

2-2006

No Laughing Matter: The Controversial Danish Cartoons Depicting the Prophet Mohammed, and Their Broader Meaning for the Europe's Public Square

Ruti G. Teitel

New York Law School, ruti.teitel@nyls.edu

Follow this and additional works at: https://digitalcommons.nyls.edu/fac_other_pubs

 Part of the [Civil Rights and Discrimination Commons](#), [Comparative and Foreign Law Commons](#), [First Amendment Commons](#), [Human Rights Law Commons](#), and the [International Law Commons](#)

Recommended Citation

<http://supreme.findlaw.com/legal-commentary/no-laughing-matter-the-controversial-danish-cartoons-depicting-the-prophet-mohammed-and-their-broader-meaning-for-europes-public-square.html>

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Other Publications by an authorized administrator of DigitalCommons@NYLS.



No Laughing Matter: The Controversial Danish Cartoons Depicting the Prophet Mohammed, and Their Broader Meaning for Europe's Public Square

By **RUTI TEITEL**

Wednesday, Feb. 15, 2006

On September 30, 2005, the Danish newspaper Jyllands-Posten published a now-infamous set of cartoons depicting the Prophet Mohammed in derogatory terms, and associating Islam with terrorism. Many people saw the cartoons as highly offensive - and specifically, as exhibiting intolerance toward those whose religion is Islam.

Some Westerners, especially, have been shocked by the fury the cartoons provoked. To understand why so many Muslims were so gravely offended, it is important to see that the cartoons don't stand alone, but rather were published against a backdrop of political and legislative action that, to many Muslims, reflects a repeated pattern of disparagement of Islam in the public sphere.

At present, Europe is struggling with issues of identity--issues that could plainly be seen in the recent debates over the adoption of a European Union Constitution. The crisis arises because of new demographics, at the same time as new regionalism. Many Muslims feel they are being relegated to second-class citizenship in Europe. And they relate the publication of the cartoons - by a newspaper they feel would not consider publishing anti-Christian or anti-Jewish cartoons - to this wrongful sense that they are not full citizens.

The cartoons, thus, raise much larger questions: How will Europe reconcile its varying affiliations: regional, national, local, and individual? And to what extent can it allow--in light of new demographics--a reconception of its public sphere ?

The UN Is Sympathetic To Muslim Complaints, while Many In Europe are Not

In light of recent events, the UN High Commissioner for Human Rights has initiated an investigation into "racism" and "Islamophobia." Similarly, while calling for "tolerance," the UN Commission on Human Rights' Special Rapporteur on contemporary forms of racism, and racial discrimination "strongly deplored the depictions of the Prophet" and the "grave offence they caused to the members of the Muslim community."

But European observers have been less sympathetic. Muslims complained soon after the cartoons were initially published in September, and received little, if any response. Later, the newspaper finally apologized that it had offended them.

Yet, still, the Danish prime minister had refused to meet with the Ambassadors from Muslim countries. And meanwhile, in France, a newspaper - in what it called a free speech protest - added fuel to the fire by reprinting the cartoons.

The Free Speech Angle Is Unduly Americanized: EU Law Is What Counts

The French newspaper is not the only one taking a "free speech" perspective here: Many have taken a similar view - often invoking the American First Amendment. But taking a closer look at European - not American - free speech views, which are obviously more relevant here, leads to a different, and more nuanced analysis.

Of course, Europe is, at present, under a rapidly changing federalist structure, under which individual nations' views on speech may still differ. Nevertheless, under the guidance of the European Court of Human Rights, the region is in the midst of developing a unified approach to speech questions.

American readers may not be aware how sharply European countries' individual approaches - and the evolving approach of Europe itself - differ from America's approach. In two respects, these differences are relevant to the issues the cartoons have raised.

The American Versus the European Approach: Offensiveness Matters

First, whereas in America, free speech doctrine is largely libertarian, free speech doctrine in Europe is far more protective of communitarian values - such as preventing social unrest, and promoting societal inclusiveness and anti-discrimination values.

In the United States, rights are framed in a radically individualist fashion -- with is a commitment to keeping the public sphere to the greatest extent possible, free of regulation. But unlike the United States Constitution, the European Convention and postwar European Constitutions make references to collective - not individual -- goals.

Thus, while it might be obvious, in libertarian America, that the balance should be struck in the cartoonist's and newspaper's favor, that is much less obvious in communitarian Europe - where the point of view of the offended audience would be taken far more seriously.

Just a month ago, a controversy erupted over a public arts project that was to celebrate the new EU presidency. Among a series of 150 different images being flashed to motorists via billboards across Vienna, were posters depicting naked models posing as world leaders Queen Elizabeth II, George W. Bush and Jacques Chirac apparently having sex; and a poster of a woman lying naked on a bed, except for a pair of knickers bearing the EU flag. After protests by Catholic clergy and opposition politicians, the posters were immediately withdrawn on the grounds that they were offensive.

More generally, the European Convention of Human Rights, while protecting the right to "freedom of expression," art 10(2) recognizes that its exercise and other liberties are limited by justifications "necessary in a democratic society." These justifications might include the need to protect order or security, but might also include concerns for reputation and other values.

Another Contrast: In Europe, Hate Speech Is Often Illegal

Second, "hate speech" - First-Amendment-protected in America, except in rare cases - is often deemed outright illegal in Europe.

Throughout Europe, there is legislation specifically limiting speech, including speech denying the Holocaust. For example, Germany, France, and Austria, all have such legislation.

Denmark, too, has related anti-hate legislation: Its law penalizes expressions that threaten, deride or degrade on the grounds of race, color, national or ethnic origin, belief or sexual orientation. Indeed, in the Jersild case, the Danish government attempted to enforce these laws against a television journalist.

Though the European Court of Human Rights drew the line on criminal prosecution on these grounds, and found there had been an attempt to counterbalance the racist views, the Court recognized the legitimate countervailing values at stake. And what's more, so did the Danish government.

While freedoms of speech and of religion are protected in Europe, there is also always a limit. One might see the arrangements as "balanced rights." Dating back to the abuses of World War II, all the postwar conventions, such as the International Covenant of Civil and Political Rights, expressly limit advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Anti-religious hate speech, is particular, is illegal in Europe. Blasphemy is still prohibited in many countries in Europe - whereas in the U.S., it is plainly First- Amendment-protected.

The European Court of Human Rights (ECHR) made clear quite recently that it approves of some regulation of anti-religious speech, based on offensiveness.

In 1994, in *Otto Preminger v. Austria*, the ECHR upheld Austria's censorship of a satirical film that mocked Christian religious beliefs. Given the high percentage of Catholics in Tyrol, the European Court deferred to the national authorities "to ensure religious peace in that region" so that people shouldn't "feel the object of attacks on their religious beliefs in an unwarranted and offensive manner."

With Anti-Semitic Speech Legally Limited, What About Anti-Islamic Speech?

There are also many instances, in Europe, of cases limiting speech because of anti-Semitism.

In *Faurisson v. France*, for example, a Holocaust denier challenged his conviction under French law - claiming that it violated his freedom of expression rights under the International Covenant of Civil and Political Rights, Article 19(2). But the Human Rights Committee concluded that the Covenant had not been violated.

In so doing, the Committee considered the context in which the expression was made -- noting that the French government saw "the denial of the existence of the Holocaust as the principal vehicle for anti-semitism." And for this reason, the Committee justified the prosecution as "necessary" within the balanced rights scheme of the ICCPR. Article 19(3).

In 1994, the German Constitutional Court reached a similar holding. At a meeting in Munich, "revisionist historian" David Irving sought to question the Holocaust. He argued that, to ban his remarks would be contrary to Article 5(1) of the German Basic Law, which provides for freedom of expression. But the court held that the ban on the assembly -- and the ensuing restriction on Irving -- were compatible with the German Constitution and, indeed, authorized under certain provisions of the German Criminal Code specifically setting forth the offense of denying the Holocaust.

Are Muslims Implicitly Exempt From European Hate Speech Protections?

In sum, then, the United States allows a whole range of hate speech - from anti-Christian, to anti-Semitic, to anti-Islamic. And Europe purports to constrain a whole range of hate speech - but, it seems, not necessarily when that speech targets Muslims.

A parallel issue can be seen when it comes to religious freedom. The United States would not limit the wearing of religious garb for any faith, for to do so would violate the First Amendment. But in Europe, generally, and in France more particularly, anti-veils law are justified by the ideal of keeping the public sphere secular, so that no one feels overly proselytized - even though they disproportionately impact Muslims.

Ultimately, France ended up banning overt religious symbols including headscarves, skullcaps or outsize crosses from being worn in State primary and secondary schools. But tellingly, the ban's original draft singled out the hijab for exclusion from public life.

Europe Must Avoid Viewpoint-Discrimination Against Muslims

My point is not that Europe can -- or should -- adopt the same approach as the U.S. to questions of religious freedom. It is simply that Europe must apply whatever approach it chooses, in a fair and impartial way.

With the relative postwar homogeneity of many of Europe's constituent countries now changing due to immigration, issues of cultural diversity are coming to the fore. Welcoming Muslims into the public sphere entails extending to them the full benefit of laws that protect other groups - including anti-hate-speech laws, if Europe continues to choose to have them.

Ruti Teitel is Ernst Stiefel Professor of Comparative Law at New York Law School, where she also teaches constitutional law and international human rights. She is a member of the Council on Foreign Relations and on the steering committee of Human Rights Watch, Europe, Central Asia. This column, however, reflects her own views, and not necessarily the views of any of these institutions or organizations.