

Opinion

In Fear of Cartoons¹

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☞ Denmark; France; Freedom of expression; Hate speech; Islam; Journalism

Abstract

This opinion examines the European judicial responses to the “Mohammed” cartoons in domestic courts, and the European Court of Human Rights’ guidance on the limits to freedom of expression in the case of inflammatory materials. It concludes by noting the problem of the asymmetry between the strong European protection of free-speech and the arrests of hundreds in France since the Charlie Hebdo massacre, and calls on courts to lead and guide societies back onto a path that guarantees respect for the human rights of all who live in Europe.

Opinion

The January and February shootings in Denmark and France in which cartoonists, journalists, a film maker, police officers and a guard at a synagogue were killed over the depiction of the Prophet Mohammed in cartoons has brought renewed focus on questions of free speech, hate speech and the role of cartoons and cartoonists in political debate.

Cartoons have caused controversy ever since they started appearing in Western European newspapers in the nineteenth century.² Using one or a short series of pictures to comment on or satirise news and current affairs, they often explore the outer boundaries of what society considers to be “good taste”. Exaggeration is a key feature and this means that the harsher the event satirised, the more biting the cartoon tends to be.

For none has this been more true than for the so-called “Mohammed cartoons”, and the fall-out of their publication—in 2005—continues 10 years later.

While there is no excuse for murder, the terrorist attacks in Denmark and France have led to renewed debate about the limits of free speech and, in particular, what constitutes hate speech. Are the Mohammed cartoons racist? Did they offend Islam? Is there a right not to be offended, and where is the line between offence, insult and incitement of hatred?

The right to freedom of expression is not an absolute right. Even in the US, which has the strongest constitutional protection for free speech of any country in the world, there are limits.³ But where is the line to be drawn, particularly as regards offensive speech and incitement to hatred? A closer look at recent

¹ This opinion piece is based on earlier columns by the author on the same topic published by the Centre for Media Pluralism and Media Freedom at the Robert Schuman Centre for Advanced Studies of the European University Institute: P. Noorlander, “When Satire Incites Hatred: Charlie Hebdo and the Freedom of Expression Debate” (January 8, 2015), <http://journalism.cmpf.eui.eu/discussions/when-satire-incites-hatred/> [Accessed March 19, 2015] and a special edition of the Montenegrin Human Rights Action bulletin: P. Noorlander, “When Satire Inspires Hatred” (January 21, 2015), <http://www.hraction.org/wp-content/uploads/Bulletin-XLV-Special-edition-%E2%80%9DWhen-satire-incites-hatred%E2%80%9D-Peter-Noorlander.pdf> [Accessed March 19, 2015].

² English painter William Hogarth is regarded as one of the first to use cartoons as a form of social commentary in the mid-eighteenth century, but it would take some time for cartoons to appear in the media on a regular basis.

³ Examples of forms of speech that do not enjoy First Amendment protection include obscenity, defamation, fraud, incitement and speech integral to criminal conduct—see for a recent discussion *US v Stevens* 559 US 460, 130 S.Ct. 1577 (2010).

French and other European cases as well as decisions from the European Court of Human Rights may help inform this debate.

It should be noted at the outset that both France and Denmark, where the Mohammed cartoons have been published most prominently, have very strict hate speech laws. In Denmark, it is a criminal offence to publically “mock or scorn the religious doctrines or acts of worship of any lawfully existing religious community”.⁴ In France, insulting individuals on the basis of their religion or inciting hatred is a criminal offence, as is inciting or “glorifying” terrorism or holocaust denial.⁵ The French laws are in frequent use. In the immediate aftermath of 9/11, a cartoonist in the Basque country was fined for a satirising the attack on the Twin Towers despite arguing that he intended to criticise US politics.⁶ More recently, comedian-turned-activist Dieudonné M’bala M’bala has had several convictions for anti-Semitism and is currently on trial for a Facebook post in which he wrote, following the march in Paris in support of Charlie Hebdo (in which he participated), “I feel like I am Charlie Coulibaly”. Similar legal action has reportedly been taken against several hundred others in the aftermath of the Charlie Hebdo attacks.⁷

Yet neither in Denmark nor in France were the Mohammed cartoons ever found to fall foul of the law. Does this mean that hate speech laws are used selectively? A closer look at the litigation around the cartoons helps clarify this question.

The Mohammed cartoons in the French and Danish courts

Over the years, Charlie Hebdo—the magazine subject of the January 2015 attack in Paris in which the gunmen called out the names of the cartoonists before shooting them—has been sued nearly 50 times in the French courts, mostly by religious groups. Catholic groups have been the most litigious, followed by Islamic associations and right-wing extremists—all of whom Charlie Hebdo offends with great vigour and enthusiasm. The magazine has won 75 per cent of cases brought against it, including nearly all the hate speech cases; the only cases it has lost have been defamation cases.⁸

The case that best illustrates the hate speech debate is the one that followed Charlie Hebdo’s re-publication in 2006 of the Mohammed cartoons, which had initially been published in a Danish newspaper, *Jyllands-Posten*. A coalition of Islamic groups sued Charlie Hebdo and its editors on the grounds that three of the cartoons in particular insulted their religious beliefs. The first, which appeared on the magazine’s cover, showed the prophet Mohammed crying and saying, “It’s hard being loved by idiots.” The caption read, “Mohammed overwhelmed by fundamentalists.” The second showed the prophet Mohammed apparently guarding the gates of heaven and saying to a line of suicide bombers, “Stop! Stop! We have run out of virgins!” The third showed the prophet Mohammed wearing a turban in which a bomb is concealed with the fuse lit.

⁴ Danish Criminal Code art.140.

⁵ The Loi Gayssot, enacted on July 13, 1990, amended the law on the Freedom of the Press of 1881 by adding the offence of contesting the existence of the category of crimes against humanity as defined in the London Charter of August 8, 1945, on the basis of which Nazi leaders were tried and convicted by the International Military Tribunal at Nuremberg in 1945–46. This law was subject of a petition to the UN Human Rights Committee on the grounds that it was incompatible with the right to freedom of expression. The French government had argued in defence of the law that Holocaust denial was a primary vehicle for hate mongers. In its decision the Committee stated that this might lead to convictions that would be incompatible with the right to freedom of expression but upheld the conviction of the applicant, Robert Faurisson, a Holocaust denier, on the grounds that he had made statements that “were of a nature as to raise or strengthen anti-semitic feelings”: *Robert Faurisson v France* (Comm. No.550/1993), UN Doc. CCPR/C/58/D/550/1993(1996). The European Court itself has held that the Holocaust belongs to a “category of clearly established historical facts ... whose negation or revision would be removed from the protection of Article 10 by Article 17”: *Lehideux and Isorni v France* (2000) 30 E.H.R.R. 665 at [47].

⁶ Tribunal correctionnel de Bayonne, January 8, 2002, upheld on appeal by the Pau Court of Appeals, September 24, 2002. The conviction was upheld by the European Court of Human Rights: *Leroy v France* (App. No.36109/03), judgment of October 2, 2008.

⁷ A. Chrisafis, “French dissenters jailed after crackdown on speech that glorifies terrorism” (January 30, 2015), *The Guardian*, <http://www.theguardian.com/world/2015/jan/30/french-jailed-crackdown-speech-glorifies-terrorism> [Accessed March 19, 2015].

⁸ As reported by *Le Monde*, “Charlie Hebdo, 22 ans de procès en tous genres” (January 8, 2015), *Le Monde*, http://www.lemonde.fr/societe/article/2015/01/08/charlie-hebdo-22-ans-de-proces-en-tous-genres_4551824_3224.html [Accessed March 19, 2015]. See also A. Stille, “Why French Law Treats Dieudonné and Charlie Hebdo Differently” (January 15, 2015), *The New Yorker*, <http://www.newyorker.com/news/news-desk/french-law-treats-dieudonne-charlie-hebdo-differently> [Accessed March 19, 2015].

The Paris “Tribunal de Grande Instance” ruled in 2007 that the cartoons did not incite hatred and therefore did not fall foul of the criminal law.⁹ The Court emphasised the importance of protecting free speech in a democratic society and the need to tolerate the viewpoints of others—including viewpoints that some may find offensive. The Court also noted that the cartoons appeared in a satirical magazine which the public had a choice not to buy—they did not appear on billboards by the side of the road which everyone would see. As for the cartoons themselves, the Court ruled that two of the three were not aimed at all Muslims, but merely satirised violent extremists. This was not hate speech.

However, the Court held that the third cartoon, showing the prophet Mohammed with a bomb in his turban, was much “darker” than the others and could be seen as offensive to all Muslims. The court observed that this cartoon did not stir a laugh or a smile but instead instilled anxiety and fear. The Court rejected the editor’s defence that he had published the cartoon to denounce the apparent appropriation of Islam by violent extremists. Instead, it cited witnesses who had testified that the cartoon was part of “a long tradition of Islamophobia, depicting the prophet as a ‘belligerent and concupiscent’ figure” and that it reduced “a multidimensional character to one aspect”. This meant that, taken in isolation, the cartoon might well overstep the mark: it constituted an actionable “insult” by suggesting “that terrorist violence is inherent in Islam”. However, for the purposes of French criminal law, the context of the publication needs to be taken into account and the Court went on to hold that its re-publication was justified in the setting of the wider international debate around the cartoons. Charlie Hebdo republished them as an act of solidarity as well as to comment on and contribute to this debate. This meant that Charlie Hebdo did not intend to incite hatred and could not be seen as propagating “hate speech”.¹⁰

The decision was upheld on appeal, and the Court of Appeal provides a much stronger defence of the third cartoon. Agreeing with the testimony of Charlie Hebdo’s editor before the court of first instance, the Paris Court of Appeal holds that the third cartoon clearly criticises Islamic extremists and “highlights, in [Charlie Hebdo’s] well-known satirical but reasoned manner, the danger of religious fanaticism, of the appropriation of Islam [for] political purposes and attacks on freedom of expression”. The Court of Appeal disagrees that the cartoons suggest that Islam is a violent religion and it does not see any confusion between Muslims in general and the minority of terrorists who claim Islam to justify their crimes. The Court of Appeal concludes that

“The cartoons ... have by their publication, participated in the public debate on freedom of expression which was undermined by controversy, intimidation and reactions to their dissemination in the Danish newspaper ... The cartoons satirise a minority of extremists within the Islamic religion and not the whole of the Muslim community. They do not constitute an insult or a personal and direct attack against a group of people because of their religious beliefs and do not exceed the permissible limits of the right to freedom of expression.”¹¹

At this point, it is worth recalling why *Jyllands-Posten*, the Danish newspaper, had published the cartoons in the first place. They did so not to provoke hatred or anger. They published the cartoons because of a growing concern around self-censorship on issues of religion and, in particular, Islam. Amongst others, it had been reported that the writer of a children’s book, *The Koran and the Life of the Prophet Muhammad*, had trouble finding an illustrator for it. In response, *Jyllands-Posten* invited members of the Danish Newspaper Illustrators’ Union to “draw Muhammad as they saw him”. In September 2005, *Jyllands-Posten* published these cartoons as part of an article, “Freedom of Expression”, in which they expressed concern that a fear of upsetting Islamic sentiment was restricting free speech, citing a number

⁹ TGI Paris, 17e ch. Corr., March 22, 2007, Case No.2007-327959.

¹⁰ TGI Paris, 17e ch. Corr., March 22, 2007, Case No.2007-327959.

¹¹ Paris Court of Appeals, 11e chamber, Section A, March 12, 2008, Case No.07/02873.

of other examples including a museum that had removed artwork and translators of essays critical of Islam not wanting to be named. The newspaper's culture editor wrote:

“Modern, secular society is rejected by some Muslims. They demand a special position, insisting on special consideration of their own religious feelings. It is incompatible with contemporary democracy and freedom of speech, where one must be ready to put up with insults, mockery and ridicule. It is certainly not always attractive and nice to look at, and it does not mean that religious feelings should be made fun of at any price, but that is of minor importance in the present context. ... we are on our way to a slippery slope where no-one can tell how the self-censorship will end. That is why *Morgenavisen Jyllands-Posten* has invited members of the Danish editorial cartoonists union to draw Muhammad as they see him.”¹²

The publication led to immediate protests. *Jyllands-Posten* was accused of gratuitously offending Islam and in response to a complaint by a coalition of Islamic groups, 11 ambassadors from majority-Muslim countries wrote to the Danish Prime Minister asking for a meeting to discuss what they saw as an “on-going smear campaign in Danish public circles and media against Islam and Muslims”.¹³ They also asked the Prime Minister to “take all those responsible to task under the law of the land in the interest of inter-faith harmony, better integration and Denmark’s overall relations with the Muslim world”.¹⁴ The Prime Minister refused to meet with the ambassadors and wrote that

“freedom of expression has a wide scope and the Danish government has no means of influencing the press. However, Danish legislation prohibits acts or expressions of blasphemous or discriminatory nature. The offended party may bring such acts or expressions to court, and it is for the courts to decide in individual cases.”

This dismissive response—later described as Denmark’s worst international diplomacy incident since the Second World War—provoked further international action, including violent attacks against Danish embassies around the world. It also led to the lodging of a formal complaint against *Jyllands-Posten* under ss.140 and 266b of the Danish Criminal Code, which prohibit hate speech and blasphemy.¹⁵ However, the Danish Director of Public Prosecutions declined to prosecute. His detailed opinion discusses all of the cartoons and concludes that they were not actionable under Danish law.¹⁶ Specifically with regard to the drawing of the prophet Mohammed with a bomb in his turban, which the Paris Court would later describe as “dark” and potentially actionable, the Director of Public Prosecutions concluded that, “the drawing could be understood to mean that violence or bomb attacks have been committed in the name of Islam”. This, he said, would be a contribution to public discussion on terror and an expression of the view that religious fanaticism has led to terrorist acts, which would be a legitimate exercise of the right to freedom of expression. Furthermore, the Director of Public Prosecutions considered that even if the cartoon would be perceived as an insult and affront to Muslims, by suggesting that the prophet Mohammed was a violent person, this still would not be punishable as hate speech. Under s.140, the minimum threshold for

¹² Flemming Rose, “Muhammeds ansigt” (September 30, 2005), *Jyllands-Posten*, http://multimedia.jp.dk/archive/00080/Avisside_Muhammed-te_80003a.pdf [Accessed March 19, 2015]. Please note that clicking on this link will show the editorial along with the 12 cartoons as originally published.

¹³ Letter to His Excellency Anders Fogh Rasmussen, 12 October 2005, as available at <http://www.rogerbuch.dk/jpabrev.pdf> [Accessed March 19, 2015].

¹⁴ See fn.13 above.

¹⁵ Section 140 provides: “Any person who, in public, mocks or scorns the religious doctrines or acts of worship of any lawfully existing religious community in this country shall be liable to imprisonment for any term not exceeding four months.” Section 266b provides: “Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, scorned or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding two years. It shall be considered an aggravating circumstance if the conduct can be characterised as propaganda.”

¹⁶ The prosecutor’s reasoning is translated and included in the European Court of Human Rights’ admissibility decision in *Ben El Mahi v Denmark* (App. No.5853/06), decision of December 11, 2006.

prosecution as a religious “insult” is that the cartoon indicates “contempt” and “debasement”, and this threshold was not met.

Not content with this outcome, the complainants then lodged a private libel action against *Jyllands-Posten*’s editor-in-chief and cultural editor claiming that the cartoons were “offensive and insulting” and that they “attacked the honour of believers because they portrayed the Prophet as war-like and criminal and made a clear link between Muhammad, war and terrorism”. The Aarhus City Court dismissed the complaint, holding that the cartoons were

“not offensive ... even if the text accompanying the pictures could be read as being derogatory and mocking ... Of course it cannot be excluded that the drawings offended some Muslims. But there is no sufficient reason to assume that the cartoons are or were intended to be insulting ... or put forward ideas that could hurt the standing of Muslims in society.”¹⁷

By now, *Jyllands-Posten* accepted they had caused offence to many Muslims and apologised.¹⁸ However, the complainants went on to file a complaint with the European Court of Human Rights—but before discussing this, it may be interesting to look at how other European courts have dealt with the cartoons’ controversy.

Perhaps unsurprisingly, the cartoons have been appropriated by right-wing politicians in various European countries who have used them for campaigning purposes (the politicians probably don’t appreciate the irony that the cartoons themselves satirised the appropriation of Islam for extremist political purposes). This in turn has led to litigation.

In the Netherlands, one of the cartoons featured centrally in the prosecution of a right-wing politician, Geert Wilders. Wilders had published a movie which included the cartoon featuring Mohammed with a bomb in his turban to which he added, at the end of the movie, an explosion. In the movie he strongly criticised radical Islam and he was prosecuted for inciting hatred. He was acquitted on the ground that his criticism was aimed at the religion of Islam and radical Islam in particular, not individual Muslims.¹⁹ In its decision to acquit, the Dutch court relied on the European Court of Human Rights’ decisions in *Féret v Belgium*, which upheld the conviction of a Belgian politician who had handed out leaflets that presented immigrants as criminals;²⁰ and *Erbakan v Turkey*, in which the Court condemned a hate speech conviction for a former prime minister of Turkey who had called for a political line to be drawn on the basis of religion.²¹

In Germany, the cartoons were the subject of litigation in 2012 when a far-right political party, Pro Deutschland, wanted to use them on banners in demonstrations outside mosques. The mosques objected to what they viewed as wanton insult and sought an injunction before the Berlin administrative court. The injunction was refused on the grounds that the cartoons were protected under the right to artistic freedom and that the risk to public order that the mosques had claimed was not made out. The Higher Administrative Court added that the cartoons did not qualify as an insult to religion under art.166 of Germany’s Criminal

¹⁷ Aarhus City Court, October 26, 2006, as reported at “Danish court rejects cartoon suit” (October 26, 2006), *BBC News*, <http://news.bbc.co.uk/1/hi/world/europe/6087506.stm> [Accessed March 19, 2015] (full original ruling not available).

¹⁸ Out of concerns for the safety of its staff, *Jyllands-Posten* chose in January 2015 not to republish the Charlie Hebdo cartoons that had led to the terrorist attack.

¹⁹ Rechtbank Amsterdam, June 23, 2011, Case No.13-425046-09. Wilders was prosecuted for various other statements as well. He was acquitted on all counts.

²⁰ *Féret v Belgium* (App. No.15615/07), judgment of July 16, 2009.

²¹ *Erbakan v Turkey* (App. No.59405/00), judgment of July 6, 2006.

Code,²² holding that this does not include “every disparaging statement, but only those that are particularly hurtful in form and substance”. The cartoons did not qualify as such.²³

In the UK, the cartoons featured in the conviction of an atheist in 2010 for religiously aggravated harassment. The cartoons had been left in a prayer room in Liverpool’s John Lennon airport along with cartoons mocking Christianity. The atheist reportedly objected that there was a prayer room at John Lennon airport at all, given Lennon’s “imagine no religion” line in the song, “Imagine”. He was given a suspended six-month sentence and banned from carrying any anti-religious leaflets in public.²⁴ His previous convictions, including for switching off Christmas music in a supermarket because he found it offensive, will not have helped him and he did not appeal. In 2007, prosecutors refused to initiate proceedings against a Cambridge student who had reprinted one of the Mohammed cartoons in a college magazine. In an attempt at satire, he had placed one of the cartoons next to a photo of the president of the student union but had swapped their names and added that one was a “violent paedophile” while the other was “a prophet of God, a great leader and an example to us all”. There was outrage in the local community and police wanted to prosecute. However, they were advised by the Crown Prosecution Service that they should tell the student to just “grow up”.²⁵

European Court—guiding principles

As the *Erbakan* and *Féret* decisions cited by the Dutch court indicate, European human rights law treats cases such as this with some caution. The European Convention on Human Rights protects the right to freedom of expression as well as the right to freedom of religion and condemns incitement to hatred. Aside from the *Erbakan* and *Féret* cases, which concern alleged hate speech by politicians, the European Court of Human Rights has dealt with several cases involving inflammatory books, cartoons or artwork. In a 1991 case concerning Salman Rushdie’s book, *The Satanic Verses*, a group of Muslims complained that the failure by the UK to ban the book—which they considered to be clearly blasphemous—violated their right to peaceful enjoyment of their religious beliefs. Their application was rejected on the grounds that they could not rely on their own right to freedom of religion to enforce a book ban—freedom of religion did not include a right not to be offended.²⁶ In a later case against Poland involving a picture of Jesus and Mary wearing gas masks, a similar complaint was also rejected. The European Commission on Human Rights held in that case that, “members of a religious community must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith”.²⁷

When the article in question is not seen as having some broader societal value, the Court has been less sympathetic. In 1994, the Court upheld the ban in Austria of a film which presented the Christian god as old, crippled and ineffective; Jesus as a somewhat dim “mummy’s boy” and the Virgin Mary as promiscuous. They are all portrayed as conspiring with the devil and the Austrian authorities had banned the film on the grounds that it insulted Christians. The European Court held that this ban did not violate the right to freedom of expression, because the film-makers had been “gratuitously offensive” and the Austrian authorities had been correct to “prevent that some people should feel the object of attacks on

²² Article 166 states: “Whoever publicly or through dissemination of writings insults the content of others’ religious faith or faith related to a philosophy of life in a manner that is capable of disturbing the public peace, shall be punished with imprisonment for not more than three years or a fine” (translation made available by the Venice Commission, in “Blasphemy, insult and hatred: finding answers in a democratic society”, *Science and Technique of Democracy*, No. 47 (Council of Europe Publishing, 2010), [http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD\(2010\)047-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(2010)047-e) [Accessed March 19, 2015].

²³ Oberverwaltungsgericht Berlin-Brandenburg 1. Senat, Case no.OVG 1 S 117.12, August 17, 2012, <http://www.gerichtsentcheidungen.berlin-brandenburg.de/jportal/?quelle=jlink&docid=MWRE120003306&psml=sammlung.psml&max=true&bs=10> [Accessed March 19, 2015].

²⁴ Case reported only in the media, for example “Atheist given Asbo for leaflets mocking Jesus” (April 24, 2010), *The Independent*, <http://www.independent.co.uk/news/uk/crime/atheist-given-asbo-for-leaflets-mocking-jesus-1952985.html> [Accessed March 19, 2015].

²⁵ As recounted by then-Director of Public Prosecutions, Ken MacDonald, in his lecture “Free Expression and the Rule of Law” (March 5, 2008) http://www.cps.gov.uk/news/articles/free_expression_05_03_08/index.html [Accessed March 19, 2015].

²⁶ *Choudhury v United Kingdom* (App. No.17439/90), decision of March 5, 1991 (Commission).

²⁷ *Dubowska and Skup v Poland* (1997) 24 E.H.R.R. CD 75.

their religious beliefs in an unwarranted and offensive manner”.²⁸ In contrast, in a 2006 ruling the Court held that a conviction for religious insult for a French newspaper article which criticised Catholic church doctrine and pointed out links with the origins of the Holocaust did violate the right to freedom of expression.²⁹ The Court considered that this article had contributed to a debate on the various possible reasons behind the Holocaust, and that this was clearly an issue of public interest.

While the European Court of Human Rights has been building its jurisprudence in a reasonably clear direction, when it had a chance to rule on the Mohammed cartoons case it declined to do so. Following the Danish prosecutor’s refusal to prosecute the authors of the cartoons in *Jyllands-Posten*, two associations of Muslims lodged a complaint with the European Court of Human Rights. They argued that not only had the publication of the cartoons violated their rights to freedom of religion and non-discrimination, under arts 9 and 14, but that the publication also constituted a violation of art.17 of the Convention, which prohibits the abuse of rights to undermine other rights (in this case, the abuse of free speech to undermine freedom of religion). Unfortunately, the Court ducked out of what would have been an excellent and high-profile opportunity to establish case law on jurisdictional grounds (the applicants were Moroccan residents and could not establish a link with Denmark).³⁰

Conclusion

The English atheist’s conviction for religiously aggravated harassment aside, it is clear that courts across Europe have been broadly protective of the cartoons. They have been deemed hurtful but not to the extent that they incite hatred or otherwise fall foul of blasphemy and related criminal laws in Germany, France, Denmark and the Netherlands—even when they have been appropriated by right-wingers for anti-Islamic political causes. This would appear to be in line with the case law of the European Court of Human Rights, which provides a clear guiding principle: the right to freedom of expression means that democratic societies need to be able to discuss current affairs and issues of public interest, and society needs to accept that some among us hold strong opinions. That is what tolerance and pluralism is all about. Inciting hatred against individuals simply on grounds of their religious beliefs oversteps the line; but satirising violent extremists within a religion is part and parcel of democratic society. Satirising a religion as such should also be permissible so long as any insults are not entirely gratuitous. The line is crossed when hatred is incited against individuals on the grounds of their religious beliefs: that constitutes hate speech. This means that cartoonists have every right to satirise Islamic fundamentalism, an issue that has dominated public debate ever since the early 2000s.

Unfortunately, the prosecutions of Dieudonné M’bala M’bala and several hundred others who have been arrested in France since the Charlie Hebdo massacre for indicating sympathy with the terrorists do not seem to be guided by the same principle. Many of those arrested are being charged under anti-terror laws drafted or tightened up in the aftermath of 9/11 which criminalise glorifying, indicating sympathy with or “indirectly encouraging” terrorist acts. Although there is a clear tension between such vaguely defined offences and the right to freedom of expression, the European Court of Human Rights has allowed prosecutions even in tenuous cases. For example, it can be questioned whether the fine imposed on cartoonist Denis Leroy for satirising the 9/11 attack, however unfunny and offensive his cartoon may have seemed at the time, was truly “necessary in a democratic society”. Nevertheless, it was upheld by the European Court of Human Rights which agreed that it had been capable of inciting copycat attacks—although the only evidence in support of this contention was a page full of letters and emails

²⁸ *Otto Preminger Institut v Austria* (1994) 19 E.H.R.R. 34.

²⁹ *Giniewski v France* (2007) 45 E.H.R.R. 23.

³⁰ *Ben el Mahi v Denmark* (App. No. 5853/06), decision of December 11, 2006 (admissibility decision).

published in the magazine's next edition, which would appear to show that the only reaction had been to stir up debate (the desired function of exercising the right to freedom of expression).³¹

Nearly all those arrested following the Charlie Hebdo massacre in France are Muslims and this has led to a strong and not entirely unfair sentiment that they are singled out for sanction while those who mock their religion are free to continue do so. It has been reported that in the three weeks following the attack on Charlie Hebdo, there have been 257 legal cases of people accused of condoning or provoking terrorism. Around 41 of these have been fast-tracked through the courts and 18 people have been given prison sentences.³² A 10-year-old child has been among those brought in for questioning by prosecutors for saying that she agreed with the terrorists.³³ Add to this the one-sided nature of France's Holocaust denial laws (however vulnerable the Jewish community still is) and the ban on wearing full-face veils in public, as questionably upheld by the Grand Chamber of the European Court of Human Rights,³⁴ and the resulting picture is emphatically not one of a society guided by principles of "pluralism", "tolerance" and "broadmindedness", the supposed hallmarks of modern democracy.

The problem is not one of over-protecting cartoons that mock religious extremists as much as an overbearing and one-sided use of the criminal law against one, increasingly cornered and vulnerable, religious community. Europe's top constitutional courts—including but not limited to the European Court of Human Rights—need to take the lead and guide societies back onto a path that guarantees respect for the human rights of all who live in Europe. The law should continue to provide robust protection for freedom of speech and reject selective protection of minorities as well as vaguely drafted anti-terror laws that confer overly broad discretion on prosecutors and courts. Society can and should criminalise and prosecute true instances of hate speech, but it should do so evenly and in keeping with those guiding principles—"pluralism", "tolerance" and "broadmindedness".

As stated by the European Court of Human Rights: "the role of the authorities ... is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other".³⁵

³¹ *Leroy v France* (App. No. 36109/03), judgment of October 2, 2008. I note that the European Court has applied far stricter scrutiny to Turkish applications concerning convictions of journalists for terrorism, but that is a debate for another time.

³² As reported in A. Chrisafis, "French dissenters jailed after crackdown on speech that glorifies terrorism", (January 30, 2015), *The Guardian*, <http://www.theguardian.com/world/2015/jan/30/french-jailed-crackdown-speech-glorifies-terrorism> [Accessed March 19, 2015].

³³ A. Boumazza, "France—Un troisième enfant musulman interrogé par la police pour apologie du terrorisme", (February 3, 2015), *TSA*, <http://www.tsa-algerie.com/2015/02/03/france-un-troisieme-enfant-musulman-interroge-par-la-police-pour-apologie-du-terrorisme/> [Accessed March 19, 2015].

³⁴ *SAS v France* (App. No. 43835/11), judgment of July 1, 2014. The judgment won the "worst judgment of 2014" poll in the influential human rights academics blog, Strasbourg Observers: S. Smet, "The Results Are In: Poll on Best and Worst ECtHR Judgment of 2014" (February 12, 2015) *Strasbourg Observers*, <http://strasbourgobservers.com/2015/02/12/the-results-are-in-poll-on-best-and-worst-ecthr-judgment-of-2014/> [Accessed March 19, 2015].

³⁵ *Serif v Greece* (1999) 31 E.H.R.R. 561, cited by both the majority and—more meaningfully—the dissenters in *SAS v France* (App. No. 43835/11), judgment of July 1 2014, at [127].