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15 Buff. Hum. Rts. L. Rev. 41 2009

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HANGING IN A BALANCE: FREEDOM OF EXPRESSION AND RELIGION

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“Liberty means responsibility. That is why most men dread it.” – George Bernard Shaw

Abstract

When the liberty to freely express oneself is at odds with another’s right to freedom of religion, we are confronted with the classic dilemma of choosing between two equally fundamental, constitutionally and internationally protected rights. The contours of the said two rights however, are far from clear. Whilst freedom of expression is not an absolute right, its limits are controversial. Equally, while it is undisputed that freedom of religion is an internationally protected human right enshrined in various international instruments, there is no comprehensive international treaty which addresses as its subject the content and extent of the right of freedom of religion, thus it is uncertain whether it entails the right to have one’s religious faith and symbols protected from insult.

The unsettled boundaries of dispute arising from the clash between two fundamental rights have led to bitter tensions between freedom of expression and concerns to protect and respect religious sentiments. Religious communities feel outraged that their religious beliefs and sacred symbols are mocked, insulted, attacked or vilified. Aggrieved believers argue that “respect” for religious beliefs and symbols is fundamental to, and part and parcel of, the right of freedom of religion and that freedom of expression, although equally fundamental, is not without its limits. On the other hand, the authors and creators of these controversial works argue that any law seeking to restrict their works amounts to a violation of the sacrosanct right of freedom of expression, which is the bedrock of any democratic society.

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These arguments require an exploration of the rationales underpinning the freedoms of expression and religion to determine the boundaries and limits of each of these rights. On the far right, the United States endows the freedom of expression with sacrosanct status, which can be limited only where there is a risk of imminent danger or physical harm to third parties or a threat of an imminent outbreak of violence. In marked contrast is the German model, where an individual's religious sentiments, dignity and identity are protected from scurrility and ridicule and any form of degrading speech against any religion is outlawed. Lying between these two extremes are the European Court of Human Rights and the Australian systems which have endeavored to strike a delicate balance between respect for religious sentiments and free speech. This paper will bring these perspectives to bear on the challenge of balancing the rights of freedoms of expression and religion.

Part I of this paper examines the content of the right to freedom of religion and whether it entails a right to protection from ridicule, scurrility, vilification and insults directed at one's religious teachings, symbols or beliefs from the perspective of international human rights law. Parts II and III review the approach of regional and national 'models of regulation' (the United States, Germany, the European Court of Human Rights, and Australia) to examine the unique experiences of these systems and the benefits, pitfalls and complexities inherent in legislating against speech or conduct which 'hurts' the sentiments of groups or individuals, who find their religious beliefs the subject of provocative, insulting, vilifying or offensive expressions. To end this 'clash' between secular libertarians and the faithful, this paper argues that a contextualized approach should be adopted in individual cases to carefully examine the value of the speech concerned, the 'harm' caused by it, and the position of the targeted individuals, group or community in that particular society and generally. It is only through such a contextualized consideration of the rights concerned, can an appropriate balance be struck to secure the interests concerned.

INTRODUCTION

Liberty has been hailed as a prized victory for humankind since the days of the glorious French revolution. Yet when the liberty to freely express oneself is at odds with another's right to freedom of religion, we are confronted with the classic dilemma of choosing between two equally fundamental, constitutionally and internationally protected rights. Adding to the difficulty, the contours of the said two rights are often far from clear. Whilst most will agree that freedom of expression is not an absolute right, its limits are controversial. Equally, while it is undisputed that freedom of religion¹ is an internationally protected human right enshrined in various international instruments,² there is no comprehensive international treaty which addresses as its subject the content and extent of the right of freedom of religion,³ thus it is uncertain whether it entails the right to have one's religious faith and symbols protected from insult. The unsettled boundaries of dispute arising from the clash between two fundamental rights have led to bitter tensions between freedom of expression and concerns to protect and respect religious sentiments in the 21st century. To name but a few such instances – the *Da Vinci Code* stretched Catholic imagination and tol-

¹ See NATAN LERNER, RELIGION, BELIEFS, AND INTERNATIONAL HUMAN RIGHTS 119-20 (2000) (For the purpose of discussion, the definition of religion is taken to be any "theistic convictions involving a transcendental view of the universe and a normative code of behavior, as well as atheistic, agnostic, rationalistic, and other views in which both elements are absent," which is a generally accepted definition within the human rights discourse).

² Article 18 Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A//810 (Dec. 12, 1948); Article 18(1), International Covenant on Civil and Political Rights G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (Mar. 23, 1976). It has also been argued that although these treaties only bind signatories to the respective treaties, some of the rights enshrined in these treaties have now achieved the status of *jus cogens*, and therefore, may be correspondingly binding on non-signatories also.

³ . See Arcot Krishnaswami's *Study of Discrimination in the Matter of Religious Rights and Practices*, UN Sales No. 60.XIV.2 (1960) (There is, however, a 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief. Acceptance of the Declaration, however, is not mandatory and as such, the Declaration has failed to move forward in garnering support for a Convention on the matter due to significant divides between states over critical issues such as the meaning of 'religion' or 'belief' and whether new or controversial sects or religious movements should also be granted equal protection). It is notable that there is a 1965 Draft Convention still pending before the United Nations. See Lerner, *supra*. note 1, p. 14.

erance;⁴ the Danish cartoons which mocked Prophet Mohammed⁵ caused a huge uproar in the Muslim community worldwide,⁶ with many taking offense and reacting violently; and a *fatwa* for the death of Salman Rushdie for his authorship of the *Satanic Verses*, which has been reissued upon his Knighthood by the Queen of England.⁷

Religious communities feel outraged that their religious beliefs and sacred symbols are mocked, insulted, attacked or vilified. Although historically, in most countries, the call to protect and respect religious sentiments stemmed from the archaic blasphemy laws which extended protection only to the dominant religion of the state (for example, Christianity and Christian

⁴ MSNBC News Services, *Cardinal's Plea: Don't Read "The Da Vinci Code,"* March 16, 2006, <http://www.msnbc.msn.com/id/7205300/print/1/displaymode/1098>.

⁵ *Muslim Cartoon Fury Claims Lives*, BBC.NEWS, Feb. 6, 2006. <http://news.bbc.co.uk>. (The Danish newspaper, *Jyllands-Posten*, published twelve cartoons depicting Muhammad and Islam negatively and in the most derogatory manner, ranging from images of Muhammad with a bomb in his turban to a purported representation of Muhammad at the gates of heaven stopping suicide bombers stating, 'Stop! Stop! We have run out of Virgins!' a reward promised to martyrs.); See Manoj Joshi, "Fact and fiction", THE HINDUSTAN TIMES. February 22, 2006. (As the controversy spread, the storm was further fueled by other cartoons even more disturbing in their associations between Islam, the Prophet and evil, which were not part of the original 12 cartoons published by *Jyllands-Posten*.); See Noam Cohen, *Online petition asks Wikipedia to remove pictures of Muhammad*, INTERNATIONAL HERALD TRIBUNE. February 5, 2008. <http://www.iht.com/articles/2008/02/05/technology/wiki.php>. (More recently, an online protest has been called for against Wikipedia, the popular internet encyclopedia, to remove its representations of the Prophet Muhammad which have been taken from medieval scriptures). .

⁶ See "Rs 51 crore reward for Danish cartoonist's head", INDIAN EXPRESS. February 18, 2006. (For example, a *fatwa* (declaration) was issued in India calling for the execution of cartoonists for a reward of 51 crore Rupees (510 million Rupees)); see also "Bounty Offered on Cartoonists", HINDUSTAN TIMES. February 18, 2006; "Death fatwa on cartoonist", THE TIMES OF INDIA. February 21, 2006; "Toon Trouble Across India", THE TIMES OF INDIA. February 18, 2006. . There were several violent attacks on the embassies of European nations, see "Violence Spreads Over Cartoon Controversy", THE WASHINGTON POST. February 8, 2006; "At Least Nine Killed in Libya as Cartoon Protests Escalate" THE GUARDIAN. February 18, 2006. "Danish Embassy in Tehran Attacked" THE GUARDIAN. February 6, 2005.

⁷ *The Satanic Verses* written by Salman Rushdie, was considered insulting and offensive to many Muslims. As a result, in 1989, President Khomeini issued a *fatwa*, a death sentence, against Rushdie.

beliefs⁸ in the United Kingdom and its colonies), contemporary calls to halt insult, ridicule and abuse against the devout rest mainly on the principles of equal treatment and public order.⁹ Some aggrieved believers argue that “re-

⁸ See Leonard Levy, *Blasphemy: Verbal Offenses Against the Sacred*, from Moses to Salman Rushdie (The University of North Carolina Press 1995). In England, the protection of the law of blasphemy extends only to the beliefs of the Church of England. See *R v Chief Metropolitan Magistrate, ex parte Choudhury* [1991] 1 QB 429, where the court ruled that Rushdie’s “*Satanic Verses*” could not form the basis for a prosecution for blasphemy against Islam. There is ample historical evidence of the Christian community protesting against distortions or offensive representations of Christianity in the media, for example, Nikos KAZANTZAKIS, *THE LAST TEMPTATION OF CHRIST* (Touchstone 1998); *THE LIFE OF JESUS*, Jerry Springer: *The Opera*, Steward Lee and Richard Thomas. Studio 2ndStage; DAN BROWN *THE DA VINCI CODE A NOVEL* (Random House, Inc. 2003); Goldstone, John. *Monty Python’s Life of Brian*, 1979; ROBERT HARRIS *THE GHOST* (Simon and Schuster 2007); among many others. See *Church Fights Da Vinci Code Novel*, BBC NEWS, March 15, 2005, <http://news.bbc.co.uk/2/hi/entertainment/4350625.stm>; *Protests as BBC Screens Springer*”, BBC NEWS, January 10, 2005 <http://news.bbc.co.uk/2/hi/entertainment/4154071.stm>, *Monty Python’s Life of Brian was the Most Controversial Film of its. . .*, THE GUARDIAN, March 28, 2003. See also, *Danish paper rejected Jesus cartoons*, GUARDIAN UNLIMITED, February 6, 2006; *Austria Arrests British Historian David Irving; charged in denying Holocaust*, THE CANADIAN PRESS, November 17, 2005 (which clearly depicted the double standards applied in the West in its protection of Christian sensitivities even in the face of a right to free speech).

⁹ For example, the UK Anti-Terrorism, Crime, and Security Act 2001 punishes “religiously aggravated offenses,” which emanate from existing offenses, namely, assault, harassment, criminal damage, and public disorder. Dec. 14, 2001, Chapter 24. Part 5. Where religious hostility is found as the motivating factor behind these “religiously activated offenses,” those convicted are likely to get higher maximum penalties. However, the Racial and Religious Hatred Act 2006, which defines “religious hatred” as hatred against a group of persons on grounds of their religious belief or lack of it, a much-needed balance is struck in ensuring equality in protection of diverse communities to foster their peaceful coexistence, by balancing conflicting rights carefully to achieve this end. Feb. 16, 2006, Chapter 1. This is plugged an important gap which existed in the law whereby previously, only mono-ethnic communities were protected against ‘racial’ slurs, whereas the religious groups which were not covered by UK’s blasphemy laws, were left without any recourse under the law. This Act brings to the fore the need for equal protection against such slurs for both, ethnic *and* religious groups. The Act, however, does not define religion or what constitutes a religious belief. In order to constitute an offense, an act must be THREATENING *and* INTENDED to stir up religious hatred. Moreover, the act(s) concerned include (but are not limited) any of the following: the use of words or conduct or display of written material; publishing or distributing writ-

spect” for religious beliefs and symbols is fundamental to and part and parcel of the right of freedom of religion and that freedom of expression, although equally fundamental, is not without its limits. On the other hand, the authors and creators of these controversial works argue that any law seeking to restrict their works amounts to a violation of the sacrosanct right of freedom of expression, which is the bedrock of any democratic society.

In the face of this dilemma, countries around the world have been compelled to come up with a solution in the hope of striking the appropriate balance between the fundamental value of free speech in a community and the need to protect the free practice of religion. As a corollary, these arguments require an exploration of the rationales underpinning the freedom of expression and religion to determine the boundaries and limits of each of these rights.¹⁰ On the far right, the United States endows the freedom of expression with sacrosanct status. This freedom cannot be interfered with unless there is a risk of imminent danger or physical harm to third parties or there is a threat of an imminent outbreak of violence. In marked contrast to this model is Germany, where an individual’s religious sentiments, dignity and identity are protected from scurrility, ridicule and any form of degrading speech against any religion, is outlawed. Lying between these two extremes are the European Court of Human Rights and the Australian¹¹ systems which have endeavored to strike a delicate balance between respect for religious sentiments and free speech. This paper will bring these perspectives to bear on the challenge of balancing the rights of freedoms of expression and religion.

Part I of this paper examines the content of the right to freedom of religion and whether it entails a right to protection from ridicule, scurrility, vilification and insults directed at one’s religious teachings, symbols or beliefs from the perspective of international human rights law. Given the

ten material; the public performance of a play; distributing, showing, or playing a recording; broadcasting or including a program in a program service; or possession of written materials or recordings with a view to display, publish, distribute, or include in a program service. The Act does not apply where words or behaviour are spoken or occur or are displayed inside a private setting, nor does it apply to censure, criticism or dislike of a religious belief. The maximum penalty for stirring up religious hatred is seven years imprisonment.

¹⁰ Simon Lee, *Law, Blasphemy and the Multi-Faith Society, Commission for Racial Equality in the United Kingdom 1990*, <http://chinesesex.herechina.net/sitearchive/catalystmagazine/catalyst/lawblasphemyandthemultifaithsociety.pdf>

¹¹ This paper looks at one instance of Australian legislation governing such speech in the State of Victoria, *see Racial and Religious Tolerance Act 2001*, Sect. 24 (Vict.).

broad nature of the provisions in international instruments generally, the lack of a specific international convention addressing these rights in particular, and the relatively few cases on point before the Human Rights Committee, the international human rights regime does not provide a definitive or satisfactory resolution of this clash between fundamental rights. Therefore, Parts II and III review the approach of regional and national 'models of regulation' (the United States, Germany, the European Court of Human Rights, and Australia¹²) which have tried to grapple with the controversial question of balancing the two fundamental rights. Parts II and III also examine the unique experiences of these systems and the benefits, pitfalls and complexities inherent in legislating against speech or conduct which 'hurts' the sentiments of groups or individuals, who find their religious beliefs the subject of provocative, insulting, vilifying or offensive expressions.

While the American system is focused solely on maintaining public order, the German system protects religious sensitivities *per se*. In a sense, the former may appear to favor groups more prone to violence and ignore the interests of groups that exercise self-restraint in reacting to scurrilous and insulting expressions directed at their religion. It aims to protect the speakers but belittles the audience, groups or individuals who affiliate themselves with the subject of ridicule.¹³ As such, the American approach exposes the limitations of liberalism. In contrast, the German approach is equally unsatisfactory as silencing voices and debates that provoke the sensitivities of believers inevitably result in tight censorship and self-censorship. Although protection against the *inhibition* of free exercise of religion which may result from defamatory remarks or highly-provocative language ridiculing religious beliefs, it is *equally* important that the responsible exercise of freedom of expression be protected in light of its valuable functions in society. To end this 'clash' between secular libertarians and the faithful, this paper argues that a contextualized approach should be adopted in individual cases to carefully examine the value of the speech concerned, the 'harm' caused by it, and the position of the targeted individuals, group or community in that particular society and generally. This position is further discussed in Part IV, V and the Conclusion.

¹² The jurisdictions have been chosen with a view to ensure a rich representation of the different national and / or regional approaches towards the issue so that a more meaningful conclusion can be derived from an assessment and analysis of these different systems.

¹³ This approach also has important implications for the notion of human dignity, given that for many, one's ability to practice and maintain their religious faiths and beliefs without shame and ridicule may have important implications for one's perceptions of leading a 'good life' or a 'life of dignity'.

I. INTERNATIONAL PROTECTION OF THE FREEDOMS OF
SPEECH AND RELIGION

Both the Universal Declaration of Human Rights (UDHR)¹⁴ and the International Covenant on Civil and Political Rights¹⁵ ("ICCPR") protect individuals' rights to the freedom of opinion and expression and freedom of religion. Article 19 of the UDHR provides every individual with the fundamental right to "freedom of opinion and expression" whilst Article 18 protects the right of "freedom of thought, conscience and religion." Article 18(1) of the ICCPR is crafted in terms identical to the protection of the freedom of thought, conscience and religion set out in the UDHR, whilst Article 19(1) of the ICCPR provides that everyone shall have the right to hold opinions without interference.

Therefore, it is clear that the international community has had a long held commitment towards protecting *both* rights as equally fundamental and belonging to every human being. What remains unclear, however, is where there is a conflict between these two rights, which of the two should prevail? Which of the two merits greater protection? The UDHR provides no direct answer.¹⁶ However, the ICCPR hints that some protection of groups and individuals from defamation against their religions is warranted.¹⁷ Whilst Article 19 of the ICCPR protects the right of freedom of expression and opinion, this right must be exercised responsibly. Article 19(3) of the ICCPR provides that this right "*may . . . be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect for the rights or reputations of others*,"¹⁸ for the protection of national security or of *public order (ordre public)*, or of public health or *morals*" (emphasis added). Moreover, Article 20(2) of the ICCPR provides that "[a]ny advocacy of national, racial or religious *hatred* that

¹⁴ G.A. Res. 217A (III), U.N. Doc. A/RES/180 (Dec. 10, 1948).

¹⁵ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, (Mar. 23, 1976) [ICCPR]

¹⁶ See Louis Henkin, *Group Defamation and International Law*, in GROUP DEFA-
MATION AND FREEDOM OF SPEECH: THE RELATIONSHIP BETWEEN LANGUAGE AND
VIOLENCE 123 (Monroe H Freedman & Eric M Freedman eds., 1995). This is true
save and except that UDHR Art. 30 provides that "Nothing in this Declaration may
be interpreted as implying for any State, group or person any right to engage in any
activity or to perform any act aimed at the destruction of any of the rights and
freedoms set forth herein," which may be read as offering a general approach to
resolving conflicting fundamental rights.

¹⁷ ICCPR *supra* note 15, at Art. 19(3),

¹⁸ For example, this is immediately relevant in the context of proselytization.

constitutes *incitement to discrimination, hostility or violence* shall be prohibited by law” (emphasis added). Therefore, there is an obligation on the part of every State party to the ICCPR to ensure that there is a provision in its domestic law for protection against such incitement on these grounds.

Based on these obligations arising under the ICCPR, there is clearly a certain degree of international consensus that the right of freedom of religion must, in order to be meaningfully protected, entail a right to be free from insults and offense directed at one’s religious practices, beliefs or teachings.¹⁹ The rationale for such inference is not based on any need for maintaining or showing ‘respect’ for these beliefs, but that any acts or speech inhibiting the *free* exercise of religion (on account of intimidation, threats, insults or remarks directed at members of the targeted religion) should be curtailed to the extent necessary to protect the freedom of religion. The Article 19(3) limitation, coupled with the Article 20(2) requirement, signal and mandate State parties to protect these rights. According to Henkin, however, a state would have exceeded its authority in limiting freedom of expression in implementing its Article 19(3) obligations if such a limitation is not “necessary in a democratic society” whether on grounds of maintaining public order or national security, etc. ²⁰ In turn, this has a direct bearing on the role of free speech in a democratic society. Respect for religious sentiments, beliefs or values have never been considered significant enough to dethrone the ‘royalty’ privilege that free speech has enjoyed to date. Freedom of expression or freedom of speech is said to be the cornerstone of liberalism and democracy. Its value has long been entrenched by John Milton and J.S. Mill²¹ since the days of the Enlightenment. Yet,

¹⁹ This interpretation has come about primarily in the context of European Court of Human Rights decisions relating to freedom of speech and the practice of proselytization. See *Kokkinakis v. Greece*, 17 Eur. Ct. H.R. 397 (1994). This aspect of curtailing free speech however is even more complicated in practice because the prohibition of proselytization in some instances may amount to limiting the legitimate practices of certain religious groups whose religions require that its members proselytize their faith. As such, proselytization as ‘speech’ generally cannot be prohibited unless it results in the prevention of another person freely practicing their faith. On this point, see e.g., Peter Edge, *The European Court of Human Rights and Religious Rights*, 47 INT’L & COMP. L.Q. 680 (1998). See also, *infra*. note 94 for a further discussion of *Kokkinakis*.

²⁰ See Henkin *supra* note 16, at p. 129. Henkin proposes that because the limitation impinges upon a fundamental human right, the degree of necessity must be high before it can be legitimized by international law.

²¹ See JOHN MILTON, *AREOPAGITICA* (1644) available at <http://www.gutenberg.org/etext/608>; JOHN STUART MILL, *ON LIBERTY* (first published 1859; Penguin 1985).

freedom of expression is not an absolute right. It can be limited on grounds such as defamation, sedition, obscenity and public order, amongst others.

The Human Rights Committee (“HRC”) defined the issue of respect for the beliefs and religions of others by reference to the scope of Article 20 of the ICCPR.²² It focused on the relationship between Article 18(3) and Article 20, and more particularly, the distinction between the limitations permissible under Article 18(3) and Article 20, respectively. Article 20 is stricter than Article 18(3) in the sense that it contains a mandatory prohibition against particular forms of speech as opposed to an option that limitations be imposed on various forms of speech on special grounds.²³ It was initially thought that Article 20 limited free speech with a view to ensuring respect for the beliefs and religion of others. However, it has since been recognized that the Article 20 limitation actually restricts free speech not on grounds of *respect* for the beliefs and religion of others, but rather on the right and *freedom to manifest* one’s religion or beliefs²⁴ encompassed in the freedom of religion. That in exercising one’s freedom to manifest religious or other beliefs under Article 18(3), the Article 20 prohibition against advocacy of national, racial or religious hatred shall provide the *limiting* parameters for such manifestation.²⁵

The challenge to free speech is whether words or conduct resulting in insult, intimidation and harassment of religious groups, teachings of a particular religion or individuals, should be banned or should be protected as inherently valuable and indispensable to public debate in a democratic society. This debate has largely been held in the context of legislation in some European countries which restrict propagation of revisionist ideas, Holocaust denial or denial of crimes against humanity, which were found to have occurred,²⁶ that the protection of the reputation of others has been heralded as a suitable ground for limiting the right of freedom of expres-

²² Human Rights Committee, General Comment 22, Art. 18 (Forty-eighth session, 1993), The Right to Freedom of Thought, Conscience and Religion, U.N. Doc. CCPR/C/21Rev.1/Add.4 at ¶ 7 (1993).

²³ UNITED NATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, HUMAN RIGHTS COMMITTEE, U.N. Doc. CCPR/C/SR. 1207 at ¶ 23 (1993).

²⁴ *Id.* at ¶ 25, 30 (1993).

²⁵ *Id.* at ¶ 33. .

²⁶ I.e. the criminal provisions of the Gayssot Act of France, which made it an offense to contest the existence of the crimes against humanity tried at Nuremberg in 1945 and 1946. See Human Rights Committee, Robert Faurisson v. France, (Communication no. 550/1993), U.N. Doc. A/52/40 at 84 (1999).

sion.²⁷ In *X v. Germany*,²⁸ the applicant was prohibited from asserting that the Holocaust was part of the deception championed by Zionist crusaders.²⁹ The European Court of Human Rights (“ECtHR”), in holding that the need to protect the reputation of others within Article 10³⁰ of the European Convention on Human Rights (“ECHR”) justified the restriction against the applicant’s speech, found against the Applicant.³¹ Thus, although Article 10 (protecting the right to freedom of expression) limits that right where it is exercised in a manner to hurt the reputation of others (as determined in the Holocaust denial cases), Article 9³², protecting the right of freedom of religion, does not protect religious beliefs, symbols, or sentiment from ridicule or insult.

In *Robert Faurisson v. France*, the HRC found that France could rely on the limitation provided in Article 19(3)(a) of the ICCPR,³³ and in referring to General Comment No.10³⁴, the HRC observed that protection of the rights or reputation of others as a limitation ground may extend not only to the “interests of other persons [but also] to those of the community as a whole.”³⁵ According to the HRC, “[s]ince the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-Semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-Semitism.”³⁶ In this

²⁷ Jonathan Cooper and Adrian Marshall Williams, *Hate Speech, Holocaust Denial and International Human Rights Law*, 1999 EUR. HUM. RTS. L. REV. 593.

²⁸ *X v. Germany*, App. No. 9235/81, 29 Eur. Comm H.R. Dec. & Rep. 194 (1982) (The murder of Jews having been established as a known historic fact).

²⁹ *Id.*

³⁰ Protecting the right to freedom of expression, among other related rights. *See infra.*, note 91.

³¹ In this context, *see also*, *Marias v. France*, App. No. 31159/96, 86 Eur. Comm H.R. Dec. & Rep. 184 (1996); *T. v. Belgium*, App. No. 9777/82, 34 Eur. Comm H.R. Dec. & Rep. 158 (1983).

³² *Gay News Ltd. v. United Kingdom*, 5 Eur. Ct. H.R. 123 (1982); *see infra* pp. 32,33.

³³ Providing that since the exercise of free speech rights carries with it special duties and responsibilities, the right may be curbed when deemed necessary to “respect [the] rights or reputation of others”.

³⁴ Human Rights Committee, General Comment 10, Art. 19 (Nineteenth session, 1983), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev. 7 at 133 (2w4).

³⁵ *Id.* at para. 4.

³⁶ *Robert Faurisson v. France*, (Communication no. 550/1993), U.N. Doc. A/52/40 at 84 (1999). para. 9.6.

context however, it is interesting to note that the reference to “respect” by the HRC refers not to respect for the beliefs of others, but to the need and right of a community to live free from hatred.³⁷

By extension, it appears that the Article 20 restraint is crafted with similar limits in mind. However, in light of the interpretation of Article 20 in the HRC’s General Comment No. 7 and *X. v. Germany*, it is encouraging to note that Article 20 is flexible enough to plug a gap in international law, if need be. It is especially encouraging since it is the only provision in an international treaty which entails this protection against hatred. However, whether this extends to protecting religious groups and their beliefs, symbols and teachings from ridicule is a different question. Clearly, international case law to date has focused on respect for religion on the basis that insults, harassment and other defiling speech against religion should not be permissible if it impedes free exercise of religion, and not on the basis that the substance of religion deserves respect.³⁸

The free exercise of religion is inextricably tied to one’s willingness to associate oneself (whether by practice, belief or participation) with a particular religion based on its value in the greater community. This willingness stands to be threatened if certain speech vilifying or ridiculing particular religions is not curbed. Thus, the question is whether the law should take a step further in curbing such speech recognizing this inherent connection between respect for religion and the free exercise of religion? Put differently, is insult and vilification reverse proselytism?

The HRC, unlike its Strasbourg counterpart, has tended to steer clear of any notion of “respect” for religious beliefs of others as a ground for limiting freedom of expression.³⁹ The tendency has instead been to impose limitations on the grounds of respect for the “rights and reputations” of others.⁴⁰ These limited cases demonstrate the dearth of jurisprudence recognizing the entitlement to respect for one’s religion or belief or reading Article 18(3) and 20 together in support of such an interpretation. Rather, in the context of offensive and unpopular speech, members of the HRC have often

³⁷ See, e.g., RESTATEMENT (SECOND) OF TORTS § 580B (1977) (This rationale penetrates the law of defamation which barring fair comments and truthful statements, condemns speech which fails to serve the interests of a democratic community).

³⁸ See Lerner, *supra* note 1, at 119.

³⁹ See U.N. HRC, 70th Sess., U.N. Doc. CCPR/C/70/D/736/1997 (Oct. 26, 2000).

⁴⁰ *Id.*; See also Article 19(3)(a), ICCPR, available at <http://www.hrc.co.nx/home/hrc/internationalhumanrights/nzandtheinternationalinstruments/iccpr/article15-19.php>.

warned of the dangers of allowing the limitation clauses to be interpreted to prohibit such speech merely on account of it being offensive or unpopular.⁴¹

Apart from the general rights enshrined in international treaties, various nations have come together to mark the existence of such a right to respect for one's religion, religious practices and symbols (which many have argued to be part and parcel of the freedom of religion) in the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.⁴² There is little by way of guidance, however, as to how such intolerance or discrimination is manifested and how those forms of manifestation ought to be targeted by the law. Thus, it is largely an expression of a commitment or a will to eradicate such forms of intolerance or discrimination without much more.

More recently, pitted against the background of the September 11, 2001 attacks against the United States and the subsequent rise of Islamophobia in the West,⁴³ the Commission on Human Rights ("CHR") passed a resolution entitled "Combating Defamation of Religions"⁴⁴ in 2002 and similar resolutions were passed in 2003,⁴⁵ 2004,⁴⁶ 2005⁴⁷ and in 2007, a draft resolution dated November 2, 2007 was introduced by Pakistan ("the Resolutions"). Although the Resolutions were passed, noting "with deep concern the intensification of the campaign of defamation of religions," the definition of "defamation of religions" was unfortunately limited to "a negative projection of Islam in the media" and the association of Islam with human rights abuses and terrorism in the aftermath of the September 11, 2001 attacks. This resulted in most Western countries opposing the 2002 Resolution, as it did not prohibit state-sponsored educational systems that

⁴¹ See Robert Faurisson v. France, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993(1996) (These warnings are clearly noted in the concurring opinion of Msrs. Evatt and Kretzmer and Mr. Lallah).

⁴² See G.A. Res. 36/55, at 171, U.N. Doc. A/RES/36/55 (Nov. 25 1981); See also U.N. GAOR, 51st Sess., U.N. Doc. A/RES/51/93 (Feb. 29, 1997).

⁴³ Convention on Prevention and Punishment of the Crime of Genocide, CHR Res. 2003/66, U.N. Doc. E/CN.4/2003/66 (Apr. 24, 2003); U.N. CHR, 61st Sess. U.N. Doc. E/CN.4/2005/18/Add.4 (Dec. 13, 2004).

⁴⁴ Combating Defamation of Religion, CHR Res. 2002/9, U.N. Doc. E/CN.4/RES/2002/9 (Apr. 15, 2002).

⁴⁵ Combating Defamation of Religions, CHR Res. 2003/4, U.N. Doc. E/CN.4/RES/2003/4 (Apr. 14, 2004).

⁴⁶ Combating Defamation of Religions, CHR Res. 2004/6, U.N. Doc. E/CN.4/RES/2004/6 (Apr. 13, 2004).

⁴⁷ Combating Defamation of Religions, CHR Res. 2005/3, U.N. Doc. E/CN.4/RES/2005/3 (Apr. 12, 2005).

teach prejudice against non-Islamic religions, and more importantly, its failure to criticize the defamation of other religions apart from Islam. This implies that these Resolutions sanction some forms of religious criticism, but shield Islam from it. This is clearly inconsistent with the international ideal of non-discrimination on grounds of religion which ought to apply to benefit all religions.

The Resolutions have been further criticized for the impact they have had in the signatory countries where anti-religious defamation legislation has been passed, and instead has been used to curb dissentients' views of the government.⁴⁸ Given the lack of the breadth of the instrument, and the lack of a clear and well-defined framework of recommended limitations and the instances in which they may be imposed, such a measure is only counter-productive and has been abused to infringe the fundamental guarantee of freedom of expression.

Therefore, it is imperative that a more comprehensive, international legislative code be designed to clearly identify and address the conflict and tension between these two fundamental rights.

II. THE LIBERALIST CREED OF FREE SPEECH

While an international consensus is yet to be reached, various states have attempted to resolve the dilemma in their own ways. The following discusses the American approach towards free speech and the protection of religious sentiments.

The dilemma between free speech and the protection of religious sentiments is not new to modern secular society. Dating back to 1676, when Western society was predominately comprised of Christians, people were prosecuted for blasphemy. These prosecutions were not only for attacks on God and religion, but for implied attacks on social order.⁴⁹ This sentiment rang true in the United States in 1811.⁵⁰ The primary concern was to protect the hostile majority from being inflamed by verbal insults against their faith. In the 20th century, the dichotomy between freedom of speech and

⁴⁸ See, e.g., Dr. Younus Shaikh, *Pakistan's Infamous Islamic Blasphemy Laws*, INTERNATIONAL HUMANIST NEWS Feb. 2004, at 6, available at <http://www.iheu.org/node/1006> (criticizing Pakistan's Defamation Bill 2004); See also AMNESTY INTERNATIONAL, *Amnesty International Annual Report 2003 Updates, May 2003*, available at <http://www.amnesty.org/en/library/asset/POL10/006/2003/en/dom-POL100062003en.pdf>.

⁴⁹ See Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297, at 306 (1988) (discussing the Taylor's Case).

⁵⁰ *Id.* at 315.

freedom of religion took a new turn when society became less religious. In *Cantwell v. Connecticut*, the Supreme Court interpreted the free exercise of religion clause in light of the spirit of freedom of speech clause.⁵¹ Both these rights are enshrined in the United States Constitution, and the latter is understood to include the right to communicate information and opinion.⁵²

In *Cantwell v. Connecticut*, a Jehovah's Witness proselytized on the streets of a Catholic neighborhood in New Haven by playing songs on a phonograph.⁵³ The songs attacked all organized religious systems calling them Satan's instruments and injurious to man, singling out in particular, the Catholic Church.⁵⁴ The hearers were very offended and Cantwell was charged with the common law offense of inciting a breach of the peace.⁵⁵ Despite the fact that hearers testified in court that they felt like hitting Cantwell, the Supreme Court considered that "there is no showing that Cantwell's deportment was noisy, truculent, overbearing or offensive. . . [i]t is not claimed that he intended to insult or affront the hearers. . . It is plain that he wished only to interest them in his propaganda."⁵⁶ Therefore, Cantwell had a right to peacefully impart his view.

In *Cantwell*, the Supreme Court focuses on the speaker rather than the offense suffered by the religious audience. The state is only permitted to interfere if there appears a "clear and present danger of riot, disorder, interference with traffic upon the public streets or other immediate threat to public safety, peace, or order . . ." ⁵⁷ In other words, a strict causal connection between speech and 'harm' must be established. In addition, *Cantwell* requires that "profane, indecent, or abusive remarks" must be "directed to the person of the hearer."⁵⁸

Applying the logic of *Cantwell* to *Chaplinsky v. New Hampshire*,⁵⁹ where a Jehovah's Witness distributed literature on the streets of Rochester

⁵¹ See *Cantwell v. Conn.*, 310 U.S. 296, 303-04 (1940).

⁵² See U.S. CONST. amend I. (The First Amendment stipulates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

⁵³ *Cantwell*, 310 U.S. 296.

⁵⁴ *Id.* at 309.

⁵⁵ *Id.* at 300.

⁵⁶ *Id.*, at 308-09.

⁵⁷ *Id.* at 308

⁵⁸ *Id.* at 309.

⁵⁹ *Chaplinsky v. N.Y.*, 315 U.S. 568, 569 (1942).

and denounced all religions as a “racket.”⁶⁰ There, an angry speaker was successfully prosecuted for shouting offensive words (“God damned racketeer” and “a damned Fascist”⁶¹) not against a religious crowd, but against a law enforcement officer (whom one might expect to display a greater degree of tolerance and self-restraint than ordinary citizens) who was removing Chaplinsky when the crowd got restless. He was charged and convicted under New Hampshire law that no person shall address “any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place,” nor “call him by any offensive or derisive name.”⁶² The state court interpreted these words to likely cause a breach of the peace. In the Supreme Court, Justice Murphy upheld the decision of the state court, stating that:

[It] is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.⁶³

Justice Murphy’s famous formulation of “fighting words” requires an examination of the injury inflicted upon the listeners, the propensity of the words to incite an immediate breach of the peace, the social interests of order and morality and the social value of the insulting words uttered. Nevertheless, later developments in American cases have focused only on fighting words that cause an immediate breach of the peace and have narrowed its scope to words that were uttered on a face to face encounter between the speaker and the listener.⁶⁴

⁶⁰ *Id.* at 569.

⁶¹ *Id.*

⁶² *Id.* at 568.

⁶³ *Id.* at 571, 572.

⁶⁴ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 114 (James W. Ely, Joel B. Grossman & Kermit L. Hall eds., Harvard Univ. Press 1981).

The unsettling reality of these developments is that, armed with the First Amendment, a Nazi group was allowed to march through a Jewish district⁶⁵ and a group of white teenagers escaped liability despite burning a cross on the front yard of an African-American family.⁶⁶ *Chaplinsky* has not been overruled, but has yet to have been relied upon to sustain any further convictions.

The combined effect of *Cantwell* and *Chaplinsky* is that only “fighting words,” and not a general advocacy of ideas, are likely to incite an imminent breach of peace that can be regulated. This singular emphasis on imminent violence has blinded many to other legitimate interests in society concerning the responsible exercise of free speech rights and the need to adequately protect and uphold fundamental individual and group rights, including the right to freedom of religion.

This formula only protects the speaker from a hostile audience, but ignores groups or audiences that are unlikely to or lack the capacity to react in a violent manner or exercise self-restraint. Kent Greenawalt has proposed the idea of the “equalization of victims” to illustrate the fallacy of the imminent danger test.⁶⁷ He argues that an insult directed to a man in his twenties, to an isolated young child or to a woman in a wheelchair, would all have different implications and would yield different reactions. Hate speech directed at disadvantaged groups would only silence and marginalize them. Rather than relying on an abstract test of propensity to incite violence, Greenawalt suggests that an appropriate test would be “whether remarks of that sort in that context would cause many listeners to respond forcibly.”⁶⁸

The American approach has assumed that the audience is a generic whole posing harm to the speaker, where the speaker is unique, and therefore his voice must be heard. However, the speaker in reality may not be a lone individual. The voice may come from an organized group or a commercial entity. In contrast, the direct or indirect subject of the speech may be a loosely organized minority group or an individual. Under the existing laws, the ideal of free speech is upheld at the expense of the agony, insult and indignity which believers and religious followers are expected to tolerate. The need to prove an imminent outbreak of violence and disorder further ignores the long term harmful effects of such speech on the target group or the audience.⁶⁹ It is known that hate speech is a form of psycho-

⁶⁵ *Nat'l Socialist Party of Am. v. Vill. Of Skokie* 432 U.S. 43 (1977).

⁶⁶ *R.A.V. v. City of St. Paul* 505 U.S. 377 (1992).

⁶⁷ KENT GREENAWALT, *FIGHTING WORDS* 52-59 (Princeton University Press 1995).

⁶⁸ *Id.* at 53.

⁶⁹ *Id.* at 59.

logical assault on the listeners and on society as a whole, causing its 'victims' physiological effects such as rapid pulse, breathing difficulties and suicidal tendencies.⁷⁰ Hate speech reinforces feelings of prejudice and inferiority, and contributes to social patterns of domination. American adherence to the ethos of individualism has failed to explain why the rights of speakers should always take priority over the interests of those who are the subject or audience of the speech.⁷¹ American courts are committed to protecting a speaker from harm inflicted by an angry crowd, but ignore the harmful effects the speaker causes the subject of the speech and its effects in inciting others to harm or prejudice the targeted individuals or groups. The debate has distorted the values of equality and democracy, which require that "public choice be made with full information and under suitable conditions of reflection."⁷² The market place of ideas, whilst suited to intellectual and political discourse, is at the same time a most dangerous engine which lends its support to groups who wish to infiltrate its space with hate speech against targeted groups in society. As such, it is incapable of providing corrective justice. Moreover, the lack of regulation of the marketplace of ideas merely sustains those in power, who have the full means to mould, shape and influence the ideologies traded.

III. DUE RESPECT TO THE FAITHFUL

In contrast, other countries have concluded that speech based on inciting racial or religious hatred should be prohibited to protect and uphold the sacrosanct values of equality and dignity which lie at the core of these societies. While the American courts consider liberty to be paramount, the German legal system values human dignity and honor above anything else. Article 1 of the German Constitution stipulates clearly that it is the duty of all state authorities to respect and protect human dignity.⁷³ Article 1 further acknowledges "inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world."⁷⁴ Article 5 of the Constitution protects one's right to "freely express and disseminate his

⁷⁰ *Id.* at 53.

⁷¹ OWEN M. FISS, *THE IRONY OF FREE SPEECH* 3 (Harvard Univ. Press 1998) (1996).

⁷² *Id.* at 23. See also, Steve Heyman, *Hate Speech, Public Discourse and the First Amendment* (July 29, 2008). *Extreme Speech and Democracy*, Ivan Hare, James Weinstein, eds., Oxford University Press, forthcoming, available at <http://ssrn.com/abstract=1186262> (discussing the misplaced emphasis and belief in the idea that maximizing access to the market place will result in the discovery of 'truth.')

⁷³ GRUNGESETZ [GG] [Constitution] art. 1 (F.R.G.).

⁷⁴ *Id.*

opinions in speech, writing, and pictures.”⁷⁵ This right is, however, subject to the protection of the “right to personal honor.”⁷⁶

While it may be tempting to attribute the German position to its horrific history, scholars have traced the roots of the German protection of dignity and honor in continental philosophy and tradition.⁷⁷ The German system has embraced Kantian philosophy, which puts human dignity and self-realization at its core.⁷⁸ According to James Whitman, the Continent, including Germany, used dueling law to defend honor in the nineteenth century.⁷⁹ Whitman further points out that German society has sophisticated and elaborate rules on social etiquette⁸⁰ and the right to privacy is largely based on the concern to protect one’s self image.⁸¹ Thus, respect for individuals and groups is an indispensable legal right.

Germany is not only famous for its heavy regulation of hate speech against Jews,⁸² which provides that Holocaust denial is a crime;⁸³ hate

⁷⁵ *Id.* at art 5.

⁷⁶ *Id.* (Article 5 of the Constitution reads “(1) Every person shall have the right to freely express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship. (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the rights to personal honour. (3) Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.”).

⁷⁷ See *infra* notes 78 and 79.

⁷⁸ Claudia E. Haupt, *Regulating Hate Speech – Damned If you Do and Damned if You Don’t: Lessons Learned from Comparing the German and U.S. Approaches*, 23 B.U. . INT’L L. J. 299, 314 (2005). See also James Q. Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 YALE L. J. 1153 at 1181 (2004).

⁷⁹ See Whitman, *supra* note 71, 1166 (on dueling) and 1186-90 (on hate speech regulation) (focusing mainly on privacy, he also discusses the rationale behind hate speech regulation in Germany).

⁸⁰ *Id.* at 1168-69 (Explaining that German journalists have their little etiquette book of press law, in which the standard of privacy is treated as an issue of good manners).

⁸¹ *Id.* at 1167-8.

⁸² See Haupt, *supra* note 71, 323-332.

⁸³ Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998. English translation of §§130, 185, 189 and 194 of the German Criminal Code, English translation by the German Federal Ministry of Justice available at <http://www.iuscomp.org/gla/statutes/StGB.htm#319>.

speech against religious groups or believers is also strictly prohibited. Under Section 130(2) of the German Criminal Code, it is a crime to incite hatred which calls for “violent or arbitrary measures against [any religious group], or which assault[s] the human dignity of others by insulting, maliciously maligning or defaming segments of the population or . . . the group.”⁸⁴ Imprisonment for this offense ranges from three months to five years.⁸⁵ Under § 166 of the Criminal Code, “whoever publicly or through dissemination of writings insults the content of another’s religious faith. . . is capable of disturbing the public peace and shall be punished with imprisonment of not more than three years or a fine.”⁸⁶ There is no need to prove causation of or likelihood of imminent violence, save that there is this requirement that the writing be ‘capable’ of disturbing public peace.⁸⁷

In 2006, a German who printed the words “Koran, the Holy Koran” on rolls of toilet paper was found guilty under Section 166 of the Criminal Code for dissemination of materials containing writings or insults against other faith which is capable of disturbing public peace.⁸⁸ The accused had printed these words and sent the toilet paper to 22 mosques and to German television stations, provoking an outcry in Islamic countries.⁸⁹ His act was condemned by Iranian diplomats in Germany. The *potential* to disrupt order was sufficient for the court to rule that the accused was culpable.⁹⁰ The conviction earned him a sentence of 300 hours of community service and a suspended prison sentence of one year.⁹¹ The Danish government discontinued an investigation against *Jyllandsposten* for possible violations of the Danish Criminal Code for publishing twelve cartoons that depicted the Prophet Mohammed in a degrading manner on the grounds of press free-

⁸⁴ Strafgesetzbuch [StGB] [Penal Code] 15, May 1871, Reichsgesetzblatt [RGBl] 127; Neubekanntmachung 13, Nov., 1998, BGBl. I 3332; Zuletzt geändert durch, Oct., 2006, BGBl. I 2350 at 2352. German Criminal Code, promulgated on Nov. 13, 1998; Federal Law Gazette I at 945, English version provided by the German Federal Ministry of Justice *available at* <http://www.iuscomp.org/gla/statutes/StGB.htm>

⁸⁵ *Id.*

⁸⁶ *Id.* at § 166.

⁸⁷ *Id.*

⁸⁸ Staatsanwaltschaft Münster, AZ: 540 Js 1309/05. *See* Suspended Prison for German who Insulted Koran, Expatica, Feb. 23, 2006 *available at* http://www.expatica.com/de/news/local_news/suspended-prison-for-german-who-insulted-koran-27912_26679.html

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

dom and public interest.⁹² In contrast, the German government pressed charges against *Die Welt*, a German newspaper which published the same cartoons.⁹³

Before modern sensitivity towards the Muslim community in the 21st century, offensive speech against Christians rendered one criminally liable under Section 166 of the Criminal Code. This includes the portrayal of a crucifix as a mouse trap,⁹⁴ calling Christian churches “gangs of criminals,”⁹⁵ and the portrayal of a pig on a crucifix printed on a T-shirt;⁹⁶ this last image was disseminated on the internet. In all the examples cited, incitement to violence was not a required element. The prime concerns were the sentiments, honor and dignity of the attacked group.

The downside of German approach is that speech and expression may be unnecessarily and excessively inhibited, for it may be difficult to draw a clear distinction between unfavorable comments capable of resulting in a breach of the peace and mere criticism or insult. The offensive expression need not be targeted at an individual or a particular group. In protecting the sensibilities and dignity of the religious, any offensive expression against that school of thought or belief systems is amenable to criminal prosecution. It is interesting that there is a strict prohibition of any such statements as long as they are “public”; also noteworthy is that there is no emphasis that the insult, threat or degradation be intentional. It is sufficient if the “conduct” or “words” are found to amount to an insult, threat or degradation.

Moreover, public good or interest is not a defense in German law. Another criticism of the German approach is that it is unjustifiably favors

⁹² See Decision from Danish Government, *Response by the Danish Government to the letter of 24 Nov., 2005 from UN Special Rapportuer on Freedom of Religion and Belief, Ms Asma Jahingir, and UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Mr. Doudou Diene, regarding cartoons representing the Prophet Mohammed published in a newspaper*, Jan. 23, 2006 available at <http://www.um.dk/NR/rdonlyres/00D9E6F7-32DC-4C5A-8E24-F0C96E813C06/0/060123final.pdf>. (Where section 140 of the Danish Criminal Code punishes “any person, who in public, ridicules or insults the dogmas of worship of any lawfully existing religious community.” Section 266b further criminalizes “the dissemination of statements or other information, by which a group of people are threatened, insulted or degraded on account of their religion).

⁹³ Staatsanwaltschaft Berlin, Az.: Js 350 350/06.

⁹⁴ LG Bochum, NJW 1989, 728.

⁹⁵ LG Goettingen, NJW 1985, 1654.

⁹⁶ LG Nurenberg, NStZ-RR 1999, 238.

religious over secular beliefs and results in overly-broad censorship.⁹⁷ This discriminates against secular groups by not proffering them any protection under the law against insults, degrading remarks against people of their kind on account of their being non-religious or members of a non-religious group that may be the subject of insults or attacks. For instance, the Deutsche Opera in Berlin, exercised self-censorship in September 2006⁹⁸ when it decided to cancel the Mozart opera *Idomeneo*, fearing that showing the fake severed heads of Jesus, Buddha, and the Prophet Mohammed would cause outrage in German society.⁹⁹ In particular, they were afraid of offending the Muslim community. It was only after the Chancellor condemned the Opera House for practicing self-censorship,¹⁰⁰ and much public outcry, that the performance was resumed.¹⁰¹

IV. STRIKING THE DIFFICULT BALANCE

Lying between the two extremes of the American and German approaches are the approaches of the ECtHR and Australian courts, both toeing a fine line between the liberalists and the religionists. Like the UDHR and the ICCPR, the ECtHR also protects the rights of freedom of thought, conscience and religion (Article 9)¹⁰² and freedom of expression (Article

⁹⁷ See Bede Harris, *Pell v. Council of Trustees of the National Gallery of Victoria – Should Blasphemy be a Crime? The ‘Piss Christ’ Case and Freedom of Expression*, 22 MELB. U. L. REV. 217 at 222-23 (1998). (Harris did not write about the German experience but his discussion on blasphemy law is equally applicable in the context of this paper).

⁹⁸ See Matthew Westphal, *Out of their Heads: Props at Centre of Berlin Idomeneo Controversy Disappear*, Playbill Arts (Dec. 8, 2006 available at <http://www.playbillarts.com/news/article/print/5707.html>). (In *Idomeneo*, a Mozart opera, there is a scene showing the ‘severed heads’ of Muhammad, Jesus, the Buddha and the ancient Greek god, Poseidon. In September 2006, the Deutsche Opera Berlin decided to cancel the performance scheduled for November 2006. After much public criticism condemning the self-censorship exercised by the company, the Deutsche Opera decided to reschedule the performance which was eventually shown on December 18, 2006).

⁹⁹ BBC News, *Beheaded Prophet Opera Dropped*, Sept. 26, 2006, <http://news.bbc.co.uk/2/hi/entertainment/5382554.stm>.

¹⁰⁰ David Flicking and Agencies, *Merkel voices concern over opera cancellation*, GUARDIAN UNLIMITED, Sept. 27, 2006, <http://arts.guardian.co.uk/news/story/0,,1882222,00.html>.

¹⁰¹ Westphal, *supra* note 85.

¹⁰² *European Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS 155 Article 9 (“(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief

10).¹⁰³ “The ECtHR has recognized that Article 9 protects the dignity of an individual by allowing him or her to act in consonance with his or her conscience and that to force individuals to act contrary to their conscience would be equivalent to stripping them of their inherent dignity and something which was a fundamental part of their identity.”¹⁰⁴

Various ECtHR decisions have centered upon the distinction between Article 9 and Article 10 rights in considering the extent to which Article 10 rights need to be restricted in order to protect another person’s Article 9 rights. The ECtHR has attempted to strike a balance between the two by extending the protection afforded under Article 9 to protect the religious feelings and sentiments of adherents of religious faiths which at times become the target of offensive speech.¹⁰⁵

Article 10 jurisprudence has made clear that the “duties and responsibilities” entailed in the right of freedom of expression require that speech

and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance; (2) Freedom to manifest one’s religion or beliefs 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.”).

¹⁰³ *Id.* at Article 10 of the ECHR, (While granting a general right of freedom of expression, provides as follows: “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are *prescribed by law* and are *necessary in a democratic society*, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary” (emphasis added)).

¹⁰⁴ *Kokkinakis v. Greece*, 17 Eur. Ct. H.R. 397 (1994). (A decision that concerned proselytism as “free speech” versus the right to proselytize under the umbrella of religious duty in exercising one’s right to manifest their religious belief pursuant to the right of freedom to religion. The right to proselytize as an aspect of manifestation of one’s religious freedom necessarily carries with it certain implications as to the freedom of religion rights of others, namely, to be “free” from coercive speech seeking to “convert” the listener, or to the extent that the act of proselytizing “infringes” another’s freedom of religion right. A further angle from which issues arising out of the right to proselytize have been examined is in relation to Article 10 freedom of expression rights.).

¹⁰⁵ *Id.*

be of “value” to society as a whole.¹⁰⁶ Thus, speech is more likely protected when it contributes to public debate or enhances the exercise of other civil and political rights. It is least likely to be protected when the speech form and content threaten others’ exercise of their rights under the ECHR.

Moreover, Article 10 rights may be subject to restrictions that are “prescribed by law” and “necessary in a democratic society.”¹⁰⁷ Therefore, all restraints on speech are evaluated against this standard. This two-pronged test requires that the restriction on the speech be one which is prescribed by law, i.e. that it should be a limitation which has observed the minimal standards of the rule of law in that it emanates from the “sovereign” with the power of imposing and executing laws and that it pursues a legitimate aim and is not one based on the whims of the sovereign. Thus, legislation is first evaluated to meet a basic standard of “legality” and “legitimacy.”

Second, the restriction must be one which is “necessary in a democratic society”¹⁰⁸, that is the restriction is weighed against the aim of the legislation to gauge the proportionality of the response of the law in light of its aim or goal to limit such speech. All restrictions are assessed to determine whether they pursue a “pressing social need” and whether they are restrictive in only the most minimal manner in the pursuit of that need and whether the effect on the rights of those affected are proportionate to the objective pursued.¹⁰⁹ If the restriction exceeds the measures required in order to achieve the purposes of such limitation, the law is usually struck down for being disproportionate given the importance of the right to free speech.

Recent jurisprudence on the exercise of Article 9 and Article 10 rights reflects increasing latitude granted to member states based on the doctrine of “margin of appreciation” in determining standards for implementing ECHR rights, especially rights related to religion or culture. Given the aforementioned, this court’s jurisprudence reflects the emphasis placed on the ‘instrumental’ value of the right of free speech. The margin of appreciation doctrine has been applied most broadly to speech contributing to matters of public interest, and less expansively to speech resulting in personal, cultural or emotional enrichment of the community or speech which is gratuitously offensive.

¹⁰⁶ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS 155 Article 10.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

The first in a series of cases exploring the interplay between the two rights in the context of the "duty" of the state (if any) to prohibit offensive speech against religions or religious beliefs, was *Gay News Ltd. and Lemon v. United Kingdom*,¹¹⁰ in which the ECtHR examined the common law offense of blasphemy. In this case, a publication, primarily aimed at homosexual readership, contained a poem detailing alleged homosexual practices of Christ.¹¹¹ The applicants were convicted of a criminal charge pursuant to the law and they claimed that their Article 9 and Article 10 rights had been violated.¹¹² However, the ECtHR limited its examination of the applicants' claim to Article 10 rights only since the applicants had failed to establish that the publication of the poem amounted to the exercise of their religious or other belief under Article 9.¹¹³

The ECtHR was of the view that the central purpose of the law used to prosecute the applicant had the legitimate aim "to protect the rights of citizens not to be offended in their religious feelings by publications."¹¹⁴ It further expressed the view that,

[i]f it is accepted that the religious feelings of the citizen may deserve protection against indecent attacks on matters held sacred by him, then it can also be considered as necessary in a democratic society to stipulate that such attacks, if they attain a certain level of severity, shall constitute a criminal offense triable at the request of the offended person.¹¹⁵

Despite the fact that there is nothing in Article 9(1) which suggests that there is a "right of citizens not to be offended in their religious feelings," the ECtHR's judgment seems to allude to such a right within Article 9 by implication.¹¹⁶

This view has been further developed in a string of subsequent ECtHR decisions, commencing with *Otto-Preminger-Institut v. Austria*,¹¹⁷ which concerned a ban imposed on a film before its first day of screening. The film *Das Liebeskonzil* ("Council in Heaven") was to be shown in the

¹¹⁰ *Gay News Ltd*, 5 Eur. Ct. HR. .123 (1982).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 132.

¹¹⁴ *Id.* at 131.

¹¹⁵ *Id.* at 130.

¹¹⁶ *Id.*

¹¹⁷ *Otto-Preminger-Institut v. Austria*, 19 Eur. Ct. H.R. 34 (1995).

Tyrol region which was predominantly Catholic.¹¹⁸ The film contained offensive characterizations of God, Jesus and Mary, such that the national court in Austria determined that the conduct amounted to the criminal offense of disparaging religious precepts as stipulated under section 188 of its Penal Code.¹¹⁹ The applicant claimed that the Austrian Government's seizure and ban against the film violated its right of freedom of expression pursuant to Article 10.¹²⁰ The government however, claimed that the action pursued a legitimate aim of "protection of the rights of others," especially the right to "respect for one's religious feelings."¹²¹ The court held that a justification for the ban could be made pursuant to Article 10(2), as the film was likely to infringe 'the rights of others' ". . . as is borne out by the wording itself of Article 10 para. 2, whoever exercises the rights and freedoms enshrined in [Article 10(1)] undertakes 'duties and responsibilities.'¹²² Amongst them – in the context of religious opinions and beliefs – may legitimately include an obligation to avoid as far as possible expressions that are gratuitously offensive to others, and thus an infringement of their rights, and which do not contribute to any form of public debate capable of furthering progress in human affairs."¹²³

The ECtHR further added that the justification behind restricting the free speech of those concerned here was the need "to protect the rights of citizens not to be insulted in their religious feelings by the public expression of views of other persons."¹²⁴ Thus, it appears that the ECtHR supports the view that expression which is merely gratuitous and does not contribute to public debate in a given society is not worthy of protection under Article 10 if it offends the religious sentiments and beliefs of others.

There are problems which arise out of such an open-ended approach and the "loose" wording employed by the court in crafting this new ground of protection and justification. Who determines whether expression is merely gratuitously offensive or sufficiently valuable in terms of its contribution to public discourse? Moreover, are all forms of expression capable of such "value"? For example, what is the "contribution value" of a form of art, such as a painting or a play? These would most likely be viewed merely as a creative artistic expression or forms of entertainment and thus, accord-

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*, at 10.

¹²² *European Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS 155 Article 10.

¹²³ *Id.*, at 11.

¹²⁴ *Id.*, at 10.

ing to the terms of the court, would be less worthy of protection as “free speech” because its content was offensive to some members of the pious community and the speech did not add value to public discourse.

Moreover, this poses the grave risk and likelihood of the imposition of *ex post facto* liability arising out of an analysis of the effect of the speech on the hearer rather than a predictable standard which speakers can adjudge for themselves. Moreover, if “religious” sentiments and beliefs are protected from ridicule, what about the beliefs of those who are non-religious? They may hold just as sternly to their beliefs, and arguably, may also be entitled to protection of their “feelings or sentiments” regarding their chosen way of life or beliefs.¹²⁵ A further problem posed by this approach is the limitless “categories” of people with deeply held beliefs, which may be able to lay claim to protection by extension since restricting protection to those with religious beliefs would amount to discrimination against those groups who are non-religious.

The Court did, however, recognize the fact that not all forms of criticism will infringe on the “rights of others,” which it acknowledged was a very broadly-cast right. It stated that:

[t]hose who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or minority cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.¹²⁶

¹²⁵ If this argument is upheld, there are strong grounds to protect homosexuals or other minority groups from insults, ridicule and degradation on the grounds that certain statements may hurt their sentiments and if belief systems are what are being singled out for protection here, there may be a vast variety of belief systems vying for such protection.

¹²⁶ *Id.*, at 10.

This again, alludes to the notion that although citizens have the right of freedom of expression, this right must be exercised responsibly and with due respect for the rights of others. Thus, the ECtHR concluded that the Austrian government had pursued a legitimate aim in that "respect for the religious feelings of believers as implicitly guaranteed in Article 9 can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration."¹²⁷ The ECtHR appears to have borrowed from its judgment in the *Kokkinakis*¹²⁸ case where it discussed extensively the notion of "respect." It is very likely that the fact that the region concerned was predominantly Catholic was a motivating factor for the Court's determination that a complete ban was a "proportionate" response and "necessary in a democratic society."¹²⁹

The approach of the ECtHR in *Otto Preminger* was followed again in *Wingrove v. United Kingdom*.¹³⁰ This case concerned a film called "Visions of Ecstasy" and it contained erotic portrayals of St Teresa of Avila.¹³¹ The film was refused a British Board of Film Censors Certificate on the grounds that the content of the film was blasphemous.¹³² Much of the case before the ECtHR centered upon the out-datedness and inappropriateness of the British law of blasphemy. The ECtHR departed slightly from its approach in the *Otto Preminger* case, going a step further in stating that the purpose pursued by the censor board was to protect against the treatment of a religious subject in such a manner that was bound to outrage Christian believers and their values because of the "contemptuous, reviling, insulting, scurrilous or ludicrous tone, style and spirit in which the subject was presented."¹³³

It is difficult to determine whether the approach of the ECtHR resulted from its deference to the United Kingdom's blasphemy laws, given the "cultural" nature of the speech or the margin of appreciation granted to its government for its rationale in restricting such speech. Furthermore, it is also difficult to discern the position of speech which has "cultural" value or contributes to debates regarding the values of a people. Such speech is less valuable in its contribution to public debate compared to political speech, yet it deserves greater protection than other speech which is completely

¹²⁷ *Id.*

¹²⁸ *Kokkinakis*, 17 Eur. Ct. H.R. 397 (1994)

¹²⁹ This is the two-limb test which must be met by a country to justify the legitimacy of the curtailing legislation.

¹³⁰ *Wingrove v United Kingdom* (No. 23), 1996-V Eur. Ct. H.R. 1937, 1978.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at para. 15.

devoid of value; such as obscene or racist expressions. Yet it is unclear where cultural or even artistic expression sits along this spectrum.

However, the decision of the ECtHR in *Murphy v Ireland*¹³⁴ has, led to further confusion as to the requisite standards of the Article 10 test before it can be applied to allow or restrict speech. In *Murphy*, the ECtHR upheld a limited prohibition against an independent local commercial radio station's advertisement with religious content.¹³⁵ The Court's view of the concept of "respect" as put forward in *Kokkinakis* and further developed in *Otto-Preminger* was overbroad. The radio station in *Murphy* advertised a video to be presented during Easter about the evidence of the resurrection.¹³⁶ There was no discussion of the religious beliefs of others or the truth or merits of other religious beliefs save and except to the extent that the advertisement suggested that Christ was the only son of God. Thus, the content of the advertisement was mainly informational, however. Implicitly, it alluded to a belief that would be discussed in the video. The ECtHR discussed the notion of respect for the religious beliefs of others and it appears that this is the only ground on which the Irish ban on the religious advertising was upheld. However, it is questionable whether the legitimate aims pursued by the Austrian government in protecting the religious feelings of Catholics in *Otto-Preminger*, and the UK government in protecting the religious feelings of Christians in *Wingrove*, can be called on to justify the blanket ban against religious advertising here. This was clearly a content-based restriction imposed merely on account of there being some "religious" content to the message. The Irish government submitted that in light of the history of religious conflict in Ireland, this blanket ban was sufficiently justified.¹³⁷

The minimal and most indirect suggestion by way of implication is that the truth of one set of religious beliefs necessarily implies the untruth of another. If this suggestion is capable of amounting to the opposition or denial of others' religious beliefs, then virtually any teaching, statement or proclamation about the truth of one religion (even if made without reference to any other religious or belief system) would necessarily entail a denial of the latter. Thus, the Court ought to have based its decision on other more sensible justifications, such as the need to regulate religious advocacy in commercial settings, so that the rich or majority religious groups do not have an unfair advantage over the "poorer" or less influential within the community in getting their views across.

¹³⁴ *Murphy v. Ireland*, 2003 -IX Eur. Ct. H.R. 1, 31.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*, at para. 38, 40.

It is suggested that the ECtHR needs to establish clearer standards for determining what expressions are to be tolerated and those which governments should be entitled to restrict on account of Article 9 rights. In the context of injury to religious feelings and sentiments, a more accurate and precise test, and one which is less likely to restrict speech which is “gratuitously” offensive but “valuable” in its own right in that it promotes a rich exchange of ideas within a community, would be to restrict speech only if it is maliciously intended to cause injury or harm to the religious sentiments of others. Moreover, the degree of insult needs to be particularized to be so serious such that only deeply insulting, contemptuous, reviling, scurrilous or ludicrous¹³⁸ speech is found to be offensive and thus, undeserving of protection under Article 10. In *Otto-Preminger*, the ECtHR condemned speech that is “gratuitously offensive” without defining the meaning of the term. It is said that offensiveness has to reach a “level of savagery” before it would be silenced.¹³⁹ The term “savagery” only adds more color than clarity to what constitutes gratuitous offensiveness. The facts of *Otto-Preminger* and *Wingrove* involve artistic and provocative plays or movies to be shown with restrictive viewership and/or with prior warning of the offensive nature of the content, yet both were completely banned.¹⁴⁰ Scholars have criticized the standard set in *Otto-Preminger* as vague and broad.¹⁴¹ In essence, *Otto-Preminger* protects the believers’ feelings from offense or insult. This is contradictory to the landmark ruling in *Handyside* which states that speech that offends, shocks and provokes has its innate and emotive values to be protected.¹⁴²

Fenwick and Phillipson argue convincingly that a better test would be to outlaw speech that would incite religious hatred rather than merely or gratuitously offensive speech.¹⁴³ Expression of prejudice, a desire to dominate, or denial of equal respect is contradictory to the value of free

¹³⁸ See *Wingrove*, 1996-V Eur. Ct. H.R. 1937; see also *Otto-Preminger-Institut* 19 Eur. Ct. H.R. 34 (1995).

¹³⁹ HELEN FENWICK & GAVIN PHILLIPSON, *MEDIA FREEDOM UNDER THE HUMAN RIGHTS ACT 485* (Oxford Univ. Press 2006).

¹⁴⁰ See *Wingrove*, 1996-V Eur. Ct. H.R. at para.58, 60

¹⁴¹ See CAROLYN EVANS, *FREEDOM OF RELIGION UNDER THE EUROPEAN COURT OF HUMAN RIGHTS 71* (Oxford Univ. Press 2001); Edge, *supra*, note 19 at 681.

¹⁴² *Handyside v. United Kingdom*, App. No. 5493/72, 1 Eur. H.R. Rep. 737 at para 49, available at <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=84&sessionId=9975100&skin=hudoc-en&attachment=true> (Discussing the protection of offensive speech).

¹⁴³ FENWICK & PHILLIPSON, *supra* note 110 at 501.

speech;¹⁴⁴ disrupting harmony in a multi-ethnic and multi-faith society. The harm caused to individuals, to specific religious groups, and to the entire society, outweighs the value of protecting the speech itself. They further point out that the prohibition against religious hate speech should only be limited to speech directed at non-believers but not the religious believer of the religion subjected to such speech.¹⁴⁵ It is the non-believers that are relevant because protecting believers from being offended will be casting too wide the net. Moreover, the perception of believers is likely to be highly subjective and sensitive. However, the lack of value of speech which incites hatred, whether against believers or non-believers, is a non-argument since the relevant test proposed is not one of the 'effect' on the feelings or sensibilities of the groups which are the subject of the slur but rather, the consequences of such speech on the group, including its dignity and standing in the community. It is this which is perceived as harmfully divisive in any democratic, multiethnic community. As the ECtHR's jurisprudence in this regard continues to evolve, it is hoped that the questions and remaining gaps in the law highlighted above are addressed in time.

Australia is another jurisdiction which has taken a middle-ground view in striking this delicate balance. The general approach in Australia is to treat offensive speech against religious groups or individuals as part of its discrimination law;¹⁴⁶ only in the state of Victoria are religious individuals or groups are protected by specific anti-vilification law, governed by the *Racial and Religious Tolerance Act* ("the Act"), enacted in 2001.¹⁴⁷ The preamble of the Act states that "Parliament recognizes that freedom of expression is an essential component of a democratic society," and that the "right of all citizens to participate equally in society" is an important value.¹⁴⁸ Paragraph three of the Preamble further states that vilifying conduct diminishes the "dignity, sense of self-worth and belonging to the community" of an individual and the groups concerned, and it is contradictory to the principle of democracy.¹⁴⁹ Thus, one could say that the Victorian approach makes a conscious attempt to combine the liberty principle of free speech and the value of human dignity.

¹⁴⁴ *Id.* .

¹⁴⁵ *Id.*

¹⁴⁶ Anna Chapman and Kathleen Kelly, *Australian Anti-Vilification Law: A Discussion of the Public/Private Divide and the Work Relations Context*, 27 Sydney L. Rev. 1, 203, (2005).

¹⁴⁷ *Racial and Religious Tolerance Act*, 2001,

¹⁴⁸ *Id.* Preamble at para. 1.

¹⁴⁹ *Id.* at para. 3.

Directed at stamping out offensive speech, Section 8 of the Act stipulates that “a person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.”¹⁵⁰ This includes the use of the internet or e-mail to publish or transmit statements or other material. Contravention of the Act could result in civil liability or criminal punishment with a prison term of up to six months.¹⁵¹ The latter is limited to intentional conduct, which the offender knows is likely to incite hatred against the person or the group, and is likely to threaten or incite others to threaten physical harm to the persons concerned or to their property.¹⁵² The defenses recognized under Section 11 of the Act are that the person acted reasonably and in good faith for artistic work; that the expression was for “genuine academic, artistic, religious or scientific purpose;” for any purpose in the public interest; or for the purpose of “making or publishing a fair and accurate report of any event or matter of public interest.”¹⁵³

At the time of writing, only two cases on religious hatred were heard before the Victorian Court. In *Judeh v. Jewish National Fund of Australia Inc.*, the complainant, of Palestinian descent, complained of a monthly advertisement posted by the respondent association calling for donation to Israel as part of one’s will; as part of the advertisement, a map of Israel was delineated.¹⁵⁴ The complainant claimed that the advertisement amounted to inciting hatred against the race of Arab Palestinians.¹⁵⁵ Applying the test of reasonable and objective standard,¹⁵⁶ the Court dismissed the case as frivolous and vexatious.

A more controversial case was that of *Islamic Council of Victoria v. Catch the Fire Ministries Inc.*, where two evangelical pastors organized a seminar comparing the Muslim faith with Christianity.¹⁵⁷ In the seminar, they made remarks that Islam and Muslims endorsed the killing and enslavement of whole groups of people based upon their religion.¹⁵⁸ They also

¹⁵⁰ *Id.* at §8

¹⁵¹ OffenseoffenseRacial and Religious Tolerance Act, 2001, §§ 24, 25 (Vic).

¹⁵² *Id.* § 24.

¹⁵³ *Id.* at §11

¹⁵⁴ *See* *Juden v. Jewish Nat’l. Fund of America Inc.* (2003) 1254 VCAT paras. 1, 47.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*, para. 41.

¹⁵⁷ *Catch the First Ministries Inc. & Ors v. Islamic Council of Victoria Inc.* (2006) 284 VSCA para 1, 207.

¹⁵⁸ *Id.*

characterized the Prophet as a paedophile.¹⁵⁹ Part of their remarks were published in pamphlets and posted on the internet. They were found to have violated the Act and were ordered to pay a fine of about US\$52,000 by the Administrative Tribunal.¹⁶⁰ The respondents defended their remarks on the grounds that the seminar was concerned with their religious faith and was a bona fide religious activity. Although the total cost of the case amounted to US\$750,000 for the two hearings before the Tribunal, the pastors vowed that they would rather go to jail than to apologize and pay the fine. After a dramatic turn, the decision was overturned by the Victorian Supreme Court in 2006.¹⁶¹

The main grounds of appeal concerned the correct interpretation of the test of incitement under Section 8, the defense allowed pursuant to Section 11 and whether both Sections 8 and 11 had infringed the constitutional right of freedom to communicate with respect to political and governmental matters.¹⁶² On a careful reading of s. 8(1), the court had to decide (1) whether “on the ground of religious belief” requires a causal connection between the impugned conduct and the religious belief or activity to which the section refers; and (2) whether the test of inciting hatred is based on an objective standard of the reasonable audience or reader.¹⁶³

On the first issue, Justice Nettle ruled that “on the ground of one’s religious belief” does not require any strict causal connection between a person’s religious belief and the consequent act of incitement.¹⁶⁴ The test was not that “the act of the discriminator be activated by the status or private life of the person alleged to be discriminated against.”¹⁶⁵ All that is required is that a “material difference in treatment be based on the status or private life of the person less favorably treated.” Furthermore, the Court specifically spelt out that “on the ground” does not refer to the subjective intention or motive of the inciter; it is only relevant when determining the sentence or penalty but is not a condition for imposing liability.¹⁶⁶ In the opinion of Justice Neave, the focus should be on “the ground on which people [are] exposed to the alleged inciter’s words or conduct,” and not the ground which caused the alleged inciter to act.¹⁶⁷

¹⁵⁹ *Islamic Council of Victoria Inc.*, [2003] VCAT 1753 para. 4.

¹⁶⁰ *Id.*

¹⁶¹ *Catch the First Ministries Inc.* (2006) 284 VSCA para 1, 207.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at para. 22.

¹⁶⁶ *Id.*, paras. 22-23.

¹⁶⁷ *Id.*, para. 160.

On the second issue of the test of incitement, the Court held that it is sufficient that incitement is likely to occur by the natural and ordinary effect of the words or conduct of the inciter directed at any ordinary member of the likely audience. The characteristics of the audience and the historical and social context in which the words are spoken or the conduct occurs must be taken into account.¹⁶⁸

On the available defenses allowed under Section 11, the Court ruled that the requirement of “good faith” will be satisfied if the conduct is engaged in for a genuine religious purpose, accompanied by the defendant’s subjective honest belief that it is necessary or desirable to achieve the genuine religious purpose.¹⁶⁹ As to what constitutes “reasonably,” the Court concluded that this must be decided according to whether it would be so regarded by “reasonable persons in general judged by the standards of an open and just multicultural society.”¹⁷⁰ The standards of such a society necessarily allows for differences in views about religions.¹⁷¹

As to the last issue concerning the constitutionality of Section 8, the Court concluded that it hardly burdens freedom of communication about political matters.¹⁷² Even if it does, the statute has served a legitimate end by preventing religious vilification in a manner compatible with the constitutionality of a representative and responsible government.¹⁷³

Applying this analytical framework to the case, the Court held that the comments were uttered by the defendants in a seminar addressed at a mainly Christian audience, with only three Muslims present. Though the tone and content might have been mocking, and indeed caused laughter in the audience, ridicule was entirely different from arousing hatred. The concluding remarks and message of the defendants’ speech was to love the Muslims and to convert them, with a clear message that religious belief should be separated from persons who adhered to the particular belief.¹⁷⁴ In addition, the Court specifically stated that although Muslim audiences might have been offended, whether their feelings were to be protected was not an issue before the court; the relevant question was whether hatred was incited, not whether one was offended.¹⁷⁵ Given this extensive elaboration

¹⁶⁸ *Id.*, para. 159.

¹⁶⁹ *Id.*, para. 82.

¹⁷⁰ *Id.*, para. 95.

¹⁷¹ *Id.*, para. 98.

¹⁷² *Id.*

¹⁷³ *Id.*, para. 113.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*, para. 67.

as to the correct application of the test, the case was remitted to the Tribunal for reconsideration.

Section 8 of the Victorian statute appears stringent on the speaker in that it does not consider the intention of the speaker, concentrating only on the likely effect of the captured audience, which is not itself a test of imminent outbreak of violence. *Prima facie*, it reads almost like a strict liability test. Yet in application, and in interpreting Section 11, the Court is lenient in looking for a subjective standard of honest belief and gives room for the defense of genuine academic discussion. One may even find the judgment unsatisfactory for leaving the murky boundary between mocking one's religious belief and not heaping scorn on or inciting hatred against the believers. The objective test of incitement of any ordinary member of the audience is no clearer than the standard of the perception of a reasonable member of the audience.

Despite these shortcomings, however, the Racial and Religious Tolerance Act has been praised for its genuine attempt to "balance freedom of expression with an ethic of respect," allowing the public good defenses, protecting religious groups other than Christians, and providing the much-needed space for artistic expression.¹⁷⁶

V. FINE TUNING

The various instances of an overbroad exercise of free speech rights with a view to inciting hatred or ridicule against selected minority communities in the global or the national context depicts the dangers posed by hate speech. This is due to hate speech's socially invidious and divisive nature given its ability to oppress and vilify sections of the populace and call out for regulation of such speech specifically and separately in its own right. It has the power to gnaw away at the dignity of individuals or even an entire class of persons, preventing them from leading a dignified life with equal respect and dignity. The ECtHR and the Australian Courts have made significant inroads into embracing the right to have one's religious sensibilities protected as an important aspect of the right to freedom of religion.

Indeed there is much to be said for the ECtHR's strategy of proscribing speech that is intrinsically unworthy, as well as potentially socially dangerous. Yet the direction, the precise tests for limiting such speech and the extent of its regulation remains obscure, confused and unsettled. On the other hand, the American approach of prohibition of any form of content-

¹⁷⁶ Lawrence McNamara, *Blasphemy*, in *LAW AND RELIGION* 197, 212-213 (Peter Radan, Denise Meyerson & Rosalind F. Croucher eds., 2005).

based restriction is far too broad and can have dangerous and chilling implications for some groups in society.

There is a premium attached to the inherent good in allowing free speech so that such a right should not be easily diluted; however, good governance does not merely entail a hefty defense of free speech alone. Good governance demands a commitment to the collective and all individuals and groups, all of whom are entitled to live with an expectation of equal respect and dignity. These collective commitments influence governmental policies towards such speech, especially hateful and derogatory speech, dictating where the balance between prohibition and regulation ought to be struck.

In search of striking the right balance, we continue to falter along the battleground of freedom of religion and freedom of expression. As Lucy Vickers points out, the conflict may be complicated by the clashes of three rights: the perpetrator's right to freedom of expression, the rights of religious to be free from harassing, offensive or vilifying speech, and both parties' right to freedom of religion;¹⁷⁷ the last situation occurs when the perpetrator decides to proselytize in an offensive and aggressive manner to followers of another religion as witnessed in the cases of *Cantwell*,¹⁷⁸ *Chaplinsky*¹⁷⁹ and *Kokkinakis*. The interaction of these rights present scenarios and complications that are so rich and diverse that a ready made formula to resolve which right should trump the others is hardly feasible. A better solution, urged by various authors, is to identify the different interests at stake, to weigh up the extent to which they would be trampled if the other is given precedence and to locate the harm done to concerned parties in each individual case.¹⁸⁰

Building on the analysis and critique of the cases explored in this paper, and the rationale underpinning the freedom of religion and freedom of expression, it is submitted that there is no ready made formula that can be judiciously applied across all situations. What is advocated in this paper is the adoption of a contextualized approach, which examines the value of that speech in that society, assessing the harm to the individuals or community in light of that individual or community's standing in the greater society. In general, freedom of expression should yield to freedom of religion if :

¹⁷⁷ Lucy Vickers, *Is All Harassment Equal? The Case of Religious Harassment*, 65 CAMBRIDGE L.J. 579, 589 (2006).

¹⁷⁸ *Cantwell*, 310 U.S. 296.

¹⁷⁹ *Chaplinsky*, 315 U.S. 568.

¹⁸⁰ See Fenwick and Phillipson, *supra* note 113 and Edge, *supra* note 19, at 684.

- (1) there is an intention to incite hatred and / or violence against an individual or a particular group by reason of their affiliation with or membership of the religious group, idea or practice which is the subject of the offender's remarks or conduct; and
- (2) it is likely that violence will indeed occur; or
- (3) the effect of the means or manner employed to oppose or deny certain religious beliefs or practices are such as to inhibit those who hold such beliefs or are somehow affiliated with the religion these beliefs or practices form a part of, from exercising their freedom to hold, express and practice such beliefs.

Even if the aforementioned conditions are met, a public interest defense, including that of genuine artistic expression and genuine academic discussion or honest belief in the value of the discussion, ought to be allowed.

This formulation does not mean that believers' feelings and beliefs are being sidestepped. As beliefs should be open to criticism, the law should only intervene if speech is so hostile that it would inhibit those who hold such beliefs from exercising or manifesting their religion openly and freely. For instance, when the environment in school, the workplace, or in a community becomes so hostile that believers are subject to ridicule or threats (such that they can no longer enjoy peacefully their right to practice their faith), the state should interfere. Feelings of anger, fear and alienation are a real risk to the wellbeing of any society. In those situations, it is no longer an issue of preventing individuals from mere distress or guarding their right not to be offended. Rather, what is at stake is a substantive encroachment of the right to manifest and practice one's religion, which ultimately could become the root cause of internal instability and turmoil within the society.

The three grounds set out to prohibit anti-religious speech are closely interrelated. The British Government considers that incitement to religious hatred "has a disproportionate and corrosive effect on communities, creating barriers between different groups and encouraging mistrust and suspicion. At an individual level this can lead to fear and intimidation. It can also lead indirectly to discrimination, abuse, harassment and ultimately crimes of violence against members of our communities."¹⁸¹

VI. CONCLUSION

Freedom of religion and freedom of expression have been at loggerheads for ages in different parts of the world. In mapping out the position of

¹⁸¹ *Id.* at 518 (quoting The 8th Report of the Joint Committee on Human Rights, HL 60/HC 388 (2004-05) at 2.57).

various arguments in the theoretical and practical battlefields in various jurisdictions, this paper argues that freedom of religion should be understood to include the right to live in a community free of religious hatred so that one can freely hold and express his religious belief, and that a delicate balance should be carefully struck between the two rights.

When these two fundamentally important constitutional rights are in conflict, we are forced to side either with the offending speaker or the targeted individual or groups who may be helpless and alone or an angry mob.

Rather than focusing on who should be protected in this heated debate, the ECtHR ventures deeper into the debate to assess the value of concerned offensive speech. It points out that one cannot reasonably expect that his or her beliefs be free from all criticism, denial or ridicule. Nevertheless, the manner in which opposition to these ideas is manifested should not be so powerful or 'rough' that believers are inhibited from exercising their freedom to hold, express or manifest their religious beliefs. The ECtHR examines diligently whether the speech at issue would contribute to matters of public interest and public debate and denigrates speech that is motivated by personal, cultural or emotional spite. Following this approach closely, the Australian approach attempts to strike the difficult balance by emphasizing the likelihood of hatred being incited among the listening audience. Intention and imminent danger are not required in civil lawsuits, but the defense of public interest, including genuine artistic expression and academic discussion which rest on the subjective test of honesty, is allowed.

To adopt the libertarian or the dignity-oriented approach may yield simplicity, predictability and certainty, yet the price to bear is too costly and unfairly levied on either the religious or the outspoken. Drawing on the experiences of the ECtHR and Victoria, Australia, the authors support a test that requires proof of malicious intent to incite hatred or violence, criminalizing this conduct, a requirement that the likelihood of such hatred or violence towards the majority of the targeted group is shown, and making allowance for the defenses of public interest, genuine artistic expression and/or academic discussion. Successful implementation of this test will depend heavily on an independent judiciary and a community that permits rational discussion of controversial and sensitive questions.

In this battle between the free speakers and the religious groups, we are confronted with a tough choice; not only of choosing between two goods, but also determining which of these is the greater good in a pluralistic society. Freedom of expression certainly has its limits, and respect for religion also demands tolerance for difference, piercing criticism and offensive mockery. As freedom of speech is a condition of legitimate government, religious freedom and manifestation is core to one's identity and

directly tied to the essential attributes of equality, dignity and individual autonomy. A hostile environment would stifle the exercise and enjoyment of this right and would contradict the principles of a true democracy. The task of balancing in each individual case may be a task equivalent to that which the Gods have given to Sisyphus, but until we start rolling the stone uphill, the fine-tuning of any rational and reasonable principle will not be in sight.

