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Charlie Hebdo: Testing the Limits of Freedom of Expression

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Abstract: The right to freedom of expression is a qualified right: it allows expression that might ‘offend, shock or disturb’ but prohibits ‘insults’, ‘abusive attacks’ and ‘hate speech’. Applying the Convention test I argue that all cartoons of the Prophet Muhammad, which although might offend Muslims, are an acceptable form of expression in Western democracies except cartoon number two implying the Prophet Muhammad as a ‘terrorist’ which is ‘insulting’ and ‘an abusive attack’ on the Muslim community and Islam. In the post-9/11 circumstances, it may be viewed as a vehicle for instigating hatred against the Muslim community. By critiquing the inaction of Denmark and France, I argue that failure to prosecute Jyllands-Posten and Charlie Hebdo violates Articles 9(1) of the European Convention and the Danish Criminal Code and the French Freedom of Press Act 1881. Relying on ECtHR’s jurisprudence, I argue that the values of the Convention and democracy aim to nurture a society based on tolerance, social peace, non-discrimination and broad-mindedness. The public space is a shared space and no single group – religious and non-religious – can monopolise nor intimidate it.

Keywords: freedom of religion, freedom of expression, cartoons of the Prophet Muhammad, insults, abusive attacks, tolerance, public space, broad-mindedness, non-discrimination

The cartoons of the Prophet Muhammad ignited debate on the right to the freedom of expression when they were first published in Denmark on 30 September 2005.¹ The debate was reignited in the aftermath of the Charlie Hebdo attack² when two armed men attacked the offices of Charlie Hebdo in Paris on Wednesday 7 January 2015 for publishing cartoons of the Prophet

¹ Wikipedia (2017).

² BBC (London, 7 January 2015).

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Muhammad. Twelve people, mostly Charlie Hebdo's staff, died in the attack.³ The attack sent a shock wave across France and the Western world. Most Western leaders, including Muslims, joined the Solidarity March in Paris on 11 January 2015 condemning the attack on Charlie Hebdo.⁴ Other world leaders, including Muslims, sent condolences and messages of sympathy to the French people and condemned the attack.⁵ On 13 January 2015, Charlie Hebdo published another cartoon of the Prophet Muhammad holding a placard stating 'All is forgiven' and '*Je Suis Charlie*', i. e. 'I am Charlie'.⁶ The attack of 7 January 2015 was not the first attack on Charlie Hebdo. It was attacked on 2 November 2011 after it published a caricature of the Prophet Muhammad saying '100 lashes if you are not dying of laughter'.⁷ Mahomet (i. e. Prophet Muhammad) was named as its Editor-in-Chief and the issue was called Charia [Sharia] Hebdo. Inside the issue, one of the cartoons showed the Prophet Muhammad with a clown's red nose. In 2007, Charlie Hebdo reproduced 12 cartoons first published in a Danish newspaper *Jyllands-Posten* on 30 September 2005.⁸ One of the 12 cartoons depicted the Prophet Muhammad as 'carrying a lit bomb on his head decorated with the Muslim declaration of faith instead of a turban'.⁹ The publication of cartoons of the Prophet Muhammad in Denmark and France caused outrage across the Muslim world. Muslims in European countries also protested. In some instances, demonstrators resorted to violence: in February 2006 Syrian protesters set fire to Danish and Norwegian embassies in Damascus.¹⁰ In total, around 150 – 200 people died in these protests.¹¹

This article is divided into four sections. Section "Background: A Polarised Debate" sets out the background and the ensuing polarised debate on cartoons of the Prophet Muhammad, providing a background and context to the discussion. Section "Freedom of Religion and Expression Under the Convention" sets out the right to freedom of religion as is recognised by the Convention and delineates the limits on the freedom of expression. It sets out the Convention test which I apply to the issue of the cartoons' publication. I argue that the Convention recognises the right to freedom of religion and requires states to

3 BBC (London, 14 January 2015).

4 Willsher, Penketh and Topping (London, 11 January 2015).

5 ABC News (New York, 8 January 2015).

6 Penketh and Weaver (London, 13 January 2015).

7 BBC (London, 2 November 2011).

8 *ibid.*

9 BBC (London, 7 February 2007).

10 BBC (London, 4 February 2006).

11 Freedom House (Washington DC, 29 May 2014); see also Polgreen (New York, 24 February 2006).

protect it. The Convention also recognises the right to freedom of expression but it can be restricted on Convention grounds such as public safety; prevention of disorder or crime and the protection of the reputation or rights of others. Analysis of the ECtHR jurisprudence demonstrates that the Convention allows expression that might ‘offend, shock or disturb’ but prohibits ‘insults’, ‘abusive attacks’ and ‘hate speech’.

In Section “The publication of cartoons under applicable law”, I apply the Convention test, together with Danish and French domestic law, to the cartoons of Prophet Muhammad published by Jyllands-Posten and Charlie Hebdo. I argue that all cartoons of the Prophet Muhammad, which, although they might offend Muslims, are an acceptable form of expression in Western democracies except cartoon number two implying the Prophet Muhammad as a ‘terrorist’ which is ‘insulting’ and an ‘abusive attack’ on the Muslim community and Islam. In the post-9/11 circumstances, it may be viewed as vehicle for instigating hatred against the Muslim community. I conclude that a failure to prosecute Jyllands-Posten is against section 266(b) of the Danish Criminal Code 2005 and Article 9 (1) of the Convention as it is part of domestic law by virtue of Act No 285 of 29 April 1992. The failure of French authorities to prosecute Charlie Hebdo is against sections 29 and 32 of the Freedom of the Press Act 1881, and Article 9 (1) of the Convention, it is not only part of domestic law by virtue of Article 55 of the 1958 French constitution but it also stands on a higher pedestal than the French statutes.¹² Furthermore, based on the analysis of ECtHR’s jurisprudence, I argue that a lack of prosecution by Denmark and France will not withstand Convention challenges at the European Court of Human Rights. Section “Conclusion” concludes that Denmark and France are in breach of domestic law as well as the Convention. It is worth pointing out that all forms of insult are prohibited under the European Convention which all member states of the Council of Europe are required to comply with even if domestic laws do not prohibit insulting speech.

Background: A Polarised Debate

Elected leaders and rulers in the Western and Muslim worlds had a measured and cautious reaction to the cartoons of the Prophet Muhammad. The Western leaders took the line that they live in democratic societies and believe in freedom

¹² Article 55 states: ‘Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party’.

of expression. On 2 November 2011, Francois Fillon, the French Prime Minister, said: ‘Freedom of expression is an inalienable right in our democracy and all attacks on the freedom of the press must be condemned with the greatest firmness’.¹³ In response to a request for a meeting by 11 ambassadors of Muslim countries in 2006, the Danish government said:

Freedom of expression has a wide scope and the Danish Government has no means of influencing the press. However, Danish legislation prohibits acts or expressions of opinion of a *blasphemous or discriminatory* nature. The offended party may bring court proceedings against the authors of such acts or expressions of opinion, and it is for the courts to decide in individual cases [emphasis added].¹⁴

On 19 February 2006, Flemming Rose, the editor of *Jyllands-Posten*, wrote that insult was not intended:

Has *Jyllands-Posten* insulted and disrespected Islam? It certainly didn’t intend to. But what does respect mean? When I visit a mosque, I show my respect by taking off my shoes. I follow the customs, just as I do in a church, synagogue or other holy place. But if a believer demands that I, as a nonbeliever, observe his taboos in the public domain, he is not asking for my respect, but for my submission. And that is incompatible with a secular democracy.¹⁵

He acknowledged that ‘some people have been offended by the publication of the cartoons, and *Jyllands-Posten* has apologized for that. But we cannot apologize for our right to publish material, even offensive material. You cannot edit a newspaper if you are paralyzed by worries about every possible insult’.¹⁶ He said that he was also offended by many things published in print media every day, e. g.:

Transcripts of speeches by Osama bin Laden, photos from Abu Ghraib, people insisting that Israel should be erased from the face of the Earth, people saying the Holocaust never happened. But that does not mean that I would refrain from printing them *as long as they fell within the limits of the law* and of the newspaper’s ethical code [emphasis added].¹⁷

Rose further said that:

One cartoon – depicting the prophet with a bomb in his turban – has drawn the harshest criticism. *Angry voices claim the cartoon is saying that the prophet is a terrorist or that every Muslim is a terrorist*. I read it differently: some individuals have taken the religion of Islam hostage by committing terrorist acts in the name of the prophet. They are the ones who

¹³ BBC (London, 2 November 2011).

¹⁴ *Ben El Mahi and Others v Denmark*, no 5853/06, 11 December 2006.

¹⁵ Rose (Washington DC, 19 February 2006).

¹⁶ *ibid.*

¹⁷ *ibid.*

have given the religion a bad name. The cartoon also plays into the fairy tale about Aladdin and the orange that fell into his turban and made his fortune. This suggests that the bomb comes from the outside world and is not an inherent characteristic of the prophet [emphasis added].¹⁸

In his column of 19 February 2015 ‘why I published cartoons of Muhammad and don’t regret it’, Rose reiterated his previous view but added that for him ‘it is important to defend the free society against the fear society’.¹⁹

The Cultural Affairs editor of *Jyllands-Posten* added an explanatory text providing the logic behind the publication of the cartoons:

Some Muslims reject modern secular society. They demand special status, insisting on special consideration of their own religious feelings. This is incompatible with secular democracy and freedom of expression, where one has to be prepared to put up with scorn, mockery and ridicule. While this is not always agreeable or pleasant to watch, and does not mean that religious feelings can be made fun of at any price, that is a minor consideration in the present context ... we are on a slippery slope, with no one able to predict where self-censorship will lead. That is why ... *Jyllands-Posten* has invited members of the Danish Newspaper Illustrators’ Union to draw Muhammad as they see him ...’.²⁰

The article titled as ‘The Face of Muhammad’ published together with one of the cartoons in *Jyllands-Posten* said:

The comedian Frank Hvam recently admitted that he did not dare openly “to take the piss out of the Koran on TV”. An illustrator asked to portray the Prophet Muhammad in a children’s book wishes to do so anonymously, as do the western European translators of a collection of essays critical of Islam. A leading art museum has removed a work of art for fear of reactions from Muslims. This theatre season, three satirical shows targeting the President of the United States of America, George W. Bush, are playing, but not a single one about Osama bin Laden and his allies. Finally, during a meeting with Prime Minister Anders Fogh Rasmussen of Denmark’s Liberal Party, an imam urged the government to use its influence over the Danish media so that they drew a more positive picture of Islam.

The examples cited above give cause for concern, regardless of whether there is any foundation for people’s fears. The fact is that those fears exist and lead to self-censorship. The public space is being intimidated. Artists, authors, illustrators, translators and theatre people are therefore steering a wide berth around the most important meeting of cultures of our time – the meeting between Islam and the secular society of the West rooted in Christianity.²¹

18 *ibid.*

19 Rose (19 February 2015).

20 *Mahi* (n 14).

21 *ibid.*

In his 2012 interview with *Le Monde*, the Editor-in-Chief of *Charlie Hebdo*, Stephane Charbonnier, said: ‘I have no kids, no wife, no car, [and] no credit. What I am saying may be a bit pompous, but I prefer to die standing than live on my knees’.²²

Two main arguments emerged from the ensuing debate on the publication of the cartoons. The first argument turned on the right to freedom of expression. The way this argument came out was as if the right to freedom of expression was an absolute right and that one could publish anything in respect of any topic or individual, especially in Western democracies. I call it the ‘absolute right’ argument. The media outlets went on with the publication of cartoons of the Prophet Muhammad without anticipating its impact and the intensity of reaction to it in the Muslim world, or were fully conscious but believed, perhaps arrogantly, that they were entitled to do so.

The second argument turned on the permissible limitations on the right to freedom of expression, i. e. that it is a qualified right and it may be curtailed on certain Convention grounds, e. g. ‘protecting the reputation and rights of others’ and ‘maintaining public order’. I call it the ‘qualified right’ argument. Part of the argument was that in democratic societies individuals are entitled to hold religious beliefs that includes protection of their belief from insults, abusive attacks and hate speech.

Before proceeding to the next stage, I want to say how misconceived some of these statements are. First, Rose’s dichotomy of fear versus free society is misconceived. The opposite of a fear society is not a free society, it is a safe society. There is no such thing as a free society. We all live in regulated by law societies. Legal norms emanate from divine and earthly sources. In Europe it is mainly the latter whereas in other parts of the world, especially in Muslim countries it is the former. Everything we do in public and, to an extent, in private is governed by law. For instance, we have to park at the right places; drive in the correct lane at a particular time of the day maintaining a certain speed limit, avoid being a nuisance to neighbours; we cannot consume alcohol after a particular time in public houses nor can we have sex with people below certain age or within certain relationship. These are some common place examples but even some fundamental rights are not unlimited, e. g. there is a right to have a religion but its public manifestation may be restricted on certain grounds. Similarly, we cannot say everything we wish to say in public because the right to a freedom of expression may be restricted on certain grounds. To have a safer society, we all must abide by law.

²² Taub (7 January 2015).

The second misconception is that the public space is a shared space and no single group, religious or non-religious, can monopolise or intimidate it. The public space is governed by domestic law and the European Convention on Human Rights and Fundamental Freedoms 1950 (the Convention).²³ When two Convention rights come in conflict, the Convention provides a scheme by restricting the exercise of one to protect the other. For instance, the right to freedom of expression is a foundational Convention right but it may be restricted to protect public safety, prevent disorder or crime, to protect health or morals and to protect the reputation and rights of others.²⁴ The non-religious individuals may publish and debate in public what is allowed by law even though it might offend, but nothing beyond the legal limits. The followers of a particular religion cannot ask for prohibition of speech allowed by law. Domestic law and the Convention govern the public space and, as we shall see later, the Convention provides a fine restriction scheme for balancing competing rights and allows a margin of appreciation to states.

The third point to note is that the Convention does not use adjectives such as ‘liberal’ or ‘secular’ before the phrase ‘democratic society’. Rose and others are reading these words into the language of the Convention. The drafters of the Convention were conscious of the competing rights of the individual and the community at large which is why, while recognising the rights to freedom of religion and freedom of expression, they added qualifications to these rights. There were other rights such as prohibition of torture which they consciously did not qualify. The European Court of Human Rights (ECtHR) has defined democratic society as one based on values such as tolerance, social harmony and broad-mindedness wherein the majority do not trump the minority.²⁵

Finally, the action of the Charlie Hebdo’s attackers is a pure criminality (including under Islamic law)²⁶ and is not worthy of further discussion. Making

23 For instance, France ratified the ECHR on 3 May 1974: see Decree 74-360 of 3 May 1974. Denmark transposed the ECHR into domestic law in 1992: see Act No 285 of 29 April 1992. In the UK, the ECHR was given effect in domestic law by the Human Rights Act 1998.

24 Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR), Article 10(2).

25 *Handyside v UK* (1979–1980) 1 EHRR 13 [49].

26 Islamic blasphemy law: An impression has been generated by the attacks on Charlie Hebdo and similar other attacks that these attackers might be drawing inspiration from Islamic law for their violent acts. This point has been clarified by scholars of Islam, Muslim states and political leaders and by several non-Muslims leaders but here I want to briefly touch on Islamic blasphemy law. Islamic blasphemy law is an established principle of Islamic law and is based on evidence derived from the two primary sources of Islamic law:

an argument for prosecuting Jyllands-Posten and Charlie Hebdo does not mean supporting or condoning the tragic attacks.

Freedom of Religion and Expression Under the Convention

For testing the legality of the publication of cartoons of the Prophet Muhammad, the legal framework consists of certain Convention rights and domestic law. Relevant Convention Articles are 1, 9, 10, 14, 17 and 18. As we shall see later, these articles recognise the rights to freedom of religion, freedom of expression and require states to ensure that Convention rights are enjoyed, subject to permissible limitations, by everyone and without discrimination, in their jurisdictions. Denmark transposed the Convention into domestic law in 1992 whereas France ratified the Convention on 3 May 1974 and it is directly applicable in domestic law. By virtue of Article 55 of the French constitution, the Convention stands on higher pedestal than French statutory norms in the hierarchy of legal norms. The Danish Criminal Code 2005 and the French Freedom of the Press Act 1881 are two domestic statutes and part of the applicable legal framework.

the Quran and the Sunnah, i. e. the model behaviour of the Prophet Muhammad. Several verses of the Quran are cited as bases for prohibiting blaspheming the Prophet Muhammad. The Quranic basis of blasphemy is the following verse: ‘surely, those who [insult] Allah and His Messenger are cursed by Allah in this world and in the Hereafter, and He has prepared for them a humiliating punishment (33:57). The Sunnah, second source of Islamic law, provides death penalty as punishment for blaspheming the Prophet Muhammad. Islamic law does not allow individuals to take law into their own hands by punishing alleged blasphemers, but in practice blasphemy law is greatly abused in Muslim countries such as Pakistan and Afghanistan. The most recent and high profile case is that of Salman Taseer. Taseer was Governor of Punjab Province, Pakistan who was shot dead by his security guard, Malik Muhammad Mumtaz Qadri, on 4 January 2011 because Taseer allegedly called Pakistani blasphemy law a ‘black law’. Qadri was charged with the offence of murder under Anti-Terrorism Act 1997 but many people supported him for killing the alleged contemnor of the Prophet Muhammad. Some people even showered flowers on him when he appeared in the Anti-Terrorism Court. The Anti-Terrorism Court awarded Qadri a death sentence. He challenged his death sentence in the Islamabad High Court. The High Court confirmed the death sentence on 9 March 2015. Later the death sentence was challenged in the Supreme Court of Pakistan, which also confirmed the death sentence (see *All Pakistan Legal Decisions* 2016 Supreme Court 17). Qadri was hanged on 1 March 2016. See *Dawn* (Karachi, 1 March 2016). If the attackers of Charlie Hebdo were tried under Islamic law in a Muslim states such as Pakistan, they would meet the same fate as did Qadri.

Freedom of Religion

Article 9 of the European Convention guarantees ‘the right to freedom of thought, conscience and religion’ but to manifest one’s religion ‘shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others’. The right to have religion is absolute and is considered as foundational in a democratic society²⁷ and it may be considered ‘necessary’ in democratic societies to ‘sanction or even prevent improper attacks on objects of religious veneration’.²⁸ The right to freedom of religion includes, among other things, protection of religious feelings from insult²⁹; denigration³⁰ and ‘gratuitously offensive’ expressions which ‘do not contribute to any form of public debate capable of furthering progress in human affairs’.³¹ Relying on *Otto-Preminger-Institut v Austria* (1995), the ECtHR in *Gough v UK* (2015) reiterated that ‘it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration, provided always that the penalty imposed be proportionate to the legitimate aim pursued’.³² In *Wingrove v UK* (1997), the ECtHR held that ‘the extent of insult to religious feelings must be significant ... to depict material of a sufficient degree of offensiveness’.³³ In *I.A. v Turkey* (2007),³⁴ the ECtHR found that article 10 of the Convention does not protect ‘abusive attacks’ on religion. Article 10 does not protect a ‘vehement attack against a religious group, likening the group as a whole with a grave act of terrorism’³⁵; insulting a particular racial group and racial hatred.³⁶ It follows that the right to freedom of religion includes protection from insult; abusive attacks and hate speech. States have positive obligations to ‘ensure the peaceful enjoyment of the

27 *Kokkinakis v Greece* (1994) 17 EHRR 397 [31]; see also *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34 [47].

28 *Otto-Preminger Institute* (n 27) [49].

29 *Skalka v Poland* (2004) 38 EHRR 1 [34]. See also *Palomo Sanchez v Spain* (2012) 54 EHRR 24 [67].

30 *Klein v Slovakia* (2010) 50 EHRR 15 [52]. It impliedly prohibited ‘denigration’ of elements of religious faith.

31 *Gough v UK* (2015) 61 EHRR 15 [167].

32 *ibid.*

33 *Wingrove v UK* (1997) 24 EHRR 1, [60].

34 *I. A. v Turkey* (2007) 45 EHRR 30, [29].

35 *Norwood v UK*, no 2313/03, 16 november 2004.

36 *Le Pen v France*, no 18788/09, 7 May 2010; see also *Jersild v Denmark* (1995) 19 EHRR 1 [35].

rights guaranteed under Article 9 to the holders of those beliefs and doctrines'.³⁷

Freedom of Expression

In assessing the protection of the right to freedom of religion, appreciating the contents and limits of the right to freedom of expression, a competing right, is essential. Article 10 guarantees that 'everyone has the right to freedom of expression'. The right to freedom of expression 'constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of everyone'.³⁸ It 'protects not only the content and substance of information but also the means of dissemination'³⁹ and 'is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population'.⁴⁰ But all expressions – offensive, shocking or disturbing – are 'subject to paragraph 2 of Article 10'.⁴¹ Paragraph 2 states that freedom of expression carries with it duties and responsibilities and may be restricted to protect national security; territorial integrity or public safety; health or morals; reputation or rights of others and to prevent disorder or crime; disclosure of information received in confidence and to maintain the authority and impartiality of the judiciary.⁴² Article 10 does not protect insult. In *Skalka v Poland* (2004), the ECtHR said that 'a clear distinction must, however, be made between criticism and insult. If the sole intent of any form

³⁷ *Otto-Preminger Institute* (n 27) [34]. Article 18 of the UN Covenant on Civil and Political Rights 1966 (ICCPR) also guarantees 'the right to freedom of thought, conscience and religion' but 'to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'. The right to freedom of religion is 'far-reaching' and 'profound' and its 'fundamental character' is reflected by the fact that it cannot be derogated from even in time of emergency under Article 4(2) of the Covenant. Like its European counterpart, the right to have a religion is absolute but its manifestation may be subjected to certain restrictions 'to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.

³⁸ *Otto-Preminger-Institut* (n 27) [49].

³⁹ *Murphy v Ireland* (2004) 38 EHRR 13, [61].

⁴⁰ *Handyside* (n 25) [49].

⁴¹ *ibid.* This is the rule now starting from the *Handyside* landmark judgement, see also *Gough* (n 32) [167].

⁴² ECHR, Article 10(2).

of expression is to insult ... an appropriate punishment would not, in principle, constitute a violation of Article 10 (2) of the Convention'.⁴³ This was held in the context of protecting judiciary from insult but in *Palomo Sanchez v Spain* (2012), the ECtHR found no violation of Article 10 where managers of a private company were insulted. 'The accusations were expressed in vexatious and injurious terms for the persons concerned'.⁴⁴ The ECtHR took the view that 'the grounds given by the [Spanish courts] were consistent with the legitimate aim of protecting the reputation of the individuals targeted'.⁴⁵

Article 10(2) uses word 'may' suggesting that states are not obligated but may choose to impose or not to impose restrictions. The decision of states in either case is subject to the supervision of ECtHR⁴⁶ and 'the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and that they based their decisions on an acceptable assessment of the relevant facts'.⁴⁷

From the discussion on the right to freedom of religion and freedom of expression it follows that both are foundational rights in a democratic society, but both are qualified rights and may be restricted on Convention grounds. As the Convention governs a public space and seeks to ensure that in a democratic society the majority does not rule the minority and a fair balance is struck between individual and public rights, it provides a restriction scheme for resolving a conflict between two competing rights.

⁴³ *Skalka* (n 29).

⁴⁴ *Sanchez* (n 29), [67].

⁴⁵ *ibid* [68].

⁴⁶ *ibid*. See also *Sunday Times v UK*, (No 1) (1979) 2 EHRR 245 [59].

⁴⁷ *Gough* (n 31) [170]. Article 19 of the International Covenant on Civil and Political Rights 1966 (ICCPR) also guarantees that 'everyone shall have the right to hold opinions without interference' and 'everyone shall have the right to freedom of expression'. Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. All kind of expressions 'even expression that may be regarded as deeply offensive' are protected but offensive expression may be restricted under Article 19(3). Restrictions must be 'such as are provided by law and are necessary (a) for respect of the rights or reputations of others and (b) for the protection of national security or of public order (ordre public), or of public health or morals. In addition, Article 20 prohibits 'war propaganda and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. Unlike the European Convention, the ICCPR does not use the phrase 'in a democratic society', it instead uses only the word 'necessary'. Perhaps the drafters were aware that democracy was not practiced all over the world and might not become a universal ideal.

The Restrictions Scheme

The first thing a court needs to do is to determine whether there is an interference with a protected right. The second step is to determine whether restrictions are ‘prescribed by law’. The prescribed by law test means two things. First, law must be adequately accessible. Secondly, law must be formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able to foresee the consequences which a given action may entail.⁴⁸ Finally, a court needs to determine whether restrictions are ‘necessary in a democratic society’.⁴⁹ The ECtHR has elaborated the meaning of words ‘necessary’ and ‘democratic society’. Interpreting the word ‘necessary’, the court said that it is not synonymous with ‘indispensable’, ‘absolutely necessary’ and ‘strictly necessary’; neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’ or ‘desirable’.⁵⁰ The necessity test consists of three subtests: whether the interference complained of corresponds to a ‘pressing social need’⁵¹; whether it was ‘proportionate’ to the legitimate aim pursued⁵²; and whether the reasons given by the national authority to justify it were ‘relevant

48 *Sunday Times* (n 47) [49].

49 ECHR, Article 9(2).

50 *Sunday Times* (n 46) [48].

51 The pressing social need test is an objective test and is determined by taking into consideration all factors and circumstances of a given case in a given country. The pressing social need test is different from the recognised legitimate aim test as an aim may be legitimate but may not be necessary in a democratic society. The ECtHR has accepted that ‘one of the purposes of the legislation is to afford safeguards for vulnerable members of society, such as the young, against the consequences of homosexual practices’. The ECtHR, however, at [60] held that ‘it cannot be maintained in these circumstances that there is a “pressing social need” to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public’. See *Dudgeon v UK* (1982) 4 EHRR 149 [47].

52 Proportionality is a fundamental element of the necessity test: ‘inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights’: see *Soering v UK* (1989) 11 EHRR 439 [89]. The Irish Supreme Court explained the test of proportionality – a test which contains the notion of minimal restraints on protected rights – which the ECtHR in *Murphy v Ireland* left undisturbed: ‘The objective of the impugned provision must be of sufficient importance to warrant over-riding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; (b) impair the right as little as possible; and (c) be such that the effects on the rights are proportional to the objective’: see *Murphy v Ireland* (2004) 38 EHRR 13 [61].

and sufficient'.⁵³ As stated above, the Convention does not use adjectives such as 'secular' or 'liberal' before the phrase 'democratic society'. The ECtHR, however, has identified features of a democratic society: pluralism, tolerance and broad-mindedness.⁵⁴

Margin of Appreciation

As the moral standards of States Parties to the Convention vary, the Convention allows a margin of appreciation to national authorities to determine the nature and extent of restrictions.⁵⁵ In certain areas the margin is limited, e. g. political speech and debate, but as compared with political expression, the ECtHR tends to 'accord a less privileged position to artistic expression'.⁵⁶ 'A wider margin of appreciation is generally available to states when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion'.⁵⁷ In *Gough v UK* (2015) the ECtHR said that:

The breadth of the margin of appreciation to be afforded depends on a number of factors. The national authorities enjoy a wide margin of appreciation in matters of morals, since there is no uniform European conception of morals A narrow margin of appreciation applies in respect of debates on questions of public interest and the freedom of expression enjoyed by the press when exercising its vital role as a public watchdog.⁵⁸

The ECtHR also provided rationale for the wider margin of appreciation:

In the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place

53 *Sunday Times* (n 4) [62]. See also *Handyside* (n 25) [48–50]. The relevance and sufficiency test is also an objective test. Cogent evidence must be provided to justify an interference. In *Smith and Grady v UK* and *Lustig-Prean and Beckett v UK* – cases concerning ban on homosexuals in the army – the ECtHR did not consider the reasons given by the UK that the ban was necessary for 'operational effectiveness' and 'threat to morale' relevant and sufficient: see *Smith and Grady v UK* (2000) 29 EHRR 493 [71–112] and *Lustig-Prean and Beckett v UK* (2000) 29 EHRR 548, [64–105].

54 *Handyside* (n 25) [49].

55 *Murphy* (n 52) [68]. See also *Wingrove* (n 3) [57–58].

56 Harris et al. (2014).

57 *Wingrove* (n 33) [58].

58 *Gough* (n 41) [166].

to place, especially in an era characterised by an ever growing array of faiths and denominations.⁵⁹

The Convention obligates states such as Denmark and France ‘to secure to everyone within its jurisdiction the [Convention] rights’⁶⁰ ‘without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’.⁶¹ States cannot interpret Convention rights leading to the ‘destruction of any of the rights and freedoms’ or aiming at their ‘limitation to a greater extent than is provided for in the Convention’.⁶²

Freedom of religion is a qualified right but is protected from insults; abusive attacks and hate speech.⁶³ Freedom of expression is a qualified right but it includes information and ideas that ‘offend, shock or disturb the State or any sector of the population’.⁶⁴ All expressions, however, can be restricted on Convention grounds, e. g. to protect the reputation and rights of others, prevention of crimes and maintaining public order and hate speech. Any restriction must be prescribed by law; it must pursue a legitimate aim and it must be necessary in a democratic society. Restrictions shall not be applied for purposes other than those for which they are prescribed.⁶⁵ States must secure Convention rights to everyone without discrimination⁶⁶ and must not interpret the Convention rights leading to their destruction or limiting them to a greater extent than is specified by the Convention.⁶⁷

The Convention is directly applicable in Denmark and France and is part of domestic law. In addition to Convention law, other domestic laws of Denmark

⁵⁹ *Wingrove* (n 33) [58].

⁶⁰ ECHR, Article 1.

⁶¹ Article 14 ECHR. European states including Denmark and France are also parties to the UN Convention on the Elimination of All Forms of Racial Discrimination 1965. Article 4 requires that ‘States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form’. Article 5 requires States Parties to ‘undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law’ especially in the enjoyment of ‘the right to freedom of thought, conscience and religion’.

⁶² ECHR, Article 17. Article 17 is very often relied on by the ECtHR in manifestly unfounded cases, e. g., *Norwood* (n 35); *Le Pen* (n 36).

⁶³ *Gough* (n 3) [167].

⁶⁴ *Handyside* (n 35) [49].

⁶⁵ ECHR, Article 18.

⁶⁶ ECHR, Article 14.

⁶⁷ ECHR, Article 17.

(e. g. sections 140 and 266(b) of the Danish Criminal Code 2005) and France (sections 29 and 32 of the Freedom of the Press Act 1881) also prohibit certain expressions, e. g. incitement to racial hatred, insulting or degrading a particular group on account of their race or belief or damaging the honour and reputation of others. The language used in domestic laws captures the spirit of the Convention providing an additional layer of protection against insults, abusive attacks and hate speech. Relevant sections of law are reproduced below when discussing legality of the cartoons in Denmark and France.

The Publication of Cartoons Under Applicable Law

The publication of the cartoons never became the subject of full judicial scrutiny by senior courts in Denmark or France or by the European Court of Human Rights. Complaints were made to the Danish prosecution authorities who decided not to prosecute. The lower court in France also did not proceed as the prosecutor asked the court not to prosecute. The European Court of Human Rights looked at the issue of the Danish cartoons in *Ben El Mahi* but the application was found inadmissible as the applicants were Moroccan citizens and Morocco was not party to the Convention.⁶⁸ In this section I apply the test set out in the previous section to determine the legality of the publication of the cartoons of Prophet Muhammad in Denmark and France.

The twelve drawings, in question, are described by the European Court of Human Rights as follows:

- Drawing 1: The face of a man whose beard and turban are drawn within a crescent moon and with a star, symbols normally used for Islam.
- Drawing 2: *The face of a grim-looking bearded man with a turban shaped like an ignited bomb* [emphasis added].
- Drawing 3: A person standing in front of an identity parade consisting of seven people, including a caricature of Pia Kjærsgaard [leader of the Danish People's Party] and five men wearing turbans. The person in front of the line-up is saying: 'Hmm ... I can't quite recognise him ... '
- Drawing 4: A bearded man wearing a turban, standing with a halo shaped like a crescent moon over his head.
- Drawing 5: Five stylised female figures wearing headscarves, with facial features depicted as a star and a crescent moon. The caption

68 *Mahi* (n 14). For a very useful discussion on the ECtHR's attitude to Muslims and Islam in Europe, see Kayaoglu (2014, 345–364).

reads: ‘Prophet! You crazy bloke! Keeping women under the yoke!’

- Drawing 6: A bearded man wearing a turban, standing with the support of a staff and leading an ass by a rope.
- Drawing 7: A man with beads of sweat on his brow, sitting under a lamp and looking over his left shoulder as he draws a man’s face with his head covered and with a beard.
- Drawing 8: Two bearded men wearing turbans and armed with a sword, a bomb and a gun, running towards a third bearded man wearing a turban. He is reading a sheet of paper and gesturing them to hold off, with the words: ‘Relax folks! It’s just a sketch done by a non-believer from southern Denmark’.
- Drawing 9: A teenage boy with dark hair, dressed in trousers and a striped top printed with the text ‘The Future’, standing in front of a blackboard, and indicating with a pointer the Arabic text written on it. The words ‘Mohammed, Valby School, 7A’ are written on an arrow pointing at the boy.
- Drawing 10: A bearded man, standing, wearing a turban and carrying a sword; his eyes are hidden by a black bar. Standing at his sides are two women wearing black gowns, with only their eyes visible.
- Drawing 11: A bearded man wearing a turban, standing on clouds with arms outspread, saying: ‘Stop, stop, we’ve run out of virgins!’ Waiting in front of him is a row of men in tatters with plumes of smoke over their heads.
- Drawing 12: A drawing of a man wearing glasses and a turban with an orange in it. The turban bears the words ‘Publicity Stunt’. The man is smiling as he shows a picture portraying a ‘matchstick man’ with a beard and wearing a turban.⁶⁹

Jyllands-Posten: The Danish Inability to Prosecute

On 29 October 2005 many Muslim organisations complained to the Danish police against Jyllands-Posten alleging that it has violated the Criminal Code concerning blasphemy and insult, based on race and religion. On 6 January 2006, the regional prosecutor for Viborg decided not to initiate proceedings against Jyllands-Posten. The Muslim organisations appealed against that decision to

⁶⁹ The translation of all 12 cartoons is taken from the case of *Mahi* (n 14).

the Director of Public Prosecutions who upheld the decision of the regional prosecutor. The assessment of the Director of Public Prosecutor was that:

[Section] 140 of the Danish Criminal Code provides that any person who, in public, mocks or scorns [ridicule or insults]⁷⁰ the religious doctrines or acts of worship of any lawfully existing religious community in this country is liable to a term of imprisonment not exceeding four months.

The Prosecution correctly identified the key issue: these drawings involved deciding whether they amount to mockery or scorn of Islam's religious doctrines or acts of worship. The Prosecution explained mockery and ridicule:

The concept of 'mockery' covers ridicule and is an expression of lack of respect or derision of the object of mockery. 'Scorn' is an expression of contempt for the object that is scorned. It must be assumed that these words imply ridicule or contempt with a certain element of abuse, just as it is clear from the preparatory legislative material for the Criminal Code that punishment can be imposed only in 'serious' cases.⁷¹

The prosecution made its assessment in light of the accompanying text of the article in *Jyllands-Posten* (reproduced above) and concluded that 'based on this text, the basic assumption must be that *Jyllands-Posten* commissioned the drawings for the purpose of sparking a provocative debate as to whether, in a secular society, special regard should be paid to the religious feelings of certain Muslims'. The prosecution found cartoons 1, 3–4, 6–7, 9, 11 and 12 as 'either neutral in their expression or do not seem to be an expression of derision or spiteful, ridiculing humour', and concluded that 'these drawings cannot be considered to constitute criminal offences under Article 140'.⁷²

Of cartoons number 5 and 10, the prosecution said:

Drawings 5 and 10 deal with the position of women in Muslim society and therefore relate to social conditions in those societies and the lives of their members. On this basis the drawings cannot be considered to contain expressions of opinion concerning Islamic religious doctrines or acts of worship, and consequently do not amount to punishable offences under Article 140 of the Danish Criminal Code.⁷³

On cartoon number 8, the prosecution concluded that 'it could be seen to be an illustration of an element of violence in Islam or among Muslims. However, the man standing up, who could be a depiction of Muhammad, is denying that there

⁷⁰ The translation available at the website of UNODC uses terms 'ridicule and insult' instead. Others have also used the terms 'ridicule and insults': see Mchangama (2016).

⁷¹ *Mahi* (n 14).

⁷² *ibid.*

⁷³ *ibid.*

is any reason for anger and speaking in soothing tones, which must be taken to be a rejection of violence. Hence, this drawing cannot be considered either as an expression of mockery or scorn of Islamic religious doctrines or acts of worship'.⁷⁴

The prosecutor said that cartoon number two could be interpreted in many ways. First, 'if Muhammad is taken to be a symbol of Islam, the drawing could be understood to mean that violence or bomb attacks have been committed in the name of Islam'.⁷⁵ This could be seen as a contribution to the debate on terrorism and as to how fanaticism has led to terrorism. This could be understood as criticism of Islamic groups 'who commit terrorist acts in the name of religion' but it does not constitute mockery or ridicule under Article 140.

Second, cartoon number two could be interpreted as depicting the Prophet Muhammad as 'a violent person and as a rather intimidating or frightening figure' as the Prophet Muhammad and his followers 'were involved in violent conflicts' with those who did not embrace Islam. The prosecution, however, accepted that 'to depict Prophet Muhammad with a bomb in his turban [in ...] today's context might be understood to imply terrorism'.⁷⁶ 'This depiction might with good reason be understood as an *affront and insult* to the Prophet, who represents an ideal for believing Muslims' but the prosecution concluded that 'however, such a depiction is not an expression of mockery or ridicule' or scorn' [emphasis added].⁷⁷

The prosecution also clarified that the right to freedom of expression is a qualified right under the Danish law. 'Article 140 of the Danish Criminal Code protects religious feelings against mockery and scorn and Article 266 (b) protects groups of persons against scorn and degradation on account of, *inter alia*, their religion'. The article in Jyllands-Posten stating that 'it is incompatible with the right to freedom of expression to demand special consideration for religious feelings and that one has to be prepared to put up with 'scorn, mockery and ridicule', does not 'accurately describe the [Danish] law as it stands'.⁷⁸

All conclusions of the prosecution seem sound, but their decision not to prosecute Jyllands-Posten is against section 266(b) of the Danish Criminal Code and Article 9(1). First, it was right for the prosecution to look at the cartoons in the context in which they were made: the post 9/11 security situation. Second, it was also right for the prosecution to clarify restrictions on the freedom of expression

74 *ibid.*

75 *ibid.*

76 *ibid.*

77 *ibid.*

78 *ibid.*

dispelling the impression that the right to freedom of expression is an absolute right. Third, the prosecution's conclusion on the first batch of cartoons, 1, 3–4, 6–7, 9, 11 and 12 seems sound: they are neutral and do not mock or ridicule the Prophet Muhammad. The prosecution's analysis, however, in one respect is flawed. The prosecution relied on two legal systems – Islamic law and Danish law – in reaching its conclusion on the first batch of the cartoons:

The religious writings of Islam cannot be said to contain a general and absolute prohibition on drawing the Prophet Muhammad.

The basic assumption must be that, according to Hadith (the written narratives of the life of the Prophet and guidelines for the conduct to be observed by Muslims), there is a prohibition in Islam against depicting human figures, which also includes depicting the Prophet Muhammad. Not all Muslims comply consistently with the ban on depiction, as there are pictures of Muhammad dating from earlier times as well as the present day. However, in these cases the Prophet is depicted respectfully, in some instances without facial features.

It cannot then be assumed that a drawing of the Prophet Muhammad in general will be contrary to the religious doctrines and acts of worship of the religion as practised today, even if certain groups within the religion comply fully with the ban on depiction. For that reason alone, a drawing of the Prophet Muhammad cannot in itself constitute a violation of Article 140 of the Danish Criminal Code.

The analysis under Islamic law is irrelevant as Islamic law is not applicable in Denmark and basing its conclusion on Islamic law is not sustainable. If the prosecution were dealing with the question of extra-marital sex between a Muslim man and a Danish woman, which are criminalised under Islamic law but not punishable under the Danish law, would the prosecution have applied Islamic law to them.

The prosecution's assessment regarding cartoon number two also seems sound: that it does not constitute ridicule and mockery in the sense of Article 140 of the Criminal Code but 'with good reason be understood as an affront and insult to the Prophet [Muhammad]' and in 'today's context might be understood to imply terrorism'. As the cartoonists' did not provide their interpretation of the cartoons, they were left open to interpretation by those who saw them. Cartoons number two is susceptible to multiple interpretations. It may signify that the current spate of terrorist attacks (and more broadly terrorism) emanate from Islam itself, i. e. violence inheres in Islam.⁷⁹ Putting an ignited bomb in the

⁷⁹ This argument was commonly heard on national TV and print media in many Muslim countries. I also heard this argument in many formal and informal discussions with scholars in Muslim countries and Muslims in Western countries.

turban of the Prophet Muhammad suggests that either he himself was a terrorist or his religion permits terrorism or both. This is insulting and an abusive attack Islam and Muslims. Cox considers the cartoons to be defamatory.⁸⁰

Cartoon number two can be viewed as a vehicle for instigating hatred against the Muslim community and Islam in the post – 9/11 circumstances. The circumstance prevailing after the tragic events of 11 September 2001, New York, 11 March 2004 Madrid bombing; 7 July 2005, London underground train bombing and many other small scale actual or foiled attacks render the above interpretation more plausible for less knowledgeable people on Islam. This widens the gap among communities and buttresses exclusionary tendencies and social vulnerability of an already marginalised minority. These images furnish ammunition to anti-immigrant individuals, groups and political parties fanning xenophobia and Islamophobia undermining democratic values such as tolerance, social harmony and broad-mindedness.

When the prosecution found that cartoon number two could imply terrorism amounting to inciting racial hatred and insult, they were required to prosecute *Jyllands-Posten* under section 266(b) of the Danish Criminal Code which, as far as is relevant, reads:

Any person who, publicly or with the intention of disseminating it to a wide circle (“videre kreds”) of people, makes a statement, or other communication, threatening, insulting or degrading a group of persons on account of their race, colour, national or ethnic origin or belief shall be liable to a fine or to simple detention or to imprisonment for a term not exceeding two years.⁸¹

If there was any doubt about prosecuting *Jyllands-Posten* under sections 140 and 266(b), Article 9(1) of the Convention imposes positive obligations on states to protect the right to freedom of religion by protecting it from insults, abusive attacks and hate speech. Article 10 does not protect such expressions. By failing to prosecute *Jyllands-Posten*, Denmark has breached its Convention obligations and has failed to uphold its own law.

Charlie Hebdo: The French Inability to Prosecute

In February 2007, two French Muslim organisations, the Great Mosque of Paris and the Union of Islamic Organisations of France, launched a legal action

⁸⁰ Cox (2016, 195–221).

⁸¹ *Jersild* (n 36) [19].

against Charlie Hebdo for reproducing the 12 cartoons first published by Jyllands-Posten.⁸² They contended that Charlie Hebdo and its director, Philippe Val, were guilty of slandering Muslims by publishing cartoons of the Prophet Muhammad.⁸³ The prosecutor, who did not initiate the legal action, asked the court to find the defendant not guilty, arguing that this was a case of freedom of expression and that the cartoons did not attack Muslims, but fundamentalists.⁸⁴ Nicolas Sarkozy, the former French President,⁸⁵ and Francois Hollande, another former President of France,⁸⁶ gave testimony in favour of Charlie Hebdo. The court rejected the claim of the Muslim organisations by saying that ‘the drawing [number two], taken on its own, could be interpreted as shocking for followers of [Islam]. However, it had to be seen in the wider context of the magazine examining the issue of religious fundamentalism. Therefore, even if the cartoon ‘is shocking or hurtful to Muslims, there was no deliberate intention to offend them’.⁸⁷

There are two issues to look at: the court’s reasoning and whether French law allows unrestricted freedom of expression. First, the court’s reasoning is not persuasive. In targeting fundamentalism and terrorism, Charlie Hebdo should have targeted fundamentalist and terrorist organisations and their leaders, e. g. Al-Qaeda and Osama Bin Laden or the so-called Islamic State and its leader Al-Baghdadi rather than the central figure of Islam itself.⁸⁸ It is inconceivable that Muslim organisations would have initiated legal action if terrorist organisations were targeted. Making a clear distinction between Muslims and Islam on the one hand and Muslim terrorist organisations on the other hand could serve the public interest better in exposing, isolating and eventually defeating the ideology of terrorism. Muslims have condemned the attacks on Charlie Hebdo and other violence but decoupling Islam and terrorism would have encouraged millions of Muslims to say: ‘*Je Suis Charlie*’.

Second, the Convention as it is directly applicable in France and French domestic law restricts the right to freedom of expression. Article 9 is discussed above. Relevant domestic law is contained in sections 29 and 32 of the Freedom of the Press Act 1881. Section 29 reads:

82 Greenslade (London, 8 February 2007).

83 *ibid.*

84 *ibid.*

85 *ibid.*

86 Duggan (London, 7 January 2015).

87 Fouche (London, 22 March 2007).

88 Black (London, 7 January 2015).

It shall be defamatory to make any statement or allegation of a fact that damages the honour or reputation of the person or body of whom the fact is alleged. The direct publication or reproduction of such a statement or allegation shall be an offence, even if expressed in tentative terms or if made about a person or body not expressly named but identifiable by the terms of the impugned speeches, shouts, threats, written or printed matter, placards or posters. It shall be an insult to use any abusive or contemptuous language or invective not containing an allegation of fact.

Section 32 reads:

Defamation of an individual by one of the means set forth in section 23 shall be punishable by a fine of FRF 80,000. Defamation by the same means of a person or group of people on the ground of their origin or their membership or non-membership of a specific ethnic group, nation, race or religion shall be punishable by a term of imprisonment of one year and a fine of FRF 300,000 or one of those penalties only.

As I argued above, cartoon number two could plausibly be interpreted as an insulting and an abusive attack on Islam and Muslims by associating them with terrorism. The publication of cartoon number two certainly damages the honour and reputation of Muslims and could be seen as a vehicle of racial hatred. The Danish prosecutor found it to be insulting and could imply terrorism. Article 10 (2) uses phrases such as protecting ‘reputation or rights of others’ as grounds for restricting freedom of expression. Section 29 the Freedom of the Press Act 1881 uses similar language for preventing damaging ‘honour or reputation’ of others. Article 9(1) of the Convention imposes positive obligations on states to protect the right to freedom of religion by protecting it from insults, abusive attacks and hate speech. Article 10 does not protect such expressions. The French prosecutor was required to prosecute Charlie Hebdo under sections 29 and 32 but it chose not to. By failing to prosecute Charlie Hebdo, France breached its Convention obligations and has failed to uphold its own law.

Survival of the Convention Challenge

Had Danish and French authorities successfully prosecuted Jyllands-Posten and Charlie Hebdo respectively, they would have survived Convention challenges at the European Court of Human Rights (ECtHR). The following jurisprudential analysis supports this proposition. The Convention is a living document and the ECtHR has over decades – starting from the leading case of *Handyside v UK* (1976) through the case of *Gough v UK* (2015) – restricted freedom of expression on Convention grounds such as ‘protect[ing] the reputation or rights of others’; ‘prevention of disorder and crime’ and ‘hate speech’.

Improper and Abusive Attack on Religion

In *Otto-Preminger Institut v Austria* (1995), the ECtHR prohibited ‘improper attacks on objects of religious veneration’.⁸⁹ The *Otto-Preminger Institut* aired a play portraying God the Father as old, infirm and ineffective, Jesus Christ as a ‘mummy’s boy’ of low intelligence and the Virgin Mary, who is obviously in charge, as an unprincipled wanton woman. The Austrian authorities banned and seized the play leading to legal challenges in the domestic courts which eventually reached the ECtHR. The ECtHR held:

The respect for the religious feelings of believers as guaranteed in Article 9 can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as *malicious violation of the spirit of tolerance*, which must also be a feature of democratic society. The Convention is to be read as a whole and therefore the interpretation and application of Article 10 in the present case must be in harmony with the logic of the Convention [emphasis added].⁹⁰

The ECtHR further said that ‘as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration’.⁹¹ The court found that ‘in seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people feeling that they were the object of attacks on their religious beliefs in an unwarranted and offensive manner’.⁹²

In *I.A. v Turkey* (2007), the ECtHR found that the Convention does not protect ‘abusive attacks’ on a religion. In this case, the ECtHR did not find violation of Article 10 where the author of *The Forbidden Phrases* was fined and imprisoned for two years for blaspheming the ‘God, the Religion, the Prophet and the Holy Book’. An extract from the book reads:

‘Look at the triangle of fear, inequality and inconsistency in the Koran; it reminds me of an earthworm. God says that all the words are those of his messenger. Some of these words, moreover, were inspired in a surge of exultation, in Aisha’s arms. ... God’s messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual relations with a dead person or a live animal’.⁹³

⁸⁹ *Otto-Preminger Institute* (n 27) [49].

⁹⁰ *ibid* [47].

⁹¹ *ibid* [49].

⁹² *ibid* [56].

⁹³ *I. A. Turkey* (n 34) [13].

The court found that ‘the present case concerns not only comments that offend or shock, or a provocative opinion, but also an abusive attack on the Prophet of Islam’.⁹⁴

In *Norwood v The United Kingdom* (2004), the ECtHR found that the Convention does not offer protection from associating Muslims with the grave act of terrorism. The applicant was a member of the British National Party (an extreme right wing political party). Between November 2001 and 9 January 2002 he displayed in the window of his first-floor flat a large poster, supplied by the BNP, with a photograph of the Twin Towers in flame, the words ‘Islam out of Britain – Protect the British People’ and a symbol of a crescent and star in a prohibition sign. The poster was removed by the police following a complaint from a member of the public. The applicant was then charged with an aggravated offence under sections 5 and 6 of the Public Order Act 1986. Section 5(1) states:

A person is guilty of an offence if he; ... (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

Section 6(4) states: ‘A person is guilty of an offence under section 5 only if he intends ... the writing, sign or other visible representation to be threatening, abusive or insulting, or is aware that it may be threatening, abusive or insulting’.

The ECtHR agreed with the assessment of the domestic courts that the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom:

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*. The applicant’s display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14’ [emphasis added].⁹⁵

Insult and Racial Hatred

In *Jersild v Denmark* (1995) the ECtHR found that the right to freedom of expression does not cover insulting a particular group. In this case, Denmark

⁹⁴ *ibid* [29].

⁹⁵ *Norwood* (n 35).

prosecuted Mr Jens Olaf Jersild who was a journalist based at Copenhagen working for a radio station and in television. Mr Jersild aired a short film based on interviews with a group of young people calling themselves Greenjackets. They described themselves as racists and described black people as ‘not human beings’. After complaints followed by an investigation, they were charged under article 266 of the Criminal Code by making, among others, the following statement: ‘a nigger is not a human being, it’s an animal, that goes for all the other foreign workers as well, Turks, Yugoslavs and whatever they are called’.⁹⁶ By airing the film, Mr Jersild was charged with aiding and abetting the Greenjackets.

On 24 April 1987 the City Court convicted the three youths, one of them for having stated that ‘niggers’ and ‘foreign workers’ were ‘animals’. Mr Jersild was convicted of aiding and abetting them in his capacity as programme controller: they were sentenced to pay day-fines totalling 1,000 and 2,000 Danish kroner, respectively, or alternatively to five days’ imprisonment.⁹⁷

Mr Jersild, but not the youths, appealed against his conviction to the High Court. The High Court upheld the decision of the lower court. He appealed to the Supreme Court. The Supreme Court held:

The defendants have caused the publication of the racist statements made by a narrow circle of persons and thereby made those persons liable to punishment and have thus, as held by the City Court and the High Court, violated Article 266 (b) in conjunction with Article 23 of the Penal Code. [We] do not find that an acquittal of the defendants could be justified on the ground of freedom of expression in matters of public interest as opposed to the interest in the protection against *racial discrimination*. [We] therefore vote in favour of confirming the judgment [appealed from] [emphasis added].⁹⁸

Mr Jersild took the case to the European Court of Human Rights. The ECtHR found the conviction of Mr Jersild disproportionate, but on the conviction of the Greenjackets youths, it found that ‘there can be no doubt that the remarks in respect of which the Greenjackets were convicted ... were more than *insulting* to members of the targeted groups and did not enjoy the protection of Article 10’ [emphasis added].⁹⁹

⁹⁶ *Jersild* (n 36) [12].

⁹⁷ *ibid* [14].

⁹⁸ *ibid* [17]. Article 23 of the Criminal Code reads: ‘A provision establishing a criminal offence shall apply to any person who has assisted the commission of the offence by instigation, advice or action. The punishment may be reduced if the person in question only intended to give assistance of minor importance or to strengthen an intent already resolved or if the offence has not been completed or an intended assistance failed’.

⁹⁹ *Jersild* (n 36) [35].

In *Le Pen v France* (2010), the applicant was fined 10,000 euros for ‘incitement to discrimination, hatred and violence towards a group of people because of their origin or their membership or non-membership of a specific ethnic group, nation, race or religion’, on account of statements he had made about Muslims in France in an interview with *Le Monde* daily newspaper. He asserted, among other things, that ‘the day there are no longer 5 million but 25 million Muslims in France, they will be in charge’.¹⁰⁰ The ECtHR reiterated that it attached the highest importance to the freedom of expression in the context of political debate in a democratic society, and that freedom of expression applied not only to information or ideas that were favourably received, but also to those that offended, shocked or disturbed. The court also said that a degree of exaggeration may be condoned for those engaged in a debate on a matter of public interest provided that they respected the reputation and rights of others.¹⁰¹ The ECtHR, however, found that Mr Pen’s ‘comments had certainly presented the “Muslim community” as a whole in a disturbing light, likely to give rise to feelings of rejection and hostility. He had set the French on the one hand against a community whose religious convictions were explicitly mentioned and whose rapid growth was presented as an already latent threat to the dignity and security of the French people’.¹⁰²

In *Feret v Belgium* (2009), the ECtHR held that the Convention does not protect incitement to racial discrimination. The applicant was a Belgian Member of Parliament and chairman of the political party Front National. During the election campaign, several types of leaflets were distributed carrying slogans including ‘Stand up against the Islamification of Belgium’, ‘Stop the sham integration policy’ and ‘Send non-European job-seekers home’.¹⁰³ The applicant was convicted of incitement to racial discrimination. He was sentenced to community service and was disqualified from holding parliamentary office for 10 years.¹⁰⁴

The ECtHR found that the applicant’s comments had clearly been liable to arouse feelings of distrust, rejection or even hatred towards foreigners, especially among less knowledgeable members of the public. The court concluded that the applicant’s conviction had been justified in the interests of preventing disorder and protecting the rights of others, namely members of the immigrant community.¹⁰⁵

100 *Le Pen* (n 36).

101 *ibid.*

102 *ibid.*

103 *Feret v Belgium*, no 15615/07, 16 July 2009.

104 *ibid.*

105 *ibid.*

Conclusion

The right to freedom of religion is a foundational right in a democratic society. So is the right to the freedom of expression. Both rights are qualified and may be restricted on specified Convention grounds. The above jurisprudential analysis provides insights as to what sort of speech is not protected: insults, abusive attacks and hate speech. As cartoon number two is insulting and an abusive attack on Islam by associating Muslims and Islam with the grave offence of terrorism and degrading the Muslim community on the basis of their religion is against the Convention. In the post-9/11 circumstances, it has strong potential for generating racial hatred against Muslims. The Danish and French authorities should have intervened to protect the rights of the Muslim community by invoking their domestic law and Articles 9(1) and 10(2). It would not have been disproportionate to restrict the right to freedom of expression by responding to a pressing social need: not stigmatising a section of society by associating it with the grave offence of terrorism. The inaction of Denmark and France demonstrate a failure to uphold Danish and French law and a failure to fulfil Convention obligations.

Living under the Convention demands promoting and abiding by the Convention's values: tolerance; social peace and non-discrimination and democratic values: pluralism; tolerance and broad-mindedness. The rule of law is a central tenant of modern democracies. Muslims living in Western democratic societies need to be tolerant of criticism, mockery and satire of Islam. If criticism, mockery and ridicule pass the threshold of insult; abusive attack; hate speech, a legal course is open to them. The public space is a shared space and is regulated by law. Religious and non-religious individuals and groups must not monopolise or intimidate it.

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