetrator and/or the foreseeability of the (discriminatory) effects play in the formulation of the legal prohibition, and/or in the prospect of a conviction?

No sufficient data.

8. Is the prosecution of the suspect of an act of blasphemy, religious insult or incitement to religious hatred at the discretion of the prosecutor?
Is there any superior supervisor?

Is there any appeal to a court against non-prosecution?

The prosecutions of these offences are at the discretion of the public prosecutor. Criminal procedure enable also some kind of « citation directe » by victims for different kind of offences.

9. Does prosecution of these acts depend on a complaint by the victim(s)?

Only commun harrassment offences exclusively depend on a complaint by the victim.

10. Have there recently been important incidents of alleged blasphemy, religious insult and/or incitement to religious hatred in your country that caused a lot of public indignation and debate but were not prosecuted or not convicted? What was the reason for non-prosecution/non-conviction? What role did freedom of speech play in that case?

Three recent public debates and attempt of prosecutions :

- During an artistic manifestation « Europalia Poland », a catholic priest accepted that some « artistic » photos were presented within his church. These pictures (naked Virgin Mary etc) offended some parishionners, but not the priest in charge of the parish. These parishioners tried to stimulate a public prosecution. But in review, they failed in their attempt, because no church authorities (the Bishop) confirm an hypothesis of sacrilege (provided by penal code)
- In another artistic manifestation, a large picture of a quasi-naked woman was placed on the main entrance of an (ancient) church, just near a monument of Virgin Mary has provoked a large public debate, but no prosecutions.
- In a public predication, a very wellknown oriental-catholic priest (revoked previously by his bishop) affirmed that a true understanding of the Koran shows that Islam is more dangerous for Europe than Hitler himself. A public prosecutions for racial (and not religious) hatred has been opened.

11. What is the attitude of the press in relation to such cases? Do they report with restraint in order not to aggravate the effects? Or do they purport to compensate by publicity for the non-prosecution?

One of the most influent and progressist French-speaking newspapers decided in February 2006 not to publish the Danish Cartoons. See below the Editorial :

Le Vif/L'Express, 10/02/2006, page 5: La dérive des continents

Les coups de crayon peuvent être mortels. Le monde occidental, stupéfait, l'a appris en comptant les morts que les manifestations ont déjà provoquées au Liban et en Afghanistan. Ainsi, il aura suffi de quelques mauvais dessins du prophète Mahomet, parus au Danemark voici plus de quatre mois, pour embraser une grande partie du monde arabo-musulman. Les excuses publiques n'y auront rien fait, la colère s'est répandue comme une pandémie furieuse, incendiant des ambassades, saccageant une église ou déchirant des contrats de coopération.

Riposte insensée à nos yeux occidentaux, sa violence doit être condamnée sans appel par tous ceux qui refusent l'obscurantisme, la terreur et le radicalisme haineux. Ceux-là, faut-il le souligner, ne vivent pas d'un seul côté de la planète. Même si leurs voix se font moins entendre dans le brouhaha du moment, il se trouve des musulmans, à Bruxelles comme à Beyrouth, pour refuser cette violence et appeler au calme. Ils ne se sentent pas moins offensés, eux aussi, par les caricatures qui associent stupidement islam et terrorisme.

Interloqué par la réaction démesurée des manifestants, l'Occident l'est aussi par l'ampleur de la contagion. En réalité, la colère n'a pas trouvé partout les mêmes mobiles ni la même sincérité. Des gouvernements ont instrumentalisé les protestations à des fins purement politiques. Et on ne saurait faire abstraction des frustrations électorales du Fatah dans les territoires palestiniens ou de la tension, au Liban, entre islamistes et chrétiens pour comprendre la radicalisation de la rue. En Iran, en Irak, en Afghanistan, l'Europe a repris le rôle du grand Satan habituellement dévolu aux Etats-Unis. Mais, dans cette Union européenne, précisément, où vivent quelque 15 millions de musulmans, nombre d'entre eux ont simplement crié leur exaspération face à l'islamophobie qui les caricature en poseurs de bombes et les enferme dans un amalgame permanent.

Avec ses consulats mis à sac et ses appels au meurtre, " l'affaire Mahomet "évoque l'image effrayante d'un " choc des civilisations ". En accepter l'augure serait la pire des attitudes, amenant chacun à s'y préparer mentalement. Mais comment nier que les relations entre l'Occident et le monde arabo-musulman paraissent plus détériorées que jamais ? Cette fois, ce ne sont pas des armées en marche, conduites par Bush père ou fils, qui soulèvent les clameurs. Seulement quelques petits dessins... C'est dire l'écart qui se creuse entre les deux mondes, comme entraînés par une lente dérive des continents. L'Europe déchristianisée et les nations (ré)islamisées jusqu'au cœur de l'Etat ne se rejoignent pas, aujourd'hui, sur l'expression du religieux, l'impertinence médiatique, la culture de l'image ou la place de la satire.

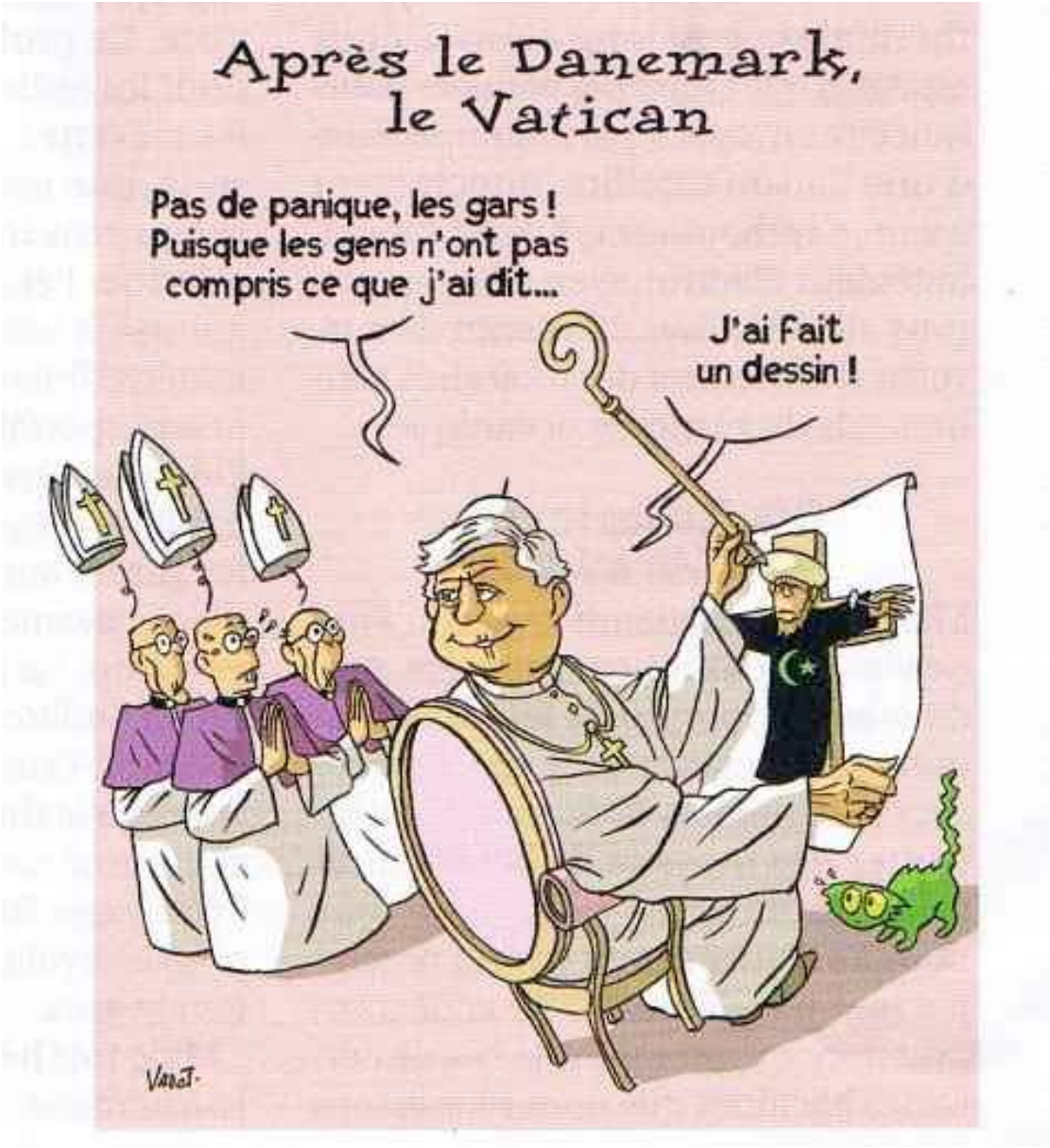
Comment faire admettre, là-bas, que le caricaturiste d'une presse libre pratique un métier salutaire, parce qu'il empêche le lissage de la pensée ? Le caricaturiste n'aime pas ce qui est trop poli. Mais il partage avec le journaliste deux responsabilités qui ne s'accordent pas toujours complètement. Celle, d'une part, de défendre, en l'exerçant, la liberté d'expression, puisqu'elle ne s'use que si l'on ne s'en sert pas. Celle, d'autre part, de respecter les personnes, leurs convictions, leur race, leur dignité... Cette responsabilité-là n'est pas la version pleutre de l'autre. Elle aussi peut demander du courage, pour ne pas hurler avec la meute ou renoncer à un effet facile. A cet égard, représenter Mahomet avec une bombe dans le turban nous

apparaît comme un faux pas. Railler une déclaration, une décision ou la faiblesse d'un dignitaire, même religieux, est une chose. Stigmatiser une religion en s'en prenant à ses fondements en est une autre. Cela procède de la même généralisation qui caricaturait odieusement les juifs jadis, les immigrés aujourd'hui, nourrissant l'antisémitisme et la xénophobie. Curieux retournement, d'ailleurs, pour les dessinateurs danois, et pour bien d'autres journaux à leur suite, qui n'ont fait que renforcer ce qu'ils prétendaient affaiblir. Ce n'est pas tant la liberté de presse qui marque ici des points mais l'intégrisme religieux tueur de libertés.

Le Vif/L'Express n'a donc pas publié les dessins incriminés et il ne le fera pas. Son attachement viscéral à la liberté d'opinion, en ce compris le droit à l'impertinence, n'en reste pas moins total. Pour le souligner, nous avons exceptionnellement invité 7 dessinateurs de presse d'autres médias belges à intervenir sur divers sujets dans ce numéro. Pour dire que les crayons sont indispensables, quand leur mine n'explose que pour faire rire ou réfléchir.

Jean-François Dumont

The same journal regularly published all kinds of religious satirical cartoons, without any public discussion, such as this one :



REPLY FROM DENMARK

By Mr Christoffer BADSE

1. Is there specific legislation prohibiting blasphemy and/or religious insult in your country? Can this be explained on the basis of :

a) historical grounds, and if so which ones?
b) doctrinal grounds, and if so which ones?
c) other grounds?

Blasphemy

There exists a specific prohibition regarding blasphemy in the Criminal Code, namely section 140. In addition section 139 subsection 2, prohibits indecent use of items belonging to the Church.[14]

The Criminal Code in force dates back to 1930, where it replaced the Criminal Code of 1866.

Danish Criminal Code section 140 (Prohibition against Blasphemy) reads:

> § 140
> Any person who, in public, mocks or scorns the religious doctrines or acts of worship of any lawfully existing religious community in this country shall be liable to imprisonment for any term not exceeding four months.
>
> Source: Consolidated Act No. 1000 of 10. May 2006, the Criminal Code (Lovbekendtgørelse 2006-10-05 nr. 1000) Entry into force: 1. July 2006.

The section prohibits blasphemy, which is defined as acts which publicly ridicule or insult in Denmark legally existing religious communities dogmas or worship.

Historical Background

Danish Law
Blasphemy was criminalized in Danish Law (Danske Lov) dating from 1683 in the Book six on misdeeds, chapter 1, provision 7 (6-1-7) and 6-1-8, where blasphemy was considered a capital crime. The piece of legislation was primarily a codification of existing legislation and was considered a major achievement during the period of absolute monarchy. However, new provisions such as the provision against blasphemy were also introduced. The inspiration and structure of the criminal provisions can be traced back to the Decalogue and Mosaic Law, which were common sources of inspiration at the time. The result was that blasphemy was judged very harshly, up until the introduction of the Criminal Code of 1866, which was

[14] As a primary source of information the author has in relation to the historical description of section 140 and section 266 b and historical references to explanatory notes primarily made use of Appendix 1 – J.nr. RA-2006-41-0151 of 15 March 2006 “Gennemgang af relevante retsregler mv.” Published by the Director of Public Prosecutions.

influenced by the period of enlightenment and the philosophy of natural law. It should be mentioned that no there is no records that acts of blasphemous character actually resulted in execution.

The Criminal Code of 1866

The provision on the prohibition against blasphemy in the Criminal Code of 1866 was maintained in the Criminal Code of 1930 in the chapter on crimes against the public order and peace, which also includes prohibition against instigation of public disorder. Hence, the religious peace is considered part of the peace of the society (according to the explanatory notes to the first draft to a new criminal code in the report on the provision from 1912). This is contrary to the prohibition against hate speech, which is located in the chapter on crimes against peace and honour, which e.g. includes the prohibition against defamation of character (see below). The Criminal Code from 1866 is very similar to the criminal code of 1930; however the provision in the Criminal Code (1866) also covered the prohibition of non-public blasphemous statements.

The Criminal Code of 1930 – the preliminary work of the Commission
In the preliminary work before the introduction of the Danish Criminal Code of 1930 the majority of the Commission which prepared the draft bill stated in a report (Straffelovskommissionen of 9. November 1917, 1923, sp. 244-245):

"[…]Where the limits of freedom of expression are overstepped in this area in an indecent way, the denunciation which is expressed in the public opinion is much more efficient and natural than punishment. In relation to the persons who find the religious feelings of value, it is presumed that there is no wish for punishing blasphemous statements or acts. And on the other hand, for those persons who find the protection of religious feeling of foreign nature, the use of punishment will in general be felt as an absurdity.[…]"

The provision on blasphemy was not included in the first draft bill for a new criminal code which was put forward in Parliament. The Ministry of Justice and the Ministry of Ecclesiastical Affairs concurred with the majority of the Commission of the reasoning of the abolishment of the provision.

However, the Bill was not adopted and in 1928 a new Government included a prohibition against blasphemy in the Bill for a new criminal code. The new Government referred (Rigsdagstidende 1927/28, Tillæg A, sp. 5363) to the views of the minority of the Commission, which stated in the report:

In relation to ridicule and scorn of the religious feelings of the individual, there exists a vivid sensation of the indecency in such behavior. Such acts of indecency are contradictory to the interests of society, which should be shown by making such acts liable to punishment in serious cases. The minority has limited the criminal responsibility to public expressions. For among numerous people both outside and within the religious communities it would be offensive if the State did not express its definite disapproval.

Furthermore, the minority stated that there was no risk that the provision in its current form would include religious criticism and expressed religious doubt.

In the parliamentary debates it was also put forward that large part of the population would feel insulted of acts of blasphemous character, hence a prohibition was perceived to be in order. This support the interpretation that the prohibition is not as such introduced out of concern for the minority. Rather it is perceived as a protection of the prevailing social order and peace.

After various proposal, amendments and discussions on the necessity of such a provision, the Criminal Code of 1930 was adopted (Act No. 126 of 15 April 1930), including a prohibition

against blasphemy. The provision has retained the original wording, except for three amendments of technical character.

There have later on been various discussions on the abolishment of the provision.

Parliamentary discussions on the abolishment of the provision

In the parliamentary year 1972-73 the Minister of Justice made a proposal arguing for the abolishment of the provision, stating that the public condemnation would be sufficient and no criminal sanction was necessary. Further it was argued that only three times had the provision been used to prosecute acts of alleged blasphemy (one acquittal and two convictions). There was no general agreement on this issue in parliament and the proposal was postponed and not reintroduced.

In the report 1424 in 2002 submitted by the Council for the Criminal Code (Straffelovsrådet) the council recommend a critical review of various sections in the Criminal Code including section 140 and the relation to e.g. section 266b prohibiting hate speech.

In 2004 in Parliament an opposition party, Socialist People's Party (SF) proposed a Bill on the abolition of section 140 in the Criminal Code (Folketingstidende 2004/2005, 1. samling – L 156), arguing that the section was obsolete and there existed a sufficient and better protection in the Criminal Code's section 266 b on hate speech.

Also, in 2004, the supportive party of the Government, the Danish People's Party (DF) proposed a Bill on the abolition of section 140 (Folketingstidende 2004/2005, 1. samling – Tillæg A page 4704), arguing that in principle and from a religious point of view it was a complete misunderstanding to have a provision on blasphemy in a Christian country. Furthermore, it was stated that the original meaning of the provision was to protect ordinary decency, but now it had become a matter of protecting religious feelings, which was a bad criteria for the rule of law. Finally, the proposal was linked to the Danish broadcasting of Theo van Gogh's movie "Submission", critique of religion, freedom of speech and the complaint by some Muslims to the police on the movie's alleged blasphemous content.

None of the proposals were adopted.

2. Is there specific legislation prohibiting religious hatred? Is there, in addition or instead, more general legislation prohibiting hate speech and/or incitement to violence, and/or defamation, and/or discriminatory speech? Could this situation be explained on the basis of:

a) historical grounds, and if so which ones?
b) doctrinal grounds, and if so which ones?
c) other grounds?

A: The Danish hate speech provision in the Criminal Code includes the protection of a group of people who are degraded etc. on account of their religion etc. In addition there exists Section 81 of the Criminal Code.[15]

[15]Other criminal acts with a racist motive

It is an aggravating circumstance, when the courts are metering out a certain sanction prohibited in the Danish Criminal Code, cf. section 81(1) no. 6, if the criminal act was motivated by others ethnic origin, beliefs, or sexual inclination. This section covers all criminal acts (violence, threats, homicide

The Danish Criminal Code section 266b (Hate Speech) reads:

> § 266b
> Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, scorned or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding two years.
>
> § 2: It shall be considered an especially aggravating circumstance if the conduct can be characterised as propaganda.

Source: Consolidated Act No. 1000 of 10. May 2006, the Criminal Code (Lovbekendtgørelse 2006-10-05 nr. 1000) Entry into force: 1. July 2006.

Historical background
Section 266 b of the Criminal Code (straffeloven) prohibits the dissemination of degrading etc. statements and propaganda. The group of people that are protected include individuals defined according to their religious worship. The provision was inserted in the Criminal Code (Act no. 87 of 15 March 1939. According to the original wording of the provision it was prohibited "by dissemination of false accusations or rumors to persecute or incite hatred against a group of the Danish population on the basis of their faith, origin or citizenship […]" The reason for the introduction of the new provision was according to the explanatory notes the (at the time) recent persecution of racial and religious communities etc. The provision on defamation in the Criminal Code was rightly perceived not to be a sufficient safeguard, since the group of people who fell victim to such an attack could be unspecified to such a degree that the expression would fall outside of the legislative protection from defamation of each and every individual belonging to the group in question.

The temporary wording

The provision got its temporary wording by Act no. 288 of 9 June 1971 amending the provision prior to Denmark's ratification of the UN International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 cf. Administrative Order no. 55 of 4 August 1972, to ensure full compliance with article 4 of ICERD, which require immediate and positive steps to combat all incitement and practice of racial discrimination. The amendment was based on Report No. 553/1969 on Prohibition against Racial Discrimination. By introducing the word "scorn" it was intended to expand the scope of protection compared to the original wording and the intention was also to criminalize ridicule etc. In addition the amendment removed the criteria "false accusations and rumors", since other statements as well were intended to be prohibited, however with due regard to the freedom of speech. Furthermore it was explicitly mentioned that it was only public statements or dissemination in a wider circle that were prohibited and the wording "degrading (in Danish: nedværdigende) treatment or comments" indicated that statements of less severity should be exempted from punishment. The initial proposal suggested the wording "being the subject of derogatory statements", however the latter formulation were perceived to be interfering with freedom of speech considerations. The report rightly points out that the ratification of ICERD does not require "religion" to be included in the provision, however it was perceived unobjectionable to include this ground of discrimination, since it was also included in the original version of the provision.

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etc.). This aggravating circumstance is mentioned in the same provision as other aggravating circumstances.

This solution solved the issue of other international obligations as well, namely the requirement to prohibit religious hatred as stipulated in ICCPR article 20.

The following amendments to the provision have been made:

"Sexual orientation" was inserted in the provision by Act no. 357 of 3 June 1987.

The provision was amended by Act no. 309 of 17 May 1995, where subsection 2 on "propaganda" was inserted. According to the explanatory notes the reason for the amendment was the increased intolerance, xenophobia and racism both in Denmark and abroad. Furthermore, it was stated that Denmark should not be perceived as a safe haven for dissemination of literature containing racism and Nazism. The subparagraph can also be used in incidents where statements are aimed against sexual orientation or religious beliefs.

The word "especially" was inserted in subparagraph 2 of section 266b by Act no. 218 of 31 March 2004; however there was no intention of changing the measurement of sentencing.

3. Is there, in any of these provisions, a specific freedom of speech clause ? If not, how do these provisions relate to existing (constitutional) legislative provisions concerning freedom of speech?

The Danish Constitution

Section 77
Anyone is entitled to publish his ideas in print, in writing and in speech, subject to the authority of the Courts. Censorship and other preventive measures may never be reintroduced.
(Part eight of the constitution: citizens' rights and freedoms).

Although the Constitutional Act guarantees freedom of expression for all, it may be limited in some situations. Limitations include: prohibition against hate speech, slander, prohibition against blasphemy, the obligation of confidentiality and security of the state.
Other relevant provisions include section 70 of the Danish Constitution (Grundloven) which provides that "no person shall be denied the right to full enjoyment of civil and political rights by reason of his creed or descent; nor shall he for such reasons evade any common civil duty".

According to section 77 of the Danish Constitution, any person shall be at liberty to publish his ideas in print, in writing, and in speech, subject to his being held responsible in a court of law. Censorship and other preventive measures can never be re-introduced.
The general opinion is that this provision contains a protection of formal freedom of expression, including a prohibition against prior restraint. The provision does not protect substantive freedom of expression, that is to say the content of the expressions.

However, the section is considered a fundamental value or principle – guiding the legal interpretation unless other important considerations indicate otherwise. Section 77 should be interpreted in the light of ECHR article 10, i.e. prescribed by law and deemed necessary in a democratic society and hence providing a substantive protection of freedom of expression. Freedom of expression is primarily considered a guiding principle and the section is rarely directly invoked in courts or used in the argumentation in the public debate. However, this guiding principle has a significant impact on the application of e.g. criminal provisions limiting the freedom of expression.

There exists no explicit clause in the two provisions, regarding freedom of speech. But explicit considerations regarding the wording and interpretation of especially section 266 b, but also 140 have been done in the explanatory notes.

4. Is there in your opinion/according to the leading doctrine a need for additional legislation concerning:

a) the prohibition of blasphemy or religious insult ?

Having the European history and the period of enlightenment in mind it is important to differ between minority protection and the question of the necessity to have a prohibition in the Criminal Code against blasphemy.

Incitement to religious hatred, intolerance and discrimination, should be prohibited, but this should not lead to less critique of religious doctrines.

In a liberal democracy it should not be necessary to have this prohibition in a Criminal Code.

b) incitement to religious hatred?

In the wording beyond the Danish provision section 266 b goes what is required in accordance to international obligations in regard to protecting incitement to religious hatred and one should be very careful not prohibit or severely limit a necessary discussion in relation to how a religion should fit in a modern secular society.

However, the most vulnerable group at the moment is the Muslim minority which is very exposed in the public debate and in general as mentioned in the ECRI Report on Denmark – recommendation no. 89. Special initiatives should be introduced to help this minority to integrate successfully, however special accommodation in relation the Criminal Code and restricting fundamental rights should not be one of them. Single cases have shown that religion, without a firm reference to a religious group of people also is covered by the section 266 b. Again widening the scope would be problematic in accordance with the arguments raised under a). On the other hand there is a risk of a strategy of evasion by a perpetrator by attacking the religion rather than the religious group. Therefore the cases should be liable to the utmost scrutiny of the motives of the alleged perpetrator and a very concrete assessment by the courts and prosecutors, leaving room for critique of religious doctrines and practices.

c) hate speech concerning a group?

According to CERD Committees latest Concluding Observations on Denmark the State party should increase its efforts to prevent racially motivated offences and hate speech, and to ensure that relevant criminal law provisions are effectively implemented. Furthermore, it was requested the State party to remind public prosecutors and members of the prosecution service of the general importance of prosecuting racist acts, including minor offences committed with racist motives, since any racially motivated offence undermines social cohesion and society as a whole.[16]

These recommendations indicate that is actually more the effective implementation, rather than new provisions, which are required. One could mention two aspects, namely the size of the fines for violating section 266 b, which could be more significant. Also, the public prosecutor could initiate more proceedings in relation to the provision, the awareness by the Director of

[16] CERD/C/DEN/CO/17.

Public Prosecutions of a uniform application of the provision and the obligation to submit information on discontinued cases is a step in the right direction.

Finally one could echo the CERD Committee in M. Gelle v. Denmark:

Statements were made in the context of a political debate does not absolve the State party from its obligation to investigate whether or not her statements amounted to racial discrimination. It reiterates that the exercise of the right to freedom of expression carries special duties and responsibilities, in particular the obligation not to disseminate racist ideas, […]

d) speech or publication with a discriminatory effect?

Other grounds of discrimination could be included in section 266 b, however this is at the moment not perceived to be necessary. One could also wish for a more fundamental debate on whether religion, which at the moment is often linked to ethnicity, rather it should be perceived to some extend as similar to having a certain political opinion.

e) negationism (denial of genocide or other crimes against humanity)?

According to the explanatory notes to section 266 b it is not the intention that scientific theories on racial, national or ethnic differences should fall within the scope of the offences described in section 266 (b) of the Criminal Code. Furthermore, statements not made in an actual scientific context but which otherwise form part of a serious debate should, according to the circumstances, be exempted from punishment. Furthermore, Holocaust-denial is not as such prohibited in Denmark.

ECRI has in the latest report on Denmark has indicated regretted that Holocaust denial and revisionism are not crimes in Denmark and urged the Danish Government to forbid the public denial, trivialization, justification or condoning of the Holocaust denial and revisionism as well as the production, publication and dissemination of Nazi memorabilia and revisionism material as recommended in its General Policy No. 9 on the fight against anti Semitism. (Recommendation no. 85 and 86 in ECRI's third report on Denmark published in May 2006).

In the opinion of the author a criminalizing would obviously limit the freedom of expression and would in a Danish context not be the proper way to combat anti-Semitism. The success of a prohibition is also highly doubtful way to dealing with the problem, since Holocaust deniers in Denmark already are a marginalized group. Rather it is important that students and others are aware of the history by e.g. maintaining the Auschwitz day the 27. of January.[17]

5. Is there any case-law concerning blasphemy, religious insult and/or incitement to religious hatred?

If so, are there cases which resulted in the conviction of the perpetrator?

What is in such cases the procedural status of the victim(s)?

- Please see above on the authority of initiating proceeding.

The case-law regarding the prohibition of blasphemy is very limited. Since the adoption of the Criminal Code of 1930, there have been only three indictments and two convictions, namely

[17] Further information is available at http://www.diis.dk/sw12806.asp and http://www.folkedrab.dk/

UfR 1938.419Ø (1938)
Four men were convicted of the publication of anti-Jewish posters. This would probably today be assessed to be a violation of section 266 b on hate speech, rather than a violation of section 140.

J.nr. 824/46 (1946)
A person was convicted of blasphemy because he during a masquerade was dressed as a priest and he and his spouse performed a baptism of a doll.

Gladsaxe Criminal Court (1971)
Two persons employed by the Danish National Broadcasting Company were indicted for the broadcasting of a song with alleged blasphemous content. They were acquitted, since the court found the song to be a contribution to the debate on the religious views of the sexuality of women.

The Director of Public Prosecutions has also in various cases decided and rejected criminal proceedings, especially on the depicting of Christ in movies and paintings.

The case-law is significantly larger when it comes to section 266 b on hate speech

The Director of Public Prosecutions has also in various cases decided and rejected criminal proceedings, especially on the depicting of Christ in movies and paintings.

The case-law is significantly larger when it comes to section 266 b on hate speech.

“From 1 January 2001 to 31 December 2003, the Danish courts have considered 23 cases concerning violation of section 266 b of the Danish Criminal Code, which prohibits the dissemination of racist statements and racist propaganda. In some of the cases more than one person was indicted. In one case, the court acquitted the person indicted and in another case the court acquitted one of the two persons indicted. In the remaining 21 cases, the courts convicted all the persons indicted.

As to the manner in which the statements/propaganda were disseminated, four cases concerned private persons shouting at someone in a public place like the street, a shop or a bus; seven cases concerned statements published on the Internet; two cases concerned statements published as advertisements; and two cases concerned statements expressed at political party conferences. In three cases, the statements were given to the press during interviews or sent to the press as a press release. In three further cases, the statements were sent by e-mail or by ordinary mail to a number of politicians. As to the persons expressing these statements, 10 cases concerned statements/propaganda from politicians (one of whom was acquitted) and one case concerned a spokesperson for a religious movement, whereas the majority of the rest concerned statements expressed by private persons.

The public prosecution service decided to withdraw charges for violation of section 266 b of the Criminal Code in six cases in 2001, seven cases in 2002 and six cases in 2003 pursuant to section 721 of the Administration of Justice Act , inter alia because of lack of evidence.”[18]

Two convictions in relation to religion and section 266 b can be found cf. U.2002.2575 Ø and U.2002.1947 Ø, where the expression to a larger extend is aimed at the religion than the religious group as such.

[18] Sixteenth And Seventeenth Periodic Report Of Denmark Concerning The International Convention OnThe Elimination Of All Forms Of Racial Discrimination June 2005.

6. Did the distinction between "blasphemy", "religious insult", "incitement to religious – or racial - hatred", "defamation" or "discriminatory speech" play a role in the case-law, and was it pertinent to the outcome of the case?

Not as such. In a Danish context it is a matter of either section 140 on blasphemy, section 266 b on hate speech against a certain group of people or the prohibition against defamation as stipulated in section 267 in the Criminal Code.

What is the leading opinion in legal doctrine about the current relevance of this distinction?

The prevailing opinion seems to be an acknowledgement of a differentiation between protection of vulnerable groups of people, which to a significantly larger extent should be protected, vis-à-vis the protection of religious dogmas, which should endure criticism, almost without limits. Generally religious insult is not a term which is used in a Danish context, where the focus is on the protection of tangible interest and not feelings, dogmas or ideas.

A practical issue is, however, that it is possible indirectly to harass minorities by aiming the criticism at the religion and not at the people. By making a concrete assessment of the motives as seen in the two convictions in relation to section 266 b, this issue can be limited.

7. What role does the intention of the perpetrator and/or the foreseeability of the (discriminatory) effects play in the formulation of the legal prohibition, and/or in the prospect of a conviction?

Mens rea

The alleged perpetrator must have an intention to publish or disseminate to a wider circle the statements, i.e. he or she must be aware that a journalist is recording or citing his or her statements. He must have intent to all parts of the crime.

In relation of the content of the statement, i.e. whether statement is severe enough to violate the provisions, the practice is more of an "objective" assessment on whether the statement generally can be characterized as being degrading. However, in relation to section 266 b, in a recent publication[19] from the Director of Public Prosecution it is recommended of the person who have expressed himself in an alleged derogatory way should be questioned to uncover the motives behind the expression,, unless the complaint is manifestly ill-founded. This administrative change of procedure was due to the opinion of the CERD Committee Communication No. 34/2004, Mohammed Hassan Gelle v. Denmark.

8. Is the prosecution of the suspect of an act of blasphemy, religious insult or incitement to religious hatred at the discretion of the prosecutor?

According to the Danish Act on the Administration of Justice, the police referring to section 749, subsection 2 of the Administration of Justice Act can decide to discontinue an investigation. According to this provision it may be decided to discontinue an investigation, if there is no reasonable suspicion that a criminal offence indictable by the state has been committed.[20]

[19] Director of Public Prosecutions Meddelelse nr. 9/2006 of 14. December 2006.

[20] Se also:

Section 721(1) of the Administration of Justice Act provides:

Is there any superior supervisor?

Prosecuting authority

According to section 719, subsection 2, no. 3 in the Act on the Administration of Justice the offences committed in relation e.g. to section 140 and section 266 b is liable to public prosecution only (The regional public prosecutor). This is an exception from the normal rule, where it is the Chief of Police, that decides whether to initiate proceedings. The reason behind this specific authority is the consideration of the importance of these cases in relation to civil liberties in the Danish constitution.

The Director of Public Prosecutions in September 1995 stipulated that he must be notified of all violations of Section 266 b of the Criminal Code, which are dismissed by the police on the grounds that no offence is assumed to have been committed. It is further stipulated that all cases in which a charge has been made

must be submitted to the Director of Public Prosecution together with a recommendation as to the question of prosecution.

With the aim of achieving a uniform application of section 266 b the Director of Public Prosecutions in December 2006 stipulated that all cases on complaints and investigations are initiated in relation to section 266 b, should be submitted to the Regional Prosecutor, before a case is closed. Cases where a charge has been raised should still be submitted to the Director of Public Prosecution.

In relation to section 266 b the police has full (however, see above) discretion whether or not to open criminal proceedings, subject to appeal to the Regional Public Prosecutor, whose decision is final and cannot be appealed to another administrative authority cf. Section 101 of the Act on the Administration of Justice.[21] The Regional Public Prosecutor can request the Police Chief to carry out further investigations

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"Charges in a case may be withdrawn in full or in part in cases:

(i) where the charge has proved groundless;

(ii) where further prosecution cannot anyway be expected to lead to conviction of the suspect; or

(iii) where completion of the case will entail difficulties, costs or trial periods which are not commensurate with the significance of the case and with the punishment, the imposition of which can be expected in case of conviction."Section 722(1)(iv) of the Administration of Justice Act provides that: "Prosecution in a case may be waived in full or in part in cases … where section 89 of the Criminal Code is applicable when it is deemed that no punishment or only an insignificant punishment would be imposed and that conviction would not otherwise be of essential importance." Section 89 provides: "Where a person already sentenced [for another offence] is found guilty of another criminal offence committed prior to the judgment, an additional sentence must beimposed provided that simultaneous adjudication would have resulted in a more severe sentence."

[21] Section 101, paragraph 2, of the Administration of Justice Act reads, in pertinent parts: "Thedecisions of the Regional Public Prosecutors on appeals cannot be appealed to the Director ofPublic Prosecutions or to the Minister of Justice."

The Public Prosecutors supervise the processing of criminal cases by the Chiefs of Police and hear complaints of decisions made by the Chiefs of Police concerning prosecution. The decision is final and cannot be appealed in the administrative system, cf. section 101 (2), second sentence, of the Administration of Justice Act.[22]

The Director of Public Prosecutions hears appeals of decisions made by the public prosecutors as first instance. A decision made in an appeal by the Director of Public Prosecutions cannot be appealed to the Minister of Justice, cf. section 99 (3), of the Administration of Justice Act.

According to the Act on the Administration of Justice, section 98, The Minister of Justice acts as the superior and supervises the public prosecutors and can, cf. subsection 3, order the prosecutor in a concrete case to initiate, continue, omit or stop prosecution.[23] The instruction has to be in writing stating the reasoning for the decision. Furthermore, the Chairperson of the Parliament has to be informed (this safeguard was introduced in 2005). The potential political interference in prosecution and concrete cases has rightly been criticized by legal scholars; however the actual use of the provision is very limited.

Is there any appeal to a court against non-prosecution?

Section 63 of the Danish Constitution enables decisions of administrative authorities, including the Director of Public Prosecutions and the Ministry of Justice, to be reviewed as to their lawfulness before the courts.

A person can apply to the courts for a review of whether the Director of Public Prosecutions' view of the scope of section 266(b) (1) or of the Ministry's view of his standing is correct.

Obviously there exist complaints mechanisms at the ECtHR and the individual complaint system in the UN Committee system. There have been several cases before the UN CERD Committees on the Danish approach and administrative tradition of being somewhat restraint towards initiating proceedings in relation to section 266 b (1),[24] and the alleged lack of effective action and investigation of racial discrimination. The reasoning behind this interpretation can be summed up by the following quote of the decision to the Regional Public Prosecutor who, on 18 November 2004, upheld the decision of the Copenhagen police in a case which later was decided upon at the UN CERD Committee:

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[22] Section 101, paragraph 2, of the Administration of Justice Act reads, in pertinent parts: "The decisions of the Regional Public Prosecutors on appeals cannot be appealed to the Director of

Public Prosecutions or to the Minister of Justice."

[23] Section 98 of the Administration of Justice Act reads, in pertinent parts: "The Minister of Justice is the superior of the public prosecutors and supervises these.(2) The Minister of Justice may lay down conditions governing the execution of the work of the public prosecutors.(3) The Minister of Justice may issue orders to public prosecutors concerning the processing of specific cases, including whether to commence or continue, refrain from or end prosecution.(4) The Minister of Justice hears appeals of decisions made by the Director of Public Prosecutions as first instance."

[24] This has been acknowledged in the explanatory notes to the Act amending the Criminal Code in 1995 (no. 3009 of 17 May 1995), introducing section 266 b (2) on propaganda, recommending the prosecutor to in show less restraint in severe cases.

"Although the statements are general and very sharp and may offend or outrage some people, I have considered it essential […] that the statements were made as part of a political debate, which, as a matter of principle, affords quite wide limits for the use of unilateral statements in support of a particular political view. According to the travaux préparatoires of section 266 (b) of the Criminal Code, it was particularly intended not to lay down narrow limits on the topics that can become the subject of political debate, or on the way the topics are dealt with in detail."[25]

9. Does prosecution of these acts depend on a complaint by the victim(s)?

If the public is entitled to take proceedings and if it is suspected that a crime has been committed e.g. in cases described in the media, the police can on own initiative initiate investigations cf. the Act on the Administration of Justice section 742, subsection 2.

Section 275, paragraph 1, of the Criminal Code reads: "The offences contained in this Part shall be subject to private prosecution, except for the offences referred to in sections […] 266 b."

If prosecution under section 266(b)(1) of the Criminal Code has not been pursued, a private prosecution under section 267 of the Criminal Code (7) protecting personal honour is available.[26] The plaintiff must in such a case convince the court that he has essential, direct and individual interest in the case to be considered an injured party. This criterion can be somewhat difficult if the alleged violation is abstract, or the target is aimed at the group or the religion.

10. Have there recently been important incidents of alleged blasphemy, religious insult and/or incitement to religious hatred in your country that caused a lot of public indignation and debate but were not prosecuted or not convicted? What was the reason for non-prosecution/non-conviction? What role did freedom of speech play in that case?

The twelve cartoons and section 267 of the Criminal Code
This above mentioned approach according to section 267 of the Criminal Code, protecting personal honour, was tried in relation to the publication of the 12 cartoons in a Danish newspaper in Aarhus district court where various Muslim organizations sued the editors for violation of section 267 of the Criminal Code. According to the judgment some of the plaintiffs could not be considered an injured parties, since the founding documents of some of the associations were not put forward. Hence it could not be assessed whether they had a concrete legal interest in the case. For the other organizations, the court concluded that the motive behind the publication could not be assessed as beinge aimed at degrading Muslims in the public eye. The editors were acquitted.[27]

The twelve cartoons and section 140 and section 266 b of the Criminal Code
Jyllands Posten's twelve cartoons of the Muslim prophet Mohammed was printed on 30 September 2005. According to Jyllands Posten, the aim of the publication was to raise debate about a growing self-censorship in Denmark and abroad, which, according to the newspaper,

[25] Communication No. 34/2004 Submitted by Mohammed Hassan Gelle to the UN CERD Committee.

[26] Section 267, paragraph 1, of the Criminal Code reads: "Any person who violates the personal honour of another [person] by offensive words or conduct or by making or spreading allegations of an act likely to disparage him in the esteem of his fellow citizens, shall be liable to a fine or to imprisonment for any term not exceeding four months."

[27] Aarhus District Court Judgment BS 5-851/2006. October 26; 2006

threatens the freedom of expression. The publication of the drawings was perceived offensive by the Danish Muslim community and has occasioned response, not only in Denmark among Muslims but also in the rest of the world. The newspaper was reported to the district attorney for having violated provisions in the Criminal Code 266b regarding hate speech and provision 140 regarding blasphemy.

The Regional Public Prosecutor did not find that there was a reasonable suspicion that a criminal offence indictable by the state had been committed. In his decision the Regional Public Prosecutor stated that he attached importance to the fact that the article in question concerns a subject of public interest, which means that there is an extended access to make statements without these statements constituting a criminal offence. Furthermore, according to the Danish case law f.i. journalists have extended editorial freedom, when it comes to subjects of public interest. For these reasons the Regional Public Prosecutor did not find basis for concluding that the content of the article constituted an offence under section 140 or section 266b of the Criminal Code.

The Regional Public Prosecutor stated that when assessing what constitutes an offence under section 140 and section 266b the right to freedom of speech must be taken into consideration and that the right to freedom of speech must be exercised with the necessary respect for other human rights, including the right to protection against discrimination, insult and degradation.[28]

The Director of Public Prosecutions concluded on 15 March 2006 that there was no basis for instituting criminal proceedings and therefore rejected the complaints. The Director of Public Prosecutions did not find basis for changing the decision made by the Regional Public Prosecutor and therefore concurred in the decision and stated in relation to section 140:

“Also taking into account that, according to the legislative material and precedents, section 140 of the Danish Criminal Code is to be interpreted narrowly, the affront and insult to the Prophet Muhammed, which the drawing may be understood to be, cannot accordingly with the necessary certainty be assumed to be a punishable offence under section 140 of the Danish Criminal Code.”

[…]

And in the decision and stated in relation to section 266 b:

“The text section of the article does not refer to Muslims in general, but mentions expressly "some" Muslims, i.e. Muslims who reject the modern, secular society and demand a special position in relation to their own religious feelings. The latter group of people must be considered to be comprised by the expression "a group of people" as mentioned in section 266 b, but the text in the article cannot be considered to be scornful or degrading towards this group – even if seen in the context of the drawings.

[28] Copenhagen 23 January 2006, Response by the Danish Government to letter of 24 November 2005 from UN Special Rapporteur on freedom of religion or belief, Ms. Asma Jahangir, and UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mr. Doudou Diéne, regarding cartoons representing the Prophet Mohammed published in a newspaper

(…) [A]ccording to the heading, the drawings in the article depict Mohammed. The drawings that must be assumed to be pictures of Mohammed depict a religious figure, and none of them can be considered to be meant to refer to Muslims in general. Furthermore, there is no basis for assuming that the intention of drawing 2 [The face of a grim-looking bearded man with a turban shaped like an ignited bomb] was to depict Muslims in general as perpetrators of violence or even as terrorists.

The drawings depicting persons other than Mohammed do not contain any general references to Muslims. Furthermore, the depiction of Muslims in these drawings is not scornful or degrading. Not even when the drawings are seen together with the text section of the article is there any basis to assume that the drawings make statements referring to Muslims in general. Accordingly, the Director of Public Prosecutions does not find that in the case of the article "The Face of Mohammed" there has been any violation of section 266 b of the Danish Criminal Code. Based on this the Director of Public Prosecutions also concurs in the decision to discontinue the investigation with regard to violation of section 266 b of the Danish Criminal Code."

Finally it was stated that:

[…]

"Although there is no basis for instituting criminal proceedings in this case, it should be noted that both provisions of the Danish Criminal Code – and also other penal provisions, e.g. about defamation of character – contain a restriction of the freedom of expression. Section 140 of the Danish Criminal Code protects religious feelings against mockery and scorn and section 266 b protects groups of persons against scorn and degradation on account of i.a. their religion. To the extent publicly made expressions fall within the scope of these rules there is, therefore, no free and unrestricted right to express opinions about religious subjects. It is thus not a correct description of existing law when the article in Jyllands-Posten states that it is incompatible with the right to freedom of expression to demand special consideration for religious feelings and that one has to be ready to put up with "scorn, mockery and ridicule"." [29]

In an appendix to the actual decision there is an assessment of the of historical legal traditions and legal interpretation,, as well as reference to the following case-law from the ECtHR on freedom of expression and religious feelings: I.A v Turkey, judgment of 13. September 2005; Wingrove v. U.K., judgment of 25. November 1996 and Otto Preminger-Institute v. Austria, judgment of 20. September 1994.:

11. What is the attitude of the press in relation to such cases?

Do they report with restraint in order not to aggravate the effects? Or do they purport to compensate by publicity for the non-prosecution?

Generally the media do not restrain themselves in the coverage of significant news events. E.g. all of the cartoons in the above mentioned case have been re-published in other newspapers and media, typically not as an act of support but rather as part of the news coverage. However, there has generally not been an agreement of the wisdom of the original publication and during the last year there has been an extensive public debate on freedom of speech, minority rights and the scope of the freedom of religion.

[29] File No. RA-2006-41-0151. 15 March 2006 Decision on Possible criminal proceedings in the case of Jyllands-Posten's Article "The Face of Muhammed" available at: http://www.rigsadvokaten.dk/media/bilag/afgorelse_engelsk.pdf

In relation to ordinary coverage of crime related news, some newspapers abide more strictly to the press ethical rules than others. The rules stipulates that Danish Press Council, The Press Ethical Rules, The National Code Of Conduct on Court Reporting that the mention of persons' family history, occupation, race, nationality, creed, or membership of organisations should be avoided unless this has something directly to do with the case.

In criminal cases against journalists and editors, the courts have made a specific assessment of the purpose of reproducing the racist statements, including whether the protection of persons who are exposed to gross contempt by the statements reproduced is stronger than the need for conveying the statements to the public. However the ECtHR judgment in the case *Jersild v. Denmark 23/9 1994* made a significant impact in Denmark and in the country's jurisprudence. It is now generally accepted that the press enjoys a wide freedom of expression when reproducing racist statements, given its role as a "public watchdog".

REPLY FROM IRELAND

By Ms Finola FLANAGAN

1. Is there specific legislation prohibiting blasphemy and/or religious insult in your country? Can this be explained on the basis of :

(a) historical grounds, and if so which ones?

(b) doctrinal grounds, and if so which ones?

(c) other grounds?

While Article 40.6.1° of the Constitution declares that the publication or utterance of blasphemy is an offence, neither the Constitution nor legislation provides any definition of blasphemy. This is the only crime expressly created in the Constitution.

Section 13(1) of the Defamation Act 1961 creates the criminal offence of "*blasphemous libel*". Section 7(2) of the Censorship of Films Act 1923 provides for the withholding of a certificate from a film with blasphemous content.

In *Corway v. Independent Newspapers (Ireland) Ltd* [1999] 4 I.R. 484 the Supreme Court held that in the absence of a statutory definition of the offence of blasphemy it was impossible to define what the offence of blasphemy consisted of. This task of defining the crime was found to be one for the legislature and not for the courts. In fact, no legislation had ever been enacted creating the 'crime' of blasphemy. At common law blasphemy involved only attacks on the established Church, i.e. the Anglican Church, and did not apply to other religions.[30] Initially, the offence involved the mere denial of Christianity, in England at least, and scurrilous language was considered essential to constitute the offence. In *Bowman* it was said that "…*to constitute blasphemy at common law there must be such an element of vilification, ridicule, or irreverence as would be likely to exasperate the feelings of others and so lead to a breach of the peace*". In the absence of Irish authority on what constitutes the *actus reus* in Irish law, this definition in *Bowman* might well have passed into Irish law and therefore an essential factor in the offence would be the tone of the language. An attack in temperate terms would not constitute blasphemy.

This can be explained on the basis of a) historical grounds.
Firstly, Article 44 of the Constitution, deleted by referendum in 1972, recognised the Catholic Church as having a "*special position*" and also "*the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland as well as the Jewish congregations and other religious denominations existing in Ireland*" being all the religious denominations existing in the State at the coming into operation of the Constitution. While to a contemporary eye Article 44 appears anachronistic, in 1937 it represented a skilful endorsement of religious pluralism. In *Quinn's Supermarket Case* [1972] I.R. at 23 it was said that this "*deletion…has done nothing to alter [the] acknowledgement that, religiously speaking, the society in which we live is a pluralist one*."

Secondly, at common law, blasphemy consisted only of attacks on the doctrines of the established Anglican Church and so did not embrace attacks on other Christian denominations or other world religions. Given its discriminatory nature, it is difficult to see how the common

[30] *Bowman –v- Secular Society* [1917] AC 406

law offence of blasphemy could have survived the enactment of the Constitution having regard to the constitutional ban on religious discrimination in Article 44.2.3°.

2. Is there specific legislation prohibiting religious hatred? Is there, in addition or instead, more general legislation prohibiting hate speech and/or incitement to violence, and/or defamation, and/or discriminatory speech? Could this situation be explained on the basis of:

(a) historical grounds, and if so which ones?
(b) doctrinal grounds, and if so which ones?
(c) other grounds?

An attack on religion might, depending on the circumstances, constitute an offence under section 2 of the Prohibition of Incitement to Hatred Act 1989 which criminalises actions likely to stir up hatred against a group of persons on account of, *inter alia*, their religion.
Other general legislation which might be used to combat racial hatred includes the Criminal Justice (Public Order) Act 1994 which deals with offences such as disorderly conduct in a public place; threatening, abusive or insulting or obscene material in a public place; riot; violent disorder; etc.

Prohibition of Incitement to Hatred Act, 1989 provides:
The long title expresses the Act to be "*an act to prohibit incitement to hatred on account of race, religion, nationality or sexual orientation.*" This is a specific anti-hate speech law. Section 2 provides as follows:

It shall be an offence for a person –

(a) to publish or distribute written material,
(b) to use words, behave or display written material –
(i) in any place other than inside a private residence, or
(ii) inside a private residence so that the words, behaviour or material are heard or seen by persons outside the residence,
or
(c) to distribute, show or play a recording of visual images or sounds,

if the written material, words, behaviour, visual images or sounds, as the case may be, are threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred.

In proceedings for an offence under subsection (1), if the accused person is not shown to the have intended to stir up hatred, it shall be a defence for him to prove that he was not aware of the content of the material or recording concerned and did not suspect, and had no reason to suspect, that the material or recording was threatening, abusive or insulting.

In proceedings for an offence under subsection (1)(b), it shall be a defence for the accused person –
(i) to prove that he was inside a private residence at the relevant time and had no reason to believe that the words, behaviour or material concerned would be heard or seen by a person outside the residence, or

(ii) if he is not shown to have intended to stir up hatred, to prove that he did not intend the words, behaviour or material concerned to be, and was not aware that they might be, threatening, abusive or insulting.

This situation can be explained by c) other grounds. The Prohibition of Incitement to Hatred Act 1989 was passed for the purposes of incorporating the obligations under the International Covenant on Civil and Political Rights. The race and religious make-up of the population in Ireland has changed dramatically since the time of drafting the 1989 Act.

3. Is there, in any of these provisions, a specific freedom of speech clause? If not, how do these provisions relate to existing (constitutional) legislative provisions concerning freedom of speech?

The Irish Constitution (1937) provides at Article 40.6.1° the right of citizens to express freely their convictions and opinions subject to public order and morality.

It was considered that the Prohibition of Incitement to Hatred Act 1989 met both the international obligations and domestic needs to protect the input of free speech and recognised that the right to free speech was not an absolute one.

Ireland, having ratified the European Convention on Human Rights in 1957, gave effect to it in domestic law by the European Convention on Human Rights Act 2003. This was expressed to be subject to the Constitution. The Act requires that statutory provisions must be interpreted and applied insofar as possible in a manner compatible with the State's obligations under the Convention. In *Murphy v. Independent Radio and Television Commission* [1997] 2 I.L.R.M. 467 it was stated that the rights protected by Article 10 of the Convention are for the most part protected by the Constitution and the limitations on the exercise of those rights under the Constitution largely correspond to the limitations expressly permitted by the Convention.

4. Is there in your opinion/according to the leading doctrine a need for additional legislation concerning:

a) the prohibition of blasphemy or religious insult?
b) incitement to religious hatred?
c) hate speech concerning a group?
d) speech or publication with a discriminatory effect?
e) negationism (denial of genocide or other crimes against humanity)?

In general the legislation provides adequately for these matters. The criminal law, together with the Prohibition on Incitement to Hatred Act and the Criminal Justice (Public Order) Act, provide for appropriate offences.

In addition to legislation outlined above, there is equality legislation which prohibits discrimination on grounds of religious belief (or the absence of belief) and on grounds of racism.

A view has been expressed that the lack of prosecutions under the Prohibition on Incitement to Hatred Act 1989 is due to difficulties with standards of proof. Prosecutions may also be made under the Criminal Justice (Public Order) Act 1994. Since prosecutions under the 1994 Act do not require an intention to stir up hatred but only an intent to cause a breach of the peace or being reckless as to whether one may be caused they are more likely to be successful than prosecutions under the 1989 Act[31]. In the circumstances, it is important that existing legislation be utilised.

[31] David Cowhey: Racist Hate Speech Law in Ireland: the Need for Reform; Cork on-line Law Review 2006 IV.

In its Report on *The Crime of Libel* in 1991 the Law Reform Commission concluded "*that there was no place for an offence of blasphemous libel in a society which respects freedom of speech. The argument in its favour that the publication of blasphemy causes injury to feelings appeared to [the Commission] to be a tenuous basis on which to restrict freedom of speech. The argument that freedom to insult religion would threaten the stability of society by impairing the harmony between groups seemed highly questionable in the absence of any prosecutions.*[32] The Commission recommended that in any revision which might be undertaken by referendum of the Constitution so much of Article 40.6.1 which renders the publication or utterance of blasphemous matter an offence should be deleted. The Law Reform Commission recommended that, in the event of that recommendation not being accepted, a new offence entitled "*publication of blasphemous matter*" should be created governing both Christian and non-Christian religions. Blasphemous matter, they recommended, should be defined "*as matter the sole effect of which is likely to cause outrage to a substantial number of the adherents of any religion by virtue of its insulting content concerning matters held sacred by that religion*." No such offence has been created.

An all-party Committee of the Oireachtas was established in 1994 to review the Constitution in its entirety. This Review Group also recommended that "*the retention of the present constitutional offence of blasphemy is not appropriate*". They noted particularly that there had been no prosecution for blasphemy in the history of the State. They commented that "*insofar as the protection of religious beliefs and sensibilities is necessary, this could best be achieved by carefully defined legislation along the lines of the Prohibition of Incitement to Hatred Act 1989 which applies equally to all religious groups, but which at the same time took care to respect fundamental values of free speech and freedom on conscience.*"

There is no "negationism" or crime of denial in Irish law.

5. Is there any case-law concerning blasphemy, religious insult and/or incitement to religious hatred?
If so, are there cases which resulted in the conviction of the perpetrator?
What is in such cases the procedural status of the victim(s)?

There have been very few blasphemy prosecution in Ireland and none since Independence in 1922. The only case in Ireland on the offence of blasphemy is *Corway v. Independent Newspapers (Ireland) Ltd* [1999] 4 I.R. 484. The applicant sought leave under the Defamation Act 1961 to institute criminal proceedings for blasphemous libel against the respondents following a cartoon and caption accompanying a newspaper article on the implications of a divorce referendum. The Supreme Court held that in the absence of any legislative definition of the constitutional offence of blasphemy was impossible to say of what the offence of blasphemy consisted. The Court found that whilst the cartoon in question may have been in bad taste no insult to the Blessed Sacrament was intended and no jury could reasonably conclude that such insult existed or was intended to exist.

I am not aware of any case brought before the Irish courts on the issue of incitement to religious hatred. In such a case the victim(s) would appear in court as a prosecution witness(es).

6. Did the distinction between "blasphemy", "religious insult", "incitement to religious or racial hatred", "defamation" or "discriminatory speech" play a role in the case-law, and was it pertinent to the outcome of the case?

[32] *The Crime of Libel*, Law Reform Commission (1991) at paragraph 17.

What is the leading opinion in legal doctrine about the current relevance of this distinction?

The distinction between "blasphemy", "religious insult", "incitement to religious or racial hatred", "defamation" or "discriminatory speech" did not play a role in the *Corway* case.

7. What role does the intention of the perpetrator and/or the foreseeability of the (discriminatory) effects play in the formulation of the legal prohibition, and/or in the prospect of a conviction?

Under the Prohibition of Incitement to Hatred Act 1989 the accused will be guilty of an offence if the written material, words, behaviour, visual images or sounds, as the case my be, are threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred. It is to be noted that the

Prohibition of Incitement to Hatred Act, 1989 Section 2(2) does not rely on actual harm being caused and only requires intention. Therefore a lack of intention is a defence. Section 4 creates an offence of preparation or possession of material with a view to its distribution, broadcasting, etc. Not only must the words the "*threatening, abusive or insulting*", they must also be intended or likely to stir up hatred. Defences include, where an accused is not shown to have intended to stir up hatred, that he or she was not aware of the content of the material and did not suspect that the material was threatening, abusive or insulting. It is a defence in relation to threatening, abusive or insulting words, behaviour or material delivered inside a private residence that the accused had no reason to believe that they would be seen or heard outside the private residence.

This is in contrast to the Criminal Justice (Public Order) Act 1994 (see paragraph 18 below) which, by contrast, does not require an intention to stir up hatred but only an intent to cause a breach of the peace or being reckless as to whether one may be caused. The point is made that prosecutions are more likely to be successful pursuant to the Criminal Justice (Public Order) Act 1994 than the 1989 Act.[33]

Under the Criminal Justice (Public Order) Act 1994 the accused must have intended to cause a breach of the peace or been reckless as to whether one may have been caused.

8. Is the prosecution of the suspect of an act of blasphemy, religious insult or incitement to religious hatred at the discretion of the prosecutor?
Is there any superior supervisor?
Is there any appeal to a court against non-prosecution?

Leave of the court is required under the Defamation Act 1961 in order to institute criminal proceedings for blasphemous libel. However, as previously stated the offence of blasphemy is not statutorily defined in Ireland.

Offences under sections 2, 3 and 4 of the Prohibition on Incitement to Hatred Act 1989 may be tried summarily or on indictment. In general, a file is sent to the Director of Public Prosecution's Office by the Gardaí Síochana on all indictable offences where a decision has to be taken whether to prosecute summarily or on indictment. Subject to the right of the presiding judge to refuse jurisdiction, cases may be prosecuted summarily. However, the Gardaí Síochana are

[33] David Cowhey: Racist Hate Speech Law in Ireland: the Need for Reform; Cork on-line Law Review 2006 IV

directed to refer any file to the DPP if they consider trial on indictment is warranted. The Gardaí are free to refer any prosecution to the DPP for legal advice. It appears that most offences under section 2 are dealt with summarily.

There is no appeal against non-prosecution.

9. Does prosecution of these acts depend on a complaint by the victim(s)?

While prosecutions are most likely to take place if there are victims who make complaints to the Gardaí it would also be open to the Gardaí to initiate the criminal proceedings themselves.

10. Have there recently been important incidents of alleged blasphemy, religious insult and/or incitement to religious hatred in your country that caused a lot of public indignation and debate but were not prosecuted or not convicted? What was the reason for non-prosecution/non-conviction? What role did freedom of speech play in that case?

There have been no such recent incidents in Ireland.

11. What is the attitude of the press in relation to such cases?
Do they report with restraint in order not to aggravate the effects? Or do they purport to compensate by publicity for the non-prosecution?

There have been no such recent incidents for the press to report on in Ireland.

REPLY BY THE NETHERLANDS

By Mr Pieter vanDIJK

1. Is there specific legislation prohibiting blasphemy and/or religious insult in your country ? Can this be explained on the basis of :

a) historical grounds, and if so which ones?
b) doctrinal grounds, and if so which ones?
c) other grounds?

In the Netherlands there is specific legislation prohibiting blasphemy and religious insult. The relevant provisions are to be found in the *Wetboek van Strafrecht*, the Dutch Penal Code (hereinafter: PC).

Article 147 PC provides that a term of imprisonment of not more than three months or a fine of the second category shall be imposed upon: (1) a person who publicly, either orally or in writing or by image, offends religious sensibilities by malign blasphemies; (2) a person who ridicules a minister of religion in the lawful execution of his duties; (3) a person who makes derogatory statements about objects used for religious celebration at a time and place at which such celebration is lawful.

The second part of this provision (sections 2 and 3) stems from the year 1886. The first part, however, was adopted as late as 1932. In 1886, Minister of Justice Modderman, a liberal, found there was no need for legislation on blasphemy.[34] In the thirties of the twentieth century however, the so-called *Lex Donner* was adopted after left-wing anti-religious propaganda had been felt to become a serious threat to the peace of the land.

Article 429bis PC provides that a person who, in a place visible from a public road, places or fails to remove words or images that offend religious sensibilities by reason of their malign and blasphemous nature is liable to a term of detention of not more than one month or a fine of the second category. Whereas Article 147 PC is regarded as a serious offence against public order,

Article 429bis PC counts as a lesser offence related to public order. This provision also entered into force in 1932.

With regard to blasphemy, one may also refer to Article 147a PC. This article provides, *inter alia*, that a person who disseminates, publicly displays or posts written matter or an image containing statements that offend religious sensibilities by reason of their malign and blasphemous nature, or who has such in stock to be disseminated, publicly displayed or posted, is liable to a term of imprisonment of not more than two months or a fine of the second category, where he knows or has serious reason to suspect that the written matter or the image contains such statements.

[34] A.L.J. Janssens & A.J. Nieuwenhuis, *Uitingsdelicten* [Crimes consisting of Expression], Deventer: Kluwer 2005, p. 197.

Religious insult is regarded as a serious offence against public order. The main provisions are Articles 137c and 137e PC. They were inserted into the Penal Code in 1934, especially in order to protect Jewish and Roman-Catholic citizens.[35] In 1971, some amendments were made in order to comply with the International Convention on the Elimination of all Forms of Racial Discrimination.

It must be stressed that these provisions do not aim specifically at the prohibition of religious insult, but of all kinds of discriminatory acts.

Article 137c PC provides that any person who verbally or by means of written or pictorial material gives intentional public expression to views insulting to a group of persons on account of their race, religion or convictions, their heterosexual or homosexual preferences or physical, mental or intellectual disability, shall be liable to a term of imprisonment not exceeding one year or to a fine of the third category.

Article 137e PC provides, *inter alia*, that any person who for reasons other than the provision of factual information makes public an utterance which he knows or can reasonably be expected to know is insulting to a group of persons on account of their race, religion or convictions, heterosexual or homosexual preference, or physical, mental or intellectual disability, or which incites hatred against or discrimination of other persons or violence against the person or property of others on account of their race, religion or convictions, heterosexual or homosexual preference or physical, mental or intellectual disability, shall be liable to a term of imprisonment not exceeding six months or to a third-category fine.

For the prohibition of religious insult, one does not have to rely on the general provisions on defamation, since Articles 137c and 137e deal with specific cases on discrimination.[36] One could refer, though, to Articles 146 and 148 PC. They are highly relevant to the topic concerned. Besides, they have been part of Dutch law since 1886.

According to Article 146 PC, a person by whom, by creating disorder or by making noise, either a lawful public gathering intended to profess a religion or a belief, or a lawful ceremony for the professing of a religion or a belief, or a lawful funeral service is intentionally disturbed, is liable to a term of imprisonment of not more than two months or a fine of the second category.

Article 148 PC provides that a person who intentionally prevents or obstructs lawful access to a cemetery or crematorium, or the lawful transport of a dead human body to a cemetery or a crematorium, is liable to a term of imprisonment of not more than one month or a fine of the second category.

2. Is there specific legislation prohibiting religious hatred? Is there, in addition or instead, more general legislation prohibiting hate speech and/or incitement to violence, and/or defamation, and/or discriminatory speech? Could this situation be explained on the basis of:

a) historical grounds, and if so which ones?

[35] B. van Stokkom, H. Sackers & J-P Wils, Godslastering, discriminerende uitingen wegens godsdienst en haatuitingen; een inventariserende studie [Blasphemy, discriminating utterances on the basis of religion and hate utterances; an inventory (WODC-rapport), Nijmegen: Radbout University 2006, p. 36.

[36] See A.L.J. Janssens, *Strafbare belediging* [punishable insult], Amsterdam: Thela Thesis 1998.

b) doctrinal grounds, and if so which ones? other grounds

There is no specific legislation prohibiting religious hatred. Hate speech is covered by Article 137c PC. There is, however, an article which prohibits the incitement to hatred. The first paragraph of Article 137d PC stipulates that any person who verbally or by means of written or pictorial material publicly incites hatred against or discriminating of other persons or violence against the person or the property of others on account of their race, religion, convictions, sex, heterosexual or homosexual preference or physical, mental or intellectual disability, shall be liable to a term of imprisonment not exceeding one year or to a fine of the third category. This provision, too, was adopted in 1934, for the same reasons as Articles 137c and 137e PC and amended in 1971 in order to make Dutch law compatible with international law binding on the Netherlands.

In 1992, a new provision, relating to incitement to (religious) hatred, was adopted. Article 137f stipulates that any person who participates in, or provides financial or other material support for, activities aimed at discrimination against persons on account of their race, religion, convictions, sex, their heterosexual or homosexual preference or physical, mental or intellectual disability, shall be liable to a term of imprisonment not exceeding three months or to a second-category fine.

3. Is there, in any of these provisions, a specific freedom of speech clause ? If not, how do these provisions relate to existing (constitutional) legislative provisions concerning freedom of speech?

None of the provisions mentioned contains a specific freedom of speech clause. Article 7 of the Constitution guarantees the right to freedom of speech. The first paragraph holds that no one shall require prior permission to publish thoughts or opinions through the press, without prejudice to the responsibility of every person under the law. The second paragraph provides that rules concerning radio and television shall be regulated by Act of Parliament. There shall be no prior supervision of the content of a radio or television broadcast. The third paragraph determines that no one shall be required to submit thoughts or opinions for prior approval in order to disseminate them by means other than those mentioned in the preceding paragraphs, without prejudice to the responsibility of every person under the law. The holding of performances open to persons younger than sixteen years of age may be regulated by Act of Parliament in order to protect good morals. According to the fourth and last paragraph, the preceding paragraphs do not apply to commercial advertising.

The words 'under the law' in the first paragraph refer to provisions of primary legislation. However, the same words in the third paragraph are given a broader meaning in legal doctrine and practice, including delegated legislation and legislation adopted by provincial and municipal councils. Some of the provisions of the Penal Code discussed in section 1 and 2 are examples of primary legislation restricting the right to freedom of speech, such as Articles 137c-137e PC.

According to Article 120 of the Constitution, courts do not have power to review the compatibility of primary legislation with the Constitution. They do have the power, though, and even the obligation to review the conformity of Dutch law and its application with self-executing provisions of treaties and of decisions of international organizations. This is where, *inter alia*, Article 10 of the European Convention on Human Rights [hereafter: ECHR] comes into play. Consequently, Article 7 of the Constitution is not the only relevant freedom of speech clause to look at by the courts.

Freedom of speech is one of the factors which may need to be taken into account by the court when adjudicating on the question whether the offence of Article 137c PC has been committed. The same applies to freedom of religion, laid down in Article 6 of the Constitution. So the relation between the relevant provisions in the Penal Code and the right to freedom of speech is not a one-way route.

4. Is there in your opinion/according to the leading doctrine a need for additional legislation concerning:

c) the prohibition of blasphemy or religious insult ?
d) incitement to religious hatred?
e) hate speech concerning a group?
f) speech or publication with a discriminatory effect?
g) negationism (denial of genocide or other crimes against humanity)?

Legal doctrine is very much intrigued by the question of whether there is a need for additional (or even less) legislation concerning religious insult and blasphemy and so are politicians and members of the public.

Simultaneously, much doctrinal debate focuses on the question of what should be the policy of the *Openbaar Ministerie*, the Dutch Public Prosecution Service, in cases in which the relevant provisions of the Penal Code restrict freedom of speech. If threats are made, in case of incitement to violence, attacks of human dignity or verbal abuse, penal law may come into play.[37] In a publication issued by the WODC (the Research and Documentation Centre affiliated with the Ministry of Justice) is has been argued that incitement to violence should be the key criterion when it comes to the determination of the question whether the offences of Article 137c PC or Article 137d PC have been committed.[38]

Although Article 147 PC does not play a role of importance in the case law,[39] it now is at the centre of public attention after the Dutch film maker Theo van Gogh was brutally, ritually murdered by a religious fundamentalist on the 2nd of November 2004. He was soon to become the symbol of freedom of expression.

In reaction to the murder, Prime Minister Balkenende pleaded for a more restrictive approach towards freedom of speech, in the sense that an increased awareness of the suffering caused by certain expressions is desirable. The Minister of Justice at the time felt that it was recommendable to initiate new, more strict legislation. The Minister for Immigration and Integration, however, said there was no need to do so. On the contrary, more should be made of the integration of those who are new to the country. In short, the debate on whether legislation ought to be changed is said to be very much influenced by the alleged clash between cultures.[40]

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[37] A. Nieuwenhuis, 'Tussen godslastering en kerstgedachte' [Between Blasphemy and Christmas Thoughts], *Mediaforum* 2005-1, p. 1.

[38] A. Ellian in: *Vloeken, schelden en schimpen* [Swearing, Calling Names and Scoffing], Justitiële Verkenningen 3|03, Den Haag: WODC 2003, p. 35.

[39] See below, under 5.

[40] See for instance P.B. Cliteur, 'Godslastering en zelfcensuur na de moord op Theo van Gogh [Blasphemy and Self-censorship after the Murder of Theo van Gogh], *Nederlands Juristenblad* 2004, p. 2328-2335.

The necessity of new legislation is a much debated topic, both in and outside The Hague. In relation to the blasphemy clause, proponents of abolition of Article 147 PC combat advocates of more strict application and extension of the said article.

Among the questions raised by MPs, there are often questions asked by members of the small Christian parties which have to do with blasphemy.[41]

Two MPs have suggested to introduce an alternative to legal protection provided by the courts.[42] Their fellow members of Parliament have been critical of this idea.[43] The same two MPs also declared themselves in favour of adaptation of Article 137d PC, since they found that this provision was interpreted too narrowly by the courts.

In a recent WODC-report, researchers from the University of Nijmegen give an overview of the doctrine.[44] Bills that aim to restrict the freedom of speech use to raise much public indignation. For this reason, the researchers are of the opinion that initiating new legislation or abolishing existing laws has no prospect. The existing legal provisions should be better used. First, existing legal provisions and case law offer sufficient scope for prosecuting outspoken racists and experienced hate mongers. In those cases a more strict prosecution policy might be initiated. Secondly, they argue that the case of law of the European Court of Human Rights provides for opportunities to reconsider prosecution policies.[45] Since the present government has tendered its resignation, it is for the new government to respond to this report.[46]

Recently a bill concerning negationism was introduced by a Member of Parliament.[47] Since, as said before, Article 120 of the Constitution provides that the constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts, constitutional review in the (pre-)parliamentary process is of imminent importance. The opinion of the Council of State of August 2006 on the initiative has not been made public, yet, and nothing else has been heard about the fate of the initiative.

5. Is there any case-law concerning blasphemy, religious insult and/or incitement to religious hatred?

If so, are there cases which resulted in the conviction of the perpetrator?

What is in such cases the procedural status of the victim(s)?

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[41] See, for instance, *Questions II* 2006/2007, nr. 2060705680; *Second Chamber* (Annex) 2005-2006, nr. 2019; *Second Chamber* (Annex) 2004-2005, nr. 1993.

[42] *Second Chamber*, 2005-2006, 30 448, nr. 1 (Initiative memorandum by MPs Koopmans and Van Haersma Buma, 'Alles van waarde is weerbaar; vrijheid is een verantwoordelijkheid' [Everything of Value is Defensible; Freedom is Responsibility]).

[43] *Second Chamber*, 2006-2007, 30 449, nr. 3, p. 13-14.

[44] B. van Stokkom, H. Sackers & J-P Wils, *supra* (note 3).

[45] See also *Second Chamber*, 2004-2005, 29 800 VI, nr. 41; *Second Chamber* 2006-2007, 30 800 hoofdstuk VI, nr. 2, p. 217; *Second Chamber*, 2005-2006, 30 800 hoofdstuk VI, nr. 2, p. 236.

[46] *Second Chamber*, 2006-2007, 30 800 VI, nr. 38.

[47] *Second chamber*, 2005-2006, 30 579 (initiative by MP Huizinga-Heringa).

On the one hand, there have been very few cases concerning blasphemy tried in Dutch courts. In 1968, prosecution against the well-known author Gerard van het Reve (alias: Reve) failed.[48] The writer had presented God as a donkey. The Supreme Court held that only a person who had had the intention to express himself with regard to a particular religion in a contemptible and humiliating manner, was guilty of blasphemy in the sense of Article 147 PC. According to the Supreme Court the words 'malign[49] blasphemies' did not merely have the function to describe a certain form of expressions which were capable of hurting religious feelings; they also implied a subjective element of an intention to show contempt for the Supreme Being.[50] Ever since this judgment, no prosecutions on the basis of Article 147 PC have been made,[51] allegedly for the reason that accusations are hardly ever reported to the police.[52]

On the other hand, many cases concerning discriminatory insult on account of race and/or religion have been tried in court and so have some cases concerning incitement to racial and/or religious hatred or discrimination. In a vast majority of these cases, the perpetrator has been convicted, at least during the past seven years. However, the discrimination clauses appear not to really bite, when discriminatory acts or expressions merely relate to religions or religious convictions.[53] And in cases where insults or incitements to hatred or discrimination concerned homosexuality, acquittals have been reached.[54]

Only in two cases of racial insult acquittals have been upheld by the Supreme Court in appeal in cassation. First, this is what happened in the *Somalia's*-case concerning racist remarks in an interview, in which the Supreme Court on appeal in cassation quashed a judgment made by the Den Bosch Court of Appeal.[55] Secondly, the prosecution failed in a case in which it argued that Jewish citizens had been intentionally insulted on account of their race and religion in a novel.[56]

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[48] See E.J. de Roo, *Godslastering: rechtsvergelijkende studie over blasfemie en religiedelicten* [Blasphemy; comparative legal study on blasphemy and delicts relating to religion], Deventer: Kluwer 1970, p. 113-125.

[49] Malign, or: scornful.

[50] Court of Cassation 2 april 1968, *NJ* 1968/373, annotated by Bronkhorst (Donkey-case).

[51] On the 29th of January 2007, the Public Prosecution Office announced its decision not to prosecute pop singer Madonna, who had posed as a crucified Christ figure on a larger than life, lighted cross in her latest concert tour. The youth section of a Christian, political party had reported the offences laid down in Article 147 PC and Article 137c PC.

[52] B. van Stokkom, H. Sackers & J-P Wils, *supra* (note 3), p. 59.

[53] *Second Chamber*, 2003-2004, 29 614, nr. 2, p. 14 (Grondrechten in een pluriforme samenleving [Basic Rights in a Pluriform Society]).

[54] The most notorious is the *Van Dijke*-case (Court of Cassation 09-01-2001, case 00945/99, *NJ* 2001, 203; Court of Appeal The Hague 09-06-1999, case 2200278098), see below under 7; Court of Appeal Arnhem 26-06-2001, case 21-000117-00 (minister). This judgment was upheld by the Court of Cassation (14-03-2003, case 01977/01, *NJ* 2003, 261). Also, see District Court Rotterdam 08-04-2002, case 10/040070-01 (Imam).

[55] Court of Cassation 30-09-2003, case 01752/02, *NJ* 2004, 189, annotated by PMe (Somalias).

[56] Court of Cassation 09-10-2001, case 01012/00, *NJ* 2002, 76, annotated by JdH (dance lessons). See below under 7.

The majority of convictions concern Article 137c PC. Intentional public expressions were said to be punishable where they were felt to be insulting to Jewish citizens on account of their race[57] and religion,[58] to foreigners on account of their race[59] and to asylum seekers on account of their race[60]

Religious insult through the internet was also deemed punishable on the basis of Article 137c PC.[61]

The Dordrecht District Court found both a young woman and a young man guilty of the criminal offence laid down in 137e PC in October 2006. Wearing t-shirts, they made public an utterance which they knew or could reasonably be expected to know were insulting to Jewish citizens on account of their race.[62]

Article 137e was also at the basis of a conviction pronounced by the Haarlem District Court in February 2006. Among other things by keeping emblems with swastikas, they were said to have made public an utterance which they knew or could reasonably be expected to know were insulting to Jewish citizens on account of their race.[63]

The Den Bosch District Court found a young man guilty of the offence of Article 137c PC but not of Article 137d. In this case the suspect had given intentional public expression to views insulting to a group of persons on account of their religion, in this case the Islam.[64] It was held that the exercise of the freedom of expression is subjected to restrictions that are necessary in a democratic society for the prevention of excesses of intolerance.

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[57] District Court Zutphen 18-07-2006, case 06/460548-05, *NJ* 2005, 419.

[58] District Court Amsterdam 27-01-2005, case 13/037899-04 (Parnassus road Amsterdam); District Court 30-11-2006, case 11/500277-06 (Hardinxveld-Giessendam).

[59] Court of Appeal Amsterdam 11-09-2003, case 23-001934-01; District Court 30-11-2006, case 11/500277-06 (Hardinxveld-Giessendam); District Court Zwolle 03-01-2006, case 07.400643-05 (Portuguese).

[60] Court of Appeal 's-Hertogenbosch 29-04-2003, case 20.000199.02 (Echt); District Court Leeuwarden 08-06-2000, case 17/085214-00 (Kollum). Also, see Court of Appeal Leeuwarden 18-10-2001, case 24-000544-00, (Kollum).

[61] District Court Amsterdam 25-01-2006, case 13/463305-05 (The Periodic Internet System). Appeal was dismissed by the Amsterdam Court of Appeal (17-11-2006, case 23-000547-06). Also, see District Court 's-Hertogenbosch 21-12-2004, case 01/040521-04 (Rosmalen).

[62] District Court Dordrecht 05-10-2006, case 11/500399-06 (Papendrecht I) and District Court Dordrecht 05-10-2006, case 11/500398-06 (Papendrecht II).

[63] District Court Haarlem 20 februari 2006, case 15/034067-04 (Schiphol).

[64] District Court 's-Hertogenbosch 19-07-2005, joint cases 01/826234-05, 01/820106-05 (Valkenswaard).

There have been convictions of suspects for incitement to hatred against refugees and asylum seekers on account of their race[65] or religion[66], and for incitement to discrimination against foreign workers on account of their race.[67]

Incitement to hatred through internet is also punishable on the basis of Article 137d PC. This conclusion was reached by the Dordrecht District Court in 2002.[68]

The prosecution based on Article 137d PC against the so-called 'Hofstad'-group may be regarded as remarkable from a legal point of view. Members of this group had been prosecuted on suspicion of many criminal offences, among them membership of a criminal organisation (Article 140 PC) and of a terrorist organisation (Article 141 PC). The Rotterdam District Court found that the organisation they belonged to, was aimed at incitement to hatred on account of people's religion or their homosexual preference.[69]

If victims of a crime have suffered loss, they may initiate civil proceedings against the suspect or apply for a one-off payment from the Criminal Injuries Compensation Fund. They may also attempt to obtain compensation by requesting the public prosecutor to claim their loss. However, blasphemy, religious insult and incitement to religious hatred are all offences against the public order. Besides, the offences laid down in Articles 137c and 137d demand insult or incitement to hatred of a group of persons. In many cases it is not possible to specify a particular victim. This may explain why there have not been many such requests in the cases discussed. In some of the abovementioned cases, though, victims have requested the public prosecutor to claim their loss. In the so-called *Papendrecht*-cases such claims were declared inadmissible in the absence of direct loss.[70] In the *Portuguese*-case a claim was successful, though it had not been made in relation to the offence of Article 137c PC.

6. Did the distinction between "blasphemy", "religious insult", "incitement to religious – or racial - hatred", "defamation" or "discriminatory speech" play a role in the case-law, and was it pertinent to the outcome of the case?

What is the leading opinion in legal doctrine about the current relevance of this distinction?

The distinction between blasphemy, religious insult and incitement to religious – or racial – hatred does play a role in the case law, for these three punishable offences are regulated in

[65] Court of Appeal 's-Hertogenbosch 29-04-2003, case 20.000199.02 (Echt). This judgment was partially quashed by the Court of Cassation (08-06-2004, case 02328/03, *NJ* 2004, 413), though not in relation to this part of the judgment. Also, see District Court Assen 14-02-2001, case 19.830195-00 (Roden).

[66] Court of Cassation 02-04-2002, case 00106/01 (Dordrecht).

[67] Court of Appeal 's-Hertogenbosch 11-10-2004, case 20.001264.04. See also Court of Appeal Amsterdam 11-09-2003, case 23-001934-01.

[68] District Court Dordrecht 11-06-2002, case 11/010053.02 (NNP).

[69] District Court Rotterdam 10-03-2006, joint cases 10/000322-04, 10/000328-04, 10/000396-04, 10/000393-04, 10/000323-04, 10/000395-04 (Hofstad-group).

[70] In the second *Papendrecht*-case the claim was partially admissible, but not in respect of the offence in article 137e PC.

distinctive provisions of the Penal Code, although the provision on blasphemy currently is *de facto* a dead letter. In some cases both (religious) discriminatory insult and incitement to hatred or discrimination have been prosecuted in combination, but they have always been dealt with separately. The distinction does not seem to be an issue in legal doctrine.

7. What role does the intention of the perpetrator and/or the foreseeability of the (discriminatory) effects play in the formulation of the legal prohibition, and/or in the prospect of a conviction?

With regard to the blasphemy-clause (Article 147 PC) the intention of the perpetrator plays a minor role in the formulation of the legal prohibition, but a major role in the prospect of a conviction. The foreseeability of the discriminatory effects, on the contrary, seems to follow from the text of the provision concerned. Despite this fact, it was given a very narrow interpretation in the *Donkey*-case (see above, under 5).

At first sight, things seem to be less complicated with regard to the provisions on religious (discriminatory) insult and incitement to hatred or discrimination. Intent is a requirement in both descriptions of the offence. However, in order to be qualified as an offender, the intentions of the suspect play an important role. Here the applicable freedom of speech clauses come into play (see under 3). If the perpetrator intends to give a scientific (biological) explanation for certain differences between races, he may be exculpated. Likewise, exculpation may follow in the case of a comedian who intends to expose abuses or to point out social injustices of which followers of a certain religion would make themselves guilty.[71] The context in which something is said or done, is of vital importance for the prospect of conviction.[72]

8. Is the prosecution of the suspect of an act of blasphemy, religious insult or incitement to religious hatred at the discretion of the prosecutor?

Is there any superior supervisor?

Is there any appeal to a court against non-prosecution?

Dutch criminal law acknowledges the right to exercise prosecutorial discretion: it is up to the Public Prosecution Service to decide whether to prosecute or not in case the offences of blasphemy, religious insult or incitement to religious hatred have been committed. The Public Prosecution Service is not a government department. Together with the courts, it forms what is known as the judiciary, the authority responsible for the administration of justice. The Minister of Justice carries political responsibility for the Department's conduct and performance, and he may be called upon to render account to both Houses of Parliament. The Minister supervises the general policy concerning investigation and prosecution. Only rarely does he intervene in individual cases, although he may issue instructions to the Department's officers after consulting the Board of Procureurs-General.

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[71] C.P.M. Cleiren e.a. (red.), *Strafrecht: tekst en commentaar: de tekst van het Wetboek van Strafrecht en enkele aanverwante wetten voorzien van commentaar* [Criminal Law: Text and Commentary; the text of the Criminal Code and some related laws with commentatary], Deventer: Kluwer 2004, p. 704-705.

[72] See Court of Cassation 09-01-2001, case 00945/99, *NJ* 2001, 203 (Van Dijke).

There is a right to appeal to the Court of Appeal against non-prosecution, laid down in Article 12 of the Criminal Procedure Code.[73]

9. Does prosecution of these acts depend on a complaint by the victim(s)?

A complaint, in the sense of reporting an offence, by the victim(s) is certainly helpful, but prosecution of blasphemous acts *et cetera* does not depend on such complaints. If the complaint merely relates to religion, it is in all practical fact bound to fail. The case law discussed under 5 shows that the prosecution has a much stronger case when the victim has been discriminated against in respect of race, too.

10. Have there recently been important incidents of alleged blasphemy, religious insult and/or incitement to religious hatred in your country that caused a lot of public indignation and debate but were not prosecuted or not convicted? What was the reason for non-prosecution/non-conviction? What role did freedom of speech play in that case ?

The most controversial cases concerning the discrimination clauses have to do with alleged discrimination against homosexuals in which freedom of religion was invoked as a ground for the exclusion of liability of punishment. These cases have been discussed above and they are not of direct relevance to this questionnaire, since they do not directly concern religious insult and incitement to religious hatred.

There has been an important case in the near past which deserves to be mentioned in this respect. In 2003, the former Member of Parliament Ayaan Hiri Ali had said in a national newspaper, among other things, that the Islam had, 'in certain respects', to be regarded as 'retarded' and the prophet Mohammed as a 'pervert'. The public prosecutor decided not to prosecute, although 600 complaints had been made. Later on, Hirsi Ali and the abovementioned film maker Van Gogh made the film *Submission*. The latter was murdered and the former was put under strict security surveillance. Some members of the public were evidently trying to take the law into their own hands. It was then, that the debate discussed above (under 3) started. And it is still going on.

11. What is the attitude of the press in relation to such cases?

Do they report with restraint in order not to aggravate the effects? Or do they purport to compensate by publicity for the non-prosecution?

The Dutch press acts in a rather independent way. In the *Van Gogh*-saga, reporters may be said to have held back a bit. The crime concerned was a very serious offence against public order indeed. After the tragic events had taken place, many people, politicians and members of the public alike, felt public order was in acute danger. By no means, though, has this sentiment stood in the way of a broad and balanced discussion in the media and elsewhere of the question whether legislation in this field needed to be changed or even partially abolished.

[73] See, for instance, the appeal brought by the List Pim Fortuyn after non-prosecution of an alleged Article 137d PC offence (though not on account of race or religion): Court of Appeal Den Haag 19-05-2003, case 02075.K10, *NJ* 2003, 382.

REPLY FROM ROMANIA

By Mr Bogdan AURESCU

1. ***Is there specific legislation prohibiting blasphemy and/or religious insult in your country? Can this be explained on the basis of :***

    a) ***historical grounds, and if so which ones?***
    b) ***doctrinal grounds, and if so which ones?***
    c) ***other grounds?***

***Answer*:**

According to art. 13 of the **Law no. 489/2006 regarding the religious freedom and the general regime of religions in Romania**, all forms, means, acts or actions slander and religious feud, as well as the **public offence to religious symbols** are forbidden. This piece of legislation does not provide sanctions for breaching the above provision. The prohibition of the **public offence to religious symbols** was introduced during the parliamentary debates on this piece of legislation (the draft law, which was proposed by the government and subjected to the opinion of the Venice Commission – see Opinion 354/2005, adopted at the 64th plenary session of October 2005 – did not include it); apparently, its inclusion was influenced by the European debates on the matter[74] (following an express request of the Muslim religious denomination, supported by the commissions of the Parliament). Also, the same article provides that hindering or disturbing the freedom of exercise of any religious activity is punished according to the criminal legal provisions in force.

The **Criminal Code** (Law no. 301/2004) sets forth the crimes of **hindering of the freedom of religion** and of **profanation of tombs** (including monuments etc.)**.**

2. ***Is there specific legislation prohibiting religious hatred? Is there, in addition or instead, more general legislation prohibiting hate speech and/or incitement to violence, and/or defamation, and/or discriminatory speech? Could this situation be explained on the basis of:***

    a) ***historical grounds, and if so which ones?***
    b) ***doctrinal grounds, and if so which ones?***
    c) ***other grounds?***

***Answer*:**

The **Romanian Constitution** sets forth, in its art. 29, that the freedom of religious beliefs can not be hindered in any form, as well as, in art. 30 para. (7), that **incitement to religious hatred is prohibited by law.**

The **Criminal Code** (Law no. 301/2004) sets forth the crime of incitement to discrimination, which includes *inter alia* the **incitement to religious hatred.**

[74] The debate following the Prophet Mohammed caricatures issue.

The **Government Ordinance no. 137/2000 regarding the prevention and sanctioning of all forms of discrimination** (subsequently modified and completed) provides that any publicly manifested behavior which has as purpose or targets the harming of dignity or the creation of an atmosphere of intimidation, hostile, degrading, humiliating or offending, against a person, group of persons or community and related to (*inter alia*) their appurtenance to a certain religion represents an offence (if it does not amount to crime under the criminal law). A special body – the **National Council for Combating Discrimination** – is created for the implementation of this law.

The **Government Emergency Ordinance no. 31/2002 regarding the prohibition of organizations and symbols with fascist, racist or xenophobic character and of the promotion of the cult of persons guilty of committing crimes against peace and humanity** defines these organizations as groups "promoting fascist, racist or xenophobic ideas, concepts or doctrines, such as hatred and violence based on ethnic, racial or religious motives,…, anti-Semitism,…". This piece of legislation prohibits, *inter alia*, such organizations, the disseminating, selling or manufacturing (or depositing for the purpose of disseminating) of the said symbols, as well as their public use. A separate article provides that **public contesting or denying of the Holocaust** is a crime (punished with prison between 6 months and 5 years and suspension of certain rights).

These provisions can be explained by the need to align domestic legislation to a number of international instruments, as well as by historical reasons related to the conduct of the totalitarian regimes in power in Romania immediately before and during the WWII.

3. ***Is there, in any of these provisions, a specific freedom of speech clause? If not, how do these provisions relate to existing (constitutional) legislative provisions concerning freedom of speech?***

***Answer*:**

Freedom of speech is guaranteed by the Constitution by the same art. 29 which provides for the freedom of religious beliefs:

"(1) Freedom of thought, opinion and religious beliefs may not be restricted in any form whatsoever. No one may be compelled to embrace an opinion or religion contrary to his own convictions.

(2) Freedom of conscience is guaranteed; it must be manifested in a spirit of tolerance and mutual respect.

(3) All religions shall be free and organized in accordance with their own statutes, under the terms laid down by law.

(4) Any forms, means, acts or actions of religious enmity shall be prohibited in the relationships among the cults.

(5) Religious cults shall be independent of the State and shall enjoy support from it, including the facilitation of religious assistance in the army, in hospitals, prisons, homes and orphanages.

(6) Parents or legal guardians have the right to ensure, in accordance with their own convictions, the education of the minor children whose responsibility devolves on them."

All mentioned pieces of legislation are to be applied **in conformity with the Constitution and the international treaties on human rights**, which according to art. 20 of the Constitution have express **priority** over domestic legislation.

The **Law no. 489/2006 regarding the religious freedom and the general regime of religions in Romania** guarantees, in articles 1 and 2, the freedom of thought, conscience and religion, according to the Constitution and the international treaties to which Romania is a party; it sets forth that no one can be prevented from gaining or exercising rights recognized by the said law, nor can one be constrained, followed or put into a state of inferiority due to one's faith or affiliation to a group, religious association or religion, for exercising the religious freedom under the conditions provided by this law. It also provides that the religious freedom includes the liberty of any person to manifest one's faith individually or collectively, private or in public, by religion, education, religious practices and performance of rites, as well as the liberty of changing one's faith and that the freedom of displaying one's faith cannot be the object of any type of restraints other than those provided by law which constitute as necessary measures in a democratic society for public security, order protection, health, public morality or protection of the rights and fundamental liberties of the human being.

The **Government Emergency Ordinance no. 31/2002 regarding the prohibition of organizations and symbols with fascist, racist or xenophobic character and of the promotion of the cult of persons guilty of committing crimes against peace and humanity** allows the disseminating, selling or manufacturing (or depositing for the purpose of disseminating) of the mentioned symbols, as well as their public use only if these are for the **purpose of art, science, research or education.**

4. ***Is there in your opinion/according to the leading doctrine a need for additional legislation concerning:***

    d) the prohibition of blasphemy or religious insult ?
    e) incitement to religious hatred?
    f) hate speech concerning a group?
    g) speech or publication with a discriminatory effect?
    h) negationism (denial of genocide or other crimes against humanity)?

***Answer*:**

According to my view, the Romanian legislation is quite complete in this field. During the debates on the draft **law on regarding the religious freedom and the general regime of religions in Romania**, the representatives of the religious denominations were against new/supplementary criminal provisions in this field; they rather stressed that the climate of inter-confessional peace should be based on mutual good understanding, and not on State coercion.

5. ***Is there any case-law concerning blasphemy, religious insult and/or incitement to religious hatred?***

If so, are there cases which resulted in the conviction of the perpetrator?

What is in such cases the procedural status of the victim(s)?

***Answer*:**

To my knowledge, there are no such cases, as – with the exception of the mentioned provisions of the Criminal Code – the **blasphemy** (**the public offence to religious symbols)** is not set forth in the Criminal Code. There were only very few cases based on the Government Emergency Ordinance no. 31/2002 regarding the prohibition of organizations and symbols with fascist, racist or xenophobic character and of the promotion of the cult of persons guilty of

committing crimes against peace and humanity**,** but they do not relate to the subject of the questionnaire.

6. ***Did the distinction between "blasphemy", "religious insult", "incitement to religious – or racial - hatred", "defamation" or "discriminatory speech" play a role in the case-law, and was it pertinent to the outcome on the case?***

What is the leading opinion in legal doctrine about the current relevance of this distinction?

7. ***What role does the intention of the perpetrator and/or the foreseeability of the (discriminatory) effects play in the formulation of the legal prohibition, and/or in the prospect of a conviction?***

8. ***Is the prosecution of the suspect of an act of blasphemy, religious insult or incitement to religious hatred at the discretion of the prosecutor?***

Is there any superior supervisor?

Is there any appeal to a court against non-prosecution?

9. ***Does prosecution of these acts depend on a complaint by the victim(s)?***

10. ***Have there recently been important cases of alleged blasphemy, religious insult and/or incitement to religious hatred in your country that arose a lot of public indignation and debate but were not prosecuted or not convicted? What was the reason for non-prosecution/non-conviction? What role did freedom of speech play in that case?***

***Answer*:**

An interesting case, with no criminal implications, is related to a complaint forwarded by E.M., a Romanian philosophy college professor, to the **Buzau County Tribunal**, as well as to the **National Council for Combating Discrimination** (see point 2 above). E.M. complained that the fact that **orthodox icons** are displayed on the walls of halls, classrooms and chancelleries of education institutions violates the freedom of conscience, of thought and the freedom of religious beliefs and constitutes discrimination of his daughter, a student attending the courses on religion.

The County Tribunal decided in March 2005 – and the Ploiesti Court of Appeal, answering to the recourse initiated by the claimant, upheld, by final and irrevocable decision, the judgment of the County Tribunal in July 2006 – that there was **no** breach of the mentioned freedoms, and that there was **no** discrimination of the daughter of E.M.

On 14 July 2006, the claimant seized the **National Council for Combating Discrimination** and asked this body (**1**) to establish if the mentioned situation represents "discrimination against agnostic persons or having a different confession than the one of which the displayed religious symbols belong, thus creating a hostile and degrading atmosphere which affects the right to personal dignity (and implicitly the right to education) of the children, as well as the process of formation of the creative and autonomous human personality"; he also claimed that through this

state of fact the public education institutions assume the transmitting of "values promoting the state of inferiority of women practiced by the respective religion". He also asked the Council (**2**) to "annul the discriminatory situation created by the presence of religious symbols" in the college where his daughter is a student, "the withdrawal of religious symbols from the public education institutions, with the exception of the courses of religion" and "to admit the presence of religious symbols only during the optional courses on religion".

The Council asked for the opinions of the State Secretariat for Religious Denominations, of the Ministry of Education and Research and of the Commission on Human Rights, Religious Denominations and National Minorities Issues of the Chamber of Deputies of the Romanian Parliament.

The State Secretariat for Religious Denominations expressed the view that in all States there is a certain symbolism having its roots in the history of that people, and which is not deemed at odds with the fundamental human rights. It is ascertained that many States (like Denmark, Sweden, Greece, Great Britain) include the cross in their national flag or in the official coat of arms. Similarly, the Romanian coat of arms includes the cross, and references to the Christian religion can be found in the Romanian national anthem. The State Secretariat invoked a decision issued in February 2006 by the State Council of Italy, which found that the presence of crucifixes in public schools constituted no discrimination of non-Christians, but symbolizes a cultural and national tradition.

The Ministry of Education and Research showed that no document issued by this institution imposes the display of icons or of other religious symbols in the school classes and that there is no reference in the domestic legislation in force regarding the presence or the absence of icons or of other religious symbols in public places or in public institutions. In its view, the decision of displaying icons in school classes, which is not a general situation, is taken by the educational community of professors, students and parents belonging to various religions, and not through the imposition of any administrative decision.

The Commission on Human Rights, Religious Denominations and National Minorities Issues of the Chamber of Deputies of the Romanian Parliament informed the Council that, in its view, the discrimination invoked by the claimant does not exist, taking into account that the decision to display religious symbols is taken with the agreement of the professorial councils and of the parents.

On the **first** request (to conclude that there is or not a case of discrimination), the Council did not adopt any standing: taking into account the *res iudicata* rule, it took note of the above mentioned judgment of the Ploiesti Court of Appeal.

On the **second** request, after analyzing the international case-law and practice on the matter, as well as the constitutional relationship between State and religious denominations in Romania, the Council concluded that the State must be neutral and impartial in relation to the religious denominations, including as far as the public education institutions are concerned. So, the uncontrolled and unlimited presence of religious symbols, such as icons, in public education institutions represents a violation of the mentioned neutrality principle. The Council found that by omitting to regulate on the matter (the display of religious symbols in schools), the State (through the Ministry of Education and Research) did not observe the positive obligation incumbent to it to create the framework necessary to protect the pluralism and the (religious) beliefs, and to allow the liberty to opt among them. The non-observing of this obligation might be conducive to discriminatory situations. It also concluded that the presence of religious symbols (of worship) in public schools might affect the laic character of the State and might breach the principle of equal treatment of citizens by the State. The decision of the Council considers that religious symbols may be displayed in public education institutions only in

spaces dedicated to teaching courses on religion. The works of art created by students of art schools, which include religious symbols, may be displayed as they are artistic creations.

In consequence, the Council recommended that the Ministry of Education and Research draft and implement a regulation on the matter, based on the following principles: the exercise of the right to education and the access to culture of children to be ensured in conditions of equality, the right of the parents to provide education for their children according to their religious and philosophic beliefs to be respected, the laic character of the State and the autonomy of religious denominations to be observed, the freedom of religion, conscience and convictions of the children to be ensured in conditions of equality, the religious symbols to be displayed only during the courses on religion or in spaces exclusively dedicated to religious education.

The reactions of the public opinion, NGO's, State institutions and religious denominations were very vivid. The very large majority of opinions criticized the decision of the Council and a lot of NGO's declared their intention to appellate it. The appeal is not yet decided upon.

The **Ministry of Education and Research** considered that its intervention to prohibit the display of religious symbols in schools would be excessive and would hinder the free choice principle. It reminded that the decision to display religious symbols is an option of the parents, of the local community and of the professors, and that in a democratic society this option can not be restricted, with the condition that such option does not violate the norms prohibiting the religious proselytism in schools. A similar position was expressed by the **Commissions on Education of both the Chamber of Deputies and the Senate of the Parliament.**

The representatives of the major religious denominations, including the Muslim one, expressed their **reservation** concerning the decision of the Council.

11. What is the attitude of the press in relation to such cases?

Do they report with restraint in order not to aggravate the effects? Or do they purport to compensate by publicity for the non-prosecution?

***Answer*:**

The press commented a lot on the case presented at point 10 above, and contributed to enlarging the debate, by presenting all various points of views. On the other hand, the Romanian media reported with moderation and equidistance on the Danish case of the caricatures of Prophet Mohammed, which were not reproduced in Romanian journals.

Another public debate concerned a theater play (called "The Evangelists"), as certain commentators considered that some scenes represented blasphemy to the Christian religion, but there was no trial (either criminal or civil). The press adopted two different stances – one focusing on the absolute freedom of expression, the other stressing the view that such attitudes might offence the religious beliefs of the majority of the population (86.7% of the population declared their belonging to the Orthodox Church). But the predominant view was rather permissive. Anyway, just like in the case of the caricatures, the press focused much less on the texts of the said play, but on the debate of ideas and principles.

REPLY FROM POLAND

By Ms Hanna SUCHOCKA

1. ***Is there specific legislation prohibiting blasphemy and/or religious insult in your country ? Can this be explained on the basis of :***

   a) ***historical grounds, and if so which ones?***
   b) ***doctrinal grounds, and if so which ones?***
   c) ***other grounds?***

1. Criminal Code in the part on "Offences against Freedom of Conscience and Religion"

Article 194

Whoever restricts another person from exercising the rights vested in the latter, for the reason of this person affiliation to a certain faith or their religious indifference shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.

Article 195

§ 1. Whoever maliciously interferes with a the public performance of a religious ceremony of a church or another religious association with regulated legal status shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.

§ 2. The same punishment shall be imposed on anyone who maliciously interferes with a funeral, mourning ceremonies or rites.

Article 196

Anyone found guilty of offending religious feelings through public calumny of an object or place of worship is liable to a fine, restriction of liberty or a maximum two-year prison sentence.

2. Broadcasting Act of December 29, 1992

Article 18 (par 2) states that the Programmes or other broadcasts shall respect the religious beliefs of the public and especially the Christian system of values.

3. - the abovementioned legislation points at the recognition by polish legislators not only the freedom of speech, but also the right to protection of religious aspect of individuals' rights

- the category of freedom of conscious and confession is based on the principles of international human rights law

the shape of the legal provisions is dependent on our historical tradition (for many centuries multireligious state with very strong role of Catholic Church.

2. Is there specific legislation prohibiting religious hatred? Is there, in addition or instead, more general legislation prohibiting hate speech and/or incitement to violence,

and/or defamation, and/or discriminatory speech? Could this situation be explained on the basis of:

a) historical grounds, and if so which ones?
b) doctrinal grounds, and if so which ones?
c) other grounds?

1. The polish Constitution contains general provisions which can be see as a basis for the prohibition of religious hatred.
2.
Article 13 of the Polish Constitution - Political pluralism

Political parties and other organisations whose programmes are based upon totalitarian methods and the modes of activity of nazism, fascism and communism, as well as those whose programmes or activities sanction racial or national hatred, (….) shall be forbidden.

Article 35 of the Polish Constitution - Identity of national and ethnic minorities

The Republic of Poland shall secure to Polish citizens belonging to national or ethnic minorities the freedom to maintain and develop their own language, to maintain customs and traditions and to develop their own culture. National and ethnic minorities shall have the right to establish educational and cultural institutions, institutions designed to protect religious identity, as well as to participate in the resolution of matters connected with their cultural identity.

2. Polish Criminal Code

Article 256

Promotion of fascism or other totalitarian system.

Offence is committed by anyone who promotes fascist or other totalitarian system of state or incites hatred based on national, ethnic, race or religious differences or for reason of lack of any religious denomination

Subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to two years.

Article 257

Publicly insulting group of people or an individual person by reason of their national, ethnic or racial affiliation.

Offence is committed by anyone who publicly insults a group within the population or a particular person because of his national, ethnic, race or religious affiliation or because of his lack of any religious denomination or for these reasons breaches the personal inviolability of another individual.

Imprisonment for up to 3 years.

Article 119

Use of violence and unlawful threat of health on the basis of national, ethnic, racial or religious hatred.

Offence is committed by anyone who uses violence or makes unlawful threat towards a group of persons or a particular individual because of their national, ethnic, political or religious affiliation, or because of their lack of religious beliefs.
Imprisonment for between three months and five years.

Article 118

Homicide or serious detriment to the health on the basis of national, ethnic, racial or religious hatred.

Offence is committed by anyone who acts with an intent to destroy in full or in part, any ethnic, racial, political or religious group, or a group with a different perspective on life, commits homicide or causes a serious detriment to the health of a person belonging to such a group.

Penalty of the deprivation of liberty for a minimum term of 12 years, the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life.

3. The existence of the aforementioned legal provisions can be in some extent explained on the basis of different factors:

-the recognition by polish legislators not only of the freedom of speech, but also of the right to protection of religious aspect of individuals' rights
-the history (Second World War, Holocaust, Communism)
-the category of freedom of conscious and confession and protection from any form of attack caused by religious beliefs is based on the principles of international human rights law
-the protected values of religious feelings and beliefs are of a great importance for the Catholic Church (over 90% of Polish society belong to Catholic Church)

3. Is there, in any of these provisions, a specific freedom of speech clause? If not, how do these provisions relate to existing (constitutional) legislative provisions concerning freedom of speech?

Generally we won't find any specific freedom of speech clause in the abovementioned provisions. However, such freedom of speech provisions exists in the Polish legal system. The main correlation between those two kinds of provisions is based on the conviction that freedom of one person is limited by the freedom of other person, in this specific situation understood as a limitation to blasphemy or religious insult. Not only freedom of speech, but also religious feelings and beliefs is in the Polish legal system a value protected by law.

The main controversy appears by the interpretation of the Article 196 of the Polish Criminal Code. The religious feelings of the different members of one specific Church or confession are very diverse. The question is: whose level of religious sensibility should we treat as the average level – the sensibility of a group of fundamentalist or tolerant members?

Another controversy relates to the limit between **freedom of speech** (including the criticism of religious rules, dogmas, ways of acting) and insulting religious feelings. Lech Gardocki (President of the Supreme Court) opts for allowing an unrestricted range of substantial analysis and criticism. However, he underlines the existence of limits of forms in which the analysis and criticism are presented. Those forms (of an action or a statement) must have the features of an insult. The estimation, if the form is an insult, must appeal to the majority of public opinion's views in that aspect.

4. Is there in your opinion/according to the leading doctrine a need for additional legislation concerning:

d) the prohibition of blasphemy or religious insult ?
e) incitement to religious hatred?
f) hate speech concerning a group?
g) speech or publication with a discriminatory effect?
h) negationism (denial of genocide or other crimes against humanity)?

1. The existing legislation concerning the abovementioned regulations seems to be mostly adequate and appropriate. However, according to the European Commission against Rasism and Intolerance (ECRI) general policy recommendation N°7 on national legislation to combat racism and racial discrimination, adopted by ECRI on 13 December 2002, the law should penalize, i.a. public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, with a racist aim, of written, pictorial or other material containing manifestations such as:

- public incitement to violence, hatred or discrimination, public insults and defamation or threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;

- public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;

- public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes

2. Another postulate concerns the change in the legal interpretation of the article 257 of the Polish Criminal Code. The postulated interpretation shall assure that not only a member of insulted group, but also every Polish citizen could fell insulted by hate speech contents and could bring an action at law.

3. The third element concerns the need of ratification by Poland of Additional Protocol to the Council of Europe Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, signed by Poland on 21 July 2003. .

The general conclusion indicates on the most important aspect of the existing legislation (especially Article 256 and 257 C.C.) which is a great need of more effective application and exercise of the provisions already existing.

5. Is there any case-law concerning blasphemy, religious insult and/or incitement to religious hatred?

If so, are there cases which resulted in the conviction of the perpetrator?

What is in such cases the procedural status of the victim(s)?

1. The procedural status of the victim is described in the Code of the Criminal Procedure. The victim can join the procedure as an subsidiary prosecutor:

Article 53
In cases of indictable offences, the injured person may participate in the judicial proceedings as a party thereto, by assuming the role of subsidiary prosecutor, alongside the public prosecutor of instead of him.

Article 54
§ 1. If the indictment has been filed by the public prosecutor, the injured person may, before the commencement of the judicial examination in the main trial, file a statement in writing on his intention to act as subsidiary prosecutor.
§ 2. The public prosecutor's withdrawal of the indictment shall not deprive a subsidiary prosecutor of his rights.

Article 57

§1. In the event that the subsidiary prosecutor waives his rights he shall not be allowed to re-enter the proceedings.

§ 2. In a case where the public prosecutor does not participate, the court notifies the state prosecutor of the withdrawal of the indictment by the subsidiary prosecutor. Failure to file an indictment by the state prosecutor, within 14 days of receiving such notification will result in the discontinuance of the proceedings.

2. The most important cases of alleged blasphemy, religious insult and/or incitement to religious hatred in Poland that arose a lot of public indignation and debate and were prosecuted or convicted:

1.**Nieznalska case**

In December 2001 Members of the League of Polish Families attacked polish artist Nieznalska verbally in the in Gdansk venue where her 'Passion' installation was exhibited. The work, an exploration of masculinity and suffering, consists of a video close-up of the face of an exercising bodybuilder together with a cross on which a photograph of male genitalia has been placed. Coupling the cross with the genitalia was regarded as a violation of this provision of Article 196 of the Criminal Code.

In July 2003, the Provincial Court in Gdańsk found Nieznalska guilty of "offending religious feelings," a violation of the Article 196 ban on blasphemy. The court sentenced her to a half-year "restriction of freedom," ordered her to do community work, and to pay all trial expenses. The gallery was closed as punishment. On the 28th April 2004 the District Court in Gdańsk quashed the previous judgment, in particular on the grounds of criminal procedure's violations: limitation to the right to defense, lack of a proper explanation and reasons for the judgment.

2. Bubel case

Leszek Bubel is the owner of „Goldpol" company – a publisher of hundreds of anti-Semitic publications: magazines, books. Since many years he has been being accused of anti-Semitism and the crime described in Article 257 of the Polish Criminal Code. However, any efforts to prosecute and convince him brought a positive result.

On the 27th July 2005 in the Provincial Court of Warszawa - Praga, a lawsuit against Leszek Bubel had been started. He was accused of committing a crime of Article 257:
Publicly insulting group of people or an individual person by reason of their national, ethnic or racial affiliation. The statements made by Bubel include i. a.: "their brains have been circumcised" – about students who sued Priest Jankowski; "the Jewish seed is deceitful".

On the 28th October 2005 the Court stated it has no doubts that Leszek Bubel exceeded the limits of freedom of speech. However, the Court renounced from inflicting a punishment of the deprivation of liberty, what was the prosecutor's demand. Leszek Bubel was convicted to a pecuniary penalty.

On the 28th of August 2006 the District Prosecutor from Białystok laid a charge on Bubel. He is accused of committing a crime of publicly insulting group of people or an individual person by reason of their national, ethnic or racial affiliation.
On the 16th November 2006 ten famous polish intellectuals, i.a. Władysław Bartoszewski, Jacek Bocheński, Kazimierz Kutz, Janina Ochojska, Adam Szostkiewicz, Paweł Śpiewak, sued Leszek Bubel. They claim that Bubel insulted them with his antisemitic statements.
On the 7th December 2006 Leszek Bubel was detained by ABW (Interial Security Agency). Detention was connected with Bubel's process in Białystok. Bubel was taken to a mental hospital in Tworki in order to undergo the mental examination.

6. Did the distinction between "blasphemy", "religious insult", "incitement to religious – or racial - hatred", "defamation" or "discriminatory speech" play a role in the case-law, and was it pertinent to the outcome on the case?

The distinction between the abovementioned concepts is decisive for categorizing the particular crime. Crimes concerning religious insult belong to Chapter XXIV of the Polish Criminal Code: Offences against Freedom of Conscience and Religion (Confession). Incitement to religious – or racial – hatred is included in Chapter XXXII: Offences against Public Order. It is also crucial for the possible kind of the imminent punishment. It should be noted that the prosecution of "defamation", in the meaning of Article 212 of the Polish Criminal Code, shall occur upon a private charge**.** It can not be decidedly stated that for example the crimes of Article 257 of the Polish Criminal Code were prosecuted and sentenced more seldom than crimes of Article 196 of the Polish C. C. However, it is to be observed that the public opinion's pressure is stronger in the cases of blasphemy and religious insult.

7. What role does the intention of the perpetrator and/or the foreseeability of the (discriminatory) effects play in the formulation of the legal prohibition, and/or in the prospect of a conviction?

Article 196 of the Polish Criminal Code describes a material crime, which appears in the form of insulting religious feelings of minimum two persons. The action/statement of a perpetrator must be of a public nature. The insult can be expressed by words or action showing disregard, abuse and deriding with an intention of insulting religious feelings of other people. This crime can be committed only intentionally.

Also the crime of Article 256 ("Promotion of fascism or other totalitarian system") has, in the leading opinion of legal doctrine, a character of an intentional crime, which can be committed only, when a perpetrator acts with a direct intention. The essence of the direct intention is the perpetrator's will to commit a crime. The perpetrator should be aware of a crime and he should want to fulfill the hallmarks of a crime.

Article 257 of the Criminal Code ("Publicly insulting group of people or an individual person by reason of their national, ethnic or racial affiliation") has as well a character of an intentional crime. However, (although the views on this question differ) in case of defamation on the ground of national, ethnic, race or religious affiliation or because of his lack of any religious denomination, a perpetrator can act with a direct intention as well as with an indirect intention. According to Article 9 of the Criminal Code, an indirect intention takes place, when a perpetrator, foreseeing a possibility of committing a crime, agrees with it. As far as an indirect

intention is concerned, the intention of the perpetrator doesn't include the result of a crime. It is indifferent for the perpetrator, if the result will appear or not, as he accepts both of those possibilities. An example given in some commentaries states that an indirect intention can take place when, i.a., a perpetrator, giving a speech in public, uses words, which he can suppose to be insulting for other people.

8. Is the prosecution of the suspect of an act of blasphemy, religious insult or incitement to religious hatred at the discretion of the prosecutor?

Is there any superior supervisor?
Is there any appeal to a court against non-prosecution?

1.The abovementioned crimes are to be prosecuted by indictment (public prosecution). There is also a possibility of bringing a private accusation.

2.The specific provisions concerning superior supervision and ways of appeal are enclosed in the Polish Code of Criminal Procedure:

Article 306

§ 1. The injured person and the institution specified in Article 305 § 4 shall have the right to bring interlocutory appeals against an order refusing to institute an investigation or inquiry, and the parties shall have such right with respect to the order on discontinuance. Those having right to bring an interlocutory appeal shall have the right to inspect the files of the case.

§ 2. The interlocutory appeal shall be brought to a state prosecutor superior to the state prosecutor who has issued or approved the order. If the superior prosecutor does not grant the appeal it shall be brought to the court.

§ 3. A person or institution which submitted a notice of offence and who has not been notified within 6 weeks about the institution or refusal to institute the investigation or inquiry shall have a right to bring an interlocutory appeal to the superior state prosecutor or one authorised to supervise the agency to which the notice has been submitted.

Article 330
§ 1. Revoking an order on discontinuance of preparatory proceedings or on refusal to institute it, the court shall indicate the reasons thereof, and, when necessary, also the circumstances which should be clarified or actions which should be conducted. These indications shall be binding on the state prosecutor.

§ 2. If the state prosecutor still does not find grounds to bring an indictment, he again issues an order on the discontinuance of proceedings or a refusal to institute it. This order is subject to interlocutory appeal only to a superior state prosecutor. In the event of upholding the order appealed against, the injured party which invoked the rights provided for in Article 306 § § 1 and 2, may bring an indictment set forth in Article 55 § 1 and he should be so instructed of this right.

§ 3. In the event that the injured party has brought an indictment, the president of the court transmits a copy of it to the state prosecutor summoning him, to deliver the files of the preparatory proceedings within 14 days.

Article 460

Interlocutory appeals should be filed within seven days from the date of the announcement of the order or, if statutory service of the order is required by statutory provisions, within seven days from the date on which the service occurred. This also covers the interlocutory appeals against decisions pertaining to costs and charges included in a judgement. However, when an appellant submits a motion for preparation of the reasons for the judgement in writing and for the service thereof, the interlocutory appeal may be brought within the time-limit prescribed for filing an appeal.

9. Does prosecution of these acts depend on a complaint by the victim(s)?

The prosecution of an act of blasphemy, religious insult or incitement to religious hatred depends on the decision of the prosecutor to institute or not to institute proceeding in a particular case. Originally the particular case is brought to the public Prosecutor's Office by the "victim's" notification or by anybody's notification of the fact that the crime has been committed.
As far as the indictable offence is concerned, the notification of committing a crime is necessary to start the prosecution of the crime. It should be notified to the District/Regional Prosecutor's Office, due to a place of committing a crime. The notification should include: name, surname, (names and surnames of the members of the group, the name of a Church) notifying the crime, description of a crime and facts, the names of the perpetrators with their description – identification – (nr of the magazine/newspaper, title of the article, radio broadcast, the date of the edition/broadcast).

10. Have there recently been important cases of alleged blasphemy, religious insult and/or incitement to religious hatred in your country that arose a lot of public indignation and debate but were not prosecuted or not convicted? What was the reason for non-prosecution/non-conviction? What role did freedom of speech play in that case?

1. <u>Michalkiewicz case</u>

On March 27th 2006 on "Radio Maryja," broadcast the commentator, Stanislaw Michalkiewicz, attacked Holocaust restitution efforts and questioned the existence of two well-known WWII-era massacres of Jews by non-Jewish Polish citizens:

On the 29th August 2006 Polish prosecutors dropped a case against a Catholic radio station accused of anti-Semitism brought by "Jan Karski Association," an anti-racism organization on the 14th April 2006. They accused Michalkiewicz of "public defamation of Jewish people" and "holocaust denial" (Article 257 of the Polish Criminal Code and Article 55 of the Act on the Institute of National Remembrance).

Prosecutors in Torun, where the station is based, dropped the case after ruling that Michalkiewicz had not broken any existing Polish laws banning Holocaust denial or insulting Jews. According to the public prosecutor's office, the broadcast did not constitute an intentional action ridiculing or denigrating the Holocaust, and Michalkiewicz "did not refute and did not deny Nazi crimes."

The case was also examined by the Polish National Broadcasting Council, which found no violation of its statue and adequate legal provisions. The Council of Media Ethics took a completely different standpoint and stated that Michalkiewicz's broadcast was "extremely anti-Semitic".

2. **"Machina" case**

In February 2006, after 4 years of absence on the Polish press market, a new edition of "Machina" magazine appeared in the bookshops. The cover of the first edition caused a great controversy and protests. The cover showed the picture of the Virgin Mary with Jesus Child – the face of the Virgin Mary was superseded by a face of Madonna – a popular pop star and singer. Many companies, to manifest their protest against the cover, decided to back off from advertising their products in "Machina".

The case was notified to the District Prosecutor's Office in Warsaw - Ochota in February 2006. On the 5th October 2006, the District Prosecutor's Office decided to bar the investigation in the case of insulting the religious feelings by offending the image of the Virgin Mary and Jesus Child in "Machina" magazine in February 2006 on the ground of lack of the crime's badges.

4. "Dogma" movie case

In October 2001 the Public Prosecutor in Kraków decided to remit proceedings in a case of „Dogma" movie by Kevin Smith. The Prosecutor found no violation of Article 196 of the Polish Criminal Code.

From December 2000 to March 2001 the Kraków Prosecutor received a mass of information about an offence of insulting religious feelings from all around Poland. The information was coming from private persons, societies, social and catholic organizations, and even members of the Catholic Church hierarchy. The investigation showed that from over thousand of people informing about the crime, only twelve people had really seen the film.
The Prosecutor took into consideration opinion of two researchers who stated that even though the movie includes allusions to Virgin Mary, God and Apostles, there were no insulting images. The Prosecutor decided that the negative moral estimation of the movie is not sufficient to accuse people who distribute "Dogma" in Poland.

5. "Wprost" cover case

The Regional Prosecutor's Office in Poznań finished the investigation in the case of "Wprost" magazine's cover from August 1994. The cover shows Virgin Mary and Jesus Child wearing the gas masks.

The investigation was started after an information about an offence of insulting religious feelings from a group of Świebodzin citizens. The editor-in-chief of "Wprost" magazine stated, that the only intention of "Wprost" was to direct public opinion's attention to the problem of extremely bad condition of the natural environment in Częstochowa and its precincts (an extensive article about this problem was in the August's edition of "Wprost").
After a group of people insulted by the „Wprost" cover has lodged a complaint on the decision to remit proceedings in this case, the decision was reversed by a Provincial Prosecutor's Office. The Regional Prosecutor was obliged to question over 10 000 people. However, a great part of the alleged victims expressed their unwillingness to be questioned with the explanation that their only intention was to show the size of a problem of insulting Catholics.

Finally, the Regional Prosecutor's Office in Poznań again found no intention of "Wprost" editorial to insult religious feelings.

6. "Antyk" Bookstore case

In December 2003, a group of Catholics protested what they considered to be anti-Semitic literature sold in a bookstore in the basement of a Warsaw church. The group called for church authorities to close the bookstore, which was run by a private company renting the basement space, and for state authorities to prosecute the bookstore owner for hate crimes. The state prosecutor's office examined the case and found no basis for prosecution. Catholic Church authorities stated that they could not take action due to the
bookstore's lease.

The Antyk bookstore, which quietly closed last October, had become a symbol of some of the last remaining vestiges of Jewish-Catholic tension. It had been opened by extreme right politician in the basement of All Saints Church, directly across from Warsaw's Nozyk synagogue in 1997.
In the end it wasn't the years of lawsuits and pressure from Catholic and Jewish groups that caused the demise of Poland's best-known haven of anti-Semitic literature, but a newly appointed parish priest who decided to stop this saying: "The bookstore should have been closed a long time ago because it did not represent contemporary Catholicism." As a result of a press article in "Rzeczpospolita" describing the fact of sale of anti-Semitic literature in a bookstore "Antyk" an inquiry in the case of violation of Articles 256 and 257 of the Polish Criminal Code had been instituted.

On the 30th June 2003, a Prosecutor from the Regional Prosecutor's Office, delegated to the District Prosecutor's Office, decided to remit the investigation.

During the preliminary proceeding, the Prosecutor received the expertise, concerning some of the books sold in "Antyk"with conclusion that the examined books contain openly anti-Semitic contents. Despite this opinion, the Prosecutor found no basis for prosecution.

A complaint against this decision had been lodged. The complaint was questioning i.a. the credibility of the "Antyk" owner's testimony (he stated i.a. that he didn't read the books he was selling) and ignoring the expertise.

On the 9th September 2003, a Prosecutor from the Appeal Prosecutor's Office decided not to take into consideration the complaint and she directed it to the Regional Court of Warszawa with a motion to reverse the complain. On the 31st October 2003 the Court decided to reverse the complaint and to uphold the previous decision to remit the investigation.

6. Kozyra case

In 1999, Katarzyna Kozyra's photo-piece 'Blood Ties' (*Wiezy krwi*) was to be exhibited as public art on municipal billboards as part of an outdoor gallery project by the Art Marketing Syndicate, a Poznan-based company that owns billboards. 'Blood Ties' comprises four square photographs. Each of the panels features a naked woman – the artist herself and her disabled sister (with an amputated leg) – on the backdrop of a red cross or crescent surrounded in the two bottom panels by cabbages and cauliflowers. Only the two more colorful bottom panels were allowed exhibition on billboards. The intention of both the artist and the Art Marketing Syndicate was to bring into focus women's suffering inflicted by the clashing religions and nationalisms in the Kosovo war, hence the use of the cross and the crescent, symbols of Christianity and Islam, as well as emblems of two major charities, the Red Cross and the Red Crescent, founded to bring relief to war casualties.

Due to a flood of letters expressing pleas and demands, the image nonetheless became a subject to censorship. With the artist's consent, the work was expurgated: the nude women were blue-penciled in such a way that the cross and the crescent became indecipherable.

The reason for this censorship was an allegedly unholy usage of religious symbols, as naked female bodies supposedly profaned both the cross and the crescent; it was a blasphemy against both Christianity and Islam.

11. What is the attitude of the press in relation to such cases?

Do they report with restraint in order not to aggravate the effects? Or do they purport to compensate by publicity for the non-prosecution?

In cases of alleged blasphemy, religious insult and/or incitement to religious hatred the reaction of the particular newspapers/magazines/tv stations depends foremost on the ideological option "represented" by them. Some media (more liberal)indicates on the great value of the freedom of speech, freedom of opinion and the right of an artist to express his/her artistic visions in any form (see Nieznalska case). Some (more conservative), defending the value of freedom of expression, tries to underline also the value of the religious feelings and beliefs, which deserve to be protected.

However, the main and the most important result of the media reports and relations was the public discussion on the question of blasphemy, religious insult and/or incitement to religious hatred what should be considered as a positive effect.

REPLY FROM TURKEY

By Mr Ergun ÖZBUDUN

1. Is there specific legislation prohibiting blasphemy and/or religious insult in your country Can this be explained on the basis of :

a) historical grounds, and if so which ones?
b) doctrinal grounds, and if so which ones?
c) other grounds?

1. Turkish legislation contains no provisions concerning the prohibition of blasphemy as such, since as a secular state Turkey affords the same kind of constitutional protection to non-believers as well as to believers of different religions.

On the other hand, there are provisions in the Turkish Criminal Code which went into effect on 1st April 2005 on religious insult and incitement to religious hatred. Religious insult is regulated in Article 125 of the Code under the title of "insult". Paragraph 3b of the Article provides that if the act of insult is committed because of someone's "expressing his/her religious , political, social, philosophical thoughts and opinions, of changing them or trying to disseminate them, or of conforming to the rules and injunctions of the religion of which he/she is a member", the lower limit of the prison term cannot be less then one year. In other words, the Turkish Code considers religious insult a more serious offense than ordinary insult. The subsequent section of the Article (3 c) also makes insult "in reference to the values held sacred by one's religion" an aggravated form of insult subject to the same penalty.

This article is similar to Article 175, para.3 of the old Criminal Code. The only difference is that in the previous Code, the Article was in the section entitled "Crimes against the Freedom of Religion", while in the present text, the title of the section is "Crimes against Honor". However, the new formulation better expresses the doctrinal grounds behind the criminalization of religious insult. Here what is intended to be protected is personal honor rather than a religion or religions per se.

There is no distinction among different religions as regards the protection afforded by the Criminal Code, Thus, in 1986 the Constitutional Court found a law (Law No. 3255) which purported to make insulting the monotheistic religions a more aggravated form of insult. The Court ruled that in a secular state no destinction can be made between monotheistic and other religions (Constitutional Court Reports, Vol. 22, p. 314)

2. Is there specific legislation prohibiting religious hatred? Is there, in addition or instead, more general legislation prohibiting hate speech and/or incitement to violence, and/or defamation, and/or discriminatory speech? Could this situation be explained on the basis of:

a) historical grounds, and if so which ones?
b) doctrinal grounds, and if so which ones?
c) other grounds?

Incitement to religious hatred is regulated in Article 216 of the Criminal Code (Article 312 in the old Code) according to which "those who incite a segment of people bearing different characteristics in terms of social class, race, religion, sect or region to hatred and hostility against another segment" shall be punished "provided that this causes a clear and present danger to public security". Paragraph 2 of the same Article punishes those who "publicly insult a segment of people on the basis of differences in social class, race, religion, sect, sex or region". Finally, paragraph 3 of the Article makes it an offense to "publicly insulting the religious values of a segment of people, provided that such action is likely to disturb public peace".

Article 216 represents a considerable improvement over the former Article 312 in that criminality is made conditional upon the existence of a "clear and present danger" to public security. As such, the main purpose of the Article is to protect minority groups against hate speech and insult.

3. Is there, in any of these provisions, a specific freedom of speech clause ? If not, how do these provisions relate to existing (constitutional) legislative provisions concerning freedom of speech?

Although the freedom of expression is recognized and guaranteed under Article 26 of the Constitution, hate speech is not considered to be protected by that Article.

4. Is there in your opinion/according to the leading doctrine a need for additional legislation concerning:

a) the prohibition of blasphemy or religious insult ?
b) incitement to religious hatred?
c) hate speech concerning a group?
d) speech or publication with a discriminatory effect?
e) negationism (denial of genocide or other crimes against humanity)?

No such need.

5. Is there any case-law concerning blasphemy, religious insult and/or incitement to religious hatred?

Under the old Article 312, many cases resulted in conviction , including those leading political personalities such as the former Prime Minister Erbakan and the present prime minister Erdoğan. However, after the introduction of the "clear and present danger" criterion, the number of such convictions dropped sharply.

7. What role does the intention of the perpetrator and/or the foreseeability of the (discriminatory) effects play in the formulation of the legal prohibition, and/or in the prospect of a conviction

The intention of the perpetrator is a sine qua non condition for all criminal offenses under Article 21 of the Criminal Code.

8. Is the prosecution of the suspect of an act of blasphemy, religious insult or incitement to religious hatred at the discretion of the prosecutor?

Is there any superior supervisor?

Is there any appeal to a court against non-prosecution?

The prosecution is at the discretion of the prosecutor.

9. Does prosecution of these acts depend on a complaint by the victim(s)?

No.

10. Have there recently been important incidents of alleged blasphemy, religious insult and/or incitement to religious hatred in your country that caused a lot of public indignation and debate but were not prosecuted or not convicted? What was the reason for non-prosecution/non-conviction? What role did freedom of speech play in that case?

See no.5 above.

REPLY FROM THE UNITED KINGDOM

By Mr Anthonly BRADLEY

1. Is there specific legislation prohibiting blasphemy and/or religious insult in your country ? Can this be explained on the basis of :

a) historical grounds, and if so which ones?
b) doctrinal grounds, and if so which ones?
c) other grounds?

Although there is no legislation by Parliament creating the offence of blasphemy, it is under the common law in England and Wales an offence to utter or publish blasphemous words and writings, but the scope of that offence has been narrowed in the last 150 years. It is not blasphemy to deny the truth of the Christian religion or the existence of God. But in 1977 the publication of a poem linking homosexual practices with the life and crucifixion of Christ was held to be blasphemous; the offence did not depend on proof that the defendants intended to blaspheme (*R v Lemon* [1979] AC 617). The offence was held to consist of the publication of material that was 'calculated to outrage and insult a Christian's religious feelings' and it did not require proof that the publication might lead to a breach of the peace. The law of blasphemy was also applied in film censorship, and a censorship decision on this ground was upheld at Strasbourg (*Wingrove v UK* (1996) 24 EHRR 1)

Although the scope of blasphemy as an offence has been narrowed, and prosecutions are very rare, its scope is limited to Christianity and does not extend to protect other religions, e g Islam (*Ex p Choudhury* [1991] 1 QB 429). For this reason, it has often been proposed that the offence of blasphemy at common law either should be abolished, or should be widened to include all religions.

In 2006, the Racial and Religious Hatred Act (summarized below) was enacted to create new offences that involve stirring up hatred against persons on religious grounds. This Act did not amend or abolish the offence of blasphemy at common law.

The common law has evolved over centuries and thus the present state of the law of blasphemy is to be explained on historical grounds. To an ever-increasing extent in the last 150 years, British manifests a widespread belief in the importance of freedom of religion, and with this the ability to discuss matters of religion without legal restrictions. There would have been doctrinal reasons in the 16th and 17th centuries for the existence of the offence of blasphemy. Religious leaders of the main branches of Christianity in the United Kingdom have in more recent times not felt the need for their faith to be protected by the criminal law.

2. Is there specific legislation prohibiting religious hatred? Is there, in addition or instead, more general legislation prohibiting hate speech and/or incitement to violence, and/or defamation, and/or discriminatory speech? Could this situation be explained on the basis of:

a) historical grounds, and if so which ones?
b) doctrinal grounds, and if so which ones?
c) other grounds?

There has long been legislation dealing with conduct that seeks to incite or provoke breaches of public order, and the police and magistrates have long had power to deal with disorder in public places. The first legislation on racial discrimination was enacted in 1965,

when an offence of incitement to racial hatred was created that did not depend on their being an immediate threat to public order. The reason for this extension of the criminal law was an argument from public order, namely that racial hatred itself was believed to contain the seeds of violence and eventual disorder. The law on incitement to racial hatred was widened by the Public Order Act 1986. This Act is the source of the present law. It defineds racial hatred as 'hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins'. By s 18 of the 1986 Act, it is an offence for a person to use *threatening, abusive or insulting* words or behaviour; it is also an offence to display any material which is *threatening, abusive or insulting* if the defendant does so with intent to stir up racial hatred or if in the circumstances racial hatred is likely to be stirred up. Corresponding offences exist in relation to publishing or distributing written material, theatrical performances, and broadcasting. The 1986 Act did not extend to incitement to religious hatred. Problems arose in that some racial groups (e g Sikhs) were protected against abuse on religious grounds but persons of many other faiths (e g Moslems) were not so protected because they did not form a single racial group.

The Racial and Religious Hatred Act 2006 inserts a new part 3A into the 1986 Public Order Act; part 3A is entitled 'Hatred against persons on religious grounds'. Religious hatred means 'hatred against a group of persons defined by reference to religious belief or lack of religious belief' (s 29A). The primary offence (s 29B) is to use *threatening* words or behaviour or to display any written material that is *threatening*, if the defendant thereby intends to stir up religious hatred. It is also an offence (s 29C) to publish or distribute written material which is threatening, if the defendant thereby intends to stir up religious hatred. Offences of this kind have been created in respect of theatrical performances (s 29D), broadcasting (s 29F) etc. There is also an offence of possessing inflammatory material (with a view to publication, distribution etc) which is *threatening* if the defendant intends religious hatred to be stirred up thereby. An important restriction on proceedings for these offences is that no prosecution for these offences may be instituted except with the consent of the Attorney-General (s 29L(1)).

It will be evident from this brief summary that the new offences in the 2006 Act on religious hatred are significantly narrower than the offences of incitement to racial hatred contained in the 1986 Act. In particular, the new offences are limited to material that is 'threatening' and not to material that is 'abusive' or 'insulting'. (In debate in Parliament, it was said that vigorous criticism of another religion's beliefs should be permitted even if was 'abusive' or 'insulting' of those beliefs: and it was also said that beliefs could be 'insulted' without the holder of those beliefs being insulted.) Moreover, the defendant's intention of stirring up religious hatred is an essential element of the offences. The view taken in Parliament was that there would otherwise be a risk of unduly limiting the freedom of debate about religious practices and beliefs.

This answer to the questions posed above does not deal with the law of defamation (the law of defamation is for all practical purposes a matter of civil law'; the offence of criminal libel continues to exist in English law but it is almost obsolete). nor does it deal with the general criminal law on incitement, conspiracy, attempts etc which would apply to specific acts like plotting to burn a religious building or to assault a religious leader or to an incitement to kill persons because of their beliefs. This answer is also limited to the law of England and Wales, and does not deal with the position in either Scotland or in Northern Ireland.

3. Is there, in any of these provisions, a specific freedom of speech clause ? If not, how do these provisions relate to existing (constitutional) legislative provisions concerning freedom of speech?

The Racial and Religious Hatred Act 2006 contains a specific freedom of speech clause, namely s 29J. This states

"Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytizing or urging adherents of a different religion or belief system to cease practising their religion or belief system."

No such provision is contained in the Public Order Act 1986. However, both the 1986 Act and the 2006 Act must be read subject to the Human Rights Act 1998, which gives effect in national law to rights guaranteed by the European Convention on Human Rights. It is therefore open to a defendant charged with incitement to racial or religious hatred to argue that a conviction would breach his or her rights under Articles 8, 9, 10 or 11 of the Convention.

4. Is there in your opinion/according to the leading doctrine a need for additional legislation concerning:

a) the prohibition of blasphemy or religious insult ?
b) incitement to religious hatred?
c) hate speech concerning a group?
d) speech or publication with a discriminatory effect?
e) negationism (denial of genocide or other crimes against humanity)?

In this brief report, it has not been possible to summarise the complex political and legislative history of the significant change in the law that was enacted in 2006. It is sufficient to say that the upper House in Parliament was instrumental in causing the Government in 2006 (against the Government's wishes) to accept some very significant modifications in the proposed legislation, and that two earlier attempts by the Government to create an offence of incitement to religious hatred had not been successful. Because of the prolonged attention that was given to this matter in Parliament, the general opinion in Parliament and in Government is probably that no further legislation in this area is needed. It is however to be hoped that at some future date the common law offence of blasphemy will be abolished, since it serves no useful purpose today. There is very little evidence in the United Kingdom of any demand for criminalizing denials of the holocaust, genocide etc.

5. Is there any case-law concerning blasphemy, religious insult and/or incitement to religious hatred?
If so, are there cases which resulted in the conviction of the perpetrator?
What is in such cases the procedural status of the victim(s)?

The answer to question 1 above mentions some recent case-law on blasphemy. Successful prosecutions under the 2006 Act will depend (a) on the decision of the Attorney-General to consent to proceedings and (b) on the willingness of a jury to convict. It is too early for such convictions to have been recorded. The law makes no provision for the victims of religious hatred to play any part in the criminal process of criminal trial, except where they are required to give evidence of the defendant's conduct.

6. Did the distinction between "blasphemy", "religious insult", "incitement to religious – or racial - hatred", "defamation" or "discriminatory speech" play a role in the case-law, and was it pertinent to the outcome of the case?

What is the leading opinion in legal doctrine about the current relevance of this distinction?

As already stated, a distinction was drawn in some of the legislative debates between the broader scope of the 1986 Act, dealing with incitement to racial hatred, and what eventually prevailed in the 2006 Act, dealing with insulting material that was likely to stir up hatred

against persons on religious grounds. The concept of 'discriminatory speech' did not feature much in the legislative debates, probably because (although the term may be used loosely in a non-legal sense) the legislation against discriminatory conduct (unequal treatment in various contexts such as employment or education) does not deal with 'discriminatory speech' at large.

7. What role does the intention of the perpetrator and/or the foreseeability of the (discriminatory) effects play in the formulation of the legal prohibition, and/or in the prospect of a conviction?

As stated in the summary of the new offences created by Parliament in 2006 (see answer to question 2 above), the intention of the defendant is an important element of the offence. It is also a defence, in the case of the use of threatening words or behaviour inside a dwelling, that the defendant had no reason to believe that the words or behaviour would be seen or heard by a person outside that or any other dwelling (s 29B(4)).

8. Is the prosecution of the suspect of an act of blasphemy, religious insult or incitement to religious hatred at the discretion of the prosecutor?
Is there any superior supervisor?
Is there any appeal to a court against non-prosecution?

As stated above, no prosecution for offences under the Act of 2006 may be brought without the consent of the Attorney-General. This means that the ordinary prosecutor of criminal offences (the Crown Prosecution Service) (CPS) is not at liberty to institute proceedings, but must send the papers (via the Director of Public Prosecutions, who is head of the CPS) to the Attorney-General (A-G), who is the chief law officer of the Government. The requirement for the A-G's consent also means that there can be no private prosecution (that is, brought by a member of the public).

There is no right of appeal to a court against non-prosecution for any criminal offence. However, by means of the procedure of judicial review, the Administrative Court does have power on the application of an interested person (e g a victim) to review a decision by the CPS not to institute proceedings, and the court may in exceptional circumstances require such a decision to be taken properly and in accordance with law (see e g *R v DPP, ex p C* [1995] 1 Cr App R 136). The 2006 Act does not expressly exclude judicial review of a decision taken by the A-G not to give consent to criminal proceedings for material that is likely to stir up religious hatred. However, the fact that consent of the A-G is required by the Act indicates that Parliament intended a broad discretion to be exercised at this very senior level; it therefore must be extremely doubtful whether the Administrative Court would be prepared to intervene in any case where it was complained that the A-G had not exercised that discretion properly (particularly in the light of earlier case-law that limited the scope of judicial review in respect of discretionary decisions made by the A-G: see *Gouriet v Union of*

Post Office Workers [1978] AC 435). As a member of the Government, the A-G is accountable to Parliament for his or her decisions, but there is no legal obligation on the A-G to give full reasons for such decisions.

9. Does prosecution of these acts depend on a complaint by the victim(s)?

No. Moreover, as stated already, the requirement for consent of the A-G means that a victim may not bring a private prosecution against the defendant. The possibility of a private prosecution in some areas of criminal law may in very rare cases still be important in practice, although such prosecutions are very far from being frequent.

10. Have there recently been important incidents of alleged blasphemy, religious insult and/or incitement to religious hatred in your country that caused a lot of public indignation and debate but were not prosecuted or not convicted? What was the reason for non-prosecution/non-conviction? What role did freedom of speech play in that case ?

The 2006 Act has been enacted too recently for there to have been prosecutions under the Act. Under the 1986 Act, the leader of a far-right party (the British National Party) was in November 2006 found not guilty by a jury of using words or behaviour intended to stir up racial hatred in the cause of a speech made in 2004. Inevitably in such a case, the jury's perception of the permissible limits of freedom of speech would have played a part in the decision. Some critics of the result called for more changes of the law, and overlooked the fact that the acquittal was by decision of a jury. More recently, prosecutions were brought in respect of some extremely inflammatory placards carried by demonstrators in London protesting at the publication in Denmark of cartoons that were considered to be offensive to the Moslem faith. In that case, criminal liability might have been established as a matter of the general criminal law or under the Public Order Act 1986.

11. What is the attitude of the press in relation to such cases?
Do they report with restraint in order not to aggravate the effects? Or do they purport to compensate by publicity for the non-prosecution?

It is not possible to generalize about the press in the manner suggested by the questions. Some of the press report the issues responsibly, others do not. Some sections of the press are committed to certain predictable positions (e g being inclined to attribute many ills in Britain to ethnic minorities), and others are not. It is however the case that such cases tend to attract a lot of interest in the media. The fact that the 2006 Act requires the consent of the Attorney-General to be given to prosecutions under the Act does not resolve all the potential problems.