

# On blasphemy

Miriam Díez Bosch  
and Jordi Sánchez Torrents (eds.)



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Facultat  
de Comunicació  
i Relacions Internacionals

Facultat de Comunicació i Relacions Internacionals Blanquerna  
Plaça Joan Coromines s/n. Barcelona 08001  
Tel. 93 253 31 08. <http://blanquerna.edu/fcc>

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**Dr. Mauro Gatti**  
Researcher in University of Bologna

## INTRODUCTION

**B** Blasphemy laws have attracted considerable attention in the past, because of the practices of certain Islamic countries and the acts of violence allegedly carried out in defence of Islam. The Iranian fatwa against Salman Rushdie, the death sentences for 'apostates' in Pakistan and the reaction to the publication of the 'Muhammad cartoons' on the *Jyllands-Posten* are typical examples in this sense. Several authors, therefore, focused on the laws of Islamic States (Forte, 1994; Siddique and Hayat, 2008; Rehman and Barry, 2012) or the attempts of these countries at 'exporting' such laws abroad (Marshall, 2011; Scharffs, 2013; Aswad, Husain and Suleman, 2014).

Portraying the issue of blasphemy laws as a dichotomy between East and West, however, may be misleading (Manzini, 2006). Wherever organised religion exists blasphemy is taboo (Levy, 1995, 3). Blasphemy is a particularly grave sin in the Christian tradition, to the extent that, according to the Gospels, "the blasphemy against the Spirit will not be forgiven."<sup>1</sup> The Old Testament prescribes a severe punishment for this sin: "whoever blasphemes the name of the Lord shall surely be put to death."<sup>2</sup> This may perhaps contribute to explain why European countries have always punished blasphemy, in order to protect religious doctrines, as well as to safeguard the political order (Leirvik, 2011, 96). Blasphemy was held in such contempt that a Scottish tribunal could affirm in the indictment of Thomas Aikenhead, as late as in 1696: "by the lawes of this and all other well-governed Christian realmes, the cryme of blasphemy against God, or any of the persons of the blessed Trinity, or against the holy Scriptures, or our holy religione, is a cryme of the highest nature, and ought to be severely punished" (cit. in Howell, 1816, 918) Aikenhead was the last person condemned to death because of his religious views in Scotland, but other European countries persecuted blasphemers until relatively recent times. In Sweden, for instance, blasphemy was regarded by lawyers as amongst the most severe of crimes individuals could commit and was subject to the death penalty until 1864 (Olli, 2008, 458).

The progressive separation between political authorities and religious power, as well as the affirmation of pluralist democracies, led several countries to abolish blasphemy laws. The U.S. Supreme Court, in particular, argued in 1952 that "the state has no legitimate interest in protecting any or all religions from views distasteful

to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine".<sup>3</sup> Many European States, however, kept blasphemy laws in their books and some still implement them. According to the European Court of Human Rights (ECtHR), the repression of blasphemy is compatible with human rights law, because there is not sufficient common ground in the legal and social orders of European States to conclude that blasphemy laws are unnecessary in a democratic society.

However, the Court's position has often been criticised, also from within the Court itself, because it is theoretically unsound and dangerous for freedom of speech (Temperman, 2008; Leigh, 2011; Letsas, 2012; Trispiotis 2013). Against this background, one may wonder whether blasphemy laws are still part of the 'common ground' of European countries or if they are destined to go from law books to history books. The present analysis seeks to verify whether blasphemy laws are still part of the EU identity, by considering EU Members' law, the ECtHR jurisprudence and the practice of the European Union.

This paper comes in three sections. The first one presents the blasphemy laws in force in EU States. The second section analyses the jurisprudence of the ECtHR concerning blasphemy laws. The third discusses the recent practice of the European Union in the field of blasphemy.

## 1. BLASPHEMY LAWS IN EU MEMBER STATES

Most European countries have eliminated the offence of blasphemy from their books, but some States maintain them to these days. Although there is no single definition of blasphemy in European law, it may generally be described as the offence of insulting or showing contempt or lack of reverence for a god and, by extension, toward anything considered sacred (Venice Commission, 2008, 8). Such offence currently exists in the systems of six EU Members: Austria, Denmark, Finland, Greece, Ireland and Italy. The punishment for blasphemy varies. Italy and Ireland impose a fine, up to 309 Euros and 25.000 Euros, respectively.<sup>4</sup> Denmark, Austria and Finland punish blasphemy by imprisonment for a few months.<sup>5</sup> Greece applies harsher sanctions, up to two years of prison.<sup>6</sup> Since only a minority of EU States apply sanctions for 'blasphemy', it may be tempting to argue that this offence is likely to disappear from the European continent. Such a conclusion may be reinforced by considering that the trend to eliminate the offence of blasphemy, which began several decades ago, continues: the United Kingdom abolished the offence of blasphemy in 2008 and Netherlands scrapped blasphemy from its penal code in 2013.

However, the trend against the punishment of blasphemy is not uncontested, since an EU country – Ireland – re-introduced its blasphemy law in 2009. Even the countries that do not punish blasphemy directly may do so through other laws, notably those on 'religious insult'. There is not a generally accepted definition of 'religious insult', but this may generally be termed as an insult based on belonging to a particular religion or an insult to religious feelings. The Maltese penal code, for instance, punishes offences to Catholicism and the Roman Church, as well as

the vilification of those who profess such religion.<sup>8</sup> Since blasphemy hurts religious feelings, it may frequently coincide with religious insult, as demonstrated also by the examples presented below. Any reference to 'blasphemy laws' in the rest of this paper is intended to encompass laws concerning blasphemy proper, religious insult, or both. Several EU Members punish religious insult: Cyprus, Croatia, the Czech Republic, Denmark, Finland, Germany, Greece, Lithuania, Malta, Poland, Portugal, Slovak Republic and Spain (Venice Commission, 2010). The penalties for religious insult vary, and can reach one year (in the case of Spain) and even two years of prison (Poland and Greece).<sup>9</sup>

One might argue, in theory, that the persistence of blasphemy laws in European systems is not particularly meaningful per se, since blasphemy and religious insult are, nowadays, rarely prosecuted. In Denmark, for instance, the last proceedings for blasphemy date back to 1938 (House of Lords, 2003, appendix V). The practical importance of blasphemy laws in Europe, however, should not be underestimated. Some European States do enforce blasphemy laws, albeit irregularly. Italian newspapers report several cases in which a fine was inflicted on persons who blasphemed (e.g. Rivara, 2014; Corriere del Veneto, 2014; Il Giorno, 2011). Believers and religious groups routinely request Italian authorities to apply blasphemy laws in order to censor social or artistic events: for instance, in 2012 numerous parliamentarians asked the Ministry of Justice to prevent the performance of a theatre play that had been criticised by Catholic authorities.<sup>10</sup> Blasphemy laws have recently been applied also in Poland, where a pop star received a fine (equivalent to about 1200 Euros) for having claimed that the Bible was written by drunkards (Day, 2010). A Polish heavy metal musician is currently on trial on similar charges, for having called the Roman Church "the most murderous cult on the planet" during one of his famously anti-religious shows (Rettman, 2012). A leading Spanish artist was prosecuted between 2010 and 2012 for having recorded a video in which he cooked a crucifix, but was eventually acquitted (El Mundo, 2012). Maltese authorities are rather active on the blasphemy front: there were about 100 convictions for blasphemy or religious insult in 2012 alone (U.S. State Department, 2013). One of the latest cases involved a 26-year-old who was given a suspended one month jail term because he dressed up as Jesus Christ during carnival celebrations; six people who dressed as nuns were prosecuted and later acquitted (Calleja, 2010). The most famous (or infamous) recent blasphemy-related incident involves Greek authorities. Philippos Loizos, a Greek Facebook user, was arrested and charged with blasphemy in 2012 for creating a page criticizing and mocking a deceased Orthodox monk. Although the blasphemy charge was dropped, the man was later charged with insulting religion and was given a 10-month suspended sentence (US State Department, 2014).

These examples suggest that a rigid implementation of blasphemy laws may "inappropriately position governments as arbiters of truth or religious rightness" (U.S. State Department, 2014) and might ultimately deter artists, writers, publishers and others from expressing their ideas. Even non-implemented blasphemy laws may engender similar results, since the prospect of being subject to a sizeable fine or penal proceedings may have a 'chilling effect' on one's freedom of expression<sup>11</sup> (Freedom House, 2010, 92). The mere existence of blasphemy laws may also justify censorship on the part of public authorities; the cases discussed in the next section present some examples in this sense. What is more, one cannot exclude that

European authorities may apply blasphemy laws more energetically in the future, notably because of the rise of extremist right-wing parties (which often oppose any criticism to traditional religion). The activism of the neo-Nazi party 'Golden Dawn' in Greece, for instance, seems to have had a role in the decision to arrest Philippos Loizos (Tsimitakis, 2012).

The persistence of blasphemy laws in Europe may lead one to wonder whether these laws are just a "historical relic" (Scharffs, 2013, 67) of the "well-governed Christian realms" of the past, which are doomed to disappear in the incoming years, or if they are still an integral part of the European understanding of religious tolerance. The practice of European institutions may contribute to shed light on this issue. The next section analyses the case-law of the European Court of Human Rights and the last section addresses the most recent actions of the European Union.

## 2. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND BLASPHEMY LAWS

The most significant European instrument that may affect blasphemy laws in Europe is the European Convention on Human Rights (ECHR). This Convention was concluded in 1954 in the framework of the Council of Europe, and was ratified by all the 28 current Member States of the EU, as well as by other 19 countries. Therefore, the Convention sets a standard of human rights protection that all EU Members must respect. The implementation of the Convention was originally supervised mainly by the European Commission of Human Rights and the European Court of Human Rights (ECtHR). Protocol 11 to the ECHR, which entered into force in 1998, abolished the Commission and enabled any individual to apply directly to the Court, once he/she has exploited all domestic mechanisms for redress of human rights violations. In practice, this means that violations of human rights operated by European States should be firstly reviewed by national tribunals. If domestic courts fail to rule in favour of the individuals whose rights have been violated, these persons may apply to the European Court of Human Rights. The judgements of the Court are binding on the States and may oblige European countries to give a compensation to the victims.

The most relevant ECHR provision in the field of blasphemy is article 10, according to which: "everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority." Article 10, however, acknowledges that the exercise of freedom of expression carries with it duties and responsibilities, and may consequently be subject to restrictions *i)* prescribed by law and *ii)* necessary in a democratic society, *iii)* to protect national security, territorial integrity or public safety, or for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Another provision which may play a role in blasphemy cases is article 9 ECHR, whereby "everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either

alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance". Freedom to manifest religion, like freedom of expression, may be subject to restrictions *i)* prescribed by law and *ii)* necessary in a democratic society, to protect *iii)* public safety, public order, health or morals, or for the protection of the rights and freedoms of others.

It is worth recalling that several non-EU States are part to the ECHR; the present analysis takes into consideration also the judgements that concern non-EU Members, since they elucidate the content of rules that apply to EU countries. This study focuses firstly on a case, *Choudhury v UK*, where the European Commission of Human Rights seems to have argued that there is no right not to be offended in one's religion. Then the attention turns to three subsequent cases – *Otto Preminger-Institut v Austria*, *Wingrove v UK* and *I.A. v Turkey* – where the ECtHR adopted the opposite approach and developed a doctrine on blasphemy laws and the protection of religious feelings. Finally, this section presents two judgements concerning freedom of expression – *Giniewski v France* and *Klein v Slovakia* – which might have introduced some limitations to the scope for protection of religious feelings.

*Choudhury v UK* (1991)<sup>12</sup> was brought to the attention of the European Commission of Human Rights in 1990. The case originated from a complaint relating to Salman Rushdie's book, *The Satanic Verses*, whose content, according to the applicant, was abusive towards Islam. Mr. Choudhury lamented that British law, as it existed at time, prevented him from suing Salman Rushdie for blasphemy, since such law only punished blasphemy against Christianity. As a result, according to the applicant, the United Kingdom had not given his religion protection against abuse or scurrilous attacks, in violation of article 9 ECHR. The Commission declared the demand inadmissible, since it considered that article 9 ECHR does not guarantee a right to bring proceedings against those who offend the sensitivities of an individual: there is no link "between freedom from interference with the freedoms of Article 9 para. 1 (Art. 9-1) of the Convention and the applicant's complaints." In other words, the Commission excluded that the expression of ideas could interfere with the freedom of religion of others.

This consideration seems to have been partially overruled in the subsequent ECtHR judgement *Otto Preminger-Institut v Austria*.<sup>13</sup> The applicant is a cultural association which sought to screen a movie based on *Das Liebeskonzil*, a XIX century theatre play, which mocks God, Jesus and the Virgin Mary. The Austrian judiciary seized the film on the basis of the national blasphemy law, thus preventing the applicant from screening the movie. The Otto Preminger Institut maintained that such seizure entailed a violation of article 10 ECHR, since it prevented the expression of ideas. The ECtHR, on the contrary, considered the Austrian measure compatible with the ECHR, since it was necessary in a democratic society to protect "the right of citizens not to be insulted in their religious feelings", notably the freedom of religion of Christians, who could feel offended by the movie in question.<sup>14</sup>

One may argue, however, that article 9 ECHR does not provide for a right not to be offended in one's beliefs. As noted by dissenting judges of the ECtHR Palm, Pekkanen and Makarczyk in their opinion annexed to *Otto Preminger*, "[t]he Convention does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom of religion, which in effect includes a right to express views critical of the religious opi-

nions of others."<sup>15</sup> It may also be affirmed that the interpretation of article 9 ECHR adopted by the Court might have paradoxical consequences. States are *obliged* to protect the rights provided for in the ECHR. If article 9 ECHR implied a right not to be offended all European States would have to introduce and implement blasphemy laws; individuals would also have a right to challenge the States' decision not to protect their religion (as Mr Choudhury unsuccessfully argued in 1990). Such a conclusion appears to run counter to the understanding of freedom of expression in contemporary Europe: most European States do not punish blasphemy, or do so sporadically.

One may surmise that the Court could have solved *Otto Preminger* in a more straightforward manner by relying directly on article 10 ECHR, which allows for restrictions to freedom of speech aimed at "the prevention of disorder". It is possible that national authorities in *Otto Preminger* could legitimately argue that censorship was necessary to prevent disorder, since the screening of the movie had been publicised and it could be expected that some believers might have responded through acts of protest.<sup>16</sup> Restricting the applicant's speech on the basis of article 10 ECHR would have had the advantage of not entailing the 'creation' of the right not to be offended in one's religious beliefs. However, such strategy may have also suggested that censorship should *only* be allowed if it actually prevents disorder.

The practice shows that European authorities do not engage in censorship activities only for the sake of public order, but also to avoid the dissemination of certain ideas. This issue has been clarified in *Wingrove v UK* (1996),<sup>17</sup> in which a filmmaker had been denied permission to distribute an experimental video work which involved erotic scenes between Teresa of Avila and Jesus, on the basis of the rules on blasphemy applicable at the time of the controversy. One could have difficulty argued that freedom of expression should have been restrained for the purpose of protecting public order, since the work of Mr. Wingrove was experimental and, as such, unlikely to be seen by many people; there was no indication that Christian groups could have responded to the video through activities that interfered with public order.<sup>18</sup> However, the Court could rely on its previous interpretation of the 'right' of believers not to be offended in their religious feelings to conclude in favour of the national government. It would have been possible, according to the ECtHR, that Christians could have entered into contact with the video work, since "it is in the nature of video works that once they become available on the market they can, in practice, be copied, lent, rented, sold and viewed in different homes."<sup>19</sup> The national government, therefore, could legitimately prevent the distribution of such work, in order to protect "the rights of others".

It would seem that the Court in *Wingrove* interpreted the concept of 'protection of the rights of others' in a very, and perhaps exceedingly, extensive way: one may doubt whether a sensitive Christian might ever view a notoriously blasphemous, pornographic and experimental video work. This leads one to suppose that the Court's interpretation of article 9 ECHR is so far-reaching that it may serve to justify *any* censorship against blasphemy, even in the cases where the blasphemy is not likely to outrage any believer in practice. The ECtHR, therefore, seems to behave like some national authorities, which formally qualify censorship as a means to protect human rights, but actually legitimise it as an instrument to prevent criticism or ridicule of religions as such (Freedom House 2010, 37).

The *Wingrove* judgement is relevant, not only because it justifies an extensive interpretation of the right not to be offended in one's religious beliefs, but also because it acknowledges that the application of blasphemy laws "has become increasingly rare and that several States have recently repealed them altogether." The Court considers, nonetheless, that "blasphemy legislation is still in force in various European countries"; as a consequence, "there is as yet not sufficient common ground in the legal and social orders of the member States of the Council of Europe to conclude that a system whereby a State can impose restrictions on the propagation of material on the basis that it is blasphemous is, in itself, unnecessary in a democratic society."<sup>20</sup> In other words, there is a trend favourable to the abolition of blasphemy laws, which may, over time, show that such laws are incompatible with the ECHR.

The Court had a chance to take account of this trend and modify its stance on blasphemy laws in 2005, when it decided *I.A. v Turkey*.<sup>21</sup> National authorities had imposed a light fine on the applicant (corresponding to about 13 Euros), for having published a book that defines God as a murderer (because of the episode of Abraham and Isaac) and that asserts that Muhammad condoned necrophilia and zoophilia. The majority of the Court followed *Otto Preminger* and *Wingrove*, and found the national measure to be compatible with the Convention. However, a large minority of the Court (three judges out of seven) dissented, arguing that censorship, such as the one performed by Turkey, may have a "chilling effect" liable to discourage publishers from producing books that are not strictly conformist or "politically (or religiously) correct". This may entail a risk of self-censorship, which is very dangerous for freedom of expression; censorship, in turn, may implicitly encourage blacklisting or "fatwas". Even more importantly, the minority argued that the time has come to "revisit" the *Otto Preminger* and *Wingrove* jurisprudence, which places "too much emphasis on conformism" and reflects "an overcautious and timid conception of freedom of the press".<sup>22</sup>

Two subsequent judgements concerning freedom of expression may provide for some indications as to the limits that blasphemy laws cannot exceed. The first such case is *Giniewski v France*.<sup>23</sup> The applicant had written a newspaper article which attacked a papal encyclical, arguing that it contained the seeds of the anti-Semitism which fostered the idea and implementation of the Shoah. National authorities convicted him on a charge of public defamation towards the Christian community, since his arguments amounted to accusing Catholics of being responsible for the Nazi massacres. The ECtHR, on the contrary, affirmed that the article "contributed to a discussion of the various possible reasons behind the extermination of the Jews in Europe"<sup>24</sup> and was not "gratuitously offensive". Against such framework, a conviction on a charge of public defamation was not compatible with the ECtHR. This judgement indicates a first limitation for blasphemy laws in Europe: while the Member States can censor gratuitously offensive works – such as those in *Otto Preminger*, *Wingrove* and *I.A.* – they cannot apply sanctions against forms of expression that contribute to the public debate.

A second limitation of blasphemy laws was identified, albeit indirectly, in *Klein v Slovakia*.<sup>25</sup> The applicant, like Mr. Klein, had been convicted for defamation of the Christian community, since he had written an article insulting the head of the Catholic Church in Slovakia. The ECtHR found the national measure incompatible

with the ECtHR, since the offensive statements of the applicant targeted a religious leader and not the content of a religious faith. This leads one to surmise that European laws protecting religious feelings in Europe cannot be used to restrict the criticism, and even the insult, against religious leaders.<sup>26</sup>

These two possible limitations to the application of blasphemy laws do not question the core of the ECtHR jurisprudence on blasphemy: censorship and even fines against 'blasphemous' speech may be compatible with European human rights law, since they allegedly protect the right not to be offended in one's religious beliefs. EU States can rely on this jurisprudence to restrict freedom of expression when believers are actually offended, when the possibility of an offence is eventual, and even when it is extremely remote. Arguably, draconian sanctions – such as imprisonment and the heavy fines applicable in certain European countries – may perhaps be considered unnecessary to protect religious freedom from blasphemy, and thus incompatible with the ECHR. In the absence of a case-law on this specific issue, however, this consideration cannot be taken for granted.

What is certain is that the application of blasphemy laws is "increasingly rare" and that the ECtHR jurisprudence is criticised in the literature (Temperman, 2008; Leigh, 2011; Letsas, 2012; Trispiotis 2013), as well as within the Court itself. If it became clear that there is sufficient common ground in the social orders of European States against the application of blasphemy laws, the Court may become willing to overrule *Otto-Preminger*. The next section shows that such 'common ground' appears to exist, at least within the European Union, since all EU Members have officially, repeatedly and consistently denied the very foundation of the Court's approach to blasphemy, by affirming that there is *no* right to the protection of religious beliefs.

### 3. THE EUROPEAN UNION AND BLASPHEMY LAWS

The European Communities were not originally conceived as human rights organisations. Even the European Union, after the Lisbon reform, has limited competences in the human rights domain. EU law affects religious freedom mostly in an indirect way, by regulating issues such as non-discrimination, work hours and the slaughter of animals (Trispiotis, 2013; Casolari, 2011). Moreover, the EU does not have, in general terms, the power to protect human rights from the action of its Member States.<sup>27</sup> This activity should be performed by the European Court of Human Rights (which is part of the framework of the Council of Europe, and not of the EU). The requirement to respect fundamental rights – as provided for in Union law – is binding on the Member States only when they act in the scope of Union law (Jacqué, 2014).<sup>28</sup> As a result, there is little the EU can do, at the moment, to protect religious freedom in Europe.<sup>29</sup> This contributes to explain why the EU's regulation of religious freedom has been analysed only in a few instances (e.g. McCrea, 2010; Gatti, 2013).

However, the EU has developed a significant *external* action on religious freedom. While EU Treaties do not enable the Union to promote human rights internally, they explicitly request that the EU promotes them abroad. Article 21 TEU, in particular, stipulates that "the Union's action on the international scene shall be

guided by the principles which have inspired its own creation," including "the universality and indivisibility of human rights." The EU has, in fact, developed a rather articulate policy of human rights promotion, which is conducted through funding to activists in other countries, the insertion of human rights clauses in international agreements, as well as international statements on human rights.

The EU has delivered a number of statements, in particular, on the issue of blasphemy. The EU's activity in this area has been stimulated by the UN debate on 'defamation of religion', promoted by some Muslim countries in the framework of the Organisation of Islamic Cooperation (OIC) in the first decade of the 2000's. The OIC campaign was meant to convince United Nations Members to conclude an international instrument against what they termed as 'defamation of religion' (Rehman and Berry, 2012, 431). Their argument was that following the theories on the clash of civilisations and the attacks of September 11, 2001, there were strong reasons to increase religious dialogue, and argued that banning defamation of religions was necessary for this purpose (Haynes, 2013, 21).

Given the persistence of blasphemy laws in Europe, one could have expected European countries to side with the OIC or, at least, to simply condemn the use of disproportionate forms of punishment – such as the death penalty – for blasphemy. On the contrary, the European Union and all its Members adopted a principled opposition to the OIC campaign. The EU and its Members questioned, firstly, the rationale of the OIC initiative: "acknowledging and practicing religious pluralism should include the right of all people to criticize the beliefs of others, to discuss and challenge them. We will not reduce religious tension by prohibiting the expression of ideas about religions and beliefs."<sup>30</sup> The Union also outlined the incompatibility between the OIC initiative and human rights law: "defamation of religions is not a human rights concept. [...] religion may never be used to justify or condone the restriction or violation of individual rights. The EU will continue to reject any attempts to do so."<sup>31</sup> The opposition of the EU, as well as of the US and several other States and non-governmental organisations, eventually led the OIC to set aside its initiative in 2012, because "European countries don't vote with us, the United States doesn't vote with us" (cit. in Heneghan, 2012).

The EU Council – an organ that consists of a representative of each EU Member State at ministerial level – recently confirmed the EU's position through the adoption of the Guidelines on the promotion and protection of freedom of religion or belief (Council, 2013) and the Guidelines on freedom of expression online and offline (Council, 2014). These Guidelines are non-binding, but contain a useful indication as to the interpretation of human rights that is favoured by the Union, since they explain "international human rights standards" (Council, 2013, para 8). They are also very relevant, since they were adopted by unanimity, that is, with the approval of the representatives of all EU Members.<sup>32</sup> According to the Guidelines, approval of religion does *not* include the right to have a belief "that is free from criticism or ridicule": human rights law only protects "individuals, not religion or belief *per se*" (Council, 2013, para 32). Therefore, the EU should oppose the criminalisation of blasphemy and "forcefully" advocates against the use of the death penalty, physical punishment, or deprivation of liberty as penalties for blasphemy (Council, 2013, para 32).<sup>33</sup>

The debate on 'defamation of religion' and the EU Guidelines demonstrate that the governments of EU States consider blasphemy laws incompatible with human rights law. This position is also supported by the European Parliament (EP), which is elected by EU citizens. According to this institution "freedom of religion or belief and freedom of expression are mutually reinforcing rights"; therefore, the EU "should firmly oppose any attempt to criminalise freedom of speech in relation to religious issues, such as blasphemy laws" (European Parliament, 2013a, para 1(g)). Moreover, the EP "opposes laws that penalise expressions deemed blasphemous, defamatory or insulting to religion" and "states that these laws do not comply with accepted international human rights standards" (European Parliament, 2013b, para 116).

European civil society appears to maintain a similar view. Secular organisations obviously appreciate the EU's commitment to protect individuals' rights and not religion or belief as such, since this implies that the Union will "recommend the decriminalization of blasphemy offences in third countries" (European Humanist Federation, 2013). The main European Churches also support the EU's views on blasphemy laws, as testified by their warm welcome for the Guidelines on freedom of religion and belief (COMECE, 2013; CEC, 2013). Although the organisation representing the Catholic Church argued that some elements of the Guidelines could be improved,<sup>34</sup> it did not criticise the EU's stance on blasphemy. This 'liberal' approach of Christian Churches may seem surprising, since Christianity benefits from the protection offered by blasphemy laws in Europe. The position of European Churches becomes more comprehensible if one considers that Christians are among the main victims of blasphemy laws in non-European countries. The Catholic Church has already recommended the abolition of blasphemy laws in countries where such laws are instrumentalised for the persecution of minorities (COMECE, 2010, 27). The influential cardinal of Milan, Angelo Scola, has also held that "in countries where a State religion dominates" protecting religious freedom means encouraging religious pluralism "by eliminating the laws that punish [...] blasphemy" (Chiesa di Milano, 2013).<sup>35</sup>

It is true that the positions expressed by European governments, by the European Parliament and by European Churches concern, first and foremost, the blasphemy laws of *non-EU* countries, and especially those that punish blasphemy most severely. It is important to note, however, that human rights are "universal" values (as testified by art. 21 TEU),<sup>36</sup> which are equally applicable to European and non-European States. The position of the Union and its Members on blasphemy laws contains their views on the interpretation of freedom of expression and freedom of belief as a "universal human right that needs to be protected everywhere and for everyone" (Council, 2013, para 16). The EU and its Members may difficultly argue that such interpretation should apply to others, but not to themselves. They may even be legally bound by their international statements on freedom of expression: no one can put forward claims contrary to his/her previous conduct (Crawford and Pellet, 2008, 862).<sup>37</sup> Christian Churches are in similar position. They may hardly affirm that the EU's stance on blasphemy is appropriate when it contributes to defend Christians abroad, but becomes undesirable where it protects those who blaspheme against Christianity in Europe: "as you wish that others would do to you, do so to them."<sup>38</sup>

## CONCLUSION

European countries have been punishing blasphemy since time immemorial. Several members of the European Union maintain blasphemy laws in their books even today. There is a trend favourable to the abolition of these laws, but they are still applied, more or less sporadically, in different countries. These laws are problematic even when they are not implemented, since they curtail criticism of religious doctrines and encourage censorship and self-censorship. The European Court of Human Rights has repeatedly affirmed that blasphemy laws may be compatible with the European Convention on Human Rights, since they protect the right of believers not to be offended in their religion. In the past, the Court acknowledged that such laws interfere with freedom of expression, but argued that there was not sufficient common ground in the legal and social orders of European States to conclude that blasphemy laws are unnecessary in a democratic society.

This paper suggests that such 'common ground' now exists, especially within the European Union. Several EU countries have scrapped blasphemy laws from their penal codes, or have ceased to implement them. What is more, the governments of *all* EU Member States, as well as the European Parliament, have repeatedly declared that blasphemy laws are incompatible with "universal" human rights standards, since they do not serve any human rights interest, but rather interfere with freedom of expression. Secularist organisations support this viewpoint and even European Churches seem not to oppose it.

The existence of such a 'common ground' between EU Members suggests that the European Court of Human Rights should possibly revise its jurisprudence on blasphemy laws. The 28 Members of the European Union have denied the very basis of the Court's line of reasoning, by affirming that freedom of religion does *not* imply a right not to be offended in one's religion. Moreover, six States which are parties of the European Convention of Human Rights but are not Members of the EU, have explicitly supported the EU's position on blasphemy.<sup>39</sup> One may logically conclude that blasphemy laws should no longer be considered as "necessary in a democratic society" and should therefore be declared incompatible with the ECHR.

The common ground within the European Union also indicates that EU States should abolish their blasphemy laws, if they have not done so already. First of all, it is not very coherent to ask other countries to carry out a thorough review of their blasphemy laws while continuing to accept the existence of domestic laws that criminalise blasphemy (Reporters without Borders, 2010). Such incoherence may actually damage the international action of the Union and the protection of human rights abroad. For instance, Pakistan once proposed that UN Members should have prohibited by law "the uttering of matters that are grossly abusive or insulting in relation to matters held sacred by any religion thereby causing outrage among a substantial number of the adherents to that religion."<sup>40</sup> This proposal proved quite embarrassing for European countries, since it reproduced almost to the letter part of the 'Defamation Act 2009', which the Irish Parliament had approved only a few months earlier.<sup>41</sup> In other words, an adversary of the Union took advantage of the European contradictions to "unmask Western hypocrisy", as noted by the UN Special Rapporteur on freedom of religion or belief (cit. in Atheist Ireland, 2013), and to further its agenda. Such situations should, hopefully, be avoided in the future.



Moreover, blasphemy laws are probably useless and potentially harmful for EU States and their societies. Punishing blasphemy was perhaps logical in the era of the “well-governed Christian realms”, when religious and political authorities partially coincided and protecting religion could be instrumental to the safeguarding of the political order. Today, however, public authorities can no longer take sides in the public and religious debate. Consequently, they cannot defend ideas from criticism: ideas, including religious ones, do not have rights (Leigh, 2011, 68). Human beings, on the contrary, have rights, including the right to freedom of expression. States cannot restrain such freedom for the purpose of protecting individuals, since human rights law does not provide any right not to be offended.

“A proper respect for the sacred” (Christian Voice 2008) is perhaps advisable, but a democracy cannot enforce it by law. In a Union founded on freedom, democracy and human rights<sup>12</sup>, freedom of belief and freedom of expression are “interdependent, interrelated and mutually reinforcing rights”. The most appropriate way to combat a perceived offense from the exercise of freedom of expression, therefore, is not censorship, but “the use of freedom of expression itself” (Council, 2013, paras 31-32).

#### Notes

1. Gospel of Matthew 12:31 (English Standard Version).

2. Leviticus 24:16 (English Standard Version).

3. Judgement of the U.S. Supreme Court, *Joseph Burstyn, Inc. v. Wilson*, 26 May 1952, 343 U.S. 495.

4. See article 724 of the Italian penal code and the Irish Defamation Act 2009 (Act. No. 31/2009), available at <http://www.irzishstatutebook.ie/2009/en/act/pub/0031>. Retrieved 19 September 2014.

5. See section 140 of the Danish Penal Code; Section 188 of the Austrian penal code; Chapter XVII, Section 10 of the Finnish penal code. See also House of Lords (2003), appendix V.

6. See article 198 of the Greek penal code. See also Temperman (2008).

7. European States have also a number of other laws that limit freedom of expression for the sake of protecting believers or religious groups. Most European countries punish the disturbance of religious practices, discrimination on the basis of religion, incitement to hatred and defamation on the grounds of religion (Venice Commission, 2008). For the sake of brevity, the present analysis does not address the laws punishing the aforesaid forms of expression, since they are less likely to be used in case of ‘blasphemy’. Once should be aware, at any rate, that the distinction between ‘blasphemy’, ‘reli-

gious insult’ and other forms of potentially illicit expression – notably, incitement to hatred – may, in certain cases, be rather imprecise.

8. Maltese penal code, title IV, section 163, available at <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574>. Retrieved 16 September 2014.

9. See article 525 of the Spanish Penal Code, article 525. See [http://noticias.juridicas.com/base\\_datos/Penal/lo10-1995.l2t21.html#a525](http://noticias.juridicas.com/base_datos/Penal/lo10-1995.l2t21.html#a525). Retrieved 15 September 2014; Art. 196 of the Polish penal code, cited in Venice Commission 2010, 202; Art. 198 of the Greek Penal code.

10. See the parliamentary question of 18 January 2012 on the censorship of “Sul Concetto di Volto nel Figlio di Dio”, available at [http://www.camera.it/\\_dati/leg16/lavori/stenografici/sed572/bt11.htm](http://www.camera.it/_dati/leg16/lavori/stenografici/sed572/bt11.htm). Retrieved 12 September 2014.

11. See, by analogy, the judgement of the European Court of Human Rights *Cump n and Maz re v. Romania*, no. 33348/96, ECHR 2004-XI, para 114.

12. Decision of the European Commission of Human Rights, 5 March 1991, *Choudhury v UK*, app. 17439/90.

13. Judgement of the European Court of Human Rights, 20 September 1994, *Otto Preminger-Institut v Austria*, app. 13470/87, Series A n. 295.

14. *Ibid.*, para 48. See also *X Ltd. and Y. v UK*, app. 8710/79, D.R. 28, p. 77, para 11.

15. *Otto Preminger-Institut v Austria*, cit. note 13, dissenting opinions of judges Palm, Pekkanen and Makarczyk, para 6.

16. It is worth noting that Austria did argue that the national measure also served to prevent disorder, see *Otto Preminger-Institut v Austria*, cit. note 13, para 46.

17. Judgement of the European Court of Human Rights, 25 November 1996, *Wingrove v UK*, app. 17419/90, in *Reports of Judgments and Decisions*, 1996-V.

18. See *Wingrove v UK*, note 17, paras 54, 55 and 62.

19. *Ibid.*, para 63.

20. *Ibid.*, para 57.

21. Judgement of the European Court of Human Rights, 13 September 2005, *I.A. v Turkey*, app. 42571/98, in *Reports of Judgments and Decisions*, 2005-VIII.

22. *Ibid.*, dissenting opinion of judges Costa, Cabral Barreto e Jungwiert, para 8.

23. Judgement of the European Court of Human Rights, 31 September 2006, *Giniewski v France*, app. 64016/00, in *Reports of Judgments and Decisions*, 2006-I.

24. *Ibid.*, para 51.

25. Judgement of the European Court of Human Rights, 31 January 2007, *Klein v Slovakia*, app. 72208/01.

26. This may be done, of course, via the laws on insult in general.

27. See the Opinion of the Court of Justice of the European Union 2/94 [1996] ECR I-1759, para 27.

28. Cf. art.51 of the Charter. See also the Judgements of the Court of Justice of the European Union in Case C-617/10 *Åklagaren* [2013] not yet published, para 19; Case C-27/11 *Vinkov* [2012] not yet published, para 58; Case C-256/11 *Dereci and Others* [2011] ECR I-11315, para 72.

29. The EU can use a few instruments to promote human rights within its borders, notably the procedure contained in article 7 of the Treaty on European Union (Official Journal of the European Union 30 March 2010 C 83/13), which may lead to the suspension of the voting rights of EU Members, but which has never been used in practice. The EU may also use soft law instruments to monitor respect for human rights in Europe, such as the Justice Scoreboard,

see Commission communication COM (2014) 155 final, 17 March 2014, through which the Commission may indirectly monitor the enjoyment of the right to an effective remedy on the part of EU citizens.

30. Statement on behalf of the European union delivered by Mr Philippe Delacroix, Coordinator for the French presidency of the European Union in New York, 22 October 2008, <http://www.franceonu.org/france-at-the-United-nations/press-room/statements-at-open-meetings/general-assembly/archives-1034/july-december-2008-french-850/third-committee/article/22-october-2008-item-64-b-human>. Retrieved 12 September 2014.

31. EU Council Conclusions on Freedom of Religion or Belief, 16 November 2009, doc. 15510/09

32. The General Secretariat of the Council, in an email communication to the author (20 January 2014), specified that the Guidelines were adopted by unanimity since they were considered as part of the Common Foreign and Security Policy, see article 24(1) of the Treaty on European Union, Official Journal of the European Union 30 March 2010 C 83/13.

33. Admittedly, the Guidelines only refer to the decriminalisation of ‘blasphemy’, but such reference should be read extensively, since – according to the Guidelines – any expression that does not constitute speech is a legitimate expression. Similar arguments are put forward, in brief, in Council (2014), at p. 17.

34. I.e. the collective dimension of religious freedom, the rights of parents to educate their children and the principle of non-discrimination (COMECE, 2013).

35. Translation by the author.

36. *Cit. supra*.

37. Cf. the separate opinion of judge Alfaro in *Temple of Preah Vihear (Cambodia v. Thailand)*, ICJ Rep. 6, 1962, available at <http://www.icj-cij.org/docket/files/45/4877.pdf>, p. 40 and 65: “Inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible [...] This principle, known to the world since the days of the Romans, is one of the ‘general principles of law recognized by civilized nations’ applicable and in fact frequently applied by the International Court of Justice”.

38. Gospel of Luke 6: 31 (English Standard Version).

39. I.e. Former Yugoslav Republic of Macedonia, Albania, Bosnia and Herzegovina, Montenegro, Ukraine and Armenia, see the statement reported above, note 30.

40. See Human Rights Council, Report of the Ad Hoc Committee on the elaboration of complementary standards on its second

session, 21 January 2010, A/HRC/13/58, para 38.

41. Defamation Act 2009 (Act. No. 31/2009), available at <http://www.irishstatutebook.ie/2009/en/act/pub/0031>.

42. Preamble of the Treaty on European Union, see note 32.

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