

The Netherlands has broken its word.

The nation is violating the spirit of a commitment it made in the community of nations. On 11 December 1978, the Kingdom of the Netherlands agreed to guarantee to all those on its territory the freedom of thought, conscience, and religion; the freedom of expression; and equal protection under the law. Yet by continuing to criminalize “scornful” blasphemy and religious “insult,” it is failing to do just that.

That, at least, is the implication of a powerful statement issued recently by the United Nations body established to monitor the implementation of the International Covenant on Civil and Political Rights, or ICCPR. Though largely unnoticed in the press, this international development cannot be ignored in the Dutch political debate over the future of blasphemy.

General Comment No. 34

The ICCPR is a legally-binding human rights treaty that came into force in 1976 and was ratified by the Netherlands in 1978. Among its other provisions, the treaty (technically, its First Optional Protocol) empowers a body of eighteen “independent experts,” the Human Rights Committee, to adjudicate complaints of violations brought by individuals and state parties. And through its “general comments” the Committee periodically interprets the meaning and scope of the treaty’s provisions in light of past practice as well as communications from states and civil society stakeholders, clarifying the application of its principles to the devilish details of changing social circumstances. While the Committee’s judgments do not constitute new law, they do represent morally authoritative ideals towards which the parties to the treaty are expected to make good-faith efforts.

On 21 July 2011, the Committee adopted its [General Comment No. 34](#), a reflection on the meaning of article 19 of the Covenant, the article which provides for freedom of expression. The Committee’s previous commentary on freedom of expression, a three-paragraph note from 1983, was formulated before blasphemy had moved to the center of international affairs; before Rushdie, van Gogh, and Westergaard; before resolutions “combating defamation of religions” had become a tradition at the UN; and before the Internet. Therefore, the body’s opinion was eagerly anticipated by many observers.

A two-year process involving 75 submissions containing at least 350 drafting suggestions culminated in an unassuming conference room at the UN’s Geneva offices where the committee gathered to [work out the final language](#). Members hailed from Algeria, Argentina, Colombia, Egypt, France, Japan, Mauritius, Morocco, Romania, South Africa, Suriname, Sweden, Switzerland, Tunisia, United Kingdom, United States, and the Netherlands, in the person of Cornelius (Cees) Flinterman, the distinguished professor of international law. The drafting was steered by the Irish professor of human rights and former Roman Catholic priest Michael O’Flaherty.

Among the document’s 54 dense paragraphs, the one on blasphemy laws generated several hours of debate and multiple drafts. Submissions by the U.S. and Swedish governments had pressed for strong language, which the Swedish lawyer and former judge Krister Thelin defended doggedly during the negotiations. The matter of principle at stake was that

authorities may limit sacrilegious expression only to the extent that it is also an incitement to discrimination, hostility, or violence, which is prohibited by article 20 of the ICCPR. If blasphemy as such is defined as an affront to another's sense of the sacred, then it is never criminal.

The paragraph that emerged with a consensus reads, "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." Clearly, laws criminalizing expression that "offends religious feelings by scornful blasphemy"—as in Dutch Penal Code articles 147 and 429b—are far broader than laws criminalizing incitement. As such, they violate the Covenant. Under international law, there is no right not to be offended. The freedom of expression is not a gift to citizens that can be taken back when it is used scornfully. It is for citizens a fundamental right and for governments a fundamental obligation.

Blasphemy is not only a matter of speech. It is also a matter of conscience. And above all, it is a matter of equality. All too often, these discussions are framed as clashes between "free speech" and faith. Instead, they must be construed as clashes between competing understandings of what is sacred. The question is not just where speech gives way before religion, but where conscience gives way before conscience—thus has it always been.

The symmetry of offence

In 1526 a roof-tiler from Warmond was breaking bread with his employer when they fell into a religious dispute. The subject was news from Germany that some reformers had trodden on a consecrated communion host in the course of their protest against Catholic power. The boss was scandalized. But as recounted by the British historian David Nash in his *Blasphemy in the Christian World*, the laborer was unimpressed, remarking, "What is it more than bread? The very bread we eat at this table is the same."

He proceeded to quote the apostle Paul's admonition against idolatry from the Book of Acts chapter 17: "God that made the world and all things therein, seeing that he is Lord of heaven and earth, dwelleth not in temples made with hands." Paul had been in Athens preaching the Gospel when some Epicurean and Stoic philosophers brought him to explain his strange new doctrine at the Areopagus, or "Hill of Ares," a forum near the Acropolis for deliberation on matters of public concern.

Paul tells the "men of Athens" that the god he proclaims is responsible for everything that they, in their ignorance, lay on the altar "to an unknown god." Paul's one god "hath made of one blood all nations of men for to dwell on all the face of the earth . . . For in him we live, and move, and have our being; as certain also of your own poets have said." Once the apostle begins talking about a man returned from the grave, however, the philosophers start heckling him. He leaves the Areopagus, one imagines, amid a shower of laughter. Still, it is said, a few converts follow after him.

The roofer's skeptical comment about the sanctity of the host was an exercise of "speech," but it was also a manifestation of conscience, a sign of his own orientation toward the sacred. From a moral perspective, the attitudes of the worker and of his more theologically

conservative employer stand in perfect moral symmetry. For one, regarding the host as mere bread was an impiety and an outrage against the sacred person who dwelt within in. For the other, sanctifying mere bread was an idolatry and an outrage against the sacred person who dwells not in hand-made temples. Neither claim was uniquely deserving of being classified as “religion,” relegating the other to being “speech” against religion. Neither man had any less cause to allege a blasphemy against the other. This is what I refer to, in my book, *The Future of Blasphemy: Speaking of the Sacred in an Age of Human Rights*, as The Symmetry Thesis.

The Dutch blasphemy law of the era, dating from 1518, stated, “As a cure against blasphemers we forbid blasphemy against the holy names of God, the Virgin and the Saints. It is also forbidden to deny, scorn or belittle them.” Notice that here the target of scorn was not the religious believer, but the object of belief. Blasphemy was understood as a show of disrespect for the godhead and other sacred entities themselves. In contrast, contemporary Dutch law understands blasphemy as a show of disrespect for fellow citizens, an abuse of their “religious feelings.”

This shift in the alleged victim of blasphemy from sacred entities to mortal persons took place in legal regimes across European societies beginning as early as 1617, with the English Common Law decision that secular courts had an interest in punishing blasphemy since it constitutes a disturbance of public peace and tranquility. The shift reflected the new paradigm in liberal political philosophy in which government is regarded as a device for protecting the natural rights of individual citizens. During a 1656 debate on blasphemy charges against the English Quaker leader James Naylor, the offence was defined by one lawyer as “cursing the name of God *or of our neighbor*” (my emphasis). Blasphemy was being transformed from a sin to a crime, from a spiritual wrong to personal one.

Pre-modern, spiritual blasphemy was a blatant failure of equal regard for citizens because it singled out one vision of the sacred—such as the Christian God, Virgin, and Saints—for protection, to the exclusion of heterodox, morally symmetrical alternatives. Yet the basic inequality in the law was not removed by the invention of the modern, quasi-secular category of personal blasphemy. Rather, it was multiplied. Now the law singled out for protection the “feelings” of all those and only those who identified with traditional, publicly recognized religious communities, neglecting the morally symmetrical feelings of the heterodox and secular. No one’s sense of the sacred should be more equal than anyone else’s.

This inequality is a legacy of blasphemy laws that lasts to this day, as [Kustaw Bessems](#) has argued recently. General Comment No. 32 forcefully reminds us that restrictions on offensive expression must not breach the Conventions’ guarantees of equality before the law (article 26) and freedom of thought, conscience, and religion (article 18):

Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.

Additionally, the new Comment cautions states against employing a narrow notion of so-called public morals to restrict speech: “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations . . . for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.”

Here again the Dutch anti-blasphemy regime contravenes international law. It singles out *religious* sensibilities as such for protection. And as is well known, the *Lex Donner* was adopted in response to early 1930s communist agitation in the press and, in some cases, in the church pews, against mainstream Christian values.

Why should traditional religious believers have available to them a legal remedy for the violation of their sense of the sacred, when heterodox believers and secularists have no remedy for the violation of theirs? Why should the law place on the scales of justice a conservative Muslim’s reverence for the honor of the Prophet, but not Sooreh Hera’s reverence for the dignity of gay men? The only principled answer is that she deserves less concern and respect than other citizens, and is therefore not worthy of equality before the law. But the state has given its word to protect all equally.

The politics of insult

What of articles 137c and 137e, which prohibit “insult” to a group of persons on account of their race, religion or belief, sexual orientation or disability and 137d, which criminalizes incitement to hatred, discrimination, and violence? Set aside incitement to imminent violence, which is outlawed even in the United States with its First Amendment protections. If the wrong of insult or incitement is to be more than a feeling of offence, what is it? An emotion of hostility is not in and of itself a crime, and so there should be no crime in stirring hostility in others.

If there is something repugnant in insult and incitement, it must be the attack on the *standing* of a group of citizens, a denial or denigration of their entitlement to equal concern and respect. Laws against group insult or group defamation, it could be argued, are designed to protect vulnerable minorities by exhibiting the state’s commitment to their equal dignity and equal standing in the face of bigots.

But as the Human Rights Committee wisely cautions, such laws are confronted with the question of truth: “All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expressions that are not, of their nature, subject to verification.”

If the state is to intervene on behalf of “Christians,” “Muslims,” or “Jews,” it must decide on whose behalf it is intervening. It must lend its official approval to some idea of what counts as a “real” or “authentic” member of such groups. Is Hera’s work an insult to Muslims? That depends on whether one thinks that “Muslims” by definition object to figural representations of the Prophet or regard homosexuality as an abomination. As American constitutional scholar Robert Post argues, the identities of such communities are not scientific facts but social categories that are open to moral contestation and re-negotiation.

Often it is those within the community who have the most urgent stake in contesting and re-negotiating the meaning of the identity.

It would not do to take a poll of all of the self-identified members of the group to determine what they believe. The question is who possesses the most worthy and defensible understanding of the identity. And that question is not subject to statistical verification. It is a moral question. In a democratic society, such questions are not decided by the state. Rather, they should be left to the uncoerced conversation of individual persons.

The promise of the Netherlands

From the early Enlightenment, the Netherlands has held out to the world a special promise, the promise of a place for unfettered conversation on matters sacred and mundane, an Areopagus, a spiritual prominence rising from a low country. Prosperous, well-ordered, and exceptionally tolerant, the Netherlands in the seventeenth century attracted religious dissidents, writers, and publishers from everywhere. René Descartes wrote to Balzac from Amsterdam in 1631, “I go to walk every day amid the Babel of a great thoroughfare with as much liberty and repose as you could find in your garden-alley.”

Yet alongside this tradition of free thought there was another tendency, represented by the blasphemy laws, which could be exploited by intolerant Reformed ministers in campaigns against Jewish communities, and which sent Adriaan Koerbagh to an early death in the Willige Rasphuis in 1669 for his unpublished book, *Een Licht Schijnende in Duistere Plaatsen*.

The Netherlands has put its name to the international covenant of human rights, and thereby committed itself to standing for freedom of expression, freedom of conscience, and equality before the law, not only on its territory but also with those, such as the religious minorities of Pakistan, who struggle against tyrannical blasphemy laws. It has given its word to the world that it is a place where words live free. By clinging to its laws against blasphemy and religious insult, the Netherlands betrays this heritage and this promise.

Being rid of laws against personal blasphemy does not mean being rid of the category of blasphemy altogether. Instead, it means finally, fully secularizing what was a discriminatory religious concept, recognizing that the claims of the believer and the claims of the unbeliever are morally symmetrical. Each of us—religious and secular alike—has equal right and equal authority to speak about what we believe to be sacred. We are free to dispute ethical blasphemy to the extent that we are not punished for personal blasphemy. We may be laughed off of Areopagus, but we may not be crucified. Death to blasphemy laws—long life to blasphemy.