

Summary

Criminalising ‘defamation of religion or belief’

The possibilities for amending the law on hate speech in the Dutch Criminal Code to criminalise defamation of religion or belief, also in view of international legal obligations

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Background, research question and sub-questions

This report carries out a motion adopted by the Dutch Senate in December 2013, that was adopted simultaneously with the abolition of the criminal offence of blasphemy (art. 147 Criminal Code/CC). The research question (that was derived from the motion), is as follows:

Can a possible amendment of article 137c-137e Criminal Code (CC) be useful to accomplish that these provisions provide adequate protection against ‘defamation of citizens – that is experienced as very serious – by defaming their belief’? Can this be achieved without unduly restricting freedom of expression?

This research question is divided in three parts.

- (1) Is an amendment of art. 137c-e CC necessary to accomplish that these offences provide protection against ‘defamation of citizens – that is experienced as very serious – by defaming their belief’, or are such expressions already covered by art. 137c-e CC?
- (2) When is there ‘adequate protection’ against ‘defamation of citizens – that is experienced as very serious – by defaming their belief’?

- (3) Are the amendments investigated in line with the right to freedom of expression (art. 7 of the Dutch Constitution, art. 10 European Convention on Human Rights [ECHR] and art. 19 International Covenant on Civil and Political Rights [ICCPR]), and when is there an undue restriction of freedom of expression in this regard?

Sub-question 1

Is an amendment of art. 137c-e CC necessary to accomplish that these offences provide protection against ‘defamation of citizens – that is experienced as very serious – by defaming their belief’, or are such expressions already covered by art. 137c-e CC?

This concerns a legal analysis of articles 137c-e CC, based on case law, Parliamentary documents and legal doctrine.

Art. 137c CC (‘group defamation’) holds liable ‘any person who, publicly – orally, in writing or by means of portrayal – and intentionally, expresses oneself in an insulting manner about a group of persons on account of their race, religion or belief, hetero- or homosexual orientation or physical, psychical or mental handicap’. Article 137d CC concerns ‘any person who publicly – orally, in writing or by means of portrayal – incites to hatred against or discrimination of persons or violence against persons or property on account of their race, religion or belief, gender, hetero- or homosexual orientation or physical, psychical or mental handicap.’ The rationale behind both offences is to prevent negative imaging about these groups, that might lead to violence or discrimination against them.

The criminal law concept of ‘defamation’ is thus geared towards protecting people’s reputation in the eyes of others, instead of protecting people against offense to their sensibilities. It is important to note that article 137c only criminalises defamation of a group of persons *on account of* their religion or belief, or another ground mentioned. So the offence is about defaming people *because* they adhere to a certain religion.

In the beginning of the 21st Century, discussions came up about the question whether defamation on account of religion can be equated with defamation on account of race; and

about the question whether expressions about a religion or religious symbols can be equated with defamation of religious persons. In the case law on art. 137c, several examples of indirect defamation (in the broad sense) can be found, such as defamation of Jews by denying the Holocaust. Defamation of religion can be considered as a specific type of such indirect defamation, but as regards this specific type, it remained unclear (until 2009) whether it was a criminal offence under art. 137c.

In the 'Defamation of Islam' judgment in 2009, the Supreme Court quashed a conviction for group defamation for a poster with the words 'Stop the cancer called Islam'. According to the Supreme Court, only 'expressing oneself in a needlessly offensive manner about a group of people, because they adhere to a certain religion' is a criminal offence under article 137c. Such is the case if the persons belonging to that group are collectively targeted in what characterises them; if they are defamed exactly because they adhere to a certain belief. Expressing oneself in a defamatory manner about a religion is not a criminal offence under art. 137c, according to the Supreme Court, even when it is done in such a manner that the adherents of that religion are thereby offended in their religious feelings. An expression needs to 'unmistakably concern a certain group of persons characterised by their religion', if it is to be considered group defamation. Only if a defendant also draws conclusions about persons – as appearing from the context and in the framework of the expression as a whole – can there be 'defamation of persons'. The Supreme Court does not explicitly rule whether expressions about gods, holy figures or religious symbols can still fall under article 137c, but this will be very difficult, because such expressions must then also 'unmistakably concern a group of persons'.

In order to accomplish that article 137c protects against defamation of belief, the law should thus be amended. As a result of the 'Defamation of Islam' judgment, the courts' room for maneuver has become very small in this area. Chances that the Supreme Court will reverse this interpretation in the future (e.g. in case of changing societal circumstances) are small, because the term 'about a group of persons on account of' cannot simply be set aside. In any case the courts are not able to provide protection against defamation on the ground that it is *experienced as very serious* by the (religious) persons targeted, because 'defamation' in art. 137c is an objective term that does not lend itself for such subjective interpretation. It is about protecting people's dignity in the eyes of others (negative imaging), not about how an expression is experienced by the person(s) targeted. A more objective reading of the words 'defamation of citizens – that is experienced as very

serious – by defaming their belief’ is also possible, however. Such a reading would imply that an expression is regarded as an objectively serious defamation not only by the persons targeted, but also more generally (by others, perhaps even by society as a whole). Such an offence could perhaps be tied to the current art. 137c, but then the question remains what to do with the words ‘on account of’ in that provision, which provide the causal connection between the expression and the characteristic of the group. Currently, these words cause the restrictive interpretation of art. 137c by the Supreme Court as mentioned before (the ‘Defamation of Islam’ judgment). If one would remove these words, however, it is questionable whether the character of *group defamation* would remain in place.

Moreover, the question what to do with other types of indirect defamation (such as Holocaust denial) – and with indirect defamation as related to other group characteristics such as race – deserves consideration. After all, forms of indirect defamation that used to fall within the scope of art. 137c (according to the courts), may no longer be covered by that article since the ‘Defamation of Islam’ judgment.

Are the Supreme Court’s considerations in the ‘Defamation of Islam’ judgment also applicable to article 137d (incitement to hatred, discrimination or violence)? That article also includes the words ‘on account of’ (the causal connection between expression and group characteristic), and both provisions have a comparable rationale and have often been taken together in Parliamentary debates. Therefore, it is plausible that under article 137d expressions are only criminal if they ‘unmistakably concern a group of persons’, the same as for art. 137c. However, it is still possible that extreme utterances about a belief (or about gods, religious figures or symbols) are covered by article 137d, if such utterances – considering the context – clearly incite to hatred, discrimination or violence about persons. *Defamation* of belief can never be covered by article 137d, because that provision is not about defamation.

In sum: in order to accomplish protection against ‘defamation of citizens – that is experienced as very serious – by defaming their belief’ it is indeed necessary to amend the law. Such expressions are currently not covered by art. 137c-e CC. If the words ‘defamation experienced as very serious’ are interpreted subjectively – any defamation that is experienced as very serious by the persons targeted – it is necessary to adopt a new criminal offence, because such a subjective offence would clash with the objective nature of art. 137c-e.

Sub-question 2

When is there ‘adequate protection’ against ‘defamation of citizens – that is experienced as very serious – by defaming their belief’?

This research only deals with ‘adequate protection’ in a narrow, legal sense: that is, with the question whether positive obligations to criminalise such speech can be derived from international conventions or other international legal instruments by which the Netherlands is bound. This entails (1) the ECHR; (2) the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); (3) the Council of Europe’s Cybercrime Protocol; (4) the EU Framework Decision on racism and xenophobia; and (5) the International Covenant on Civil and Political Rights (ICCPR). An analysis is provided of these instruments, the interpretation thereof in case law and other documents of authoritative international bodies, and legal doctrine.

It is probably not possible to derive such positive obligations from the ECHR; the case law of the European Commission of Human Rights (ECommHR) and the European Court of Human Rights (ECtHR) does not explicitly provide such obligations. Positive obligations to counter certain expressions can be based on article 8 ECHR – the right to respect for private life (possibly together with the prohibition of discrimination in article 14 ECHR if expressions have ‘discriminatory intent or effect’), but as regards hate speech and group defamation states have a large margin of appreciation to balance article 8 with the right to freedom of expression (article 10 ECHR). It is difficult to imagine that the Court would formulate a positive obligation to criminalise defamation of *belief* in the future. Though the ECommHR has referred to positive obligations under article 9 ECHR (the right to freedom of religion or belief) to counter expressions about religious figures or symbols (without explicitly adopting such obligations), the ECtHR did not use this formulation in comparable cases, so it can be assumed that the Court will not formulate such positive obligations in the future (also because the Court has not even accepted positive obligations for group defamation against *persons*).

The CERD, the Cybercrime Protocol and the EU Framework Decision only create positive obligations (with several possibilities for making reservations) as regards expressions against *persons* on account of their religion, and only if it concerns racial discrimination shrouded in religious terms – if the context makes clear that the underlying message is

actually racist. Expressions targeted purely at religions, instead of persons, are in any case not included in these obligations.

Art. 20(2) ICCPR provides that ‘Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’. This does not have to be criminal law. In the Netherlands, such expressions are covered by article 137d. This ICCPR obligation is specifically meant to deal with the more direct forms of hate speech against people, and not to prohibit ‘displays of lack of respect for a religion or other belief system’. The Human Rights Committee does leave open the possibility that extreme expressions about a belief can be covered by art. 20(2) if such expressions constitute discrimination, hostility or violence against persons. Art. 137d already leaves a small room for covering such extreme expressions.

In sum: positive obligations to criminalise defamation of belief cannot explicitly be derived from international law, and it is not to be expected that this will happen in the near future. In a legal sense, it is thus not necessary to provide protection against such utterances; the offences of art. 137c-e already provide adequate protection in the sense that they adhere to international legal obligations on hate speech against *persons* on account of religion.

Sub-question 3

Is criminalisation of defamation of belief in line with the right to freedom of expression (art. 7 of the Dutch Constitution, art. 10 ECHR and art. 19 ICCPR), and when is there and undue restriction of freedom of expression in this regard?

Is it possible to provide protection against ‘defamation of citizens – that is experienced as very serious – by defaming their belief’, without violating the right to freedom of expression? This section provides an analysis of article 7 of the Dutch Constitution, art. 10 ECHR and art. 19 ICCPR, of the relevant case law and interpretation of these provisions by authoritative international bodies, and of legal doctrine. Moreover, this section delves into legal theory in order to answer the question when such criminalisation unduly restricts freedom of expression. It gives insight into the ideas behind criminalising expressions, in order to assess the implications of amendments of the law in this field. This includes an analysis of the relationship of such possible amendments to the abolished prohibition of

blasphemy (art. 147 CC) and of the question which religions and beliefs – and which aspects of such religions and beliefs – an amendment could cover. For this part of the research, legal theory and social science literature have been used.

The Constitution

From Article 7 of the Constitution (freedom of expression), it cannot be derived what kinds of criminal law restrictions of freedom of expression are allowed. Neither can this be derived from case law, considering the prohibition of constitutional review of most relevant legislation. As a general principle, the legislature shall be cautious not to criminalise too wide a range of behavior; criminal law should be a last resort.

The Council of Europe / ECHR

Under article 10 ECHR, states still have a rather broad margin of appreciation to criminalise defamation of religion: after all, there exist large differences between the Council of Europe's member states in the field of morals and religion. In any case, states are allowed (depending on the specific circumstances, such as public order problems) to criminalise certain expressions about *people* on account of their religion. From the *Norwood* case it also appears that expressions about a religion can be prohibited if, considering the context, they actually target a group of people. That seems to indicate that criminalising the expression dealt with in the Dutch 'Defamation of Islam' judgment (which can be considered similar to the expression in the *Norwood* case) would also pass the ECtHR's test.

As a general rule, the ECtHR holds that Article 10 ECHR also protects expression that 'shock, offend or disturb'. In practice, however, the ECommHR and ECtHR do sometimes allow states to provide (criminal law) protection against 'gratuitously offensive' expressions about religion. The Court does differentiate between, on the one hand, offensive or shocking commentary or provocative ideas, and on the other hand, harsh attacks on objects of religious veneration. States are often allowed to prohibit verbal attacks on religion or belief in itself or about religious figures or symbols, but not every offensive expression may be prohibited. It is really about the *manner* in which beliefs are opposed. There shall be sufficient room for criticism of religion, of religious institutions, doctrines or leaders. The fact that such expressions may offend some people, is not necessarily sufficient to prohibit an expression. After all, the ECtHR stresses that utterances in the context of a debate about issues of public interest deserve a high degree of

protection. What is more, one may question whether the Court will continue its line of reasoning as regards defamation of religion in the future, considering the many dissenting opinions in this field and the fact that the CoE's Parliamentary Assembly's and the Venice Commission's much more critical stance as regards criminalising defamation of religion. These institutions recommend to abolish offences of blasphemy, defamation of religion and offense to religious feelings. Though it concerns non-binding documents, they do point to a tendency in the Council of Europe's member states – tendencies which the ECtHR may take into account when deciding on the scope of states' margin of appreciation.

The UN / ICCPR

Under article 19 ICCPR, expressions about religion cannot be prohibited as easily as under the ECHR. According to the Human Rights Committee, 'prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant'. Accordingly, such expressions can only be prohibited if they advocate religious hatred that constitutes incitement to discrimination, hostility or violence. Such laws may not discriminate between different religions or beliefs. It is still possible, though, that extreme attacks on religions, religious symbols or figures can fall under article 20(2): that is, if they actually propagate hatred against people. In any case, criticism of religious leaders or of the doctrines of religions or beliefs may not be criminalised. Thus, criminalising defamation of belief can result in a violation of article 19 ICCPR, unless it concerns advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence – that is, extreme expressions against people. This seems to relate only to expressions that lead to negative imaging *against* the religious group in the eyes of others, and not to expressions that offend the members of that group and thus lead to public order problems (if they take the law into their own hands). Whether expressions satisfy the test of article 20(2) can also depend on the social climate, for instance in a context where there is already much violence against a certain group.

In sum: article 10 ECHR still leaves some room for states to criminalise defamation of religion, though the prohibition of strong, but not gratuitously offensive criticism of religion, religious institutions, doctrines or leaders is not allowed. Under article 19 ICCPR only extreme utterances about belief – that amount to advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence – can (and must) be prohibited.

Legal theory: 'unnecessary' restrictions of freedom of expression

What possible reasons are there to criminalise defamation of religion and how strong are these reasons? When criminalising defamation of religion, one should look very critically at the necessity of such laws in light of the interests of speaker, receiver and society. After all, such utterances often involve criticism of convictions, ideas, institutions and ways of life, so the balancing act between the social value of an expression and its potential harm will often incline towards freedom of expression. The risks for freedom of expression would be highest if the legislature would decide to opt for a subjective interpretation of the words 'defamation of citizens – that is experienced as very serious – by defaming their belief'. That points to the rationale of protecting people against offense, possibly in combination with protecting public order in the sense of preventing offended people from causing public order problems. This is problematic: offense caused by defamation of belief is, in principle, not serious enough to justify a restriction of the speaker's freedom of expression. Such offense depends very much on the subjective sensitivities of the persons concerned, which would then determine the boundaries of freedom of expression, even if expressions do provide an important contribution to public debate. Moreover, the speaker's freedom to manifest his or her religion or belief can thus be compromised. Such a criminal offence would also be very difficult to operationalise and to enforce, whereas the risk of violating the legality principle (particularly *lex certa*) is high.

Former article 147 CC – blasphemy – was also geared towards protecting people against offense to their religious feelings, and thereby protecting public order. A subjective reading of 'defamation of citizens – that is experienced as very serious – by defaming their belief' would thus lead to an amendment in the law that would, in a way, bring back article 147 CC that has just been abolished. The difference is that such an amendment could protect more (aspects of) religions and beliefs than article 147 CC did. However, since the prosecution mostly declined to bring cases concerning defamation of religions to court – neither under article 147 CC when it still existed, nor under article 137c-e CC even before the 'Defamation of Islam' judgment – it is worth considering what added value such an amendment would really have. To what extent would it bring protection in practice?

Moreover, criminalising defamation of religion and belief necessitates a definition of what 'religion and belief' is and which aspects (which gods, symbols, holy figures, and convictions) are to be protected. A pertinent question is also how much leeway is left to the

courts in this interpretation, and vice versa, how much guidance the legislature should give. For both legislature and judiciary this is a difficult task, considering the issue of state neutrality in questions of belief. Expressions about religion or belief can take several forms:

- expressions about gods / about ‘the sacred’;
- expressions about symbols (including holy figures);
- expressions about doctrines;
- expressions about religion or belief as an institution or social phenomenon;
- expressions about the practices emanating from religion or belief.

When criminalising such expressions, several problems rise as regards freedom of expression. For the first two categories, the main problem is the subjectivity: what is sacred and for whom, and what should thus be protected? For the latter three categories, the problems lie mainly in the contribution that such expressions often make to public debate about important social issues. For non-religious beliefs such problems may be even more pertinent, because it is more difficult to differentiate them from political ideologies.

Conclusion

If an amendment of Dutch criminal law were considered, it would be advisable to opt for a more objective offence instead of criminalising defamation that is experienced as serious by the persons targeted. Moreover, it is necessary – in order not to violate art. 19 ICCPR – to restrict the offence to extreme expressions about religion that amount to ‘advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence’, instead of criminalising *defamation of religion*. However, this brings us to the conclusion that an amendment is not necessary; art. 137d already covers such extreme expressions, as long as they unmistakably concern a group of people (which article 19-20(2) ICCPR also seem to require). The Dutch courts have not often been confronted with such cases, however. If such cases come up, it may sometimes be difficult to assess which aspects of religions and beliefs can fall under this heading. It does not seem necessary that the legislature gives the judiciary more guidance on this point, because everything depends on the specific context anyway – giving general guidelines is hardly possible. In theory, all of the abovementioned categories of expressions about religion can, in extreme cases, amount to advocacy of religious hatred; in practice, this is difficult to imagine for all of the categories.