

‘Islamophobia’ and the law: Belgian hate speech legislation speech and the wilful destruction of the Koran

International Journal of
Discrimination and the Law

1–12

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DOI: 10.1177/1358229113500418

jdi.sagepub.com



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Abstract

In Belgium a man was convicted for incitement to racial hatred and discrimination because he publicly tore up a Koran, before the eyes of a small group of Muslims. The case fits within a wider development of increasing legal sensitivity to ‘Islamophobia’. This development, however, has several problematic aspects and implications, as is illustrated by a detailed analysis of the case.

Keywords

Hate speech, incitement, symbolic speech, Islamophobia, Koran, racism

Introduction

On 8 June 2012, a man identified as Arne S. participated in a demonstration organised by a radical right-wing political party, Vlaams Belang¹ (‘Flemish Interest’), opposing the construction of a new mosque in the Belgian coastal city of Ostend. In the aftermath of the demonstration, S. tore up a Koran in the presence of a small group of Muslims,

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with whom he had exchanged words. The public prosecutor indicted S. for incitement to hatred, discrimination and violence on the basis of race and ethnic origin.²

The defendant's attorney called for an acquittal, arguing that no infraction of the anti-racism legislation had occurred. The criminal court in Bruges convicted the man, however, on 11 March 2013.³ Due in part to the unfavourable criminal history of the defendant, the sentence was relatively severe, consisting of an effective prison sentence of four months and a fine of 600 Euros. The court held that the facts were serious and testified to 'a blatant lack of tolerance and a highly questionable attitude'.⁴

Context

The ruling fits within a wider development in the legal world in general, and in Belgium in particular, of increased sensitivity to what is often referred to as 'Islamophobia'.⁵ Another notable example of this trend, within Belgian case law, was the conviction, a few years ago, of an individual who, while drunk, had shouted 'Terrorist!' at a sun-tanned, but Caucasian (!), snack bar owner, adding that the latter should 'return to his own country'. The criminal court in Ypres regarded this too as incitement to racial hatred. The Centre for Equal Opportunities⁶ – a government institution responsible for enforcing the federal Belgian discrimination and hate speech legislation – welcomed this conviction at the time. A representative was quoted saying that the defendant 'had targeted a man whom he thought was of foreign descent', and that – as such – he had had 'the intention to affect this person'.⁷ 'Several people have been convicted for similar statements, but it remains a strong signal by the court', the Centre's representative concluded.

The Centre, which disposes of special prosecution powers under Belgian discrimination and hate speech legislation, has itself increasingly focused on 'Islamophobia' as well. One of its early cases in this regard concerned the prosecution of a priest who had engaged in anti-Islamic speech. The man had said, *inter alia*, that 'every Muslim child that is born in Europe is a time bomb for future children in the West', and that 'the mosques in Europe are more dangerous than nuclear power plants'.⁸ At the time when the prosecution was initiated, in 2002, only incitement to racial hatred was prohibited in Belgium, and the court eventually acquitted on that basis:

Muslims constitute [...] a religious community, but not a race, not an ethnicity, which would include groups like Arabs, Turks, Indians, persons with black skin colour and Belgians.⁹

'Religion', the court continued, 'is not a protected characteristic which the legislator has included in [the Antiracism Act]'. Therefore, the court considered the alleged violation of the act not to have taken place.¹⁰ The court did express its moral condemnation for the defendant's viewpoints, indicating furthermore that the speech did amount to incitement to hatred, just not on the basis of a legally prohibited characteristic. In 2003 incitement on the basis of religion or belief did become criminalised.¹¹

More recently, and after several other cases, the Centre issued a press release concerning the controversy surrounding the anti-Islamic movie (trailer)¹² 'Innocence of Muslims',

which had been uploaded to YouTube in July 2012. In its press release, the Centre ‘strongly condemned’ the film, stating that it ‘no doubt contributed to an Islamophobic climate’.¹³ The Centre indicated that it did not (yet) see any possibility of prosecution, ‘in the absence of information about [the film’s] creators, their intent and their lack of a link with Belgium’.¹⁴ However, it did emphasise that people in Belgium could be prosecuted if ‘the dissemination of this film (by showing it in a venue or by sharing it on the Internet) is accompanied with hateful messages or any form of violence’, announcing that it would remain vigilant for such incidents and take legal action when necessary.¹⁵

In addition, one can point to the Centre’s tendency to support even quite far-reaching measures taken in response to ‘Islamophobic’ incidents. In May 2013, for instance, a weatherman working for a national television station (RTL) was fired on account of posts on his personal Facebook profile. The man, allegedly, had been the victim of a violent incident of road rage, involving what he claimed to have been Islamic men. This prompted him to post a Facebook rant in which he asserted, *inter alia*, that if Muslims in Belgium refuse to conform to ‘our traditions’, they ought to ‘go back to the countries they came from’. ‘Integrate or get out!’, his conclusion read.¹⁶ In response to the dismissal, the Centre refrained from taking a formal position on the legality of Trullemans’ utterances, suggesting however that there were indications that the hate speech legislation had *not* been violated (pointing to the context of the utterances, and to the fact that Trullemans had immediately apologised and retracted his words, which seemed to negate intent, etc.).¹⁷ Nonetheless, the Centre did explicitly support the dismissal, stating:

[T]he decision of RTL to fire Mr. Trullemans [...] [is] a correct and adequate response [...], proportional to the seriousness of his words.¹⁸

On the political level too some are attempting to increase the legal sensitivity to ‘Islamophobia’. Senators Fauzaya Talhaoui and Bert Anciaux, for instance, introduced a draft resolution on 21 February 2013, aimed at the ‘the fight against Islamophobia’.¹⁹ Following the broad definition offered by the Runnymede Trust Commission on British Muslims and Islamophobia,²⁰ the Senators understand ‘Islamophobia’ to entail the ‘strong presence’ of any of eight elements, including: ‘Islam as monolithic and static’; ‘Islam as inferior to the West and as barbaric, irrational and sexist’; and ‘Islam as violent, providing support to terrorism, and actively involved in a clash of civilisations’.²¹

Such ‘Islamophobic’ ideas, Talhaoui and Anciaux contend, ‘incite to discrimination and racism, and require unequivocal condemnation and judicial prosecution’.²² They argue that the police and the office of the public prosecutor should be instructed to treat the issue as an absolute priority.²³

Race versus religion

The judgement of the criminal court of Bruges appears to rise to the challenge set by the draft resolution. In doing so, it has several problematic aspects and implications though.²⁴ For starters, there is the fact that the legislation concerning *racial* hate speech is applied. The case involves tearing up a *Koran*, in the presence of *Muslims*, following a

demonstration against the construction of a new *mosque*. This would primarily seem to involve the criterion ‘religion’ rather than ‘race’.²⁵ While, as mentioned, hate speech on the basis of religion is currently prohibited in Belgium as well, it is covered by a different provision (in separate legislation).²⁶ Nevertheless, the court convicted S. on the basis of the prosecutor’s indictment under the anti-racism legislation. Exactly how the case would involve racial hate speech is not clarified in the ruling.

This ‘racialisation’, if you will, of what is considered ‘Islamophobia’ is a hazardous development, as racist speech is traditionally accorded a lower degree of constitutional and human rights protection than speech concerning religions.²⁷

This difference in free speech protection for both types of speech is sometimes based on the (alleged) fact of one’s racial identity being something one is born with, while one’s religion is something one chooses.²⁸ However, to begin with, this distinction is not as clear as it may seem. For one thing, the vast majority of adherents to a religion never actively choose their beliefs, but are instead ‘born into them’. To the extent that they can be regarded as making a choice, this is at most a ‘choice’ not to actively opt out. More fundamentally, it is not clear why the choice factor should legitimate a differential treatment for purposes of free speech.²⁹ It hardly seems convincing that one should be less protected against vilification on the basis of a particular characteristic on account of it constituting a choice.

A more relevant difference between religion and race, from a free speech perspective, is that religion is primarily a matter of beliefs, ideas, values and morality, while race could be said to lack content in this regard. Religious ideas and beliefs can be appraised and argued over, as in fact they are: religious perspectives are frequently at the centre of political and societal debates, ‘on matters ranging from when life begins to when it ends (and many matters in between)’.³⁰ All of this renders free speech concerns much more salient for ‘anti-religious’ speech, warranting increased constitutional protection as a necessary precondition for open debate.³¹ People’s belief systems and ideas, which are implicated in their religious views, cannot and should not be insulated against criticism and attacks;³² at least not to the same extent as speech targeting someone’s racial characteristics.³³

Treating ‘Islamophobic’ speech as racist speech under hate speech legislation serves to unduly limit and discourage free speech, severely restricting what public policy options we can debate and pursue, and requiring public debate to tiptoe around religion, all for fear of causing offence. Allowing hostile criticism, ridicule and even ‘desecration’ of religious tenets and beliefs is a necessary price of living in a free society.

Constitutional Court

An important further shortcoming of the Bruges court’s ruling is that it pays no heed to the restrictive interpretations that the Belgian Constitutional Court handed down in connection with the incitement provisions in both the anti-racism and anti-discrimination legislation. The Constitutional Court held that, for the purposes of these provisions, ‘incitement’ must be understood as actively urging or instigating third parties to effectively undertake hateful, discriminatory or violent action vis-à-vis the targeted persons or groups (excluding incitement to ‘mere’ negative attitudes or feelings from the scope of the provisions).³⁴

Moreover, the Constitutional Court required the presence of a demonstrable, special intent: a deliberate ill will to incite the aforementioned behaviour.³⁵

To the extent that tearing up a Koran does (and seeks to do) anything, taking into account the context of the case, it is mainly to taunt or 'provoke' the targeted group *itself*. Although this may not be morally commendable behaviour, it is not prohibited under the incitement provisions,³⁶ which do not have an 'offensiveness rationale'. The suspect does not seem to actively have encouraged third parties to foster hatred or engage in violence against Muslims, in any way.³⁷

The foregoing also implies that the legislation need not *necessarily* be amended in order to avoid outcomes such as this, since the ruling is quite clearly not in line with what the Belgian hate speech legislation ought to mean.³⁸

Symbolic speech

Even regardless of the above, it seems curious to qualify tearing up a book as a criminal offense; at least, if the book is one's personal property. Legally speaking, you may tear up, shred, burn, dissolve or even eat any book you own, so long as you, in doing so, avoid violating generally applicable health and safety laws.³⁹ The fact that it here concerns a book that others regard as holy, does nothing to change this in principle. Quite the contrary even, since the destruction of the book in this case amounts to a form of 'symbolic speech', protected not only under someone's property rights, but by the right to freedom of expression as well.⁴⁰ Only legal systems that fail to take the separation of Church and State sufficiently seriously, regard causing damage to sacred books – in and of itself – as a legitimate ground for legal prosecution.⁴¹ Of course, conversely, people have as much right to oppose and criticise the destruction of books, both by means of speech and through other (legal) modes of protest.

What if the Koran belonged to someone else? Although the judgement remains silent on this point, the media accounts⁴² of the case had the defendant claiming that the Muslims had actually thrown the book at him, in order to hit him. Even in that (slightly bizarre) hypothesis, the culprit – it seems – can at most be charged with damaging someone else's property,⁴³ and not with incitement to religious hatred or violence (let alone *racial* hatred). Besides, that version of events also begs the question whether someone who knowingly throws his property at someone else's head, thereby does not himself elicit any damage subsequently done to it. One might even argue that the person who *threw* the book could have been prosecuted on charges of assault and battery.

Do the context of the case and the personal history of the accused not serve to cast a different light on the analysis? After all, it did concern a member of a radical right-wing party,⁴⁴ with a criminal record, who had just participated in a demonstration against the construction of a mosque. Although this might, again, make a moral difference, it seems to change little, if anything, from a legal point of view. All of the previous arguments apply regardless of the political background of the accused. Constitutional rights are there to protect right-wing nationalists as well.⁴⁵

Freedom of speech has little value if it only applies to uncontroversial views; generally such views do not even require protection, since they are unlikely to trigger opposition in the first place. If free speech is to mean anything, then, it should surely be to

protect unpopular and controversial views espoused by dissident individuals and groups: ‘freedom for the thought that we hate’.⁴⁶ This includes the right to be disrespectful towards people’s beliefs.⁴⁷

All the more so, since it would be virtually unimaginable that ripping up any other holy book than the Koran would lead to a similar legal response.⁴⁸ Rare attempts by Christians to have ‘blasphemous’ speech prosecuted under the discrimination legislation, have – for instance – consistently been rejected by Belgian courts, and rightly so.⁴⁹ In that regard, the prosecution and conviction in this case seem to be driven, in part, by fear of reactions of the Muslim community. This can be seen as a version of the so-called ‘heckler’s veto’:⁵⁰ the situation in which a speaker’s rights are curtailed for fear of the reaction from the audience.

Although such fears may be somewhat understandable, in light of past incidents,⁵¹ the case at hand did not seem to entail much if any risk. More importantly, using hate speech legislation in an attempt to quell such (presumed) risks and to appease religious sentiments amounts to a misappropriation of such legislation, subverting its aims: rather than punishing speech liable to elicit discrimination or violence vis-à-vis particular groups, it would instead ‘reward’ the threat of violence by these groups themselves.⁵² If anything can be considered ‘Islamophobia’, it is precisely this.

Funding

This work was supported by the Research Centre on Equality Policies, which receives its funding from the Flemish government.

Acknowledgements

The author thanks Stefan Sottiaux and Jelle Flo.

Notes

1. The party is the successor of the Vlaams Blok (‘Flemish Block’), a party that disbanded after three of its (constitutive) non-profit associations were found to have violated the legislation concerning racist hate speech. The associations concerned the party’s education office, its financial office and its media office (the reason for prosecuting these organisations instead of the party itself had to do with the fact that, under Belgian law, most political parties are not legal entities, and cannot be prosecuted). The violation consisted in the organisations having belonged to and having provided aid to a group (i.e. the party) that ‘repeatedly incited to hatred and discrimination on the basis of race and ethnic origin’. As evidence for this incitement, publications by the party and its officials were adduced.

After both the criminal court of Brussels and the Brussels court of appeals declared themselves incompetent to hear the case, the Supreme Court referred the case to the Ghent court of appeals, which convicted the associations (Ghent Court of Appeals 21 April 2004). The ruling by the Ghent court was upheld by the Supreme Court (Supreme Court 9 November 2004), rendering the conviction final. Due to risks of further litigation (and other adverse measures) based on the precedent of this ruling, the party decided to disband, and start over under a new name: Vlaams Belang. On the case, see, for example, Brems (2006) and Vrielink and Sottiaux (2004).

2. Art. 20 Act of 30 July 1981 aimed at combating particular acts inspired by racism and xenophobia.
3. Criminal court Bruges, 11 March 2013 (www.legalworld.be).
4. Ibid.
5. Paradoxically, this is happening at the same time that the State and legal institutions are also cracking down on (what they perceive to be) Islamic radicalism, and while numerous measures are being taken, by state actors in Belgium, that limit or prohibit the wearing of Islamic 'symbols' (e.g. 'burqa bans'; headscarf bans for secondary schoolchildren, for public servants in several cities, etc.). Many of these measures raise fundamental constitutional and human rights issues as well.
6. See www.diversite.be.
7. 'The context and intention of the offender are what's important. Not his exact words', the representative added. Quoted in Masschelin and Feys (2006: 5).
8. Translation of (respectively) 'Chaque enfant musulman né en Europe, c'est une bombe à retardement contre les petits, petits enfants occidentaux dans le futur' and 'Les mosquées en Europe, c'est pire que le[s] centrales] nucléaire[s]'.
9. Translation of '[L]es musulmans forment un groupe, une communauté, religieuse, mais ni une race, ni une ethnie, ceux-ci comptant des Arabes, des Turcs, des Indiens, des personnes ayant la peau noire et des Belges' (Criminal court of Charleroi, 26 September 2008). Note that the eventual ruling came over 6 years after the introduction of the complaint.
10. Partial translation of '[L]a religion n'est pas un critère de discrimination que le législateur a retenu au travers [...] de la loi de 30 juillet 1981 dont la transgression est reprochée au prévenu' (ibid.).
11. The Anti-discrimination Act of 25 February 2003 (*Moniteur Belge*, 17 March 2003) introduced a prohibition of incitement to religious hatred, discrimination and violence (Art. 6 § 1). This Act was replaced by the Anti-discrimination Act of 30 May 2007 (*Moniteur Belge*, 30 May 2007), which contains a similar incitement provision (Art. 22).
12. Aside from a 14-minute trailer with several edited (and clearly dubbed) scenes, a full movie called 'Innocence of Muslims' is nowhere available, and there is no record of such a movie being made in California. For more details, see The Week Staff (2012).
13. Centre for Equal Opportunities (2012).
14. Translation of '[B]ij gebrek aan informatie over de makers ervan, hun intentie en het gebrek aan een link met België, ziet het Centrum momenteel geen mogelijkheid tot vervolging' (ibid.). The Centre emphasised the importance of free speech, while also stressing that this right is not absolute, and subject to restrictions.
15. Partial translation of 'Het is met name strafbaar om de verspreiding van dit filmpje (door het in een zaal te vertonen of via het internet te verspreiden) te koppelen aan haatdragende boodschappen of elke vorm van geweld. Het Centrum zal vanzelfsprekend waakzaam blijven voor dergelijke voorvallen en juridische stappen ondernemen wanneer nodig' (ibid.).
16. Translation of 'Intégrez-vous ou dégagez !' For the entire post (in the original French), see <http://nimga.fr/f/PgT9Q.gif>.
17. Centre for Equal Opportunities (2013).
18. (Partial) translation of 'Toch meent het Centrum dat de beslissing van de RTL om de heer Trullemans te ontslaan wegens een ernstige fout een correcte en adequate reactie is, in verhouding met de ernst van zijn woorden' (Centre for Equal Opportunities, 2013).

19. Voorstel van resolutie betreffende de strijd tegen islamofobie [Draft Resolution Concerning the Fight Against Islamophobia], *Parliamentary Documents*, Senate 2012-13, no. 5-1980/1 (introduced by B Anciaux and F Talhaoui; co-signed by A Laaouej, F Piryns, Z Khattabi and R Miller).
20. Runnymede Trust (1997). The Runnymede Trust is a British think tank concerning multicultural issues, founded in 1968. Its definition of Islamophobia is used quite widely, including by the (former) European Monitoring Centre on Racism and Xenophobia (EUMC); the current Fundamental Rights Agency (FRA). The definition has also sparked severe criticism, however, especially where it concerns its usage (or usefulness) in legal contexts, on account (inter alia) of its vague and contestable nature, which is liable to stifle free speech. For a radical critique, in the popular media, see Toynbee (1997). For academic criticism, see Halliday (1999: 899); Joppke (2009: 457).
21. Voorstel van resolutie betreffende de strijd tegen islamofobie [Draft Resolution Concerning the Fight Against Islamophobia], *Parliamentary Documents*, Senate 2012-13, no. 5-1980/1.
22. Ibid.
23. The draft resolution also urges the Belgian government to take initiatives to tackle the issue at the European Union (EU) level, and to optimise European judicial cooperation regarding Islamophobia and racism.
24. That being said, the European Court of Human Rights (ECtHR) would likely not regard the conviction as a violation of Art. 10 of the European Convention on Human Rights (ECHR). In the case of *Norwood v. the UK*, for instance, the Court dealt with a conviction of an individual who had displayed a poster, supplied by the radical right-wing British National Party (BNP), in the window of his flat depicting the Twin Towers in flame. The picture was accompanied by a caption with the words 'Islam out of Britain - Protect the British People'. The ECtHR declared the application to be inadmissible. Invoking Art. 17 of the Convention (abuse of rights), the Court considered that the poster constituted a 'public expression of attack on all Muslims in the United Kingdom', and it consequently did not enjoy the protection of Art. 10: 'Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination' (ECtHR 16 November 2004, No. 23131/03, *Norwood v. United Kingdom*).

This case is one of many that demonstrate how little scope the ECtHR grants to speech that it regards as 'hate speech'. The Court, in this context, attaches far-reaching implications to the fact that the authors of the European Convention sought to establish an institutional framework based on democratic values in order to overcome extremism, and it therefore considers some (allegedly) 'anti-democratic' or 'radical' forms of expression contrary to the Convention. In line with this, national 'hate speech' convictions are basically never considered a violation of the Convention, and rarely even make it past the admissibility stage. Strikingly, in doing so, the Court neglects to adequately define (or even to introduce a minimum threshold as to) what constitutes 'hate speech', thereby undermining its general case law on free speech: speech is unprotected if it fails to comply with abstract values of 'tolerance' and 'social peace'. This leaves very little room indeed for free speech, rendering the Court's oft-repeated mantra – that is, that Art. 10 applies 'not only to 'information' or 'ideas' that are favourably received, but also to those that offend, shock, or disturb the State or any sector of the population' – all but meaningless (see e.g. ECtHR 7 December 1976, No. 5493/72, *Handyside v. the United*

- Kingdom*, § 49; since then repeated in countless cases). Compare Hare (2009a: 78–79); Sottiaux and Vrielink (2013). See also *infra* note 49.
25. Compare the approach taken by the Charleroi court in the case described in the previous section.
 26. While incitement based on racial and ethnic criteria is covered by Art. 20 of the Antiracism Act of 30 July 1981 (see *supra* note 2), incitement on the basis of religion or belief is prohibited on the basis of Art. 22 of the Antidiscrimination Act of 30 May 2007 (see *supra* note 11).
 27. See, however, *supra* note 24 on the point of human rights law, as applied by the ECtHR. At the same time, however, the ECHR, as interpreted by the Strasbourg institutions, does not entail a positive *requirement* to legislate in order to protect individuals from incitement to religious hatred either: EComHR 5 March 1991, No. 17439/90, *Choudhury v United Kingdom*. See Hare (2009b: 309).
 28. Neil Addison, author of the book *Religious Discrimination and Hatred Law*, for instance, argues against the expansion of hate speech and discrimination legislation to religion and belief, as these grounds presume a level of choice and changeability: ‘Race is something you are and cannot change; religion is something you choose and which you can change’ (Addison, 2004, 2007).
 29. Compare Larvor and Norman (2005).
 30. Hare (2009b: 300).
 31. Lester (2007).
 32. As comedian Rowan Atkinson puts it, somewhat extremely, but nonetheless to the point: ‘To criticise a person for their race is manifestly irrational and ridiculous. But to criticise their religion – that is a right. That is a freedom. And a law that attempts to say you can criticise or ridicule ideas, as long as they are not religious ideas, is a very peculiar law indeed’ (quoted in Gilbey, 2004).
 33. Although one can rightly criticise the overbroad provisions (and case law) concerning racist ‘hate speech’ in many European countries as well. However, the solution to that problem – in any case – is not to elevate the protection against other forms of ‘hate speech’ to the same level.
 34. Constitutional Court 6 October 2004, no. 157/2004, B.49–51; Constitutional Court 12 February 2009, no. 17/2009, B.67.2–4; Constitutional Court 11 March 2009, no. 40/2009, B.57–59.
 35. Constitutional Court 6 October 2004, no. 157/2004, B.39–40; Constitutional Court 12 February 2009, no. 17/2009, B.67.2–3; Constitutional Court 11 March 2009, no. 40/2009, B.57–58.
 36. More generally, aside from rare circumstances, the legal responsibility for any criminal behaviour (e.g. violence) that should erupt after such ‘provocations’ lies with those engaging in that behaviour (although the preceding conduct may sometimes be considered a mitigating circumstance).
 37. One could perhaps argue that the act was liable to ‘incite’ hatred or violence towards the perpetrator himself (and/or towards wider society), but the hate speech provisions in the Belgian anti-racism and anti-discrimination legislation do not cover this type of (auto-)incitement.
 38. However, that being said, there is a significant number of (other) rulings by lower courts and even by courts of appeal in Belgium that appear to ignore the Constitutional Court’s case law concerning the issue (see, extensively, Vrielink, 2010). The main problem is that while lower courts (as well as administrative governments and institutions such as the Centre for Equal Opportunities) are – in principle – held to interpret the legislation in line with the Constitutional

- Court's decisions, the system provides no way in which this obligation can actually be enforced. Therefore, it would still seem prudent for the legislator to codify the Constitutional Court's conditions in the legislation itself (i.e. the requirement of special intent and the fact that the incitement should be of a nature to actively instigate discriminatory, hateful or violent behaviour).
39. In addition, it may be prohibited to damage or destroy extremely rare books, even ones you own, if they are legally protected as heritage. For Flanders, for instance, see the 'Topstukken-decreet' (Masterpieces Decree) of 24 January 2003 (*Moniteur Belge*, 14 March 2003).
 40. Compare, for example, Holmes (2012).
 41. Provided, of course, it is not used as a means to intimidate or threaten one or more individuals.
 42. See, for example, Vossen (2013).
 43. Although one could argue that a book that has been thrown at someone could be regarded as abandoned property.
 44. The predecessor of which had, as mentioned, been (indirectly) convicted for racism: see *supra* note 1.
 45. Especially in the light of the highly problematic 'multi-level' guilt by association implications of the assumption to the contrary: the *act* (1) would then have to be considered (criminally) racist, since it was committed by an individual (2) who participated in a demonstration (3) that was organised (4) by a party (5) that is the successor of another party, which was (indirectly (6)) convicted for 'racism' (7).
 46. A famous quote from the dissenting opinion by Justice Holmes in *United States v. Schwimmer*, 279 U.S. 644 (1929). The phrase is also used as the (main) title for a much-acclaimed book by Anthony Lewis about free speech and the US constitution: Lewis (2007).
 47. As long as such speech does not reach the threshold of incitement (*stricto sensu*) vis-à-vis the adherents of such beliefs (cf. *supra*). Compare the approach by the United Nations' Human Rights Committee (HRC). Its authoritative interpretation of Article 19 (freedom of speech) of the International Covenant on Civil and Political Rights states: 'Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant.' These displays must not, however, amount to a violation of the Article 20 ICCPR ban on 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. See HRC, General Comment No. 34. Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011.
 48. At least in (contemporary) Western Europe. In Poland the Supreme Court did rule, in October 2012, that a lower court had been wrong to exonerate the Polish heavy metal musician Adam Darski on charges of offending religious feelings for having ripped apart a Bible during a concert in 2007, and for calling the Roman Catholic Church a 'murderous cult'. In that case, however, at least the EU responded, saying that artists should be free to 'shock' and that the prosecution went against European constitutional values (Rettman, 2012). Moreover, Darski has not been convicted yet: the Supreme Court's decision referred the case back to the lower court, which will decide on Darski's guilt.
 49. Although even in cases involving speech deemed offensive for Christians, the ECtHR is disinclined to offer free speech protection (compare *supra* note 24), *de facto* accepting the validity of the heckler's veto. In the case of *Otto-Preminger-Institut v. Austria*, for instance, an art-house cinema in Tyrol planned to show a film called 'Council in Heaven', which caricatured Christian beliefs. The public prosecutor prevented the showing of the film, and initiated proceedings for disparaging religious doctrines; the film was seized and forfeited. The ECtHR, even in this case

- of prior restraint, sided with the Austrian government, accepting that the measure was justified in order to protect the religious feelings of Tyrol's Catholic community and for preventing disorder. The Court considered that the seizure and forfeiture of the film were aimed at preventing an 'abusive attack on the Roman Catholic religion according to the conception of the Tyrolean public', and that it could not disregard 'the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans' (ECtHR 20 September 1994, No. 13470/87, *Otto-Preminger-Institut v. Austria*, § 56). The Court concluded that the Austrian authorities had 'acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner' (ibid., § 56). Article 10 (right to freedom of expression) had therefore not been violated.
50. Although the basic idea is much older, the actual term was introduced by Kalven (1965: 140–141). For discussions of the issue, see Sadurski (1999: 88); Stone (2007: 57); Fiss (1985: 1405–1425) and McGaffey (1973: 39–64).
 51. Most notably, of course, in July 2010 a pastor in Florida announced he would organise a mass burning of Qurans on 11 September 2010, after which violent protest erupted in Afghanistan, Iran, Somalia and elsewhere. The pastor cancelled the event in the end. Other incidents involving the (announced or actual) destruction of Korans took place in Michigan, in England (Gateshead) and in France (Strasbourg). See Holmes (2012).
 52. Giving in to the 'heckler's veto' in this manner also flies in the face of what the framers of the Belgian Constitution believed (see Vrieling, 2010: 44–45). Furthermore, on a practical level, it is unlikely to work, as Holmes points out in relation to other cases involving the wilful destruction of the Koran, for which the 'perpetrators' were prosecuted: '[I]ndividuals were criminally charged after burning Qurans in Strasbourg, France and Gateshead, England. Instead of calming public furor over the burning of Qurans, the incident sparked a debate over speech restrictions. Some might argue that criminalizing bad speech provides a channel for public anger and reduces vigilantism against the speakers, but these cases have not borne out that theory' (Holmes, 2012: 480).

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