The cartoon controversy: a note on freedom of expression, hate speech and blasphemy*

Nazeem MI Goolam**

Abstract
In the light of the recent publication of cartoons aimed at mocking the Prophet Muhammad (peace be upon him) this article analyses the approach to the idea of freedom of expression in Western/European jurisdictions – in particular the USA, Canada, Australia and Belgium/Netherlands – and in Islam. In terms of Islamic law, the public utterance of hurtful speech and blasphemy constitute violations of the right to freedom of expression. It is submitted that the limits of the freedom were overstepped by the publication of the cartoons and that such freedom must be limited when it reaches the bounds of hate speech and blasphemy. It is further submitted that the publication infringed the human dignity of Muslims worldwide. The article makes apparent the double standards in respect of blasphemy inherent in Western/European jurisdictions, with particular reference to its treatment of Holocaust denial. The section on the status of the Prophet Muhammad (pbuh) has been included so as to enable the non-Muslim reader in particular to understand the worldwide Muslim reaction. Finally, the article calls for an urgent need for a European/Western commitment to the mutual respect of all religions and to a sincere commitment to multiculturalism.

Introduction
And it is not right for you to insult Allah’s Messenger.¹

The recent publication of twelve cartoons mocking the Prophet Muhammad (peace be upon him) (hereafter abbreviated to pbuh) in the Danish newspaper, Jyllands-Posten, has deeply offended and consequently evoked a huge outcry from the international Muslim community. The cartoons, depicting the Prophet Muhammad (pbuh) as a terrorist,² were subsequently published in a number of other European newspapers. It is quite clear that these publications were aimed at demonising the character and personality of the Prophet (pbuh). These cartoons elicit contempt for the religious beliefs of the Muslim community or ummah and have abused and overstepped the right to freedom of speech by taking it to a dangerous and irresponsible level in its disregard for the sensitivities of Muslims.³

¹The author is a Muslim, and as such, the article may contain a certain extent of Islamic bias.  
²BA LLB (University of Cape Town); MCL (International Islamic University, Malaysia).  
³Associate Professor: Department of Jurisprudence, University of South Africa.  
¹The Holy Qur’an chapter 33 verse 53.  
²One of the cartoons depicts the Prophet (pbuh) with a bomb in his turban.  
³E-mail communication dated 11 February 2006 by Mufti Zubair Bayat of the Kwa-Zulu Natal branch of the Jamiatul Ulama (Council of Muslim Theologians)
The reasons for the outcry by the global Muslim community are threefold.

- Images of the Prophet (pbuh) are strictly prohibited in Islam. It is regarded as disrespectful and it may lead to distortion.  
- The entire value system of Islam is based on respect and reverence for one's parents, elders and teachers. And the greatest reverence is to be accorded to God's last Prophet on earth and, indeed, to all of God's Prophets (peace be upon them all).  
- The Prophet Muhammad (pbuh) is considered the greatest role model for all Muslims in the world and thus any mocking of the Prophet (pbuh) is seen as a mocking of all those who follow and revere him.

Furthermore, the reaction of Muslims can be properly understood by Western and European onlookers only if they are aware of the approach to freedom of expression and to the concept of blasphemy in Islam. Before discussing the Islamic approach, it is of course necessary to analyse briefly the rationale for the protection of freedom of expression in Western human rights law.

**Freedom of expression in Western human rights law**

In most European countries freedom of expression, like all other human rights, is limited. These limitations are in respect of libel, hate speech, invasion of privacy, protection of national secrets, blasphemy and anti-Semitism. In the light of the publication of these cartoons, it would seem that these limitations apply exclusively to non-Muslims.

Section 16 of the South African Constitution provides:

1. Everyone has the right to freedom of expression, which includes –
   (a) freedom of the press and other media;  
   (b) freedom to receive or impart information or ideas;  
   (c) freedom of artistic creativity; and  
   (d) academic freedom and freedom of scientific research.

2. The right in subsection (1) does not extend to –
   (a) propaganda for war;  
   (b) incitement of imminent violence; and  
   (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

De Waal et al state three reasons for giving constitutional protection to freedom of expression. These are:

<sup>4</sup> As has indeed happened with the publication of these cartoons.  
<sup>5</sup> See the status of the Prophet Muhammad (pbuh) below.  
<sup>6</sup> The Qur'an states this clearly in chapter 33, verse 21: 'You have indeed in the Messenger of Allah a most beautiful pattern of conduct'; see n 99 below.  
<sup>7</sup> See AA Jeena 'First, do no harm to others' Sunday Times 12 February 2006.  
<sup>8</sup> See De Waal, Currie & Erasmus The Bill of Rights handbook (2001).  
<sup>9</sup> The third reason is perhaps the most important in the context of this article.
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• scientific, artistic or cultural progress would be impossible if people were not free to express their ideas and discoveries;
• to speak or to otherwise express oneself is a natural and essential human activity, part of what it means to be human; and
• freedom of expression is but one of a web of mutually supporting constitutional rights closely related to freedom of religion, belief and opinion and the right to dignity.\(^\text{10}\)

Section 16(2) expressly places certain forms of expression, including hate speech based on ethnicity and religion, outside the scope of the right. As regards hate speech De Waal et al write:

> An overview shows that the need to restrict the scope of freedom of expression by preventing the incitement of racial hatred is recognised in a number of international human rights documents. Hate speech restrictions are also found in the laws of a number of democratic societies.\(^\text{11}\)

I now briefly analyse the jurisprudence on hate speech in the United States of America; Canada; Australia, and Belgium and the Netherlands.

**United States of America**

The First Amendment to the United States Constitution states that ‘Congress shall make no law ... abridging the freedom of ... the press’.\(^\text{12}\) It is an active freedom in that it focuses on a right to do something, that is to speak one’s mind.\(^\text{13}\) On the other hand, the Fifth and Fourteenth Amendments protect citizens against racial and religious discrimination. Since the US Constitution contains no limitation clause, an unresolved tension between these Amendments operates in American jurisprudence.\(^\text{14}\)

Knoll states that in the United States almost all speech is constitutionally protected. Speech includes conduct with or without words. However, incitements to violence are not protected and this exception is known as the ‘fighting words’ exception. Where speech is so offensive or uncivil, it may fall within the highly limited category of ‘fighting words’.\(^\text{15}\) ‘Fighting words’ was defined by the United States Supreme Court in the case of *Chaplinsky v New Hampshire*\(^\text{16}\)

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\(^\text{10}\)De Waal *et al* n 8 above at 309–310; see also *South African National Defence Force Union v Minister of Defence* 1999 4 SA 469 (CC), *Banana v Attorney-General* 1999 1 BCLR 27 (ZS).

\(^\text{11}\)Id at 319; see further art 20(2) of the International Convention on Civil and Political Rights and art 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.

\(^\text{12}\)See Bezanson RP *How free can the press be* (2003) 1.


\(^\text{14}\)Ibid.

\(^\text{15}\)Id at 213; see also M Chesteman *Freedom of speech in Australian law: a delicate plant* (2000) 231.

\(^\text{16}\)315 US 568, 572 (1942).
as words which 'by their very utterance inflict or tend to incite an immediate breach of the peace'. The court added that such words were of such slight social value that any benefit derived from them is outweighed by 'the social interest in order and morality'.

This highly limited category of 'fighting words' has been further confined by a number of Supreme Court decisions. First, the court has refused to treat what were clearly highly offensive expressions, as sufficient to provoke physical violence in retaliation. And secondly, it has required that the 'incitement of an immediate breach of the peace' test is only satisfied where the 'the advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action'. Furthermore, in the 1992 decision of RAV v St Paul, the Supreme Court held that, even within this very limited category of 'fighting words', a prohibitive law may not discriminate on grounds of political or ideological content.

In respect of the difficult choice between the protection of freedom and the protection against discrimination Knoll states that: 'tolerance of intimidatory conduct is a form of moral majoritarianism. It is indeed an intolerance that is inappropriate to our multicultural society.'

Canada
Section 319(2) of the Canadian Criminal Code provides that:

Every person who, by communicating statements, other than in a private conversation, wilfully promotes hatred against any identifiable group is guilty of
(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
(b) an offence punishable on summary conviction.

Anti-hate legislation is also contained in provincial legislation. One example is the very broadly worded section 14 of the Saskatchewan Human Rights Code, which provides that:

No person shall publish or display ... any representation ...
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(a) tending or likely to tend to deprive, abridge or otherwise restrict the
enjoyment by any person or class of persons of any right to which he
is or they are entitled under law; or

(b) which exposes, or tends to expose, to hatred, ridicules, belittles, or otherwise
affronts the dignity of any person, any class of persons or a group of persons
because of his or their race, creed, religion, colour, sex, sexual orientation,
family status, marital status, disability, age, nationality, ancestry, place of
origin or receipt of public assistance.  

The leading Canadian case is the Supreme Court decision of R v Keegstra.  
James Keegstra was a high school history teacher in the town of Ekville in
Alberta. For almost ten years he taught his students about a grand conspiracy on
the part of Jews to undermine Christianity and to control the world. He taught
his students that the banking system, the media, Hollywood, the universities,
most publishers, most churches, and almost all political leaders were agents of
this conspiracy. He told his students that Jews were treacherous, subversive,
manipulative, deceptive, money-loving and power hungry. Students who
parroted his theories and ideas obtained good marks, while those who did not
adopt his views did poorly in his class.

When Keegstra’s teaching eventually became a public issue, he was dismissed
from his position. In January 1984 he was charged with the wilful promotion of
hatred under section 319(2) of the Criminal Code. In its decision the Canadian
Supreme Court described the ‘harm’ that may result from hate speech, stating
that emotional damage caused by words may result in grave social and
psychological consequences. There is often a response of humiliation and
degradation from the individual targeted by hate propaganda. In the words of De
Waal et al:

A person’s sense of human dignity and belonging to a community at large
is closely linked to the concern and respect accorded the groups to which
he or she belongs. The derision, hostility and abuse encouraged by hate
propaganda therefore have a severely negative impact on an individual’s
sense of self-worth and acceptance... These are undesirable consequences
in a nation that prides itself on tolerance and the fostering of human
dignity through, among other things, respect for the many racial, religious
and cultural groups in society.

See further s 13(1) of the of the 1891 Human Rights Code of Ontario and s 2 of the 1984
Human Rights Act of British Columbia, as amended by the 1993 Human Rights Amendment
Act.

26[1990] 3 SCR 697.

27 See R Moon ‘Drawing lines in a culture of prejudice: R v Keegstra and the restriction of hate
propaganda’ UBC Law Review (1992) 99 and LE Weinrib ‘Hate promotion in a free and

28 For a more detailed analysis of the Keegstra decision, see LW Sumner The hateful and the
obscene: studies in the limits of freedom of expression (2004), in particular chapter 3 entitled
‘The balancing act’ and chapter 5 entitled ‘in harm’s way’ (in particular 5.5. on ‘hate speech
and hate crimes’).

29 De Waal et al n 8 above at 320.
It is important to note that McLachlin J, in her dissenting judgment in *R v Keegstra*, commented on the need for the enhancement and preservation of multiculturalism in Canada.

**Australia**

Chesterman writes that freedom of speech is indeed a 'delicate plant' in Australian law. It is an important value to be protected but it must be nurtured properly.\(^{30}\)

The absence of an express constitutional recognition of the right to freedom of expression in Australia marks a significant difference with Canadian jurisprudence. Australian racial vilification legislation should be viewed in relation to two issues. First, the freedom of political communication under Australian constitutional law and secondly, general principles of free speech. As regards the first issue, the question to be asked is whether racial vilification or racist speech constitutes political communication in the constitutional sense. Chesterman argues that it depends on whether a broad or a narrow interpretation is given to 'political communication'. If the former is the case, racial vilification would be regarded as a form of political communication, while if the latter is the case, racist speech would not be constitutionally protected.\(^{31}\) As regards the compatibility of racist speech with the general principles of free speech, racial vilification is not seen as an infringement of or threat to public order. Nor is it treated as a violation of equality.

Chesterman concludes:

> In the highly controversial arena of racial vilification, every country must ultimately determine for itself how prevention of its acknowledged harms through law, is best reconciled with freedom of speech. There is no single 'right answer'. In the accommodation of these competing aims in Australia, freedom of speech is indubitably treated as an important value. But, as in other contexts, it is far from paramount.\(^{32}\)

**Belgium and the Netherlands**

In the Netherlands it is a criminal offence to deliberately give public expression to views insulting to a group of persons on account of their race, religion, conviction or sexual preference.\(^{33}\) This is provided for in article 137 of the Criminal Code.

... art. 137c dat strafbaar stelde het zich in het openbaar opzettelijk beledigend uitleten ober een groep mensen wegen hun ras, hun godsdienst of levensovertuiging. Verder in: art 137d dat straf bedreigde op het aanzetten tot haat tegen of discriminatie van mensen wegen hun ras,

\(^{30}\)See Chesterman n 15 above at 1.

\(^{31}\)Id at 238–240.

\(^{32}\)Id at 247.

\(^{33}\)Sadurski n 17 above at 179.
godsdienst of levensovertuiging, dan wel tot gewelddadig optreden tegen persone of goed van mensen op dezelfde drijfveren. En ook nog in eenderde misdrijf, nl: art 137e, dat een verbod behelsde op het anders dan ten behoeve van zakelijke berichtgeving openbaarmaken van uitlatingen die naar men weet of rederijkwijs moet vermoeden beledigend zijn voor of aanzetten tot haat of discriminatie of tot geweld tegen mensen wegen hun ras, godsdienst of levensovertuiging. Ook de verspreiding van voorwerpen waarin dergelijke uitlatingen voorkwamen was ingevolge dit artikel verboden.34

Article 137 is clearly quite broadly worded. In Belgium the anti-racism law of 30 July 1981 prohibits the incitement of hatred on grounds of race, gender, religion or nationality.35 In essence, articles 1 and 3 of the law make certain types of conduct punishable in respect of racism. These include the incitement of hatred, racial segregation or discrimination, giving publicity to such conduct and membership of or cooperation with any organisation which promotes such conduct.36

Summary of freedom of expression in Western human rights law

It is clear, therefore, that even by Western secular standards, the right to free expression and freedom of speech is of fundamental importance, but it is not absolute. As Sadurski37 correctly argues, nearly everyone agrees that law ought to prevent harm, even when that harm is inflicted through words38 or pictures. Clearly, the bounds were overstepped by the publication of the cartoons. The right to freedom of expression goes hand in hand with the responsibility not to use it to harm others unnecessarily.

On the question of whether the harm of hate speech39 outweighs the harm of limiting it, Kathleen Mahoney40 argues that whatever form it takes, the purpose and effect of hate propaganda is to lay the foundation for the mistreatment of members of the victimised group.41 She states that members of such groups are humiliated and degraded and their self-worth42 is undermined. Referring to the Canadian Supreme Court decision of R v Zandel,43 she adds that hate propa-

35D Voorhoof ‘Racismebestrijding en vrijheid van meningsuiting in Belgie: wetgeving en jurisprudentie’ in Schuijt & Voorhoof 34 above at 156.
36Id at 158.
37Sadurski n 17 above.
39Alternatively referred to as hate propaganda. The concept of hate promotion is also used in this context (see, for example, Weinrib n 27 above).
41In the context of this article, the victimised groups are primarily the minority Muslim populations in European countries.
42Self-worth and the celebration of human worth is the essence of human dignity. An undermining of one’s self-worth represents an undermining of one’s human dignity. See further the related discussion on human dignity later in this article.
ganda is not merely offensive, but that it also constitutes a serious attack on psychological and emotional health. As a result society as a whole suffers because such expressions undermine freedom and core democratic values by creating discord between groups and an atmosphere conducive to discrimination and violence.\

The right to freedom of expression, like all other human rights, is not absolute. No human right is absolute. All important values in a free and democratic society must be qualified and balanced against other equally important and often competing values. Just as the right to life of the unborn child or foetus may be limited by the woman’s right to privacy, just as the right to freedom of religion and culture may be limited by the equality clause, so too the right to free expression may, and indeed must, be limited by the right not to engage in hate speech and the right to have one’s dignity respected and protected.

It is, however, to be lamented that in response to the reaction by Muslims globally to the publication of the cartoons, a leading South African constitutional lawyer, David Unterhalter, argues that at the heart of freedom of speech lies the freedom to offend others and that in a free society, no belief system can claim immunity from mockery. Concerning the call for responsible free speech and free speech that properly respects the deepest religious convictions of others, he writes that these are empty formulations, since at the heart of the right to free speech is the right to say things that others find offensive.

Unterhalter does, of course, agree that freedom of speech is not an unlimited right and that the South African Constitution does not extend the right to propaganda for war, incitement of imminent violence or advocacy of hatred. In a strange twist of language, he then argues that no proper interpretation of the cartoons would suggest that they constitute advocacy to hatred. In his words:

"Advocacy is a call to regard a particular group, in this case a religious group, with hatred. Hate is a very strong emotion. The cartoons involve ridicule, they plainly draw a link between adherence to Islam and suicide bombing; but the cartoons do not call for readers to hate Muslims."

Unterhalter and others sharing his views, would be well advised to take heed of Delgado’s enquiries into the harms – often very traumatic – of racism and the harms of racial insults, as well as Sadurski’s observations that:

... there are words that hurt, and that produce harm to other people and to entire communities. The damage produced by words may be very high;...

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44 See Mahoney n 40 above at 355–356.
45 See The concept of human dignity below.
46 'In a free society, no belief system can claim immunity from mockery' Sunday Times 12 February 2006 18.
47 Ibid.
48 See n 38 above at 136–143.
49 Id at 143-149.
for example, public statements that express racial hate or contempt for an entire group of people hurt their victims more than many other unpleasant words.50

Obviously Unterhalter – and many others like him – do not understand the status of the Prophet Muhammad (pbuh)51 and the love and respect that Muslims have for him. If he did, he would know that any ridicule or vilification of the character of God’s final Messenger would, for Muslims, amount not only to advocating hatred but also to blasphemy. Furthermore, Unterhalter obviously does not understand that portraying the Prophet Muhammad (pbuh) as a violent man, and Islam as a violent religion, is more than enough to stir the emotions of a Muslim and to advocate hatred and incite harm.

The Islamic approach to freedom of expression
What, then, is the Islamic approach to freedom of expression? Islam affirms the right to freedom of expression. At the same time it imposes certain limitations, both moral and legal, on the exercise of this freedom.52 Kamali states that there are two objectives served by the right to free speech, namely the discovery of truth, and the upholding of human dignity.53 As regards the role and significance of the right to free expression, Kamali states that freedom of expression has often been characterised as a yardstick by which to measure the democratic quality of a government and its commitment to the rights and liberties of its citizens. He adds:

It is, perhaps, equally true to say that the endeavours of a people in safeguarding this freedom, and the way they balance its use against its possible abuse is an index of their cultural refinement. The degree of tolerance that a society encourages on the part of its members to enable everyone to say what they have to say, and for the rest to show sensitivity in receiving it, is not just a question of legal finesse but reflects the liberality and latitude of a society’s collective conscience. Only in a secure and tolerant atmosphere where thoughtful contribution and constructive criticism are received and appreciated by the community and its leaders, can such contributions be positively encouraged and utilised.54

The concept of free expression in Islam can only be fully understood in the context of the Qur’anic principle of hisbah. The principle of hisbah entails commanding the good and forbidding evil and is a cardinal Qur’anic principle which lies at the root of many Islamic laws. It represents the supreme objective of the Shari‘ah and lays the foundation for some of the basic freedoms that lie

50 Sadurski n 17 above at 37; see also MJ Matsuda ‘Public response to racist speech: considering the victim’s story’ in MJ Matsuda, CR Lawrence, R Delgado & KW Crenshaw (eds) Words that wound: critical race theory, assaultive speech, and the First Amendment (1993); and Summer n 28 above at 159–160.
51 See Status of the Prophet Muhammad (pbuh) below.
53 Id at 8.
54 Id at 13.
at the core of most modern constitutions. Kamali argues that the right to free speech and expression is the sine qua non of the concept of hisbah. Affirmative evidence of the right to freedom of expression in Islam includes the following: the principle of hisbah; the giving of sincere advice (nasihah); consultation (shura); personal reasoning (ijtihad); freedom to criticise; freedom to express an opinion; and freedom of religion.

Kamali states that freedom to express an opinion is probably the most important aspect of freedom of speech since the latter may comprise other distinguishable varieties of expression such as a simple narration of facts, or comedy and fiction. As stated earlier, in Islam moral and legal limitations are imposed on the exercise of this freedom. The moral violations of freedom of speech include reprehensible acts such as telling lies, backbiting and ridiculing others and exposing the weaknesses of others. A prominent theme of the moral teachings of the Qur'an and the Sunnah is to avoid causing harm to others and to conceal the weaknesses of one's fellow human beings. The underlying reason for this is Islam's emphasis on the honour and dignity of the individual.

As regards the legal limitations Islam imposes on freedom of expression, the most important limitation is the avoidance of harm to others and the fact that free speech should not be hurtful to others nor encroach on their rights or dignity. Under the Shari'ah violations of freedom of speech may take the form of the following offences: public utterance of hurtful speech; slanderous accusation; blasphemy; sedition; insult; cursing; and attribution of lies.

In the context of this article, the public utterance of hurtful speech and blasphemy are of particular significance and will therefore be briefly considered.

Public utterance of hurtful speech
The following Qur'anic verse offers guidelines on the limitations that may be imposed on freedom of speech: 'God loves not the public utterance of evil speech except by one who has been wronged'. Public utterance includes broadcasting and publicising, while hurtful/evil speech comprises that which is addressed to an individual, to more than one person, or to the community at large. Kamali explains further that the commentators (mufassiroon), indicate that this Qur'anic verse denounces the utterance of offensive speech absolutely, regardless of the end it may serve, or the context in which it may occur. Kamali concludes:

\[55\text{Id at 28.}\]
\[56\text{Id at 61.}\]
\[57\text{Sunna refers to the speeches, actions and teachings of the Prophet Muhammad (pbuh). Sunnah, therefore includes ahadith (singular hadith) which are the speeches of the Prophet (pbuh).}\]
\[58\text{Id at 123.}\]
\[59\text{Id at 166.}\]
\[60\text{Chapter 4, verse 148.}\]
Also forbidden is the publication and display of obscene literature .... The only exception that the Qur'an has granted aims at encouraging the quest for justice, which is given priority over prevention of evil speech.\(^61\)

**Blasphemy**
The etymology of the word ‘blasphemy’ is to be found in two Greek words, ‘blapto’ (to harm) and ‘pheme’ (speech), and simply means to defame or insult. The essence of blasphemy is the contemptuous and hostile attack on the fundamentals of religion, which offends the sensibilities of its adherents.

According to the *Encyclopedia of Religion and Ethics* blasphemy comprises ‘all utterances expressive of contempt of God, for His Names, attributes, laws, commands and prohibitions ... All scoffing at Muhammad or any other Prophets of Allah is also regarded as blasphemy in Islam’.\(^62\)

The principal offence of blasphemy in Islam is the reviling of Allah (God) and the Prophet Muhammad (p.b.u.h). Reviling includes any insult to God Most High and to the Prophet (p.b.u.h), any irreverent and contemptuous statement that outrages the religious sensitivities of believers, an act such as throwing the Holy Qur'an on a heap of rubbish, and giving a lie to fundamentals of the religion.

Insult of the Prophet (p.b.u.h) may take either an explicit or implicit form. An example of an explicit insult would be a statements attacking his personal integrity, while an example of an insult which is implicit would be in the form of mockery or disrespect.\(^64\)

The scholars (ulama) of Islam have drawn a distinction between reviling God (sabb Allah) and insulting the Prophet (sabb al-Rasul). This distinction is related to the division of rights in Islam into the rights of God and the rights of man. Sabb Allah consists of the violation of the right of God (haqq Allah) which is pardonable when the offender repents and expresses regret for his conduct. Insult to the Prophet (p.b.u.h) is a violation of the right of man (haqq al-abd), that is, the personal right and honour of the Prophet (p.b.u.h). Kamali states that there is disagreement among the ulama on the question of whether repentance by a person who insults the Prophet (p.b.u.h) is admissible at all, and whether such repentance absolves the offender from punishment. This offence is similar to slanderous accusation since both cases involve the violation of the right of a human being and repentance in either case is of little consequence, since only a pardon granted by the injured party, not repentance as such, constitutes a valid ground for withholding the punishment.

\(^{61}\) Kamali n 53 above at 168.

\(^{62}\) Id at 214.

\(^{63}\) The fact that the 2004 incident at Guantanamo Bay concerning the flushing of a Qur'an down the toilet did not meet with similar anger or even greater reaction from the global Muslim community is an indication of the great love and respect Muslims have for the Holy Prophet Muhammad (p.b.u.h).

\(^{64}\) Kamali n 52 above at 229.
Therefore blasphemy against the Prophet (pbuh) consists of a violation of his personal right and only the Prophet himself can pardon such conduct. This is the ruling of the Hanbali and Maliki schools of thought, which operates on the presumption that the right to pardon, in the case of insult to the Prophet (pbuh), only existed when the Prophet was alive. In Kamali’s opinion, the correct view is that after the passing of the Prophet the offence of sabb al-Rasul should be no different to sabb Allah since both of these violate the right of God.

A few words on the Salman Rushdie incident would be appropriate at this stage. Ever since his novel The satanic verses was published in 1988 it has aroused controversy and evoked denunciation and protest among Muslims globally. The book reviles and defames the Prophet Muhammad (pbuh), the wives of the Prophet and his leading companions. It also contains contemptuous passages regarding the Holy Qur’an and some of the cardinal values and principles of Islam.

On 14 February 1989 Ayatollah Khomeini of Iran issued a fatwa stating that the author of the book The satanic verses which denigrates Islam, the Prophet and the Qur’an, and all those involved in its publication who were aware of its content, are sentenced to death. In March 1989 the Organisation of Islamic Conference issued a statement denouncing Rushdie’s book as a flagrant violation of the right to freedom of expression. With reference to the Universal Declaration of Human Rights and its limitations on freedom of speech, the statement emphasised that the right should not be exercised at the expense of the rights of others, nor should Islam be the target of sacrilege in the name of freedom of expression.

It is abundantly clear that, both in Western human rights thinking and in Islamic law, the right to freedom of expression is permitted as long as it does not encroach on the self-worth and dignity of the human being. Furthermore, as regards Islamic law, the public utterance of hurtful speech and blasphemy, inter alia, constitute violations of the right to freedom of expression.

The concept of human dignity

Human dignity is not merely a human right, but is one of three fundamental values upon which the South African Constitution is founded. Section 10 of the South African constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected. With reference to the concept/value of human dignity, Venter states:

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65 The other two well-known schools of thought are the Shafi and Hanafi schools.
66 Kamali n 52 above at 232.
67 Id at 294.
68 Religious opinion.
69 At its twelfth session of foreign ministers held in Riyadh, Saudi Arabia.
70 See n 17 above at 298.
In s 1 (a), only human dignity is presented as an unqualified constitutional value. That it is the most fundamental value also appears from the wording of s 10, where it is stated that everyone has "inherent dignity". That human dignity thus lies at the root of the meaning of the Constitution, also resonates well with all the other values. Stated differently, each of the other values emerging from the constitutional text can be seen as deriving from human dignity.71

The German Constitution’s point of departure is expressed in article 1(1) of the Grundgesetz, which states:

‘Human dignity is inviolable. To respect and protect it is the duty of all state authority.’

Commenting on article 1(1), Venter writes that it is a celebration of human worth representing the culmination of diverse European and German philosophical, religious and ethical thinking and that ‘it can be described as the essence of German civil and juridical conviction’.72 The wording of the article, he says, expresses the belief that human rights are founded upon human dignity, and not the other way around.

The central role of human dignity was reiterated by Judge Chaskalson73 in the first case74 heard by South Africa’s Constitutional Court, when he declared:

The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in the Bill of Rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.75

In elaborating on the philosophical basis for this contention, De Waal et al argue that, in liberal moral philosophy, human dignity is considered to be that which gives a person his/her intrinsic worth and, consequently, dignity is ‘above all price and so admits of no equivalent’.76

Discussing the right to dignity in the context of defamation, De Waal et al state that when the common law of defamation comes under constitutional scrutiny, the right to freedom of expression must be balanced against the right to dignity. If freedom of expression needs to be balanced against human dignity in a case of defamation, how more so should it not be in a case of blasphemy. In this regard it is important, in particular, for the Western or European reader, to understand the Islamic approach to blasphemy.77

71 Venter Constitutional comparison Japan, Germany, Canada and South Africa as constitutional states (2000) 142.
72 Id at 135.
73 Then President of the Constitutional Court.
74 S v Makwanyane 1995 3 SA 391 (CC).
75 Id at para 144.
76 See De Waal et al n 9 at 231.
77 See subsection entitled ‘blasphemy’ earlier in this article.
The decision of the Johannesburg High Court\textsuperscript{78} in interdicting the \textit{Sunday Times} newspaper from publishing the cartoons on 5 February 2006 reiterates the place and extent of the right to freedom of expression in a democratic society. In his judgment, Judge Jajbhay declared that although freedom of expression is fundamental in our democratic society, it is not a paramount value. It must be construed in the context of other values enshrined in the South African Constitution, namely the values of human dignity, freedom and equality. The value of human dignity, he said, respects both the personal sense of self-worth as well as the public’s estimation of the worth or value of an individual and a religious group.

Judge Jajbhay was of the view that the cartoons were characterised by insult and innuendo intended to ridicule Islam. Commenting very briefly on the status of the Prophet (pbuh), he said that the Prophet is the cornerstone of every Muslim’s existence. In his view the limitation to freedom of expression was justifiable in the interest of human dignity.

He added that for many centuries South Africans have been bitterly divided through laws and practices which fostered hatred and fear. The caricatures of the Prophet Muhammad as a terrorist showed a lack of human sensibility and advocated hatred and stereotyping of Muslims. This, he said, is harmful to the achievement of our core values as a nation since it reinforces and perpetuates patterns of discrimination and inequality.

**Double standards and blasphemy in the West**

In 2003 the same Danish newspaper which published these cartoons, rejected a series of cartoons of the Prophet Jesus\textsuperscript{79} (pbuh)\textsuperscript{80} on the grounds that they may be offensive to readers and were not funny. In Europe, Holocaust denial is a very serious matter. This is evidenced by the fact that, by 1994, four European countries\textsuperscript{81} passed laws prohibiting Holocaust denial. The 1937 Swiss Penal Code states that:

> Whoever ... publicly through utterances, writings, gestures, assaults or in any other form injures the honour of a person or a group of persons for reason of their race or their belonging to an ethnic or religious group or for one of these reasons defames the memory of deceased persons, or, for the same reason, grossly minimises or seeks to dispute genocide or other crimes against humanity ... shall be punished by imprisonment or a fine.\textsuperscript{82}

\textsuperscript{78}3 February 2006, as yet unreported.
\textsuperscript{79}In Islamic teaching Jesus is a prophet and messenger of God, just as Moses was before him and Muhammad after him.
\textsuperscript{80}Muslims revere all of God’s prophets, with the greatest reverence being accorded to the last of them, the Prophet Muhammad (pbuh).
\textsuperscript{81}They were Switzerland, France, Austria and Germany.
\textsuperscript{82}Article 26 1b.
The Federal Republic of Germany's Criminal Code similarly provides for the punishment of one who blackens the memory of a deceased person. Denial of the Holocaust in Germany is punishable by up to five years in prison, while Austria's maximum sentence is ten years. Had the cartoon of the Prophet instead shown a chief rabbi with a bomb-shaped hat, cries of anti-Semitism would have been heard.

While the publication of the cartoons is regarded as a simple exercise in free speech, two very recent occurrences serve to amply prove the double standards applied in Europe. First, German federal prosecutors have received a criminal complaint against Iranian President Mahmoud Ahmadinejad in which he is being charged with the crime of Holocaust denial. Ahmadinejad has repeatedly expressed doubt that six million Jews were killed by the Nazis during World War II. The Israeli lawyer who filed the criminal indictment, Ervin Eran Shahar, stated that the defendant should be investigated for inciting racial hatred, defiling the dead, and denying the Holocaust, as well as for violating the rights of Jews to security of life and freedom.

Secondly, in 2006 British historian David Irving was jailed for three years by a Viennese court on a charge of denying the Holocaust. In his defence, Irving stated that freedom of speech means the freedom to say things to other people that they do not want to hear. Using strong emotive language Jones has the following to say of Irving:

"David Irving has large audiences for his esoteric writings on World War II history and used this fact to preach the lies Holocaust Deniers to a wider audience. The importance of David Irving to international racism was commented upon by the authors of the Antisemitism World Report 1993 ... The Australian government's decision not to grant David Irving permission to enter Australia in 1993 or 1994 was based on immigration law and it is not the purpose of this paper to canvass the political merits of the decisions."

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84 "Legal protest against Iran's leader filed in Germany' reported in the Pretoria News 24 February 2006.
85 Irving is best known for his book entitled Hitler's war.
86 The day after the sentence Austria's state prosecutor filed an appeal to lengthen the sentence.
87 "I won't be silenced", says Holocaust denier Irving' reported in the Sunday Times 26 February 2006.
88 See Jones n 83 above at 177.
However, when Muslims in the UK tried to invoke its 89 blasphemy law against the blasphemy perpetrated by *The satanic verses* 90 in 1989, they were informed that the law only protected Christianity, not Islam. 91

Even in South Africa, 92 the rationale for the crime of blasphemy, according to Snyman, is consideration for the religious feelings of a large section of the community, namely Christians, and thus the preservation of public peace and order. 93 Snyman defines blasphemy as the unlawful and intentional publication of words or conduct whereby God is slandered. He adds that the abusive reference may be either to God or Jesus. 94 Snyman states further that:

... the expression of an opinion regarding the existence or attributes of God may amount to blasphemy if it takes the form of contumelious or scurrilous language or conduct, or contains an element of vilification, ridicule or irreverence which transgresses the limits of decent controversy and tends to lead to a breach of peace. 95

Burchell comments that if the crime of blasphemy can only be committed in respect of the Christian God and religion, it is discriminatory because only those who attack Christian beliefs will be liable to prosecution, while those who attack other religions will not be exposed to prosecution. 96 If, however, the guarantee of freedom of expression in the constitution results in blasphemy being very restrictively construed or, as Snyman believes, is ceasing to exist, Burchell is of the view that cases of blasphemy should be regarded as cases of incitement to religious hatred. 97 The major advantage of this, Burchell argues, would be that the prohibition to incite religious hatred would apply to all religions equally. 98

The status of the Prophet Muhammad (pbuh)

It is impossible to understand the reaction of Muslims worldwide to the publication of the cartoons, without a basic understanding of the place and status of the Prophet Muhammad (pbuh) in Islam.

89That of the United Kingdom.
90The book was published in 1988. For deeper insights into the events that followed see R Abel *Speech and respect* (1994) 11–22. One of the more significant subsequent publications was that of Shabbir Akhtar entitled *Be careful with Muhammad! The Salman Rushdie affair* (1989).
91See Lee *The cost of free speech* (1990) 76. Lee points out that if an incitement to religious hatred remedy had been available in Britain at this time it may have helped assuage the feelings of British Muslims who, justifiably, felt that the British law of blasphemy discriminated against them.
92Regard South African law as Western law since it is based on English and Roman-Dutch law.
94In Islam, Jesus is known as the Prophet Eesa (pbuh).
95Snyman n 94 above.
97Id at 881.
Concerning the Prophet, Allah states in the Holy Qur'an: ‘Indeed you possess the most sublime character.’ 99

This implies that the Prophet Muhammad (pbuh) is the greatest human being to have walked the face of the earth.

And further in the Qur'an:

‘You have indeed in the Messenger of Allah a most beautiful pattern of conduct.’ 100

In another verse of the Qur'an believers are admonished to honour and respect the Prophet (pbuh). 101 The Prophet (pbuh) has himself stated that ‘none of you can be a true believer until and unless he loves me more than his parents, his children and all other human beings’. 103

One of the verses of the Qur'an encapsulating the status of the Prophet Muhammad (pbuh) is the following:

O Prophet! Truly We have sent thee as a Witness, a Bearer of glad tidings and a Warner And as one who invites to God’s (Grace) by His Leave. And as a Lamp, Spreading Light. 104

Therefore the love, honour and respect of the Prophet Muhammad (pbuh) permeates all of Islamic thinking and, in fact, forms the fons et origo of Islamic teaching. Thus if the dignity of the Prophet is in any way challenged, let alone vilified, those who love and respect him will not tolerate it. And the vilification, in turn, encroaches on the human dignity of all those who love and revere the Prophet (pbuh). In fact, Allah 105 has given to each of His Prophets a title. The Prophet Eesa (pbuh) is called the ‘Spirit of God’ 106 while the Prophet Muhammad (pbuh) is called the “Love of God”. 107

In Islam, all of God’s Prophets are revered and held in the highest esteem. The disrespect of any of them, let alone the greatest of them all, represents not only an affront to the human dignity of those who love and respect them, but also the most vile form of blasphemy.

99 Chapter 68, verse 4.
100 Chapter 33, verse 21.
101 Chapter 68, verse 9.
102 A believer is a Mu'min, as opposed to a Muslim. A believer (Mu'min) is regarded as a Muslim with true faith and thus higher in status than a Muslim.
103 As reported in the authentic hadith compilations of Bukhari and Muslim, two of the most well-known and respected compilers of hadith.
104 Chapter 33, verses 45–46.
105 Arabic for ‘God’.
106 Ruhullah (‘ruh’ means ‘spirit’ or ‘soul’; thus ‘Ruhullah’ means ‘spirit of Allah’).
107 Habibullah (‘habib’ means ‘love’; thus Habibullah thus means ‘love of Allah’).
Concluding remarks

The publication of the cartoons mocking the Prophet Muhammad (p) represents contempt for the fundamental religious beliefs of Muslims and has abused and overstepped the right to freedom of speech by taking it to a dangerous and irresponsible level in its disregard for the sensitivities of the Muslim community. The fundamental individual freedoms enshrined in European Constitutions and in the South African Constitution, must be exercised with responsibility coupled with due care in ensuring that such freedoms do not hurt the feelings of others and do not disrespect the human dignity of others. The media, too, should ensure that their right to freedom of expression does not incite racial or religious hatred.

After all, as stated by Venter, human rights are founded upon human dignity and not the other way around. Venter further states that each of the values emerging from the South African constitutional text can be seen as deriving from human dignity.

It is apt to conclude by reiterating the sentiments expressed in the Canadian Supreme Court case of R v Keegstra. There is an urgent need for a European – or more correctly a Western – commitment to the mutual respect of all religions and to a sincere commitment to multiculturalism. At the core of such commitment must be, not merely a tolerance of difference, but a respect for such difference coupled with a sincere attempt to understand such difference. There is an urgent need, as Abel calls it, to negotiate this respect. In this negotiation the religious scepticism of our times should not be allowed to override the honour and truth of Islam.

Hate speech, hate propaganda and hate promotion in respect of any religion and the vilification of any religion will only serve to exacerbate tensions between different cultural and religious communities. When viewed from a harms-based analysis, Mahoney argues that it is difficult to argue that laws should not be used to protect humanity's basic existence. If it cannot or will not, then it too, is likely on the path of extinction.

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108 See, for example, Delgado n 38 above.
109 See The concept of human dignity above.
110 See n 26 above.
111 See De Waal et al n 8 above.
112 McLachlin J commented, in her dissenting judgment in R v Keegstra, on the need for a contribution to the enhancement and preservation of multiculturalism in Canada.
113 See Abel n 90 above at 22–29.
114 Nor the honour and truth of Christianity, for that matter. It is the author's opinion that the book, and the subsequent film based on it and released in May 2006, the Da Vinci Code (Dan Brown), blasphemes both Christianity and Islam.
115 See n 40 above at 356; see also L McNamara 'Criminalising racial hatred: learning from the Canadian experience' Australian Journal of Human Rights 198. At 209 he argues that the relationship between anti-vilification laws and official policies of multiculturalism needs to be articulated more effectively.