

**INVESTGATING THE CONFLICT BETWEEN FREEDOM OF RELIGION AND
FREEDOM OF EXPRESSION UNDER THE SOUTH AFRICAN CONSTITUTION**

**A MINI- THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS
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BY



PREPARED UNDER THE SUPERVISION OF

PROFESSOR PATRICIA LENAGHAN

AT THE FACULTY OF LAW, THE UNIVERSITY OF THE WESTERN CAPE,

CAPE TOWN

SOUTH AFRICA

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Plagiarism Declaration

I, Hishaam Jurgens, hereby declare that this dissertation is my original work and has not been submitted to any other institution. Whenever other sources have been used, they have been duly acknowledged.

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Key Words

Religious dignity

Freedom of religion

Freedom of expression

Conflict of rights

International human rights law

Sharia law

Salman Rushdie

Mohammed cartoons

Limitation clause

Hierarchy of rights



Dedication

To my wife Zayaan Jurgens, my parents Farieda Jurgens and Dawood Jurgens and my aunts Abida Alexander and Fowzia Alexander who sacrificed a lot to get me here. God bless you.



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Chapter One

1.1 Introduction

On 30 September 2005 a Danish newspaper called *Jyllands-Posten* published an article called the 'Face of Muhammad'. This article was about self-censorship and the fear of Muslim backlash. It contained 12 cartoons depicting the Prophet Muhammad.¹ The 12 cartoons, published by *Jyllands-Posten*, caused a worldwide uproar and pitted supporters of freedom of expression and freedom of religion against each other.² One of these cartoons showed the Prophet wearing a headdress shaped like a bomb and inscribed on the headdress was the *kalimah* (the words where one declares his/her intention to become a Muslim), another cartoon indicated the Prophet saying that paradise is running short of virgins for suicide bombers.³ Muslims the world over were outraged at these cartoons as insulting the Prophet is against the religion of Islam.⁴ This culminated in riots, violent protests, kidnapping and death threats as well as boycotts of Danish products and diplomatic arguments.⁵ Journalist and newspaper publishers were claiming protection under their right to freedom of expression.⁶

The first newspaper to publish the cartoons in South Africa was the *Mail & Guardian* in its edition dated 3 February to 9 February 2006.⁷ On Friday 3 February 2006 *Jamiat-UI-Ulama*, voluntary Muslim association in Transvaal, discovered that the Sunday Times were going to publish the Muhammad cartoons. The first thing they did was try to get an undertaking by the Sunday Times that it would not publish the cartoons and when this failed they sought an urgent interim order in the Johannesburg High Court to prohibit the publishers and printers of the newspaper

¹Holland G 'Drawing the Line: Balancing Religious Vilification Laws and Freedom of Speech' (2006) 8 *University of Technology, Sydney. Law Review* 9-10.

²Modood T, Hansen R, Bleich E, O'Leary B & Carens J 'The Danish Cartoon Affair: Free Speech, Racism, Islamism, and Integration' (2006) 44 *The Author Journal Compilation* 1-62.

³Holland G (2006) 9-10. See also Cobb K 'The Muhammad Cartoons' (2006) *The Author Journal Compilation* 1.

⁴Goolam N 'The Cartoon Controversy: A Note on Freedom of Expression, Hate speech and Blasphemy' 2006 *Comparative and International Law Journal of Southern Africa* 343.

⁵Asmal F *Islamophobia and The Media: The Portrayal of Islam since 9/11 and an Analysis of the Danish Cartoon Controversy in South Africa* (unpublished LLM thesis, Stellenbosch University, 2008) 47.

⁶Hashmi SZ 'Danish Cartoons: Islam vs. Freedom of Expression' available at www.desipad.com (accessed 19 October 2009).

⁷Pillay K 'The Cartoon Wars: Free Speech or Hate Speech?' (2010) 127 *South African Law Journal* 465.

from publishing and distributing the cartoons.⁸ An urgent rule *nisi* was granted by the court which prohibited the publication of the cartoons.⁹

Seven years have passed since the Danish cartoons were first published however the tension between supporters of freedom of religion and freedom of expression is still ongoing. In September 2012 a short trailer for a supposed anti-Muslim film called 'Innocence of Muslims' was posted on YouTube. This 14 minute clip depicts the Prophet Muhammad as a sex-crazed child molester and murderer and once again anger and outrage at this clip was expressed by Muslims in a string of riots.¹⁰

This mini-thesis is based on the presumption that the Danish cartoons and the anti-Muslim clip posted on YouTube as forms of expression, ridiculed the religious beliefs and practices of Muslims which in turn affected the exercise of religious freedom as it violated the dignity of the bearers of the right to freedom of religion and therefore a conflict between the right to freedom of religion and freedom of expression exists.¹¹ The above incidence of conflict between the right to freedom of religion and freedom of expression involves infringing the freedom of religion of the Islamic community.¹² Blasphemy in Islam is speech that is insulting to God, but during the course of Muslim history it has become increasingly linked with insult to the Prophet Muhammad.¹³ In Islam the depiction of the Prophet Muhammad in any way is strictly forbidden and is considered blasphemous.¹⁴

In South Africa the right to freedom of religion and expression are rights entrenched in a Bill of Rights. They are constitutional permissions that determine a constitutional status, its scope

⁸Pillay K (2010) 466.

⁹ *JamiatUl-Ulama of Transvaal v Johncom Media Investment Ltd and Others* (1127/06) [2006] ZAGPHC 12 (3 February 2006). See Malherbe R 'The Mohammed cartoon, freedom of expression and the infringement of the right to religious dignity' (2007) 2 *Tydskrif Vir Die Suid-Afrikaanse Reg* 336.

¹⁰Basseley N 'The Innocence of Muslim Riots' available at http://topics.nytimes.com/top/reference/timestopics/subjects/i/innocence_of_muslims_riots/index.html (accessed 12 September 2012). See also Wise L 'Bizarre YouTube clip Innocence of Muslim infuriated faithful' available at <http://www.mcclatchydc.com/2012/09/13/168434/bizarre-youtube-clip-innocence.html> (accessed 12 September 2012).

¹¹Van Der Schyff G *The Right to Freedom of Religion in South Africa* (unpublished LLM thesis, Rand Afrikaans University, 2001) 110. See also Malherbe R (2007) 333.

¹²Modood T, Hansen R, Bleich E, O'Leary B & Carens J (2006) 1-62.

¹³Ishāq I, Şahîh B 'Blasphemy in Islam' available at <http://quranandinjil.org/pdfs/Blasphemy-in-Islam.pdf> (accessed 17 May 2012).

¹⁴Landscheidt D 'The Conflict Between Western World and Islam' available at <http://www.landscheidt.com/The%20Islam.pdf> (accessed 20 May 2012).

coincides with an individual sphere of inviolability and its function is to distribute freedom and power.¹⁵ The right to human dignity is closely related to freedom of religion.¹⁶ Under the South African Constitution, dignity is a core value and as a core value it guides courts in determining the purpose and scope of other rights contained in the Constitution such as freedom of religion.¹⁷ The right to religious dignity is a right which incorporates the right to freedom of religion and dignity and guarantees complete and total respect and dignity to the bearers of these rights.¹⁸ Bearers of the right to religious dignity enjoy the right to advance and cherish their religious beliefs while demanding respect from parties bound by this right.¹⁹

In order for there to be a conflict between rights, one norm must make it permissible to do X and the other norm must deny the permission to do X. This means the actions allowed by both rights are not jointly performable.²⁰ Conflicts between human rights involves a deadlock as the Constitution confers rights on both parties who have equal status and whose rights are simultaneously enforceable; the only way to solve the conflict is by sacrificing one of the rights.²¹

If the right to freedom of expression and religion conflict under the South African Constitution, the conflict is resolved by balancing these rights in terms of the Section 36 proportionality test.²² A hierarchy of rights in the South African Constitution has constantly been rejected, meaning that one right is not more important than the other and will not automatically undermine another if they conflict.²³ It is argued that balancing is not the best approach to dealing with a conflict of rights as it allows for limiting the value of basic liberties on the grounds of public interest, which are not recognised as human rights and because of this balancing, fails to respect the priority of

¹⁵The Bill of Rights is the cornerstone of democracy in South Africa it enshrines the right of all people in our country and affirms the democratic values of human dignity equality and freedom. See Constitution of the Republic of South Africa, 1996, section 7 and Zucca L *Constitutional Dilemmas: Conflict of Fundamental Legal Rights in Europe and the USA* (2007) 48.

¹⁶*Prince v President, Cape Law Society* (2002) 2 SA 794 (CC).

¹⁷Cheadle MH, Davis DM & Haysom NRL *South African Constitutional Law: The Bill of Rights* (2002) 133.

¹⁸ Van Der Schyff G *The Right to Freedom of Religion in South Africa* (unpublished LLM thesis, Rand Afrikaans University, 2001) 110.

¹⁹ Van Der Schyff G *The Right to Freedom of Religion in South Africa* (unpublished LLM thesis, Rand Afrikaans University, 2001) 109-110.

²⁰Zucca L (2007) 50.

²¹Zucca L (2007) 3.

²²Constitution of the Republic of South Africa, 1996, section 36.

²³Iles K 'A Fresh Look at Limitations: Unpacking Section 36' (2007) 23 *South African Journal on Human Rights* 79.

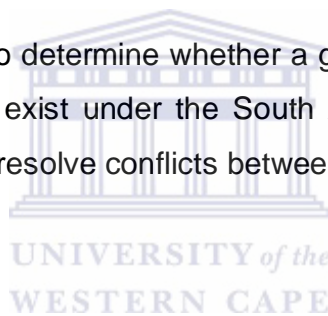
human rights.²⁴

1.2 Statement of the problem

The primary investigation of this mini-thesis is to determine if ridiculing a religious belief which infringes on a person's right to religious dignity causes a conflict between the application of the right to freedom of expression and the application of the right to freedom of religion under the South African Constitution. If such a conflict exists, then the secondary investigation is to establish an appropriate manner in which this conflict may be addressed.

1.3 Aims of the research

The objective of this mini-thesis is to determine whether a genuine conflict between freedom of religion and freedom of expression exist under the South African Constitution and to provide suggestions which could be used to resolve conflicts between rights in order for both rights to be recognized and honoured.



1.4 Significance of the study

Solving the problem of conflicting rights could influence the scope of the right and the level of protection given to citizens will also be affected. The issue of conflicting rights is vital as it stands at the crossroad of different enquiries related to theories of rights. Understanding how to deal with a conflict of rights allows us to look more deeply into the basic problem we face collectively, and to measure the strengths and weaknesses of the rights' discourse within our constitutional democracy²⁵. The tension that underlies a conflict of rights cannot be dispelled altogether but it can be better accepted if it is explained and justified. In the post 9/11 age, increased tension between freedom of religion and expression have arisen; this paper will

²⁴Zucca L(2007) 90.

²⁵Zucca L(2007) x.

contribute to the debate on this topic.²⁶

1.5 Methodology

A qualitative research methodology will be employed for this study. An analytical and prescriptive approach will be used. Reference will be made to legislation and case law relevant to the topic. Academic writings and scholarly articles will be consulted.

1.6 Chapter overview

This mini-thesis will have five chapters:

Chapter two discusses incidents where the right to freedom of religion and freedom of expression have come into conflict with each other and theories on solving conflict of rights in order to establish how to deal with a conflict of rights. This chapter commences the discussion by providing the historical and philosophical context of the right to freedom of religion and freedom of expression. It then discusses the Salman Rushdie Affair and the Danish cartoon controversy as incidents of conflict between the right to freedom of religion and the right to freedom of expression in order to determine how these incidents dealt with the conflict. It finally discusses Habermas' Theory on solving conflicts and Konrad Hesse's notion on *Praktische Konkordanz* in order to determine how to address a conflict of rights.

Chapter three determines whether a conflict between the right to freedom of religion and freedom of expression exists under international human rights law. It discusses the scope of freedom of religion and freedom of expression under the International Covenant of Civil and Political Rights (ICCPR) in order to determine whether a conflict exists under International law. Cases decided by the European Court of Justice (ECtHR), which have dealt with the conflict between freedom of religion and freedom of expression, will be discussed in order to determine the regional regulation of these rights and how the mechanisms which ensure compliance of

²⁶Kierulf A & Rønning H *Freedom of Speech Abridged? Cultural, Legal and Philosophical Challenges* (2009) 102. For further reading see Asmal F *Islamophobia and the Media: The Portrayal of Islam since 9/11 and an Analysis of the Danish Cartoon Controversy in South Africa* (unpublished LLM thesis, Stellenbosch University, 2008) 30- 46.

these rights under the European Convention on Human Rights (ECHR) dealt with the conflict between freedom of religion and freedom of expression.

Chapter four determines firstly whether a conflict between the right to freedom of religion and freedom of expression exists under the South African constitution and secondly whether our courts' approach in the case of *Jamiat-UI-Ulama of Transvaal v Johncom Media Investment Ltd and Others* was the correct approach when dealing with a conflict between rights. It examines the scope of freedom of religion and freedom of expression under the South African Constitution. South Africa's approach to dealing with a conflict of rights is then discussed followed by an analysis of this case *Jamiat-UI-Ulama v Johncom Media Investment Ltd and Others*.

The last chapter concludes the discussion and provides a few recommendations.



Chapter Two

Incidents where the right to freedom of religion and freedom of expression have come into conflict with each other

2.1 Introduction

No religion can be permitted to legislate for everyone about what can or cannot be drawn anymore than it can legislate about what may or may not be eaten. No one's religious convictions can be thought to trump the freedom that makes democracy possible.²⁷

The above quotation is Ronald Dworkin's conclusion on the Danish cartoon controversy and the right to ridicule religious beliefs. The publication of the Danish cartoons, which ridiculed the Islamic Prophet Muhammad, was a tragedy as indicated in section 1.1. of chapter one. More than one hundred people died during the ensuing protest and riots and it is presumed by this mini-thesis that the cause of this violence resulted out of the conflict between the right to freedom of religion and freedom of expression. Many arguments stemmed from the publication of the cartoons which were either in favour of the publication or against the publication. According to Daglier and Schnieder, there are two opposing arguments resulting from the publication of the Danish cartoons; firstly that the Danish cartoons were published in order to emphasize the sacrosanct value of freedom of expression and the threat posed to it by religious zealotry, and secondly that the Danish cartoons were intended to mock and insult the religious beliefs of Muslims thereby abusing the right to freedom of expression and infringing a Muslim's right to freedom of religion.²⁸

The former argument by Daglier and Schnieder is in favour of protecting freedom of

²⁷Dworkin R 'Ronald Dworkin On the Right to Ridicule' available at <http://www.cs.utexas.edu/~vl/notes/dworkin.html> (accessed 1 November 2011).

²⁸Daglier U & Schneider TE 'The Freedom of Expression in Global Perspective' (2008) 45 *Society* 212.

expression and it is submitted by this mini-thesis that the essence of this argument is that freedom of expression is a condition of a legitimate government and in order for a law to be valid it has to be adopted through a democratic process; and if a government has prevented anybody from expressing their convictions of the law the process would not be democratic.²⁹ Freedom of expression is therefore essential in a democratic society and in a democracy nobody can have a right not to be insulted or offended.³⁰

It is further submitted by this mini-thesis that the latter argument is in favour of limiting freedom of expression in order to protect freedom of religion. According to Modood, as a result of the cartoons Muslims felt a sense of anger due to the fact that they were not respected and that their most cherished feelings and dignity were fair game.³¹ Mir argued that to Muslims, the Danish cartoons mocked and insulted the religion of Islam; the purpose was neither education nor discussion but rather an outlet of prejudice and hatred and an infringement of a Muslim's right to freedom of religion.³² Goolam states that the publishing of the cartoons created a double standard between Islam and Christianity, and it exists because the same newspaper that printed the Danish cartoons refused to publish cartoons ridiculing Jesus for fear that it might offend some Christians.³³

Ridicule is a type of expression its substance cannot be repackaged in a less offensive rhetorical form without expressing something very different from what was intended'.³⁴ Freedom of expression protects the freedom to ridicule because sometimes it is necessary to use a little humour to prick the skin of sanctimonious piety which often

²⁹Dworkin R 'Ronald Dworkin on the Right to Ridicule' available at <http://www.cs.utexas.edu/~vl/notes/dworkin.html> (accessed 1 November 2011).

³⁰Dworkin R 'Ronald Dworkin on the right to ridicule' available at <http://www.cs.utexas.edu/~vl/notes/dworkin.html> (accessed 1 November 2011).

³¹Modood T, Hansen R, Bleich E, O'Leary B & Carens J (2006) 4.

³²Mir AM 'Holy Prophet, Freedom of Speech and Cartoon Controversy' available at <http://www.alislam.org/holyprophet/Holy-Prophet-Freedom-of-Speech-and-Cartoon-Controversy-20080321MN.pdf> (accessed 22 November 2011).

³³Goolam N (2006) 346.

³⁴Dworkin R 'Ronald Dworkin on the Right to Ridicule' available at <http://www.cs.utexas.edu/~vl/notes/dworkin.html> (accessed 1 November 2011).

surrounds religious teachings.³⁵ Offending expressions are not always an attack, criticism or comment that is purposeful and negative on the beliefs or faith at issue. Sometimes it's simply a case of treating religious subjects in ways that others find improper or inappropriate.³⁶ This mini-thesis submits that humour and ridicule is not the same thing but humour is used to ridicule, for example the Danish cartoons uses humour to ridicule the religious beliefs of Muslims, and as a result of this ridicule, as indicated in section 1.1 of chapter one, a conflict between freedom of religion and freedom of expression is created.

According to Jones, freedom of expression on religious matters relates to two types of freedoms, firstly the freedom to express a belief or faith and secondly the freedom to express a view about a religion or a faith, such as a view that challenges, criticizes or ridicules it.³⁷ The debate surrounding freedom of expression on religious matters focuses on insult and hatred; on the one side there are arguments in favour of protecting the right to freedom of expression at the expense of protecting a person's religious beliefs and feelings from insult and ridicule, and on the other side there are arguments that freedom of expression should be limited in order to protect a person's religious beliefs and feelings from ridicule and insult.³⁸

The purpose of this chapter is to discuss incidents where the right to freedom of religion and freedom of expression have come into conflict with each other as well as theories on the conflict of human rights in order to establish how a conflict of human rights should be dealt with. The incidence of conflict which this chapter will discuss is the Salman Rushdie Affair and the Danish Cartoon controversy.³⁹ These two incidences of conflict relate to the religion of Islam. This chapter will therefore be discussing the religion of Islam in order to understand why the indignity felt by adherents to the Islamic religion was so immense and more acutely perceived than other religions.

³⁵Singer P 'The Freedom to Ridicule Religion and Deny the Holocaust' available at http://www.secularhumanism.org/index.php?section=library&page=psinger_26_4 (accessed on 22 November 2011).

³⁶Jones P 'Introduction: Religion and Freedom of Expression' (2011) 17 *Res Publica* 1-4.

³⁷Jones P (2011) 1-4.

³⁸Jones P (2011) 1-4.

³⁹These incidents have been chosen because they are most relevant to the conflict between freedom of religion and expression see Joffé G 'Religion and Rationality' available at <http://www.iemed.org/anuari/2007/aarticles/aJoffe.pdf> (accessed 12 December 2012).

Finally, Habermas' Theory on solving conflicts and Konrad Hesse's notion on *Praktische Konkordanz* will be discussed in this chapter.⁴⁰ The historical and philosophical aspects of the right to freedom of religion and freedom of expression will firstly be discussed in order to lay the foundation of these rights.

2.2 The historical and philosophical context of the right to freedom of religion and freedom of expression

2.2.1 Freedom of religion

The meaning of the word 'religion' is to bind fast, which comes from the Western Latin word *religare*.⁴¹ A religion is a set of beliefs which are intensely personal to a person. Acts of worship and demonstrations in a religion and are usually manifested in communities with others.⁴²

Following World War Two (WW2) the right to freedom of religion became one of the most important rights known to humanity; it formed part of the core of most conceptions of human rights. The international community viewed the right to religious liberty as a privilege that is so foundational and precious that it should be guaranteed by international law.⁴³ International law developed detailed provisions on the right to freedom of religion taking a two-pronged approach to the question of religious rights, namely the freedom to manifest religious beliefs and the freedom from religious bases discrimination.⁴⁴

Historically if you have practiced your religion you were granted protection if you did not

⁴⁰Crane RD 'The Essence of Islamic law' available at <http://www.islamicity.com/politics/shariah.htm> (accessed 23 November 2011).

⁴¹ Roan M 'Study Guide: Freedom of Religion or Belief' available at <http://www1.umn.edu/humanrts/edumat/studyguides/religion.html> (accessed 25 November 2011).

⁴²The Human Right Committee has described religion or belief as theistic, non theistic, atheistic as well as the right not to profess any religion or belief see Smith KM, Dr Rhona & McIntosh C 'Freedom of Religion: The Evolution of a Human Rights' available at <http://www.derechos.org/koaga/i/smithr.html> (accessed on 25 November 2011).

⁴³Smith KM, Dr Rhona & McIntosh C 'Freedom of Religion: The Evolution of Human Rights' available at <http://www.derechos.org/koaga/i/smithr.html> (accessed on 25 November 2011).

⁴⁴The international regulation of freedom of religion after WW2 will be discussed in more detail in section 3.2.1 of chapter 3. See Smith KM Dr, Rhona & McIntosh C 'Freedom of Religion: The Evolution of Human Rights' available at <http://www.derechos.org/koaga/i/smithr.html> (accessed on 25 November 2011).

pose a threat to the state. For example in Rome you were allowed to practice your religious beliefs if it did not infringe the rules of the Roman Empire.⁴⁵ One of the earliest documents to protect religious freedom was the treaty between King France 1 of France and Sultan Suleiman 1 of the Ottoman Empire in 1536 to ensure French merchants who lived in the Ottoman Empire would have religious freedom.⁴⁶ In order to stop a 30 year war between the Catholics and Protestants the treaty of Westphalia stated the following:

Those of the Confession of Augsburg, and particularly the Inhabitants of Oppenheim, shall be put in possession again of their Churches, and Ecclesiastical Estates, as they were in the Year 1624. As also that all others of the said Confession of Augsburg, who shall demand it, shall have the free Exercise of their Religion, as well in public Churches at the appointed Hours, as in private in their own Houses, or in others chosen for this purpose by their Ministers, or by those of their Neighbours, preaching the Word of God.⁴⁷

The First Amendment of the United States of America was established in 1791 and stated that 'congress shall make no law respecting an establishment of religion or prohibiting the exercise thereof'.⁴⁸ This amendment has two parts: (1) the establishment clause which prevents congress from creating a religion and (2) the free exercise clause which prevents government from prohibiting, regulating or rewarding religious beliefs. This amendment came about as a result of the civil fighting and the persecution by established sects for the purpose of maintaining their political and religious supremacy during the colonial era.⁴⁹

In 1789 the Declaration of the Rights of Man and of the Citizen was adopted by the National Assembly of France. Article 10 of this declaration states that 'No man is to be interfered with because of his opinions not even because of his religious opinions,

⁴⁵Smith KM, Dr Rhona & McIntosh C 'Freedom of Religion: The Evolution of Human Rights' available at <http://www.derechos.org/koaga/i/smithr.html> (accessed on 25 November 2011).

⁴⁶Vanderschryff G 'The Historical Development of the Right to Freedom of Religion' 2004 *Tydskrif Vir Die Suid-Afrikaanse Reg* 270.

⁴⁷The Treaty of Westphalia, 1648, article XXVIII.

⁴⁸The Constitution of the United States, 1787, First Amendment.

⁴⁹Okenu B P *The Right to Freedom of Religion vis a vis Religious Intolerance in the New Millennium* (LLM thesis, University of Georgia 2002) 3.

provided his avowal of them does not disturb public order as established by law'.⁵⁰

Religious minorities are historically the groups which are in need of protection. The treaty of Berlin 1878 protected the religious minority; it placed obligations on the Government of the Balkans to respect the religious liberties of their populations.⁵¹ After World War One (WW1) the League of Nations oversaw the establishment of minority guarantee clauses which were placed in all the peace treaties signed after the WW1.⁵² Following WW2 the United Nations Organization was established in 1945 together with its charter which states that its aim was to 'Promote and encourage respect for human rights and for fundamental freedom for all without distinction as to race, sex, language and religion'.⁵³

In 1948 the Universal Declaration of Human Rights (UDHR) set the standard for the recognition of the right to freedom of religion, since then UDHR international and regional recognition of the right to freedom of religion has flourished.⁵⁴

Through its teachings, religions and beliefs have influenced the development of international law for example, all religions teach that you should treat others as you would like to be treated; this teaching of reciprocity has shaped humanitarian legal doctrine.⁵⁵ Religions and beliefs have also been the cause of many conflicts and wars; most wars and conflicts have religious implications.⁵⁶ Religion has been a great determinant of human existence. It presupposes life itself, promises eternity, absolute truth and providence, which brings hope and consolation to many people. Enlightenment, reason and science has not affected religion or its practice.⁵⁷

⁵⁰The Declaration of the Rights of Man and of the Citizen, 1789, article 10.

⁵¹Smith KM, Dr Rhona & McIntosh C 'Freedom of Religion: The Evolution of Human Rights' available at <http://www.derechos.org/koaga/i/smithr.html> (accessed on 25 November 2011).

⁵²K M Smith, Dr Rhona & McIntosh C 'Freedom of Religion: The Evolution of Human Rights' available at <http://www.derechos.org/koaga/i/smithr.html> (accessed on 25 November 2011).

⁵³Vanderschiff G (2004) 259.

⁵⁴Vanderschiff G (2004) 271.

⁵⁵Bahiyih GT *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (1996) 10.

⁵⁶Bahiyih GT (1996) 10.

⁵⁷Okenu B P *The Right to Freedom of Religion vis a vis Religious Intolerance in the New Millennium* (unpublished LLM thesis, University of Georgia 2002) 1. See also Rehman J 'Accommodating Religious Identities in an Islamic State: International Law, Freedom of Religion and the Rights of Religious Minorities' 2000 *International Journal on Minority and Group Rights* 139.

Freedom of religion has also been confronted with an entirely new range of demands following the collapse of the former Soviet Union and the aftermath of the 11 September attacks as well as the Danish cartoons.⁵⁸ These new demands could not have been anticipated by the drafters of the core freedom of religion articles. Demands such as religious hatred against Muslims (e.g. xenophobia, intolerance and discrimination), the call to control mass media in order to prevent incitement to violence and intolerance towards Muslims, and the demand to limit ridiculing and defamation of religions because it affects a person's religious dignity have tested the text of the core and subsequent provisions to freedom of religion.⁵⁹

2.2.2 Freedom of expression

Freedom of expression is a first generation human right.⁶⁰ The concept of an individual's right to freedom of expression goes back to the writings of Plato and Euripides.⁶¹ The birth of the right is a result of the sixteenth century reformation where Protestants protested and reclaimed the right to dissidence.⁶² The first document to state that individuals possessed a right to freedom of expression was the French Declaration of the Rights of Man and the Citizen.⁶³ Freedom of expression was accepted as an individual's right in countries around the world following the United States of America's protection of the right in the first amendment of its Constitution in 1791.⁶⁴ Following WW2, freedom of expression was included in the lists of human rights; international and regional instruments included freedom of expression as one of

⁵⁸Taylor PM *Freedom of Religion: UN and European Human Rights Law and Practice* (2005) 1. See also Cerone J 'Inappropriate Renderings: The Danger of Reductionist Resolutions' (2008) 33 *Brooklyn Journal of International Law* 357.

⁵⁹Taylor PM (2005) 3.

⁶⁰Jorgensen RF 'The Right to Express Oneself and to Seek Information' 2006 *Human Rights in the Global Information Society* 54.

⁶¹Magnuson W 'The Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection Under International Law' 2010 *The Vanderbilt University Law School Vanderbilt Journal of Transnational Law* 8.

⁶²Zoller E 'An Ocean Apart? Freedom of Expression in Europe and the United States: Forward: Freedom of Expression: Precious Right in Europe, Sacred Right in the United States?' 2009 *Trustees of Indiana University Indiana Law Journal* 803.

⁶³Magnuson W (2010) 277.

⁶⁴Magnuson W (2010) 277.

an individual's basic human rights.⁶⁵

Freedom of expression is viewed and implemented differently in different countries and even though these differences exist, documents on an international level such as the International Covenant on Civil and Political Rights (ICCPR) - and on a regional level - the European Convention of Human Rights (ECHR) and the American Convention on Human Rights (ACHR) have established a floor-level protection for freedom of expression.⁶⁶ The basic understanding of the right is that individuals are guaranteed the right to seek and receive information and ideas as well as the right to impart or express information or ideas through media of their choice.⁶⁷ The right to freedom of expression is a multifaceted right however it is tempered by permissible restrictions to protect national security, individual privacy and reputation, the impartiality of courts and the like.⁶⁸ The above definition of freedom of expression will be used in this chapter because it represents the core agreement on a floor-level protection for freedom of expression.

The right to freedom of expression is an important right in our society. Without it we would not be able to achieve firstly democracy, as freedom of expression is an essential foundation for development of a democratic society which requires 'pluralism of ideas and concepts about the world and life, about social organisations and about the relationship between members of society'.⁶⁹ Secondly we would not be able to achieve personal autonomy; we are social beings and as such we need to receive ideas and information and to express, in any form, our own ideas and concepts in order to progress and develop.⁷⁰

The positive aspects freedom of expression brings to our society are tremendous; we can, with peace of mind and the confidence that the government will not interfere, speak

⁶⁵The international regulation of freedom of expression after WW2 will be discussed in more detail in section 3.2.1 of chapter 3. See Magnuson W (2010) 277.

⁶⁶Wimmer K 'Toward a World Rule of Law: Freedom of Expression' (2006) 603 *Annals of the American Academy of Political and Social Science* 202-216.

⁶⁷Commonwealth Secretariat *Freedom of Expression, Assembly and Association: Best Practice* (2002) 9-10.

⁶⁸Commonwealth Secretariat (2002) 9-10. See also Wimmer K (2006) 202-216.

⁶⁹Licuta V 'Right to Freedom of Expression and Its Regulation in National and International Legislation' 2009 *Acta Universitatis Danubius Juridica* 103.

⁷⁰Jorgensen RF (2006) *Society* 53-54.

our mind, defend our opinions and communicate our ideas even though it may shock and disturb. It represents the rise of the individual and our ability to act, think and break the shackles of a paternalistic society.⁷¹

The term freedom of expression is used in this mini-thesis rather than the United States of America's term of 'freedom of speech' a clarification of terms will now be addressed.

Freedom of speech is cherished by Americans and protected in the First Amendment to the United States Constitution.⁷² The First Amendment does not contain the term 'freedom of expression', instead it contains the terms 'freedom of speech' and 'freedom of the press'.⁷³ Freedom of speech and freedom of the press are joined in American culture and in practice the court does not make a distinction between the two terms. When the First Amendment was adopted these terms meant immunity from remarks made in congress and a prohibition of censorship.⁷⁴ The term 'freedom of expression' entered the American courts' jurisprudence in the year 1941 for the purpose of limiting the effects of the common law rule of contempt of court which prohibited all commentary on trials in process.⁷⁵ Today the term 'freedom of speech' has been given a broad construction by the American Supreme Court which includes the protection of freedom of expression.⁷⁶ Even though the term 'freedom of expression' is used in the American Supreme Court opinions, the court prefers the term 'freedom of speech', perhaps because it is the exact language of the constitution.⁷⁷

The term 'freedom of expression' can be attributed to John Stuart who wrote an essay on liberty which showed that freedom of expression of opinion helped the well being of humanity.⁷⁸ According to Van der Westhuizen, 'freedom of expression includes utterances with some intelligible content intended to inform, ask or persuade'; it also

⁷¹Zoller E (2009) 803.

⁷²The Constitution of the United States, 1787, first amendment states the following '**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**'.

⁷³Seleoane M 'Freedom of Expression: A Comparative Analysis' 2002 *Ecquid Novi* 236.

⁷⁴Zoller E (2009) 803.

⁷⁵Zoller E (2009) 803.

⁷⁶Seleoane M (2002) 236.

⁷⁷Zoller E (2009) 803.

⁷⁸Zoller E (2009) 803.

includes 'appeals to the emotion or the senses through sound, colour etc.'⁷⁹ This mini-thesis submits that freedom of expression includes speech.

Based on the above examinations of the terms, it is submitted that the term 'freedom of expression' protects speech and the term 'freedom of speech' is given a broad construction which includes the protection of expression, therefore both terms are treated equally and it makes little difference which term we use.⁸⁰

Two decades ago freedom of expression was gaining ground around the world. The Soviet empire was falling apart, there was a worldwide awareness of how important the struggle for freedom of expression was and pro democracy movements that challenged authoritarian regime were gaining ground.⁸¹ However, since the *fatwa* pronounced against Salman Rushdie, the 11 September attack, war on terror and the Danish Cartoon controversy, the freedom of expression movement finds itself in uncertain times.⁸²

2.3 Blasphemy and Islam



The histories of these rights indicate limitations on these rights were imposed in order to protect an official or preferred point of view in order for the dominant voice or teaching to take preference.⁸³ These rights have not been tension-free; in fact an open clash between freedom of religion and freedom of expression is the prohibition of blasphemy, which is still an offence in many European democracies.⁸⁴ A discussion on blasphemy and blasphemy in Islam is necessary in order to understand why most of the conflict between freedom of religion and freedom of expression stem from the religion of Islam.

2.3.1 Blasphemy

⁷⁹Oosthuizen IJ & Russo C J 'A Constitutionalised Perspective on Freedom of Artistic Expression' (2001) 21 *South African Journal of Education* 260.

⁸⁰Seleoane M (2002) 236.

⁸¹Kierulf A and Roning H (2009) 9.

⁸²Kierulf A and Roning H (2009) 9,139.

⁸³Refer to section 2.1.2 and 2.1.3 of chapter 2.

⁸⁴Uitz R 'Constitutional Democracy Trapped Between Freedom of Expression and Freedom of Religion: A Preface in Censorial Sensitivities: Free Speech and Freedom of Religion in a Fundamentalist World' 2007 *András Sajó* 1-2.

According to Milton, blasphemy is, in its (non legal) essence, the 'speaking evil of divine things'. The legal definition of blasphemy, according to Skeen, is 'blasphemy consists in the unlawful and intentional publication of words or conduct whereby God is slandered'.⁸⁵

The United Kingdom (UK) common law offence of blasphemy was officially abolished in May 2008.⁸⁶ In January 2008 a spokesman for the Prime Minister - at the time Gordon Brown - stated that the abolition of blasphemy laws was being considered during the passage of the Criminal Justice and Immigration Bill. Before making its decision the Government consulted with the Church of England and other churches and on the 8 May 2008 the Criminal Justice and Immigration Act 2008 ended the common law offences of blasphemy and blasphemous libel in England and Wales with effect from 8 July 2008.⁸⁷

Until 2008 the UK still had old outdated blasphemy laws on its statute books. The crime of blasphemy in the UK dates back to the seventeenth century. It was one of the four branches of common law criminal libel in England; obscenity, defamation and sedition were the other branches. These four branches were created to ensure that speech did not violate social norms for decency and propriety.⁸⁸ The courts and the general public agreed that Christianity was central to the common law of England and should be recognized as such.⁸⁹ The majority views were imposed at the expense of protecting the values of minority groups. The common law crime of blasphemy was developed over centuries in England to protect the dignity and importance of Anglicanism, in particular, and Christianity in general.⁹⁰

The UK blasphemy laws only protected Christians and Christianity not Muslims and

⁸⁵Smith N 'The Crime of Blasphemy and Protection of Fundamental Human Rights' (1999) 116 *South African Law Journal* 162-164.

⁸⁶Temperman J 'Blasphemy, Defamation of Religions and Human Rights law' (2008) 26 *Netherlands Quarterly of Human Rights* 519.

⁸⁷Crabtree V 'Blasphemy Laws in the UK' available at <http://www.vexen.co.uk/religion/blasphemy.html> (accessed 2 May 2012).

⁸⁸Karlberg C 'Freedom of Expression in the Modern Age: An Obscure Blasphemy Statute and its Effect on Business Naming' (2009) 11 *Rutgers Journal of law and Religion* 275.

⁸⁹Karlberg C (2009) 275.

⁹⁰Van Der Schyff G *The Right to Freedom of Religion in South Africa* (unpublished LLM thesis, Rand Afrikaans University, 2001).

Islam. The Concise Law Dictionary states that blasphemy is only valid if it affects the Christian God, Jesus Christ, the Christian Bible or the Christian Book of Common Prayer. Blasphemous libel occurs when hurtful literature or a ludicrous matter relating to Christian concepts is published.⁹¹

Blasphemy has become of significant importance within the last 30 years. The Salman Rushdie and Danish cartoon affairs brought attention to the nature, scope and application of the common law relating to blasphemy. It also demonstrated that blasphemy has become an essential factor in inter-religious relationships as well as bringing modern States to re-examine their religious and legislative past⁹²

The Salman Rushdie and Danish cartoon affairs will be discussed in greater detail below but first a discussion on blasphemy in Islam will take place. The reason for discussing blasphemy in Islam is because Christians and Jews have not been offended by the Salman Rushdie and Danish cartoon affairs but Muslims, the followers of the Islamic religion, have taken offence, felt insulted and reacted towards these incidents.⁹³

2.3.2 Blasphemy in Islam

Islam means peace and submission to God.⁹⁴ Islam is based on the message and directives of God which were dictated to the Prophet Muhammad and laid out in the *Quran*. Islamic societies follow the duties and obligations which God commands of man and believe that conformation to the word of God will create a just society.⁹⁵ The Muslim community is open to all people who recognise *Allah* as God and the Prophet Muhammad as his final messenger regardless of their race, cast or class. The foundation of Islam is a concept called *tawhid* which means the oneness of *ALLAH*,

⁹¹Crabtree V 'Blasphemy Laws in the UK' available at <http://www.vexen.co.uk/religion/blasphemy.html> (accessed 2 May 2012).

⁹²Nash D 'Introduction: Blasphemy' (2008) 32 *Journal of Religious History* 393.

⁹³Slaughter MM 'The Salman Rushdie Affair: Apostasy, Honour and Freedom of Speech' (1993) 79 *Virginia Law Review* 161.

⁹⁴Murata S and Chittick WC *The Vision of Islam* (1994) 3.

⁹⁵Islamic law has influenced the legal code in most Muslim counties. Islamic nations are connected to each other by its submission to Islamic practices and law, they form part of the house of Islam (dar al Islam) see Noori Y *Legal and Political Structure of an Islamic State: Implications for Iran and Pakistan* (1986). See also Johnson T 'Islam Governing under Sharia' available at <http://www.cfr.org/religion/islam-governing-under-sharia/p8034> (accessed 17 May 2012).

sura. (Chapter) 112 of the Quran explains it and says 'He is God, the One and Only; God, the Eternal, the Absolute; He begetteth not, nor is He begotten, and there is none like unto Him'.⁹⁶ The nature and character of Islamic law is religious, it is believed to be based on divine inspiration and therefore it is the sacred law of all Muslims.⁹⁷

Freedom of religion in the Islamic context states that non-Muslims are not obliged to convert to Islam, nor are they denied from practising their own religious rites.⁹⁸ Muslims and non-Muslims are entitled to spread the religion of their following and also to defend their religion against attack or provocation regardless of whether such an action is launched by people of their own faith or others.⁹⁹

Islam supports freedom of expression but places certain restrictions on it.¹⁰⁰ Islam embraces freedom of expression and positive evidence of the existence of this right in Islam are the following:

- 1) *Hisbah* - commanding the good and forbidding evil.
- 2) *Nasihah* - the giving of sincere advice.
- 3) *Shura* - consultation.
- 4) *Ijtihad* – personal reasoning.
- 5) Freedom to criticise.
- 6) Freedom to express an opinion.
- 7) Freedom of religion.¹⁰¹

In Islam moral and legal limitations are placed on the exercise of freedom of expression. Honour and dignity of the individual is central to Islam therefore telling lies, back-biting,

⁹⁶Saloom R 'You Dropped a Bomb on Me Denmark: A Legal Examination of the Cartoon Controversy and Response as it Relates to the Prophet Muhammad and Islamic law' (2006) 8 *Rutgers Journal of Law and Religion* 10.

⁹⁷Noori Y (1986)12.

⁹⁸Kamali MH *Freedom of Expression in Islam* (1997) 7.

⁹⁹Kamali MH (1997) 7.

¹⁰⁰Kamali MH (1997) 8.

¹⁰¹Goolam N (2006) 342.

ridiculing others and exposing the weakness of others are moral violations of freedom of expression.¹⁰² Islam denounces the spreading of lies and false stories and if the truth should be spoken and you remain passive and reluctant, it is condemned.¹⁰³ The spreading of lies, back-biting, ridiculing and exposing the weakness of others is discouraged by Islam because it infringes on the basic right to freedom as a human being.¹⁰⁴ In Islam every individual must think well of others.¹⁰⁵

Legally, freedom of expression should not be hurtful to others and should not violate their right to dignity.¹⁰⁶ The following types of speech would violate Sharia:

- 1) public utterance of hurtful speech;
- 2) slanderous accusation;
- 3) blasphemy;
- 4) sedition;
- 5) insult;
- 6) cursing;
- 7) attribution of lies.¹⁰⁷



This mini-thesis submits that in the Islamic vocabulary many words overlap with the word blasphemy in the Christian tradition. The Arabic word *tajd_f* would be the word used to describe blasphemy in the Christian tradition; the word *tajd_f* means scoffing at Gods bounty.¹⁰⁸ There are other words used that overlap with the English word of blasphemy, for example *kufr* which means unbelief, *ridda* which means apostasy, *fisq* which means moral depravity, *ilh_d* which means heresy, *sabba* which means to abuse,

¹⁰²Goolam N (2006) 342.

¹⁰³Madani AH 'Freedom and its Concept in Islam' (2011) 17 *International Conference on Humanities, Historical and Social Sciences* 119.

¹⁰⁴Madani AH (2011) 119.

¹⁰⁵Madani AH (2011) 119.

¹⁰⁶Goolam N (2006) 342.

¹⁰⁷Kamali MH (1997) 166.

¹⁰⁸Asad T 'Reflections on Blasphemy and Secular Criticism' available at <http://townsendcenter.berkeley.edu/pubs/ASAD.pdf> (accessed 22 May 2012).

insult and *shatama* which means to abuse, vilify.¹⁰⁹ In response to the Danish cartoons, the word used by the World Union of Muslim Scholars in its statement on the cartoons were *is_ 'ah* which means insult, harm and offence.¹¹⁰

Blasphemy, which is one of the types of speech which violates *Sharia* (Islamic law), consists of insulting of *Allah* (God), the Prophet Muhammad and making a contemptuous statement which outrages the religious sensitivities of believers for example, attacking the fundamentals of the Islamic religion. Insulting the prophet can be explicit which means attacking his personal integrity, or implicit by mockery or disrespect.¹¹¹ In essence, blasphemy in Islamic law falls under two categories: (1) *zindiqa* and (2) *sabb al-rasul*. In *zindiqa*, if your public expression of free-thinking, atheism or heresy is regarded as scandalous and menacing, it is blasphemy. *Sabb al-rasul* means insult of the Prophet and is considered blasphemy.¹¹²

In Islam, apostasy is based on sedition. An apostate, in terms of the *Quran*, is inspired by Satan and treated as having committed treason against the Islamic state and the social order.¹¹³ An apostate would contribute to social disorder because he would be challenging the accepted norms and beliefs.¹¹⁴ Apostasy in Islam overlaps with blasphemy because conduct that would constitute blasphemy could also constitute apostasy. There are many differences of opinion regarding whether an act constitutes apostasy but traditionally an individual would commit apostasy if he commits the following acts: denying Gods divinity, denying that Muhammad is a Prophet, rejection of the authenticity of the *Quran* and the rejection of the *Sharia* courts.¹¹⁵ There are differences of opinion regarding the punishment for apostasy, however the death penalty as a punishment is based on content of the *Quran* which states that:

Those that make war against God and his apostle and spread disorder in the land shall

¹⁰⁹Kamali MH (1997) 166.

¹¹⁰Asad T 'Reflections on Blasphemy and Secular Criticism' available at <http://townsendcenter.berkeley.edu/pubs/ASAD.pdf> (accessed 22 May 2012).

¹¹¹Goolam N (2006) 343.

¹¹²Chase A 'Legal Guardians: Islamic Law, International Law, Human Rights Law, and the Salman Rushdie Affair' (1996) 11 *American University International Law Review* 399.

¹¹³Sedition definition: Conduct or language inciting rebellion against the authority of a state available at <http://www.thefreedictionary.com/sedition> (accessed 5 June 2012). See also Slaughter MM (1993) 177.

¹¹⁴Slaughter MM (1993) 177.

¹¹⁵See the difference of opinions in Slaughter MM (1993) and Chase A (1996) 403.

be put to death or crucified or have their hands and feet cut off on alternate sides, or be banished.¹¹⁶

Salman Rushdie was also sued by British Muslims in the English Court; the charges were blasphemy and sedition. The Queen's Bench Division of the High Court found that Salman Rushdie was not guilty of seditious libel and blasphemous libel as this only applied to attacks on the Christian religion.¹¹⁷

In Islam, as referred to in section 1.1 of chapter 1, speech which is insulting to God would constitute blasphemy, however in Muslim history blasphemy became associated mainly with perceived insults to the Prophet Muhammad.¹¹⁸ By the third Islamic century speaking against the Prophet Muhammad was an unlawful act within the Muslim community and at the start of the fourth Islamic century it was decided that insults to the Prophet Muhammad shall be punishable by death.¹¹⁹ According to Ishāq Islamic law is more severe with regard to insulting and reviling of the Prophet Muhammad than towards the reviling and insult of God.¹²⁰

There is a tradition under *Sharia* that you are not to draw the Prophet and this can be linked to the prohibition of idol worship discussed in the *Quran*.¹²¹ There is a *hadith* which states that when the Prophet entered Mecca he saw pictures of the Prophet Abraham and Mary practicing divination of arrows on the *Kabba* which were placed there by the *Quarash* (enemies of Islam) and the Prophet refused to enter the *Kabba* until it was removed. The Prophet Muhammad stated that angels do not enter a house in which there are pictures, and cursed the *Quarash* for depicting Abraham as practicing divination by arrows which was not true.¹²² This mini- thesis submits that based on the *hadith* a drawing of the Prophet may be seen as idol worship, which is prohibited in

¹¹⁶Dawood NJ *The Koran* (1990) 33-34.

¹¹⁷*Regina v. Chief Metropolitan Stipendiary Magistrate ex parte Choudhury*, [1990] 3 WLR 986.

¹¹⁸Ishāq I, Ṣahīḥ B 'Blasphemy in Islam' available at <http://quranandinjil.org/pdfs/Blasphemy-in-Islam.pdf> (accessed 17 May 2012).

¹¹⁹Ishāq I, Ṣahīḥ B 'Blasphemy in Islam' available at <http://quranandinjil.org/pdfs/Blasphemy-in-Islam.pdf> (accessed 17 May 2012).

¹²⁰Ishāq I, Ṣahīḥ B 'Blasphemy in Islam' available at <http://quranandinjil.org/pdfs/Blasphemy-in-Islam.pdf> (accessed 17 May 2012).

¹²¹ For *Quranic* verses on prohibition of idol worship see Saloom R (2006) 16-18.

¹²²Saloom R (2006) 18.

Islam.

Muslims have to accept all commandments, rules and values as they are *Allah's* rules; this is a big reason why Muslims cannot agree with Western law. For example, the fact that the ECHR protects speech that offends, shocks or disturbs the state or any sector of the population would not be consistent with *Sharia*.¹²³ It is submitted by this mini-thesis that based on the Islamic understanding of blasphemy the Salman Rushdie affair and the Danish cartoon controversy would constitute blasphemy.

2.4 The Salman Rushdie Affair

As mentioned in section 2.1 of chapter 2, the Salman Rushdie affair illustrates the conflict between freedom of religion (Islamic religion) and freedom of expression; one of the elements present in this affair is blasphemy. A brief summary of the facts of the Salman Rushdie affair will be stated in order to understand the reaction to it. In 1988 Salman Rushdie published a book called *The Satanic Verses*.¹²⁴ The post modern satirical style novel stimulated controversy and was regarded as blasphemous, insulting, offensive and defamatory by Muslims globally, however in the western community it was regarded as freedom of expression and has won numerous prizes and awards.¹²⁵

The book contains defamatory passages about the Prophet Muhammad, his companions and wives and it also contains parts which are scornful to the *Quran* and the principles of Islam.¹²⁶ There are several parts in this book which Muslims found defamatory and blasphemous. The blasphemous episodes in the book will be stated.¹²⁷

Blasphemous episodes:

¹²³Landscheidt D 'The Conflict between Western World and Islam' available at <http://www.landscheidt.com/The%20Islam.pdf> (accessed 20 May 2012).

¹²⁴Rushdie S *The Satanic Verses* (1988).

¹²⁵Slaughter MM 'The Salman Rushdie Affair: Apostasy, Honour and Freedom of Speech' (1993) 79 *Virginia Law Review* 153 -157.

¹²⁶Slaughter MM (1993) 161-173.

¹²⁷The episodes that insult or defame are unfortunately beyond the scope of this thesis for reading on these episodes see Slaughter MM (1993) 161-173.

1) The first episode is the meaning of the title *The Satanic Verses* which refers to a time in the Prophet Muhammad's life.¹²⁸ Tabari, a tenth century historian, explains that when the Prophet Muhammad received the message of God he started to convert groups to the religion of Islam and one of the groups he wanted to convert was the polytheistic tribes of Mecca who worshipped three female deities.¹²⁹ When the Prophet Muhammad recited the message of God to these groups, Satan caused him to say that these goddesses are 'exalted birds' - this would mean that the goddesses are equal to *Allah*. Angel *Gibreel* then told Prophet Muhammad that these words were not the words of *Allah*, *Allah* then abrogated these verses and replaced them with verses that indicate that Muslims should not worship idols and that the other passages were the words of *Satan*.¹³⁰ Rushdie's use of *The Satanic Verses* challenges the divine origin of the *Quran* and Islam as Gods words. In the novel Salman Rushdie writes that Mahound (the Prophet Muhammad in the novel), in order to advance his religion, speaks the satanic verses through *Gibreel* but then repents and erases them again through *Gibreel*.¹³¹ This is an indication that Mahound and not *Allah* makes *Gibreel* speak and this implies that Islam is built on errors and the *Quran* is a fiction.¹³²

2) The second episode is that of Salman the Persian, who undermines the legitimacy of the *Quran*. In the novel Salman was the first Persian to convert to Islam and one of the Transcribers of the *Quran* he tested the legitimacy of Mahound's revelations by making his own changes to the text and Mahound failed to notice.¹³³

3) The third episode is where Salman Rushdie shows specific laws as Mahound's petty obsessions instead of laws prescribed by God for leading a just life.¹³⁴

These three episodes were contested by Muslims on the basis that Salman Rushdie was asserting false claims about Islam and therefore it was considered as

¹²⁸ Ruthven M A *Satanic Affair: Salman Rushdie and the Wrath of Islam* (1991) 38-39.

¹²⁹ Tabari AL 'The Satanic Verses in Qur'an' available at <http://www.muhammadanism.org/Quran/SatanicVerses.htm> (accessed 5 June 2012).

¹³⁰ Tabari AL 'The Satanic Verses in Qur'an' available at <http://www.muhammadanism.org/Quran/SatanicVerses.htm> (accessed 5 June 2012).

¹³¹ Rushdie S (1988) 113, 123-124.

¹³² Rushdie S (1988) 114,123.

¹³³ Rushdie S (1988) 367- 368.

¹³⁴ Rushdie S (1988) 363-364.

blasphemous.¹³⁵

Muslim authors put their feelings into words. Baddawi states that the Novel was like 'a knife being dug into you - or being raped yourself'.¹³⁶ Sardar and Davies stated that 'it is as though he has personally assaulted and raped every single believing Muslim man and women'.¹³⁷ Muzuri stated that 'It's as if he has composed a brilliant poem about the private parts of his parents, and then gone to the market place to recite that poem to the applause of strangers'.¹³⁸ Richard Webster's novel stated that 'Islam is the victim not simply of criticism and satire but an act of cultural rape'.¹³⁹

2.4.1 The reaction to the Novel

Responses to the novel took the form of banning of the novel, mass demonstrations, and the most extreme reaction being Ayatollah Khomeini's *fatwa* (religious sentence).¹⁴⁰ The Indian finance ministry was the first to ban the novel on 5 October 1988 and countries such as Bangladesh, Pakistan, South Africa, Sri Lanka and Sudan also placed their own bans on it.¹⁴¹ In December 1988 the Islamic defence council held a protest rally.¹⁴² On 14 January 1989 Muslims in England Bradford burned copies of the novel in public.¹⁴³ Fire bombings at bookstores that carried *The Satanic Verses* in Berkeley, California took place, and a New York newspaper that supported Rushdie also suffered fire bombings.¹⁴⁴ In February 1989, five people were killed in Islamabad in a riot protesting the book.¹⁴⁵

On 14 February 1989 Ayatollah Khomeini, Iran's spiritual leader, put a *fatwa* on Tehran

¹³⁵Slaughter MM (1993) 166.

¹³⁶Ashen MM & Kidwai AR *Sacrilege Versus Civility: Muslim Perspectives on the Satanic Verses Affair* (1991) 35.

¹³⁷Sardar Z & Davies MW *Distorted Imagination: Lessons from the Rushdie Affair* (1990)165.

¹³⁸Muzuri A 'The Satanic Verses or a Satanic Novel? Moral Dilemmas of the Rushdie Affair' available at <http://www.juliushonnor.com/catalyst/catalyst/The-Satanic-Verses-or-a-Satanic-Novel.pdf> (accessed 5 June 2012).

¹³⁹Webster RA *Brief History of Blasphemy: Liberalism, Censorship and The Satanic Verses* (1990) 95.

¹⁴⁰Slaughter MM (1993) 154.

¹⁴¹Chakravorty P 'The Rushdie Incident as Law-and-Literature Parable' (1995) 104 *The Yale Law Journal* 2216.

¹⁴²Chakravorty P (1995) 2216.

¹⁴³Chakravorty P (1995) 2216.

¹⁴⁴Arch Pudington A 'Essay: Freedom of Expression After the Cartoon Wars' available at <http://www.freedomhouse.org/report/freedom-press-2006/essay-freedom-expression-after-cartoon-wars> (accessed 6 June 2012).

¹⁴⁵ Slaughter MM (1993) 157.

radio sentencing Salman Rushdie and all involved in the publication of the novel to death. Ayatollah Khomeini declared Salman Rushdie guilty of apostasy and stated that all 'zealous Muslims' should kill Salman Rushdie and his publishers and offered a \$3 million reward to anyone who would carry out the *fatwa*.¹⁴⁶

Following the fatwa, Rushdie's interpreters felt the brunt; his Japanese translator was stabbed to death, his Italian translator was stabbed and seriously injured, his Norwegian publisher was shot and severely injured and 37 people were killed when a Turkish hotel was burned in protest against Rushdie's Turkish translator.¹⁴⁷

Rushdie was also sued by British Muslims in the English Court; the charges were blasphemy and sedition. The Queen's Bench Division of the High Court found that Rushdie was not guilty of seditious libel and blasphemous libel as this only applied to attacks on the Christian religion.¹⁴⁸

As a result of the Salman Rushdie affair Muslims received much more attention in the media, which portrayed them as unable to adapt to western society.¹⁴⁹ The term 'west' would refer to Europe and lands of significant European settlement such as North America.¹⁵⁰ The west is viewed as the colonial and post-colonial European and American global pre-eminence.¹⁵¹ The west compared Muslims to Nazis who burned libraries and harassed intellectuals.¹⁵² The burning of the novel was proof to the west that Muslims were 'barbarians, fanatics, ignorant, blood thirsty bigots and medieval

¹⁴⁶Arch Pudington A 'Essay: Freedom of Expression After the "Cartoon Wars' available at <http://www.freedomhouse.org/report/freedom-press-2006/essay-freedom-expression-after-cartoon-wars> (accessed 6 June 2012).

¹⁴⁷Arch Pudington A 'Essay: Freedom of Expression After the "Cartoon Wars' available at <http://www.freedomhouse.org/report/freedom-press-2006/essay-freedom-expression-after-cartoon-wars> (accessed 6 June 2012).

¹⁴⁸*Regina v. Chief Metropolitan Stipendiary Magistrate ex parte Choudhury*, [1990] 3 WLR 986.

¹⁴⁹Patel II 'Study of Salman Rushdie's 'The Satanic Verses', and 'The Rushdie Affair' available at <http://victorian.fortunecity.com/coldwater/439/rushdie.htm#western> (accessed 11 November 2011).

¹⁵⁰World Economic Forum 'Islam and the West: Annual Report on the State of Dialogue' available at https://members.weforum.org/pdf/c100/islam_west.pdf (accessed 8 June 2012).

¹⁵¹World Economic Forum 'Islam and the West: Annual Report on the State of Dialogue' available at https://members.weforum.org/pdf/c100/islam_west.pdf (accessed 8 June 2012).

¹⁵²Patel II 'A Study of Salman Rushdie's, The Satanic Verses, and The Rushdie Affair' available at <http://victorian.fortunecity.com/coldwater/439/rushdie.htm#western> (accessed 11 November 2011).

fundamentalist'.¹⁵³ There was a feeling that the Muslims' reaction to the novel was irrational and that they exposed themselves as enemies of free thought.¹⁵⁴

2.4.2 Concluding remarks on the Salman Rushdie affair

The Salman Rushdie affair indicates a disagreement between Islam and the west. These orders have co-existed for many years however the potential for eruption between these orders is always present and the conflict in most instances would be between a religious natural law order and the positive, secular international order.¹⁵⁵ This conflict between Islam and the west stems from each order's commitment to incompatible world views: Islam is God centred while the west are irreligious and focus on individualism and self fulfilment.¹⁵⁶ This mini-thesis submits that there are two competing rights in the Salman Rushdie affair namely freedom of expression and freedom of religion and there are different arguments in favour of each of these rights.

The argument in favour of freedom of religion is that strongly held religious convictions should trump freedom of expression, particularly if issues of multi-culturalism and anti-racism are involved.¹⁵⁷ There are limitations on freedom of speech; this right should not be exercised at the expense of the rights of others nor should it be used to justify blasphemy against Islam according to the Organisation of Islamic Conference who stated that Rushdie's Book violates freedom of expression.¹⁵⁸ This mini-thesis submits that the essence of this argument is that although *The Satanic Verses* is a form of expression, it oversteps the boundaries of freedom of expression by infringing on another's right to freedom of religion.

The arguments in favour of freedom of expression are that the Militant Islamic rights should not dictate what people can read, write, print, distribute and display. It is also

¹⁵³Ahsan MM & Kidwai AR (1991) 41.

¹⁵⁴Patel II 'A Study of Salman Rushdie's 'The Satanic Verses' and 'The Rushdie Affair' available at <http://victorian.fortunecity.com/coldwater/439/rushdie.htm#western> (accessed 11 November 2011).

¹⁵⁵Walia M A *Tale of Two Cultures: Islam and the West* (2011) 6-7.

¹⁵⁶Walia M (2011) 6-7.

¹⁵⁷Boyle K 'The International Committee for Defence of Salman Rushdie and his Publishers' available at <http://www.article19.org/data/files/pdfs/publications/crime-of-blasphemy.pdf> (accessed 9 June 2012).

¹⁵⁸Boyle K 'The International Committee for Defence of Salman Rushdie and his Publishers' available at <http://www.article19.org/data/files/pdfs/publications/crime-of-blasphemy.pdf> (accessed 9 June 2012).

argued that 'to punish a man for his religious thoughts is one of the most abhorrent of crimes'.¹⁵⁹ The reason that freedom of expression should take preference is because free speech is a constitutive institution and a constitutive of democracy and without it democracy cannot go forward. It is further argued that religious beliefs are not essential to democracy and therefore free speech should take precedence.¹⁶⁰

Blasphemy is a common law offence which only protects the Christian religion.¹⁶¹ The Salman Rushdie affair confirmed that blasphemy laws only extended to beliefs of Christianity. *The Satanic Verses* focussed on ambivalent religion, doubt and moral deliberation. Muslims were outraged and felt the novel was offensive and blasphemous.¹⁶² Rushdie's freedom of expression remained intact as *The Satanic Verses* book could not be prosecuted for blasphemy against Islam because the religion of Islam fell outside the scope of Blasphemy.¹⁶³

2.5 The Danish Cartoon Controversy

The Danish cartoon controversy started with Danish writer Kaare Bluitgen who was writing a children's book called 'The life of the Prophet Muhammad'.¹⁶⁴ He was of the view that a better understanding of Islam would encourage tolerance in Danish children.¹⁶⁵ Finding an illustrator was difficult for him, he approached three illustrators who turned him down. Finally an illustrator agreed to do it anonymously.¹⁶⁶ As referred to in section 1.1 of chapter 1, on 30 September 2005 *Jyllands-Posten* published an article called the 'Face of Muhammad'; this article was about self-censorship and the

¹⁵⁹Patel II 'A Study of Salman Rushdie's 'The Satanic Verses' and 'The Rushdie Affair' available at <http://victorian.fortunecity.com/coldwater/439/rushdie.htm#western> (accessed 11 November 2011).

¹⁶⁰Boyle K 'The International Committee for Defence of Salman Rushdie and his Publishers' available at <http://www.article19.org/data/files/pdfs/publications/crime-of-blasphemy.pdf> (accessed 9 June 2012).

¹⁶¹*Regina v. Chief Metropolitan Stipendiary Magistrate ex parte Choudhury*, [1990] 3 WLR 986.

¹⁶²Leirvik O 'Blasphemy, Offence, and Hate Speech: Response to Henk Vroom' available at <http://adss.library.uu.nl/publish/articles/000080/bookpart.pdf> (accessed 01 May 2012).

¹⁶³*Regina v. Chief Metropolitan Stipendiary Magistrate ex parte Choudhury*, [1990] 3 WLR 986.

¹⁶⁴Cobb k 'The Muhammad Cartoons' 2006 *The Author. Journal Compilation* 1-9.

¹⁶⁵Saloom R (2006) 16-18.

¹⁶⁶Boyle K 'The Danish Cartoons' available at www.courses.essex.ac.uk/hu/hu901/useful%20docs/00%20Column.txt (accessed 12 June 2012).

fear of Muslim backlash; it contained 12 cartoons depicting the Prophet.¹⁶⁷

In essence, the printing of these cartoons was a stand for the right to express yourself without self-censorship and the fear of a backlash for what you have expressed.¹⁶⁸ It is ironic that a huge backlash occurred. Muslims called these cartoons ‘despicable racism’ and ‘revolting.’¹⁶⁹ The cartoons sparked a reaction from Muslims across the world, they protested and marched, burned Danish flags and embassies, boycotted Danish products and all media that exhibited the cartoons; damage to property and loss of lives was a result of this reaction.¹⁷⁰ Drawing the Prophet Muhammad is prohibited in Islam as it is seen as idol worship and idol worship goes against the Islamic principle that there is only one God.¹⁷¹

Denmark’s response to the printing of the cartoons was that the Danish government was not taking a stance on the cartoons as there was a free press in Denmark and only the courts could judge whether the cartoons broke the law.¹⁷²

2.5.1 Denmark’s failure to prosecute

On 12 October 2005 in response to the Danish cartoons, ambassadors of eleven Muslim majority countries requested a meeting with the Danish Prime Minister but it was refused on the following grounds:

Freedom of expression has a wide scope and the Danish Government has no means of influencing the press. However, Danish legislation prohibits acts or expressions of opinion of a blasphemous or discriminatory nature. The offended party may bring court proceedings against the authors of such acts or expressions of opinion, and it is for the

¹⁶⁷Holland G Speech’ (2006) 9-10.

¹⁶⁸McLaughlin N ‘Spectrum of Defamation of Religion Laws and the Possibility of a Universal International Standard’ (2010) 32 *Loyola of Los Angeles International and Comparative Law Review* 395.

¹⁶⁹McLaughlin (2010) 395.

¹⁷⁰Asmal F *Islamophobia and the Media: The Portrayal of Islam since 9/11 and an Analysis of the Danish cartoon Controversy in South Africa* (unpublished LLM thesis, Stellenbosch University, 2008) 47.

¹⁷¹*Quran* 112:1-4.

‘He is God, [t]he One and Only; God, the Eternal, the Absolute; He begetteth not, [n]or is He begotten, [a]nd there is none like unto Him’.

¹⁷²Larsen H ‘The Cartoon Crisis in Danish Foreign Policy: A New Balance Between the EU and the US?’ in Hvidt N *Danish Foreign Policy Year Book 2007* (2007) 55.

courts to decide in individual cases.¹⁷³

On 29 October 2005 several Muslim associations took the editors to court for offending followers of Islam and based their argument on article 140 and 266b of the Danish Penal Code.¹⁷⁴

Section 140 of the Danish Penal Code states that:

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.¹⁷⁵

Section 266b of the Danish Penal code states that:

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.¹⁷⁶

Jyllands-Posten claimed that the cartoon was an exercise of free speech and that it was incompatible with the right to freedom of expression to demand special consideration for religious feelings and that one has to be ready to put up with 'scorn, mockery and ridicule'.¹⁷⁷

The Regional Public Prosecutor for Vibor found that there were no grounds for considering the publication of the cartoons to be a violation of section 140 or 266b of the Danish Penal Code and this resulted in complaints to the Director of Public Prosecution who also found insufficient grounds to attach criminal liability and dismissed the

¹⁷³ *Mohammed BEN EL MAHI and Others v Denmark* Application no. 5853/06 (2006).

¹⁷⁴ *Mohammed BEN EL MAHI and Others v Denmark* Application no. 5853/06 (2006).

¹⁷⁵ The Danish Penal Code, 1995, Article 140.

¹⁷⁶ The Danish Penal Code, 1995, Article 140 and Article 266b.

¹⁷⁷ Fode H 'Decision on Possible Criminal Proceedings in the Case of *Jyllands-Posten's* Article The Face of Muhammad' available at http://www.rigsadvokaten.dk/media/bilag/afgorelse_engelsk.pdf (accessed 2 July 2012). Section 77 of the Constitutional Act of Denmark, 1953 states that 'Any person shall be entitled to publish his thoughts in print, in writing, and in speech, provided that he may be held responsible in a court of law'.

complaints.¹⁷⁸ One of the Director of Public Prosecution's arguments for not prosecuting is that *Jyllands-Posten* had no intention of provocation but wanted to promote a public debate, which is not unusual in Denmark, on freedom of expression in relation to religion and religious feelings.¹⁷⁹

Section 140 of the Danish Penal Code prohibits blasphemy and protects the religious feelings of all lawfully existing religious communities not just those of Christians, as in the UK, against mockery and scorn by prohibiting public ridiculing or insult of the dogmas of worship.¹⁸⁰ Section 266b protects groups of persons against scorn and degradation on account of their religion. This section protects religion and does not include a firm reference to a religious group.¹⁸¹ This mini-thesis submits that based on these sections there is no free and unrestricted right to express opinions about religious subjects if expression falls within these rules, and the Danish cartoons fell within the scope of Section 140 and 266b of the Danish Penal code and the Government should have enforced the Code and prosecuted.

The cartoon controversy started in Denmark and spread throughout Europe and the world sparking debate and causing split opinions. There was support for freedom of expression as a fundamental freedom on the one side and support for freedom of religion, claiming that freedom of expression carried with it a responsibility to depict all religious beliefs and groups in an inoffensive way, on the other.¹⁸² The factors which would possibly influence a country and its people's opinions on the Danish cartoon controversy with regard to which argument they would favour are the different societal and political understandings of these two rights, the perceptions of the key values of a country, a country's historical experiences and the religious composition of the country's

¹⁷⁸Fode H 'Decision on Possible Criminal Proceedings in the case of Jyllands-Posten's Article The Face of Muhammad' available at http://www.rigsadvokaten.dk/media/bilag/afgorelse_engelsk.pdf (accessed 2 July 2012).

¹⁷⁹ For the full argument on why the Director of Public Prosecution did not prosecute see *Mohammed BEN EL MAHI and Others v Denmark* Application no. 5853/06 (2006).

¹⁸⁰Asmal F *Islamophobia and the Media: The Portrayal of Islam since 9/11 and an Analysis of the Danish cartoon Controversy in South Africa* (unpublished LLM thesis, Stellenbosch University, 2008) 50.

¹⁸¹Venice Commission 'Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society' available at [http://www.venice.coe.int/docs/2010/CDL-STD\(2010\)047-e.pdf](http://www.venice.coe.int/docs/2010/CDL-STD(2010)047-e.pdf) (accessed 5 December 2012).

¹⁸²Larsen H 'The Cartoon Crisis in Danish Foreign Policy: A New Balance Between the EU and the US?' in Hvidt N *Danish Foreign Policy Year Book 2007* (2007) 63.

population.¹⁸³

2.5.2 Concluding remarks on the Danish cartoon controversy

In the Danish cartoon controversy, the right to freedom of religion and freedom of expression are in conflict and parties such as the followers of Islam and certain countries in the west have stood up for their beliefs. This is understandable given the different cultures and understanding of these rights under International law as well as the different understanding of autonomy.¹⁸⁴ It is submitted by this mini-thesis that Islamic law and International norms are compatible but the *Quran* contains express contradictions to human rights law which lead to conflict and confrontation. In Islamic law, freedom of expression is an obligation on the right holder to speak the truth, not on others. Islam puts society above the individual whereas human rights ideals protect the individual's ultimate worth.¹⁸⁵ The conflict arises because Islam emphasizes duties not individual rights and human rights law focuses on the individual as the key unit of society.¹⁸⁶

According to Powers, Rose used the cartoons as a fight for freedom of expression by arguing that freedom of expression in Europe is being undermined by the atmosphere of fear and intimidation created by Islamic extremist.¹⁸⁷ Rose wanted to ignite a cultural battle between defenders of a particular conception of western free speech principles and the Muslims' conception of free speech in the hope that the western enlightenment values would triumph.¹⁸⁸

¹⁸³To see which country favoured the freedom of expression argument and which country favoured the freedom of religion argument see Larsen H 'The Cartoon Crisis in Danish Foreign Policy: A New Balance Between the EU and the US?' in Hvidt N *Danish Foreign Policy Year Book 2007* (2007) 64.

¹⁸⁴Chase A (1996) 389.

¹⁸⁵Khan A 'Discuss With Reference to Islamic Law/Tradition: The Origins of Human Rights as Defined in the Universal Declaration on Human Rights, Necessarily Mean that these Rights are not or Cannot be Truly Universal.' available at <http://www.islamawareness.net/HumanRights/aafreen.html> (accessed 12 November 2012).

¹⁸⁶Khan A 'Discuss with Reference to Islamic Law/Rradition: The Origins of Human Rights as Defined in the Universal Declaration on Human Rights, Necessarily Mean that these Rights are not or Cannot be Truly Universal.' available at <http://www.islamawareness.net/HumanRights/aafreen.html> (accessed 12 November 2012).

¹⁸⁷Powers S 'The Danish Cartoon Crisis: The Important and Impact of Public Diplomacy' available at http://uscpublicdiplomacy.com/index.php/newsroom/specialreports_detail/1667/ (accessed 3 July 2011).

¹⁸⁸Powers S 'The Danish Cartoon Crisis: The Important and Impact of Public Diplomacy' available at http://uscpublicdiplomacy.com/index.php/newsroom/specialreports_detail/1667/ (accessed 3 July 2011).

In order to resolve the conflict caused by the Danish cartoons, the United Nations (UN) got involved. The UN special *rappporteur* stated that these cartoons were one of the most severe examples of hatred for Islam, stating that the Danish government's handling of the matter revealed trivialization of *Islamaphobia* at the political level.¹⁸⁹ In 1999 a resolution called Defamation of Religions was introduced in the UN for the first time in order to prevent negative stereotyping of religions and manifestations of intolerance and discrimination in matters of religion or belief and to prevent defamation of religions. Similar resolutions were adopted in the following years.¹⁹⁰ In 2006 after the cartoons were published, defamation of religions became a topic of debate in the UN General Assembly.¹⁹¹ The supporters of the resolution were mostly Muslim countries stating that the resolution provide a platform for tolerance and respect of all the religions.¹⁹² The opponents of the resolution were the west who argued firstly that although the resolution states that defamation of all religions should be combated, it emphasises the position of the Islamic religion; and secondly that Islamic countries were using the resolution to protect the rights of the majority religion at the expense of the rights of religious minorities.¹⁹³ This mini-thesis submits that in order to resolve the conflict caused by the Danish cartoons, the UN implemented a resolution called Defamation of Religions however, the conflicting traditions, cultures and religion between Islam and the west has resulted in an ongoing debate over the purpose and content of the resolution.

This mini-thesis submits that in the Salman Rushdie affair nothing indicates that the conflict has been resolved and no guidelines exist in assisting in solving the conflict between freedom of religion and freedom of expression. The Danish cartoon controversy has not provided us with a clear solution to solve the conflict between freedom of religion and freedom of expression. Instead it has indicated that the core of

¹⁸⁹Jensen T 'The Cartoon Crisis Revisited: A Danish Perspective' available at www.realinstitutoelcano.org/analisis/989/989_jensen_danish_cartoon_crisis.pdf (accessed 12 June 2012) 1.

¹⁹⁰Social, Humanitarian and Cultural Affairs Committee 'Combating Defamation of Religions' available at <http://www.modelun.ru/uploads/pdf/DEFAM.pdf> (accessed 5 December 2012).

¹⁹¹Social, Humanitarian and Cultural Affairs Committee 'Combating Defamation of Religions' available at <http://www.modelun.ru/uploads/pdf/DEFAM.pdf> (accessed 5 December 2012).

¹⁹²Social, Humanitarian and Cultural Affairs Committee 'Combating Defamation of Religions' available at <http://www.modelun.ru/uploads/pdf/DEFAM.pdf> (accessed 5 December 2012).

¹⁹³Social, Humanitarian and Cultural Affairs Committee 'Combating Defamation of Religions' available at <http://www.modelun.ru/uploads/pdf/DEFAM.pdf> (accessed 5 December 2012).

the problem lies in the conflicting tradition, culture and religion of Islam and the west. This mini-thesis therefore suggests that one solution to resolving the conflict between freedom of religion and freedom of expression is to address the relationship between Islam and the west. Further suggestion on how to address the relationship is discussed in section 5.3 of chapter 5.¹⁹⁴

The Salman Rushdie affair and the Danish cartoon controversy has not provided us with guidance on how to deal with the conflict of rights; this mini-thesis will now discuss selected theories on the conflict of rights in order to address this issue.¹⁹⁵

2.6 Habermas' Theory on solving conflicts

Habermas' approach to dealing with a conflict of rights is to deny that any balancing between constitutional rights should be done, Habermas states that balancing constitutional rights deprives them of their normative powers.¹⁹⁶ Constitutional provisions should be regarded as legal norms and principles and according to Habermas, when balancing rights it is downgraded to the levels of goals, policies and values.¹⁹⁷ Habermas rejects any balancing of constitutional rights to solve a conflict. Instead 'he conceives constitutional review as a type of application discourse, seeking an impartial application of already justified higher level constitutional norms to legal norms'.¹⁹⁸ Habermas indicates that constitutional courts should examine the *prima facie* applicable norms in order to find out which one is most suitable to the case at hand. Essentially what he is saying is that one should clarify the context so that only one constitutional right applies.¹⁹⁹

¹⁹⁴Haraszti M 'The Cartoon Controversy: The Need for Respect Within Freedom' (2006) 4 *Asia Europe Journal* 15.

¹⁹⁵For further reading on the theories on solving conflict of rights see Brems E *Conflicts Between Fundamental Rights* (2008).

¹⁹⁶Maes E 'Constitutional Democracy, Constitutional Interpretation and Conflicting Rights' in Brems E *Conflicts Between Fundamental Rights* (2008) 84.

¹⁹⁷Habermas J *Between Facts and Norms: Contributions to a Discourse theory of Law and Democracy* (1996) 240-259.

¹⁹⁸Habermas J (1996) 240-259. See Maes E 'Constitutional Democracy, Constitutional Interpretation and Conflicting Rights' in Brems E *Conflicts Between Fundamental Rights* (2008) 85.

¹⁹⁹Habermas J (1996) 240-259. See Maes E 'Constitutional Democracy, Constitutional Interpretation and Conflicting Rights' in Brems E *Conflicts Between Fundamental Rights* (2008) 86.

Habermas' theory is a relevant option which can be used to solve the conflict between freedom of expression and religion as it teaches us about the co-originality of the rights to popular sovereignty and to human rights however, since he denies that any balancing between constitutional rights should take place, his theory does not point out how constitutional courts should solve a concrete conflict of human rights.²⁰⁰ Furthermore, by stating that courts should adjudicate by using an application discourse i.e. clarifying the context so that only one norm can be applicable, Habermas denies the role of every lawyer and judge.²⁰¹

2.7 Konrad Hesse's notion on *Praktische Konkordanz*

In Germany, the Constitutional Courts' approach to reconciling conflicting constitutional rights is to apply the principle of *Praktische Konkordanz* (Practical Concordance).²⁰² Hesse submits that rights and interests guaranteed by the Constitution must be related to one another in such a way that each of them can be put into effect.²⁰³ Hesse further submits that in the case of conflicting rights, none of them must be implemented at the expense of the other, nor by hastily balancing the underlying values on the basis of abstract considerations.²⁰⁴ Conflicting rights and interests must be subject to limitations so that each one attains its optimal effect. Consequently, limitations have to be proportionate in light of the specific circumstances.²⁰⁵ They must not be broader than required to establish a concordance of conflicting constitutional values.²⁰⁶

Essentially what Practical Concordance does is it harmonizes and balances conflicting

²⁰⁰Maes E 'Constitutional Democracy, Constitutional Interpretation and Conflicting Rights' in Brems E *Conflicts Between Fundamental Rights* (2008) 97.

²⁰¹Maes E 'Constitutional Democracy, Constitutional Interpretation and Conflicting Rights' in Brems E *Conflicts Between Fundamental Rights* (2008) 97.

²⁰²Marauhn T & Ruppel N 'Balancing Conflicting Human Rights Konrad Hesse's Notion on *Praktische Konkordanz* and the German Federal Constitutional Court' in Brems E *Conflicts Between Fundamental Rights* (2008) 273.

²⁰³Hesse K *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* 20 ed (1995) 71-75.

²⁰⁴Hesse K (1995) 71-75.

²⁰⁵Hesse K (1995) 71-75.

²⁰⁶Hesse K (1995) 71-75.

constitutional rights so that each is preserved in creative tension with one another.²⁰⁷ Practical Concordance is an interpretive tool and is primarily applied to rights which lack an explicit limitations clause; it offers a general approach and provides case specific solutions due to its underlying objective, which is the preservation of the unity of the constitution.²⁰⁸ Practical Concordance regards all 'constitutional rights and values involved as being of equal value and rank, enabling the courts to give preference to one of them according to the specifics of the case under consideration'.²⁰⁹

Practical Concordance is very similar to the South African approach as referred to in section 4.4.2 in chapter 4 to solving conflicts, and would fit into its framework as there is no hierarchy of rights under the South African Constitution. The requirements for Practical Concordance to be successful in a system is that the 'constitutional and human rights system under consideration considers all rights included as being of equal validity and rank and only if there are no specific limitation clauses addressing such conflicts between rights of equal validity'.²¹⁰ If the requirements are met, Practical Concordance will preserve the unity of the instrument and provide guidance to case specific answers to conflicting rights.

In theory this approach to solving problems is very impressive however in practice the German Constitutional Court, in balancing and harmonizing conflicting constitutional rights, has created a *de facto* hierarchy of rights and as a result of this the jurisprudence

²⁰⁷Banks TL 'Balancing Competing Individual Constitutional Rights: Raising Some' available at http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1634&context=fac_pubs&sei-redir=1&referer=http%3A%2F%2Fwww.google.co.za%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3Dcompeting%2520constitutional%2520rights%253A%2520raising%2520some%2520questions%2520%26source%3Dweb%26cd%3D2%26ved%3D0CDkQFjAB%26url%3Dhttp%253A%252F%252Fdigitalcommons.law.umaryland.edu%252Fcgi%252Fviewcontent.cgi%253Farticle%253D1634%2526context%253Dfac_pubs%26ei%3DNqW_UNTDNli3hAe53IC_OBA%26usg%3DAFOjCNHPD_cUCEiJp32iWRMox_yxCB3h9g#search=%22competing%20constitutional%20rights%3A%20raising%20some%20questions%22 (accessed 5 December 2012).

²⁰⁸Marauhn T & Ruppel N 'Balancing Conflicting Human Rights Konrad Hesse's Notion on PraktischeKkonkordanz and the German Federal Constitutional Court' in Brems E *Conflicts Between Fundamental Rights* (2008) 296.

²⁰⁹Marauhn T & Ruppel N 'Balancing Conflicting Human Rights Konrad Hesse's Notion on PraktischeKkonkordanz and the German Federal Constitutional Court' in Brems E *Conflicts Between Fundamental Rights* (2008) 296.

²¹⁰Marauhn T & Ruppel N 'Balancing Conflicting Human Rights Konrad Hesse's Notion on PraktischeKkonkordanz and the German Federal Constitutional Court' in Brems E *Conflicts Between Fundamental Rights* (2008) 296.

of the court is inconsistent and unpredictable.²¹¹ Sometimes the court jurisprudence rests on rigorous analysis and other times it rests on bewildering *ex cathedra* pronouncements.²¹²

2.8 Concluding remarks

This chapter has laid the foundation of the conflict between freedom of religion and freedom of expression by discussing the historical and philosophical aspects of these rights. Blasphemy in general and blasphemy in Islam was discussed and it was established that insults to the Prophet Muhammad is considered to be blasphemous under the Islamic religion. It has further been established that the reason why most of the conflict between freedom of religion and freedom of expression stem from the religion of Islam is because Muslims have to accept all commandments, rules and values as they are *Allah's* rules - this is a big reason why Muslims cannot agree with western law.

In order to determine how to deal with the conflict between freedom of religion and freedom of expression this chapter discussed the Salman Rushdie affair and the Danish cartoon controversy. These incidences provided little guidance on how to deal with a conflict of rights. Rushdie and *The Satanic Verses* book could not be prosecuted for blasphemy against Islam because the religion of Islam fell outside the scope of blasphemy in the United Kingdom. In order to resolve the conflict caused by the Danish

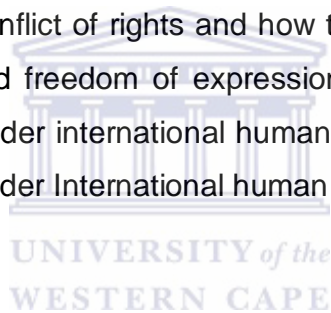
²¹¹Banks TL 'Balancing Competing Individual Constitutional Rights: Raising Some' available at http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1634&context=fac_pubs&sei-redir=1&referer=http%3A%2F%2Fwww.google.co.za%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3Dcompeting%2520constitutional%2520rights%253A%2520raising%2520some%2520questions%2520%26source%3Dweb%26cd%3D2%26ved%3D0CDkQFjAB%26url%3Dhttp%253A%252F%252Fdigitalcommons.law.umaryland.edu%252Fcgi%252Fviewcontent.cgi%253Farticle%253D1634%2526context%253Dfac_pubs%26ei%3DNqW_UNTDNii3hAe53IC_OBA%26usg%3DAFOjCNHPD_cUCEiJp32iWRMox_yxCB3h9g#search=%22competing%20constitutional%20rights%3A%20raising%20some%20questions%22 (accessed 5 December 2012).

²¹²Banks TL 'Balancing Competing Individual Constitutional Rights: Raising Some' available at http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1634&context=fac_pubs&sei-redir=1&referer=http%3A%2F%2Fwww.google.co.za%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3Dcompeting%2520constitutional%2520rights%253A%2520raising%2520some%2520questions%2520%26source%3Dweb%26cd%3D2%26ved%3D0CDkQFjAB%26url%3Dhttp%253A%252F%252Fdigitalcommons.law.umaryland.edu%252Fcgi%252Fviewcontent.cgi%253Farticle%253D1634%2526context%253Dfac_pubs%26ei%3DNqW_UNTDNii3hAe53IC_OBA%26usg%3DAFOjCNHPD_cUCEiJp32iWRMox_yxCB3h9g#search=%22competing%20constitutional%20rights%3A%20raising%20some%20questions%22 (accessed 5 December 2012).

cartoons the UN implemented a resolution called Defamation of Religions, however the conflicting traditions, cultures and religions between Islam and the west have resulted in an ongoing debate over the purpose and content of the resolution. Although the Danish cartoon controversy did not provide us with guidance on how to deal with the conflict between the right to freedom of religion and freedom of expression, it was established that the core of the problem lies in the conflicting tradition, culture and religion of Islam and the west.

In order to provide us with guidance on how to deal with the conflict of rights, this mini-thesis discussed Habermas' theory on solving conflicts and Konrad Hesse's notion on *Praktische Konkordanz*, and although both theories provide guidance on solving conflicts of rights this mini-thesis has established flaws in both these theories.

To further the discussion on conflict of rights and how to solve the conflict between the right to freedom of religion and freedom of expression this mini-thesis will determine whether these rights conflict under international human rights law and how a conflict of these rights would be solved under International human rights law.



Chapter Three

The conflict between freedom of religion and freedom of expression under international human rights law

3.1 Introduction

Every individual has human rights which are designed to protect them from unwarranted interferences in crucial aspects of their lives; human rights can only be limited when strict requirements of necessity and proportionality are met.²¹³ When two or more human rights conflict, the principle of indivisibility of human rights requires that both rights carry equal weight - one right cannot trump the other and therefore alternative means must be used to resolve the conflict.²¹⁴ The definition of a conflict is:

A strong disagreement or collision of values, needs, interests, or intentions among individuals, groups, organisations, communities or nations.²¹⁵

As indicated in section 1.1 of chapter 1, according to Zucca:

In order for there to be a conflict between rights, one norm must make it permissible to do X and the other norm must deny the permission to do X meaning that the actions allowed by both rights are not jointly performable.²¹⁶

Zucca's definition of a conflict of rights will be employed by this mini-thesis.

After World War Two (WW2) international treaties, resolutions and declarations aimed at protecting human rights were created. Brysk states that the purpose of developing

²¹³Smet S 'Freedom of Expression and the Right to Reputation: Human rights in Conflict' available at <http://www.auilr.org/pdf/26/26.1.8.pdf> (accessed 23 November 2011).

²¹⁴Smet S 'Freedom of Expression and the Right to Reputation: Human rights in Conflict' available at <http://www.auilr.org/pdf/26/26.1.8.pdf> (accessed 23 November 2011).

²¹⁵Hovatter D 'Understanding Conflicts and Disagreements' available at <http://www.wvu.edu/~exten/infores/pubs/fypubs/wlg353.pdf> (accessed 23 November 2011).

²¹⁶Zucca L (2007) 50. The Dictionary definition of a conflict is 'to come into collision or disagreement; be contradictory, at variance, or in opposition; clash: incompatibility or interference, as of one idea, desire, event, or activity with another', the definition is available at <http://dictionary.reference.com/browse/conflict> (accessed 23 November 2011).

international human rights following WW2 was to create 'a set of universal claims to safeguard human dignity from illegitimate coercion enacted by state agents'.²¹⁷ International human rights laws set out obligations and States are bound to respect these obligations when they become a party to an International treaty.²¹⁸ The obligations and duties a State becomes bound to once they become a party to a treaty are to respect, protect and fulfil human rights.²¹⁹ These obligations require a State to refrain from interfering with or curtailing the enjoyment of human rights, to protect individuals and groups against human rights abuses and to take positive action to facilitate the enjoyment of basic human rights.²²⁰ To comply with the obligations, domestic measures are developed and implemented by Governments.²²¹

A customary rule of law comes into being when a state ratifies a codifying treaty. When a state ratifies or accedes to a treaty that claims a rule of law the state accepts the rule of the treaty as legally binding upon it.²²² It is argued that freedom of expression and freedom of religion are general norms of customary international law.²²³ A mode of behaviour or form of conduct becomes a customary rule of international law through:

- 1) The continuous practice of states.
- 2) The act or usage must be adhered to by an overwhelming majority of states in the international community.
- 3) The element of opinion *jurissive necessitates* must be present.
- 4) The states adhering to the usage must recognise it as a rule of law that creates a binding legal obligation.

²¹⁷Merry SE 'The Practice of Human Rights: Tracking Law Between the Global and Local' available at <http://humanrights.uconn.edu/documents/papers/MarkGoodaleHumanRights.pdf> (accessed 25 November 2011).

²¹⁸United Nations Human Rights Office of the High Commissioner for Human Rights 'International Human Rights Law' available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (accessed 25 November 2011).

²¹⁹United Nations Human Rights Office of the High Commissioner for Human Rights 'International Human Rights Law' available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (accessed 25 November 2011).

²²⁰United Nations Human Rights Office of the High Commissioner for Human Rights 'International Human Rights Law' available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (accessed 25 November 2011).

²²¹United Nations Human Rights Office of the High Commissioner for Human Rights 'International Human Rights Law' available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (accessed 25 November 2011).

²²²Jones TD *Human Rights: Group Defamation, Freedom of Expression, and the Law of Nations* (1998) 37.

²²³Jones TD (1998) 37.

- 5) The practice must be viewed as more than a norm of international courtesy abided by out of a sense of comity.
- 6) Time is also a determinate of whether a norm becomes a customary rule of international law.²²⁴

This mini-thesis submits that the right to freedom of expression is an established norm of customary international law. It is guaranteed and protected under various international and regional instruments; it is also inscribed in most constitutions of the world.²²⁵ Virtually all countries of the world regard freedom of expression as innate, instinctive, primordial and imprescriptible.²²⁶ This mini-thesis further submits that freedom of religion is also a well established norm of customary international law and as an international norm, freedom of religion protects religious and non-religious beliefs, private religion and belief and the freedom to express belief by peaceful means, and it is one of the core protections of the international human rights system.²²⁷

The purpose of this chapter is firstly to determine whether the right to freedom of religion and freedom of expression are in conflict with each other under International Human Rights law and secondly to determine how a conflict between the right to freedom of religion and freedom of expression would be resolved under international human rights law. International and Regional instruments will be discussed in order to make these determinations.

3.2 International regulation of the right to freedom of religion and the right to freedom of expression

²²⁴Jones TD (1998) 37.

²²⁵Asoka K 'Right to Freedom of Expression: Human Rights Defenders Briefing Papers and Series' 2009 *International Service for Human Rights* 4.

²²⁶Jones TD (1998) 37.

²²⁷United States District Court 'Affidavit of International Law Professors and Religious Freedom Experts Regarding the Right to Freedom of Religion or Belief' available at http://www.haguejusticeportal.net/Docs/NLP/US/LiuQi_Affidavit_ReligionFreedomExperts_3-7-2002.pdf (accessed 10 December 2011).

The right to freedom of religion and freedom of expression is contained in various International and regional instruments. Unfortunately discussing all the international instrument which contain the right to freedom of religion and freedom of expression is beyond the scope of this mini-thesis.²²⁸ The mini-thesis will be discussing the International Covenant of Civil and Political Rights (ICCPR) because it is a binding covenant.²²⁹ Even though the ICCPR is only binding on signatory countries, more than three quarters of the UN's member States are bound by the ICCPR under treaty law. It could be argued that all nations, regardless if they signed the covenant or not, may be bound by the ICCPR under customary International law.²³⁰ Furthermore, the ICCPR stems from Universal Declaration of Human Rights (UDHR). The UDHR sets out individuals' basic civil and political rights.²³¹ The UDHR is a non-binding document which has had a great impact on international human rights law as all treaties adopted by the UN since 1948 has been elaborations of the UDHR.²³² Commentators have stated that the UDHR has become part of the common law of the world's community and is superior to all international instruments and domestic law.²³³

The ICCPR is an elaboration of the UDHR; both the right to freedom of religion and freedom of expression are protected under the UDHR and the ICCPR under article 18 and 19.²³⁴ The ICCPR elaborates more fully on the provisions of freedom of religion and freedom of expression and in order to prevent repetition, the relationship between freedom of expression and freedom of religion under the ICCPR will be discussed.

²²⁸The International human rights framework according to Steiner and Alston can be split up into four groups (1) the United Nations Charter, (2) The Universal Declaration of Human Rights (UDHR) (3) the International Covenant of Civil and Political Rights (ICCPR) and (4) multilateral human rights treaties at the international and regional level see Steiner H and Alston P *International Human Rights in Context: Law, Politics and Morals* 2 ed (2000) 137-138. Discussing all the international and regional instruments is beyond the scope of this mini-thesis which will focus on the ICCPR under international treaties and the ECHR under regional treaties.

²²⁹Magnuson W (2010) 8.

²³⁰Clarke B 'Freedom of Speech and Criticism of Religion: What are the Limits?' (2007) 14 *Murdoch University E Law Journal* 103.

²³¹International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Preamble.

²³²Coliver S 'The ARTICLE 19 Freedom of Expression Handbook' available at <http://www.article19.org/data/files/pdfs/publications/1993-handbook.pdf> (accessed 24 November 2011).

²³³Magnuson W (2010) 8.

²³⁴Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).

3.2.1 The right to freedom of religion and freedom of expression under the International Covenant of Civil and Political Rights

As referred to in section 3.2 of chapter 3, the right to freedom of religion is contained under article 18 of the ICCPR.²³⁵ The United Nations Human Rights Committee issued a series of General Comments on articles contained in the ICCPR in order to assist State Parties to the ICCPR.²³⁶ General comment number 22 deals with the right to freedom of thought, conscience and religion.

The United Nations Human Rights Committee indicates the importance of article 18 and the right to freedom of thought, conscience and religion in paragraph 1 of General Comment 22, which states that Article 18:

is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others. The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4.2 of the Covenant.²³⁷

Paragraph (2)(a) of General Comment 22 emphasizes that all beliefs are protected by freedom of religion or belief equally; this includes atheist and non-religious beliefs. It states that 'Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief'.²³⁸

Choice is very important under article 18 and the right to choose or replace a religion or belief is guaranteed.²³⁹ In order to make the correct decision, the right to full and free disclosure as to the truth, benefits and disadvantages of any religion or belief should be included in the ICCPR, meaning the right to criticize any or all religions or beliefs is an

²³⁵International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) article 18.

²³⁶Clarke B (2007) 103.

²³⁷UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), 30 July 1993, paragraph 1.

²³⁸UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), 30 July 1993, paragraph 2.

²³⁹Cherry M 'Speaking Freely About Religion: Religious Freedom, Defamation and Blasphemy' available at <http://www.iheu.org/files/Speaking%20Freely%20about%20Religion.pdf> (accessed 25 November 2011).

important element of freedom of religion.²⁴⁰ Paragraph 5 of General Comment 22 states that ‘The Committee observes that the freedom to have or to adopt a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief’.²⁴¹

Article 18(3) is a limitation on the freedom to manifest religion or belief; it is not a limitation on the freedom of thought and conscience, as these are protected unconditionally.²⁴² Paragraph 3 of General Comment 22 states that:

Article 18 does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19.1.²⁴³

Finally, the right to freedom of religion or belief does not protect religions, it protects the individual.²⁴⁴ The right to have one's religion or belief at all times exempted from criticism, ridicule or insult, in other words having your religious feelings protected at all times, is not protected by this right.²⁴⁵

The right to freedom of expression is protected under article 19 of the ICCPR, and General Comment 10 of the United Nations Human Rights Committee deals with the right to freedom of expression.²⁴⁶ According to the United Nations Human Rights Committee, there are no exceptions and restrictions on the right to hold an opinion. It is

²⁴⁰Cherry M ‘Speaking Freely About Religion: Religious Freedom, Defamation and Blasphemy’ available at <http://www.ihcu.org/files/Speaking%20Freely%20about%20Religion.pdf> (accessed 25 November 2011).

²⁴¹UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), 30 July 1993, paragraph 5.

²⁴²Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers ‘Some other Key Rights: Freedom of Thought, Conscience, Religion, Opinion, Expression, Association and Assembly’ available at www.ohchr.org/Documents/Publications/training9chapter12en.pdf (accessed 25 November 2011).

²⁴³UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), 30 July 1993 paragraph 3. Discussing the full General comments will not contribute to the mini-theses and is unfortunately beyond its scope.

²⁴⁴Cherry M ‘Speaking Freely About Religion: Religious Freedom, Defamation and Blasphemy’ available at <http://www.ihcu.org/files/Speaking%20Freely%20about%20Religion.pdf> (accessed 25 November 2011).

²⁴⁵Temperman J (2008).

²⁴⁶International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) article 19.

logical because you cannot control what goes on in a person's mind.²⁴⁷ Paragraph 1 of General Comment 10 requires protection of the 'right to hold opinions without interference'; this is a right to which the Covenant permits no exception or restriction.²⁴⁸

The right to freedom of expression would be infringed if States tried to stop the public from watching satellite television networks, using mobile phones, the internet or trying to monitor private communications for the purpose of enforcing oppressive and discriminatory laws.²⁴⁹ Paragraph 2 of General Comment 10 requires protection of the right to freedom of expression, which includes not only freedom to 'impart information and ideas of all kinds, but also freedom to seek and receive them regardless of frontiers and in whatever medium, either orally, in writing or in print, in the form of art, or through any other media of his choice'.²⁵⁰

Although freedom of expression is the cornerstone of liberalism and democracy it is not absolute and may be limited in terms of Article 19(3) which is the limitations clause telling a State when they can and cannot limit the right to freedom of expression. Since freedom of expression is a paramount right in a democratic society, any restriction must meet a strict requirement meaning the restriction must comply with the principles of legality and proportionality and be imposed for one or more of the legitimate purposes in article 19(3).²⁵¹ Paragraph 3 of General Comment 10 lays down conditions, and it is only subject to these conditions that restrictions may be imposed. The restrictions must be 'provided by law; they may only be imposed for one of the purposes set out in

²⁴⁷Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers'. Some other Key Rights: Freedom of Thought, Conscience, Religion, Opinion, Expression, Association and Assembly' available at www.ohchr.org/Documents/Publications/training9chapter12en.pdf (accessed 25 November 2011).

²⁴⁸UN Human Rights Committee (HRC), CCPR General Comment No. 10: Article 19 (Freedom of Expression), 29 June 1983, paragraph 1. See also Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers' Some other Key Rights: Freedom of Thought, Conscience, Religion, Opinion, Expression, Association and Assembly' available at www.ohchr.org/Documents/Publications/training9chapter12en.pdf (accessed 25 November 2011).

²⁴⁹Clarke B 'Freedom of Speech and Criticism of Religion: What are the Limits?' (2007) 14 *Murdoch University E Law Journal* 104.

²⁵⁰UN Human Rights Committee (HRC), CCPR General Comment No. 10: Article 19 (Freedom of Expression), 29 June 1983, paragraph 2.

²⁵¹Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers' Some Other Key Rights: Freedom of Thought, Conscience, Religion, Opinion, Expression, Association and Assembly' available at www.ohchr.org/Documents/Publications/training9chapter12en.pdf(accessed 25 November 2011).

subparagraphs (a) and (b) of paragraph 3; and they must be justified as being necessary for that State party for one of those purposes'.²⁵²

Article 20 also limits freedom of expression it states that 'propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.²⁵³

3.2.2 The conflict between freedom of religion and freedom of expression under the ICCPR

Article 5 of the ICCPR prevents people from using their rights as a weapon to attack the rights of others. It states that:

Nothing in the present Covenant may be interpreted as implying for any State, on any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.²⁵⁴

Article 5 of the Vienna Convention confirms article 5 of the ICCPR, emphasizing that there should be no hierarchy of rights or conflict of rights under international human rights law and that balancing of competing rights should take place. It states the following:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.²⁵⁵

The right to freedom of expression under the ICCPR is not absolute and may be limited

²⁵²UN Human Rights Committee (HRC), CCPR General Comment No. 10: Article 19 (Freedom of Expression), 29 June 1983, paragraph 1.

²⁵³International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 article 20.

²⁵⁴International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) article 5.

²⁵⁵Vienna Convention on the Law of Treaties, 1969 (1969) 8 ILM article 5.

in order to protect the rights or reputations of others, national security, public order, public health and morals.²⁵⁶ Under the ICCPR, freedom of expression protects ridiculing the religious beliefs of others, and claiming the protection of religion is not a legitimate ground for limiting freedom of expression.²⁵⁷ The ICCPR does not protect a particular religion, it protects people and every person has the right to freedom of religion or belief which includes the right to have or adopt a religion or belief, and the right to manifest that religion or belief either individually or in a community.²⁵⁸ The right to have one's religion or belief at all times exempted from criticism or ridicule is not included under international human rights law and no right or duty is placed on a person to respect another's religious feelings.²⁵⁹

This mini-thesis submits that under international human rights law, if a person's right to freedom of religion is affected, which is not the same as the right to respect one's religious feelings it is a legitimate ground to limit freedom of expression. According to Temperman, ridiculing and insulting a person's religious beliefs and practices is not a threat or limit to a person's right to freedom of religion and it also does not affect a person's freedom to have or adopt a religion or belief or to freely exercise the religion or belief in question and therefore would not be a justifiable limitation on the right to freedom of expression.²⁶⁰ It is further submitted by Temperman that a state must prove that freedom of expression actually impedes or jeopardises a person's freedom of religion or belief and that a group of believers being insulted by a publication, film or a play does not show an actual impediment or jeopardy to a person's religion or belief in terms of the ICCPR.²⁶¹ This mini-thesis agrees with the statement but the agreement is conditional and would vary depending on the instrument protecting these rights.

²⁵⁶Temperman J (2008) 526-527.

²⁵⁷I have chosen to determine whether a conflict exist under the ICCPR and the UDHR because the ICCPR is an elaboration of the UDHR and a binding document. Temperman J (2008) 527.

²⁵⁸Temperman J (2008) 526.

²⁵⁹Eltayeb MSM 'The Limitations on Critical Thinking on Religious Issues under Article 20 of ICCPR and Its Relation to Freedom of Expression' available at https://docs.google.com/viewer?a=v&q=cache:-3f5DAKAIE4J:www.ohchr.org/Documents/Issues/Expression/ICCPR/Seminar2008/PaperEltayeb.doc+Eltayeb+M+S+M+%E2%80%98The+Limitations+on+Critical+Thinking+on+Religious+Issues+under+Article+20+of+ICCP R&hl=en&gl=za&pid=bl&srcid=ADGEEShG00aqN69WrmS59XaJw_ONAPiR4cyrIT-Dbw0S7pfTgJcFFXbsHxz3Gly-6wsk8Jk-Xi-tNqDj80PGm4FHsvy3NqzWx1iaqbAtqm5YkKTitlKhRE3DJ-OgNASHwcBwDW2Ne7mC&sig=AHIEtbQE0SOPc4ysYHxehgfdBjUx7eO_VQ (accessed 5 December 2012).

²⁶⁰Temperman J (2008) 527.

²⁶¹Temperman J (2008) 527.

At international level a case where the right to freedom of religion and freedom of expression have come into conflict has not occurred but at regional level in Europe three cases have been dealt with by the European Court of Human Rights (ECtHR). This mini-thesis will therefore discuss the conflict of the right to freedom of religion and freedom of expression at regional level, focusing on the European Region.

3.3 Regional regulation of the right to freedom of religion and freedom of expression

Three regions have developed their own declarations and conventions to protect and enforce human rights namely Europe, the Americas and Africa. Regional agencies and courts are more effective at investigating alleged violations of rights and providing relief for victims because of its location, and regional agencies are more familiar with the culture and identity of the region and would have a better understanding of the problems, circumstances and possible reform.²⁶² Regional human rights arrangements are important because of their ability 'to extend the domestic impact of international human rights guarantees through the treaty-enabled Courts and Commissions'.²⁶³

The purpose of discussing the regional regulation of these rights is to determine how the mechanisms which ensure compliance of the rights under these instruments have dealt with the conflict between freedom of religion and freedom of expression.

This mini-thesis, as referred to in section 3.2.2 of chapter 3, will be discussing the European region in order to determine how it has dealt with the conflict between the right to freedom of religion and freedom of expression under The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). This mini-thesis will not be discussing the African region and the African charter because the African commission and the African court whose duty is to enforce, clarify and specify articles under the African Charter, have been in operation for a very short time and has

²⁶²Nickel J 'Human Rights' available at <http://plato.stanford.edu/entries/rights-human/#regional> (accessed 24 November 2011).

²⁶³Agocha B M *The Application of the Local Remedies Rule Under the African Charter on Human and Peoples Rights: With a Case Study of Communications from the Niger Delta* (unpublished LLM thesis, McGill University, Montreal, 2009) 29.

heard little cases. It has not yet dealt with a case where the conflict between freedom of religion and expression has come into question and therefore will not contribute to this mini-thesis.²⁶⁴ The American region and the American Charter will not be discussed because the articles of freedom of religion and expression under the American Convention is almost identical to that of the ICCPR, which has already been discussed, and little guidance is provided on solving the conflict of these rights under this region.²⁶⁵

3.3.1 Freedom of religion and expression under the European Convention on Human Rights

The ECHR is adopted under the auspices of the council of Europe. The ECHR formally applies to Council of Europe Member states only, and the interpretative authority on this convention is the ECtHR.²⁶⁶ Any individual or organization claiming that their right under the ECHR has been violated may lodge an application directly with the ECtHR after all relevant domestic remedies in the member state concerned have been exhausted.²⁶⁷

The rights in the ECHR have no hierarchal order and the responsibility of determining what each right means vest with the ECtHR.²⁶⁸ If a conflict arises between two or more rights in the ECHR, the ECtHR would resolve the conflict by determining if the national non judicial authorities have struck an appropriate balance taking factors such as the context of the specific litigation and the margins of appreciation into account.²⁶⁹

Paragraph two (2) of article 8, 9, 10 and 11 of the ECHR use analogous concepts and

²⁶⁴Coliver S 'The Article 19 Freedom of Expression Handbook' available at <http://www.article19.org/data/files/pdfs/publications/1993-handbook.pdf> (accessed 24 November 2011). See also Evans MD and Murray R *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (2008) 215, 220.

²⁶⁵American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143.

²⁶⁶Cerone J 'Inappropriate Renderings: The Danger of Reductionist Resolutions' (2008) 33 *Brooklyn Journal of International Law* 363.

²⁶⁷Voorhoof D & Cannie H 'Freedom of Expression and Information in a Democratic Society: The Added but Fragile Value of the European Convention on Human Rights' (2010) 72 *The International Communication Gazette* 408.

²⁶⁸Greer S 'Balancing and the European Court of Human Right: A Contribution to the Habermas-Alexy Debate' (2004) 63 *Cambridge Law Journal* 423.

²⁶⁹Voorhoof D & Cannie H (2010) 409.

follow a similar pattern if there is an interference with these rights.²⁷⁰ If the right to freedom of religion conflicts with freedom of expression, the ECtHR follows the same approach; firstly it would be determined whether an interference with the right to freedom of expression under article 10(1) took place, then a determination as to whether the interference was prescribed by law and pursued by legitimate aims under Article 10(2) and finally whether the interference was necessary in a democratic society.²⁷¹

To be more specific on the evaluation of article 10(2), the court conducts a two-part test in order to determine if the infringement is justified. In the first stage of the test the court determines whether the restriction is prescribed by law; for a restriction to be prescribed by law it must meet the minimal standard of the rule of law. To meet the minimal standards, the law must serve a legitimate aim e.g. section 10(2) and must not be void for vagueness.²⁷²

In the second stage of the test the court determines whether the restriction is necessary in a democratic society in terms of the reasons listed in the article. A proportionality test is conducted by the court to determine how important the goal of the restriction is and to determine whether the scope is exceeded in trying to achieve this goal.²⁷³

A number of cases decided by the ECtHR determined and elaborated the characteristics of this test. The court has to address the following questions but this is not a closed list:

1. Whether the interference complained of is responding to a pressing social need.²⁷⁴

²⁷⁰Discussing why the court have not developed interpretation of the concepts with reference to article 9 is unfortunately beyond this thesis read Javier MT 'The European Convention on Human Rights: The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief: A Comparative Perspective' available at <http://find.galegroup.com/itx/infomark.do?&contentSet=IAC- Documents&type=retrieve&tabID=T002&prodId=AONE&docId=A114945130&source=gale&srcprod=AONE&userGroupName=uwcape&version=1.0> (accessed 12 June 2011).

²⁷¹Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR). See Grinberg M 'Defamation of Religions v Freedom of Expression: Finding the Balance in a Democratic Society' (2006) 18 *Sri Lanka Journal of International Law* 206.

²⁷²Vance SC 'The Permissibility of Incitement to Religious Hatred Offenses Under European Convention Principles' (2005) 14 *Transnational Law & Contemporary Problems* 204.

²⁷³Vance SC (2005) 201.

²⁷⁴*Financial Times v. The United Kingdom* Application no. 821/03 (2009) ECtHR.

2. Are the means chosen, rationally connected to the objective
3. Have the national authorities given justified reasons for their interference.²⁷⁵
4. Does the restriction impair the right as little as possible.²⁷⁶
5. Are the effects on the rights proportionate to the legitimate aims it pursued.²⁷⁷

This 'doctrine of margin of appreciation' is considered by the ECtHR at the proportionality stage.²⁷⁸ When the national authorities applies the restriction on freedoms stated in the ECHR articles example paragraph 2 in article 8-11, then it must be given a reasonable margin of appreciation. The doctrine of margin of appreciation gives EU member states a certain amount of flexibility when interpreting the application and limitation of rights in the ECHR.²⁷⁹ In terms of the margin of appreciation the ECtHR holds the belief that national authorities should be given leeway because they are closer to the respective societies, are in a better position to evaluate the necessity of the restrictive measures adopted and they can better appraise the needs of the public interest and interpret the relevant domestic law.²⁸⁰

²⁷⁵ *Steel and Morris v. The United Kingdom* Application no. 68416/01 (2005) ECtHR and *Manolea O. v. Moldova*, Application no. 13936/02 17 (2009) ECtHR.

²⁷⁶ *Sunday Times (No. 1) v. The United Kingdom* Application no 6538/74 26 (1979) ECtHR.

²⁷⁷ *Karsai v. Hungary* Application No. 5380/07 (2009) ECtHR. See also Voorhoof D & Cannie H (2010) 410.

²⁷⁸ Definition of margin of appreciation:

Margin of appreciation refers to the power of a Contracting State in assessing the factual circumstances, and in applying the provisions envisaged in international human rights instruments. Margin of appreciation is based on the notion that each society is entitled to certain latitude in balancing individual rights and national interests, as well as in resolving conflicts that emerge as a result of diverse moral convictions.

For further reading on the margin of appreciation see Vance SC (2005) 202-249, Bakircioglu O 'The Application of the Margin of Appreciation Doctrine' (2007) 8 *German Law Journal* 711 and Hutchinson MR 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48 *International and Comparative Law Quarterly* 639.

²⁷⁹ Vance SC (2005) 201. The cases of *Otto Preminger Institut v. Austria* Application no. 13470/87 (1994) ECtHR, *Wingrove v. United Kingdom* Application no. 17419/90 (1997) ECtHR and *I.A. v. Turkey* Application no. 42571/98 (2005) ECtHR illustrates a countries margin of appreciation when it comes to limiting rights under the ECHR. The case of *Dubowska & Skup v. Poland* Application No. 34055/96 and 33490/96 (1997) illustrates the application of rights under the ECHR.

²⁸⁰ Javier MT 'The European Convention on Human Rights: The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief: A Comparative Perspective' available at <http://find.galegroup.com/itx/infomark.do?&contentSet=IAC-Documents&type=retrieve&tabID=T002&prodId=AONE&docId=A114945130&source=gale&srcprod=AONE&userGroupName=uwcape&version=1.0> (accessed 12 June 2011).

The right to freedom of religion is stipulated and protected by Article 9(1) of the ECHR.²⁸¹ In article 9(1) the right to freedom of thought, conscience and religion is guaranteed without qualifications, meaning that any thought, moral conviction or opinions on religious or other issues are absolute as long as they are silent and not expressed.²⁸² This makes sense because it is part of a person's conscience and intangible, making it impossible for a State to breach.²⁸³ Article 9(2) protects the right to manifest one's religion or belief in worship, teaching practice and observance.²⁸⁴ The right to manifest one's religion or belief is not absolute and may be limited in terms of Article 9(2) of the ECHR.²⁸⁵ If the right to manifestation was to be limited by article 9(2), two things have to be met: (1) the limitation must be prescribed by law and (2) it must be necessary in a democratic society.²⁸⁶

The right to freedom of expression is stipulated and protected by Article 10(1) of the ECHR which includes the right to hold an opinion and to receive and impart information and ideas.²⁸⁷ Freedom of expression is not only applicable to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend shock or disturb.²⁸⁸ Article 10(2) sets out the exceptions to freedom of expression. For a restriction, any formalities, conditions or penalties imposed by the State to be lawful it must comply with the principle of legality, the

²⁸¹Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) article 9.

²⁸²Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) article 9(1). For commentary see van Dijk F, van Hoof F, van Rijn A & Zwaak L *Theory and Practice of the European Convention on Human Rights* 4 ed (2006) 752.

²⁸³Kufner S, Rube D & Sonczyk B 'The Santo Daime Church: The Protection of Freedom of Religion Under International Law' available at <http://www.bialabate.net/wp-content/uploads/2008/08/Santo-Daime1.AILC.FINAL-REPORT.14.03.07.pdf> (accessed 10 December 2011).

²⁸⁴Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) article 9(2). For commentary see van Dijk F, van Hoof F, van Rijn A & Zwaak L (2006) 761.

²⁸⁵Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) article 9(2). For commentary see Torron J M 'The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief: The European Convention on Human Rights' (2003) 3 *Global Jurist Advances* 4.

²⁸⁶Evans MD *Religious Liberty and International Law in Europe* (1997) 315-328.

²⁸⁷Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) article 10 (1).

²⁸⁸*Lingens v. Austria* Application No 9815/82 (1986) ECtHR. See also Cerone J 'Inappropriate Renderings: The Danger of Reductionist Resolutions' (2008) 33 *Brooklyn Journal of International Law* 365.

condition of legitimate purpose and the principle of necessity in a democratic society.²⁸⁹

The ECtHR has had the opportunity to examine the interaction between the right to freedom of expression and freedom of religion in a number of cases and although these rights can interact in numerous ways, for example a State can permit or prohibit certain expression which conflict with religious views, the jurisprudence of the ECtHR with regard to the interaction between these rights centres on the protection of religious feelings.²⁹⁰ In three cases decided by the ECtHR which concerned blasphemy laws namely *Otto Preminger Institut v. Austria*, *Wingrove v the UK* and *İ.A. v Turkey*, the interaction between freedom of expression and freedom of religion resulted in the ECtHR protecting the right to freedom of religion and limiting the right to freedom of expression.²⁹¹ These above three cases will be the only cases analysed in this mini-thesis because they deal with the interaction between freedom of religion and freedom of expression and contain elements of blasphemy and the protection of religious feelings, which is central to this mini-thesis. Other cases dealt with by the ECtHR which also focus on the interaction between freedom of expression and freedom of religion such as *Gündüz v. Turkey*, 4 December 2003 and *Güzel v Turkey*, 27 July 2006, which deals with hate speech, and *Klein v. Slovakia*, 31 October 2006 and *Albert-Engelmann-GesellschaftmbH v Austria*, 19 January 2006, which deals with criticism of a high ranking church official, will not be discussed in this mini-thesis as it is beyond the scope of this mini-thesis.

3.4 Analyses of the cases

3.4.1 Otto Preminger Institut v Austria

This incident started with a request to the public prosecutor by the Innsbruck diocese of the Roman Catholic Church to institute criminal proceedings against the Otto-Preminger-Institut. The Otto-Preminger-Institut is based in Innsbruck and runs a

²⁸⁹Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) article 10(2).

²⁹⁰Cerone J (2008) 363.

²⁹¹Cerone J (2008) 363.

cinema. It was intending to screen a Werner Schroeter film called *Council in Heaven* on 13 May 1985.²⁹² The film was based on a nineteenth-century play and it depicted the revered figures of Christianity in irreverent and demeaning ways such as the depiction of God in image and in text as a senile and impotent idiot, Jesus as a cretin and Mary, mother of God, as a wanton woman.²⁹³ The reason for instituting criminal proceedings was an allegation that the film disparages religious precepts.²⁹⁴

The Innsbruck regional court ordered a seizure of the film a day before its screening. The criminal proceedings were not to convict a particular person but for the forfeiture of the film.²⁹⁵ On 10 October 1986, Innsbruck regional court ordered the forfeiture of the film relying on the penal code which prohibits expressions insulting 'an object of veneration of a church established within the country'.²⁹⁶ The authorities seized the film from the society and also forbade its screening in the country on the grounds that the interference with religious feelings outweighed the right to freedom of art in the Constitution.²⁹⁷

On 6 October 1987 the Otto-Preminger-Institut made an application to the European Commission of Human Rights (the Commission) on the grounds that the seizure and forfeiture of the film was against article 10 of the ECHR, and the Commission found that a violation of article 10 did occur with regard to seizure, and forfeiture violated article 10 of the ECHR. The Commission found in favour of nine votes to five with regard to seizure and with regard to forfeiture thirteen votes to one.²⁹⁸ The Commission and the ECtHR work in conjunction with each other; the Commission works as a filter which resolves a claim before it reaches the ECtHR.²⁹⁹ If the Commission finds an application admissible and are unable to broker a friendly settlement between the parties then the

²⁹²*Otto Preminger Institut v. Austria* Application no. 13470/87 (1994) ECtHR. See also Mularoni A 'The Society Of Information: Freedom, Pluralism, Resources' (2006) 30 *Southern Illinois University Law Journal* 4.

²⁹³*Otto-Preminger Institute v. Austria* Application no 13470/87 (1994) ECtHR. See also Mclaughlin N (2010) 402.

²⁹⁴*Otto-Preminger Institute v. Austria* Application no. 13470/87 (1994) ECtHR paragraph 1-57. For a discussion on the case see also Misthal MP 'Reigning in the Paparazzi: The Human Rights Act, The European Convention On Human Rights and Fundamental Freedoms, and The Rights of Privacy and Publicity in England' (1998) 10 *International Legal Perspectives Journal* 9.

²⁹⁵*Otto Preminger Institut v. Austria* Application no. 13470/87 (1994) ECtHR.

²⁹⁶*Otto Preminger Institut v. Austria* Application no. 13470/87 (1994) ECtHR.

²⁹⁷*Otto-Preminger Institute v. Austria* Application no. 13470/87 (1994) ECtHR.

²⁹⁸*Otto-Preminger Institute v. Austria* Application no. 13470/87 (1994) ECtHR.

²⁹⁹Misthal MP (1998) 9.

application will be heard by the ECtHR. However, if the Commission finds an application inadmissible, the application will not go any further.³⁰⁰ The case was referred to the ECtHR by the Commission on 7 April 1993 and by the Government of the Austrian Republic on 14 May 1993.³⁰¹ The reason for the referral was to establish if Austria breached its obligations under Article 10 of the ECHR. The ECtHR held by six votes to three that there had been no violation of article 10 by the Austrian courts when it ordered the seizure and forfeiture of the film.³⁰²

In the ECtHR, the Austrian lawyers turned the conflict between Otto-Preminger-Institut and the state of Austria into a conflict between rights namely freedom of expression and freedom of religion. The focus was on the legitimate aim of limiting freedom of expression in terms of article 10(2) to protect the rights of others. The ECtHR held that Austria had legitimately limited the right to free speech to protect the religious rights of others.³⁰³ The ECtHR also found that the national authorities were capable of assessing the needs of its society better than an international judge and did not overstep the margin of appreciation as they were entitled to stop what could be thought of as unwarranted and offensive attacks on the religious beliefs on the majority of believers in Austria.³⁰⁴

In the case of *Otto-Preminger v Austria* the reasoning behind the majority decision of the ECtHR in accepting the decision of the Austrian court that the film lacked any artistic merit that could outweigh the offence and that seizing the film was to protect the religious feelings of the majority of the county's people, which was Christianity, was firstly that the film was advertised and that there was sufficient public knowledge of the film's content to cause offence, and secondly the ECtHR pointed out that the Roman Catholic religion was the majority religion of Tyroleans with eighty seven percent (87%) following it and therefore the Austrian authorities, in seizing the film, did not overstep the

³⁰⁰Misthal MP (1998) 9.

³⁰¹*Otto-Preminger Institute v. Austria* Application no. 13470/87 (1994) ECtHR.

³⁰²*Otto-Preminger Institute v. Austria* Application no. 13470/87 (1994) ECtHR.

³⁰³*Otto-Preminger Institute v. Austria* Application no. 13470/87 (1994) ECtHR. See also Haarscher G 'Symposium: Recalling Vico's Lament: The Role of Prudence and Rhetoric in Law and Legal Education: Article: Rhetoric and its Abuses: How to Oppose Liberal Democracy While Speaking its Language' (2008) 83 *Chicago-Kent Law Review* 11.

³⁰⁴Fuhrmann W 'Perspectives of Religious Freedom from the Vantage Point of the European Court of Human Rights' 2000 *Brigham Young University Law Review* 835.

margin of appreciation as the seizure was to protect religious peace and the religious feelings of Christians from offence.³⁰⁵

The dissenting judges had a very different view from the majority decision. Three out of the nine judges found firstly that the seizure and forfeiture was a complete denial of freedom of expression and stated that such denial is only justified if the speech was so abusive that it would come close to a denial of freedom of religion of others, which the film does not.³⁰⁶ The dissenting judges held firstly that there was 'little likelihood of anyone being confronted with objectionable material unwittingly' and secondly that the applicant acted 'responsibly in such a way as to limit, as far as it could reasonably have been expected to, the possible harmful effects of showing the film'.³⁰⁷ The dissenting judgment stated further that 'on balance, the seizure and forfeiture of the film in question were not proportionate to the legitimate aim pursued'.³⁰⁸

The issue of religious feelings plays an important part in the reasoning behind the majority decision, however the dissenting judges denied that this protection exists if you look at the letters of article 9 ECHR. Looking strictly at the wording of article 9 of the ECHR it does not include the right to be protected from offensive expression nor the right to be protected against criticism or ridicule by others, but it does provide for restriction of expression where the expression would impair the enjoyment of article 9 of the ECHR freedoms. In *Otto-Preminger v Austria* the majority judgment of ECtHR

³⁰⁵ *Otto-Preminger Institute v. Austria* Application no. 13470/87 (1994) ECtHR. See also Tsakyrakis S 'The B Balancing Method on the Balance: Human Rights Limitations in the ECHR' available at http://www.google.co.za/url?sa=t&rct=j&q=i.a.%20v.%20turkey%20full%20case&source=web&cd=4&sqi=2&ved=0CEkQFjAD&url=http%3A%2F%2Fwww.law.nyu.edu%2Fidcplg%3FidcService%3DGET_FILE%26dDocName%3DECM_DLV_013717%26RevisionSelectionMethod%3DLatestReleased&ei=cekiUMKkLpKT0QWSyID4DA&usg=AFQjCNFnIDo6_PpVdtddnYcSX3dGUR57mg&sig2=OnYbJdBKighyTEbFWqer6A (accessed 10 August 2012).

³⁰⁶ See the joint dissenting opinion of Judges Palm, Pekkanen and Makarczyk in *Otto-Preminger Institute v. Austria* Application no. 13470/87 (1994) ECtHR. See also Tsakyrakis S 'The B Balancing Method on the Balance: Human Rights Limitations in the ECHR' available at http://www.google.co.za/url?sa=t&rct=j&q=i.a.%20v.%20turkey%20full%20case&source=web&cd=4&sqi=2&ved=0CEkQFjAD&url=http%3A%2F%2Fwww.law.nyu.edu%2Fidcplg%3FidcService%3DGET_FILE%26dDocName%3DECM_DLV_013717%26RevisionSelectionMethod%3DLatestReleased&ei=cekiUMKkLpKT0QWSyID4DA&usg=AFQjCNFnIDo6_PpVdtddnYcSX3dGUR57mg&sig2=OnYbJdBKighyTEbFWqer6A (accessed 10 August 2012).

³⁰⁷ See the joint dissenting opinion of Judges Palm, Pekkanen and Makarczyk in *Otto-Preminger Institute v. Austria* Application no. 13470/87 (1994) ECtHR.

³⁰⁸ See the joint dissenting opinion of Judges Palm, Pekkanen and Makarczyk in *Otto-Preminger Institute v. Austria* Application no. 13470/87 (1994) ECtHR.

illustrated the need to ensure the peaceful enjoyment of article 9 rights such as the right to express and hold religious beliefs.³⁰⁹ The ECtHR did not demonstrate a clear link between the protection of religious feelings and the exercise of freedom of religion. Protection of religious feelings is not contained in the wording of article 9 ECHR but it cannot be discarded that some manifestation of freedom of expression may amount to harassment of people who exercise their religion or belief in a certain way.³¹⁰ Furthermore, article 9(2) ECHR gives States a wide margin of appreciation to limit free speech if it deems it to pose a threat to national security, territorial integrity, public safety, the health and morals of society or the reputation and rights of others.³¹¹

3.4.2 Wingrove v the UK

Nigel Wingrove wrote and directed a film called *Visions of Ecstasy*. This film focused on the sixteenth century Carmelite nun St Teresa of Avila; this nun is believed to have had ecstatic visions of Christ.³¹² The Video Recordings Act 1984 required a video to be submitted to the British Board of Film Classification (BBFC) before it could be screened for the public. The BBFC stated that this film infringed blasphemy laws and would cause outrage because it focused on Christ and therefore rejected the application.³¹³

Mr. Wingrove appealed this decision to the Video Appeals Commission but was unsuccessful. In 1990 an application was made to the Commission, arguing that Mr Wingrove's right to freedom of expression under article 10 of the ECHR was infringed and the Commission agreed that it was with a vote of fourteen to two.³¹⁴ The Commission then referred the case to the ECtHR.³¹⁵

The ECtHR, by a vote of seven to two, found that article 10 was not violated. The ECtHR held that although freedom of expression applies to information and ideas that

³⁰⁹ Taylor PM 'The Questionable Grounds of Objections to Proselytism and Certain Other Forms of Religious Expression' 2006 *Brigham Young University Law Review* 6-7.

³¹⁰ Cerone J (2008) 365.

³¹¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) article 9(2).

³¹² *Wingrove v United Kingdom* Application no. 17419/90 (1997) ECtHR.

³¹³ *Wingrove v United Kingdom* Application no. 17419/90 (1997) ECtHR. See also Petman J 'Human Rights, Democracy and the Left' 2006 *Unbound Harvard Journal of the Legal Left* 12.

³¹⁴ *Wingrove v United Kingdom* Application no. 17419/90 (1997) ECtHR.

³¹⁵ *Wingrove v United Kingdom* Application no. 17419/90 (1997) ECtHR.

shock, offend or disturb the State or any sector of the population, it is not unlimited.³¹⁶ Religious beliefs of others or the religious freedom of others is a justifiable limitation on freedom of expression, provided that this limitation on expression is necessary in a democratic society. The court found that national laws may prevent or punish gratuitous attacks or offences to religious beliefs however the court emphasized that freedom of religion is not exempt from all criticism.³¹⁷

The case of *Wingrove v the UK* was the second case after *Otto-Preminger v Austria* to deal with the protection of religious feelings and as in the *Otto-Preminger v Austria* the ECtHR had a different view to the Commission. The Commission believed that the film, as it was a short experimental video, would have limited reach and impact and that boxes containing the video cassettes would have a description of its content. Delegates of the Commission stated that 'the risk that any Christian would unwittingly view the video was therefore substantially reduced and so was the need to impose restrictions on its distribution'.³¹⁸ The ECtHR held that a video could be 'copied, lent, rented, sold and viewed in different homes, thereby easily escaping any form of control by the authorities'.³¹⁹

The dissenting judges in *Wingrove v the UK* stated that the interference was prior restraint which was unacceptable in the field of freedom of expression. Prior restraint occurs when authorities interfere with freedom of expression even though members of society whose feelings they seek to protect have not called for such interference.³²⁰ The interference is based on the opinion of the authorities and the actual individuals' opinions remain unknown. Therefore the judges held that the interference could not respond to a pressing social need and therefore could not be regarded as necessary in a democratic society.³²¹

³¹⁶ *Wingrove v United Kingdom* Application no. 17419/90 (1997) ECtHR.

³¹⁷ *Wingrove v United Kingdom* Application no. 17419/90 (1997) ECtHR paragraph 32-64.

³¹⁸ *Wingrove v United Kingdom* Application no. 17419/90 (1997) ECtHR paragraph 62.

³¹⁹ *Wingrove v United Kingdom* Application no. 17419/90 (1997) ECtHR paragraph 63.

³²⁰ See the dissenting judgement of judge Lohmus in *Wingrove v United Kingdom* Application no. 17419/90 (1997) ECtHR.

³²¹ See the dissenting judgement of judge Lohmus in *Wingrove v United Kingdom* Application no. 17419/90 (1997) ECtHR. See also Petman J (2006) 12.

3.4.3 Similarities between *Otto-Preminger v Austria* and *Wingrove v the UK*

The cases of *Otto-Preminger v Austria* and *Wingrove v the UK* have many similarities. Firstly, the facts in these cases are very similar; both involve audio visual work (films) which disparage Christianity and depict sacred figures of the Christian religion in demining ways. In both cases the films were held to be blasphemous by the national authorities, namely Austria in the case of *Otto-Preminger v Austria* and the UK in the case of *Wingrove v the UK*, and the screening of these films was not allowed. The next similarity between these two cases is the applicability of blasphemy laws; in Austria and the UK, Christianity is the majority religion and blasphemy laws at the time of these cases were in operation in both of these authorities, and in both authorities blasphemy laws applied to offences only against the Christian religion.³²²

The approach of the ECtHR in these two cases is also very similar. In both of these cases the applicant's right to freedom of expression was being infringed and the ECtHR essentially held that protecting the religious feelings of others was a legitimate aim under article 10(2) ECHR and that it was a justifiable limitation on the applicant's right to freedom of expression as it was necessary in a democratic society.³²³ In coming to its conclusion in the above two points the ECtHR gave Austria and the UK a wide margin of appreciation; the reason for this was that the national authorities had closer contact with its societies and was in a better position to determine whether the protection of religious feelings is a permissible interference with freedom of expression. In both cases the ECtHR found that not allowing the applicant to screen the film was a justifiable limitation on the applicant's right to freedom of expression.³²⁴ Essentially in these two cases the ECtHR held that the protection of religious freedom of others was a legitimate aim under article 10(2) of the ECHR and justified a limitation on freedom of expression, provided that the limitative measure could be seen as necessary in a

³²²European Commission for Democracy Through Law 'Analysis of Domestic Law Concerning Blasphemy, Religious Insult and Inciting Religious Hatred in Albania, Austria, Belgium, Denmark, France, Greece, Ireland, Netherlands, Poland, Romania, Turkey, United Kingdom.' Available at [http://www.venice.coe.int/docs/2008/CDL-AD\(2008\)026add2-bil.pdf](http://www.venice.coe.int/docs/2008/CDL-AD(2008)026add2-bil.pdf) (accessed 10 August 2012).

³²³*Otto-Preminger Institute v. Austria* Application no. 13470/87 (1994) ECtHR and *Wingrove v United Kingdom* Application no. 17419/90 (1997) ECtHR.

³²⁴*Otto-Preminger Institute v. Austria* Application no. 13470/87 (1994) ECtHR and *Wingrove v United Kingdom* Application no. 17419/90 (1997) ECtHR.

democratic society.³²⁵

To determine whether the interference was necessary in a democratic society, the ECtHR had to look at two things: (1) the actual social impact of the anti-religious forms of expression and (2) whether the remedies provided by criminal law were proportionate to the legitimate aims pursued.³²⁶ In the *Otto-Preminger v Austria and the Wingrove v the UK* case the ECtHR gave a wide margin of appreciation to Austria and the UK because the national authorities had closer contact to its societies, and as the ECtHR would find it impossible to 'discern throughout Europe a uniform conception of the significance of religion in society' and therefore 'it would be impossible for the ECtHR to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others'.³²⁷

Based on these two cases it can be concluded that when a conflict arises between freedom of expression and freedom of religion under the ECHR that freedom of expression will give way to the freedom of majority religious beliefs. However, these cases should be looked at based on its facts and if that is looked at the ECtHR seems to indicate, that the relationship between freedom of expression and freedom of religion should be decided by democratic governments based on the wide margin of appreciation given by the court.³²⁸

3.4.4 I.A. v Turkey

In 1993 a book called *The Forbidden Phrases*, which contained the author's views on philosophical and theological issues, was printed. In 1994 the Istanbul public prosecutor charged the owner and managing director of the publishing company that published the book with the crime of blasphemy against God, the religion of Islam, the

³²⁵Javier MT 'The European Convention on Human Rights: The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief: A Comparative Perspective' available at <http://find.galegroup.com/itx/infomark.do?&contentSet=IAC-Documents&type=retrieve&tabID=T002&prodId=AONE&docId=A114945130&source=gale&srcprod=AONE&userGroupName=uwcape&version=1.0> (accessed 12 June 2011).

³²⁶Voorhoof D & Cannie H (2010) 410.

³²⁷*Otto-Preminger Institute v. Austria* Application no. 13470/87 (1994) ECtHR.

³²⁸Fuhrmann W (2000) 835.

prophet and the holy *Quran* under Article 175(3) and (4) of the Turkish penal code.³²⁹ The managing director was convicted in 1996 for the charge of blasphemy and was sentenced to two years imprisonment and a fine. An appeal was then lodged in the Turkish court of cassation, which confirmed the decision.³³⁰

The matter was then taken to the ECtHR by the manager, and four of seven judges found that article 10 of the Convention had not been violated. Their reasoning was that the book was an abusive attack on the Prophet of Islam and justified the applicant's conviction.³³¹ The ECtHR stated that by imposing the limitation on the manager's freedom of expression, the Turkish authorities protected against offensive attacks on matters regarded as sacred by Muslims and as such corresponded to a pressing social need.³³² The ECtHR also held that the Turkish authorities did not overstep its margin of appreciation as the reasons for the restriction was relevant and sufficient.³³³

In *IA V Turkey* the ECtHR used the principles it established in the *Otto-Preminger v Austria* and *Wingrove v the UK* cases to uphold a conviction of blasphemy a Turkish court imposed on the director of a publishing house who published a book which was offensive to Muslims.³³⁴ The majority of the ECtHR (four out of seven) relied on the rulings of the above cases and saw the case as a clash between two rights namely the right of the applicant to impart to the public his views on religious doctrines and the right

³²⁹ *IA v Turkey* Application no. 42571/98 (2005) ECtHR.
Article 175 3-4 of the Turkish Penal code states that

It shall be an offence punishable by six months' to one year's imprisonment and a heavy fine of 5,000 to 25,000 Turkish liras to blaspheme against God, one of the religions, one of the prophets, one of the sects or one of the holy books or to vilify or insult another on account of his religious beliefs or fulfilment of religious duties 4. The penalty for the offence set out in the third paragraph of this Article shall be doubled where it has been committed by means of a publication.

³³⁰ *IA v Turkey* Application no. 42571/98 (2005) ECtHR.

³³¹ *IA v Turkey* Application no. 42571/98 (2005) ECtHR, Paragraph 12 of this case states:

However, the present case concerns not only comments that offend or shock, or a 'provocative' opinion, but also an abusive attack on the Prophet of Islam. Notwithstanding the fact that there is a certain tolerance of criticism of religious doctrine within Turkish society, which is deeply attached to the principle of secularity, believers may legitimately feel themselves to be the object of unwarranted and offensive attacks through the following passages: 'Some of these words were, moreover, inspired in a surge of exultation, in Aisha's arms God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual intercourse with a dead person or a live animal.

³³² *IA v Turkey* Application no. 42571/98 (2005) ECtHR.

³³³ *IA v Turkey* Application no. 42571/98 (2005) ECtHR.

³³⁴ *IA v Turkey* Application no. 42571/98 (2005) ECtHR.

of others to respect their freedom of thought, conscience and religion, and proceeded to balance these rights.³³⁵ The court found that the law of blasphemy was intended to protect against attacks on matters which are considered sacred by Muslims and the measure used by the Turkish authority was to meet a pressing social need and therefore it did not violate freedom of speech.³³⁶

It was interesting that in the majority decision of this case there was no analysis of the factual evidence submitted to the court; the court was satisfied with a short statement on the abusive nature of the offensive opinions contained in the book.³³⁷ Three out of the seven judges gave a joint dissenting decision criticizing the majority decision as well as the cases of *Otto-Preminger v Austria and Wingrove v the UK*. The dissenting opinion discusses certain facts which the majority decision failed to analyse such as the impact of the book on the Turkish society, the right to defend atheistic ideas as well as the fact that the public did not demand prosecution; it was the public prosecution who instituted proceedings.³³⁸ The most intense part of the dissenting opinion was its criticism of the *Otto-Preminger v Austria and Wingrove v the UK* cases. It stated that:

The time has perhaps come to 'revisit' this case-law, which in our view seems to place too much emphasis on conformism or uniformity of thought and to reflect an overcautious and timid conception of freedom of the press.³³⁹

3.4.5 Similarities and differences between *IA v Turkey* and *Otto-Preminger v Austria and Wingrove v the UK*

The *IA v Turkey* case departed from the *Otto-Preminger v Austria and Wingrove v the UK* cases' focus of equating freedom of religion or belief with the respect for one's

³³⁵ *IA v Turkey* Application no. 42571/98 (2005) ECtHR. See also Tsakyrakis S 'The B Balancing Method on the Balance: Human Rights Limitations in the ECHR' available at http://www.google.co.za/url?sa=t&rct=j&q=i.a.%20v.%20turkey%20full%20case&source=web&cd=4&sqi=2&ved=0CEkQFjAD&url=http%3A%2F%2Fwww.law.nyu.edu%2Fidcplg%3FidcService%3DGET_FILE%26dDocName%3DECM_DL%26RevisionSelectionMethod%3DLatestReleased&ei=cekiUMKkLpKT0QWSyID4DA&usq=AFQjCNFnIDo6_PpVdtdnYcSX3dGUR57mg&sig2=OnYbJdKBKighyTEbFWqer6A (accessed 10 August 2012).

³³⁶ *IA v Turkey* Application no. 42571/98 (2005) ECtHR.

³³⁷ *IA v Turkey* Application no. 42571/98 (2005) ECtHR.

³³⁸ See the joint dissenting decision of Judges Costa, Barreto and Jungwiert IA in *IA v Turkey* Application no. 42571/98 (2005) ECtHR.

³³⁹ See the joint dissenting decision of Judges Costa, Barreto and Jungwiert IA in *IA v Turkey* Application no. 42571/98 (2005) ECtHR.

religious feelings. Instead it focused on the rights of others to freedom of religion as a legitimate ground for limitation.³⁴⁰ The ECtHR stated that:

The issue before the Court involves weighing up the conflicting interests of the exercise of two fundamental freedoms, namely the right of the applicant to impart to the public his views on religious doctrine on the one hand, and the right of others to respect for their freedom of thought, conscience and religion on the other hand.³⁴¹

The ECtHR seemed to change its stance in the case of *I.A v Turkey* from the point of view that there is an *abstracto* conflict between freedom of expression and freedom of religion and has now abandoned the notion that one has the right not to be insulted in one's religious feelings. The ECtHR is now focusing on the existing grounds for limiting freedom of expression, one of which is article 9(2) ECHR.³⁴²

This mini-thesis submits that the cases discussed indicates the way in which the ECtHR deals with the conflict between freedom of expression and freedom of religion and although these cases dealt with blasphemy laws, the ECtHR did not rely on blasphemy laws as the overriding factor. The decisions were centred on article 10 of the ECHR and its limitations, the crux being whether the interference on the right to freedom of expression is prescribed by law and necessary to the functioning of a democratic society.³⁴³

In each of the abovementioned cases, the country in which these cases were made namely Austria, The United Kingdom and Turkey, found that limiting freedom of

³⁴⁰ *IA v Turkey* Application no. 42571/98 (2005) ECtHR.

³⁴¹ *IA v Turkey* Application no. 42571/98) (2005) ECtHR. The ECtHR in *Otto-Preminger Institut v. Austria* paragraph 27 focused on the protection of religious feelings stating the following:

The measures complained of were based on the Austrian Penal Code Their purpose was to protect the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons The Court accepts that the impugned measures pursued a legitimate aim under Article 10 para. 2 of the European Convention on Human Rights, namely the protection of the rights of others.

The ECtHR in the case of *Wingrove v The United Kingdom* also elaborated on the right not to be insulted in ones religious feelings Sating the following:

The Commission considered that the English law of blasphemy is intended to suppress behaviour directed against objects of religious veneration that is likely to cause justified indignation amongst believing Christians. It follows that the application of this law in the present case was intended to protect the right of citizens not to be insulted in their religious feelings.

³⁴² Temperman J (2008) 534-544.

³⁴³ Grinberg M (2006) 206.

expression was necessary in order to protect freedom of religion. The ECtHR agreed with these countries and stated that limiting freedom of expression is justified under article 10(2) in order to protect freedom of religion.³⁴⁴ Although blasphemy was involved in each of these cases the majority religion in each country was protected not just Christianity.³⁴⁵

A wide margin of appreciation was given to the national authorities in these cases because they were closer to the societal aspect than the ECtHR. In these cases the ECtHR found that these restrictive measures were within the authority's legal framework.³⁴⁶ Based on the wide margin of appreciation given by the ECtHR to national authorities, it is indicating that the relationship between freedom of expression and freedom of religion should be decided by the country itself.³⁴⁷

3.5 Concluding remarks

This chapter has determined that a conflict between freedom of religion and freedom of expression does not exist under the ICCPR. It has established that under the ICCPR freedom of expression protects ridiculing the religious beliefs of others, and claiming the protection of religion is not a legitimate ground for limiting freedom of expression. It further established that the right to have one's religion or belief at all times exempted from criticism or ridicule is not included under international human rights law and no right or duty is placed on a person to respect another's religious feelings. Insulting a person's religious beliefs and practices under the ICCPR is not a threat or limit to a person's right to freedom of religion and it also does not affect a person's freedom to have or adopt a religion or belief or to freely exercise the religion or belief in question and therefore would not be a justifiable limitation on the right to freedom of expression.

As the right to freedom of religion and freedom of expression has not come into conflict under international law, it therefore provided no guidance on how to deal with the

³⁴⁴Cerone J (2008) 363.

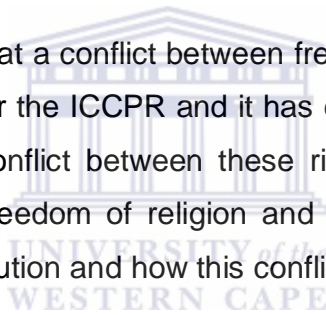
³⁴⁵Greer S (2004) 420.

³⁴⁶*Wingrove v United Kingdom* Application no. 17419/90 (1997) ECtHR.

³⁴⁷Fuhrmann W (2000) 837.

conflict and therefore the regional division of Europe was discussed. Under the ECHR the right to freedom of expressions is not only applicable to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference but also those that offend, shock or disturb. The ECtHR had the opportunity of examining freedom of expression in relation to freedom of religion in a string of cases relating to the protection of religious feelings. These cases are *Otto-Preminger v Austria*, *Wingrove v The United Kingdom* and *I.A v Turkey*. In each of these cases the States suppressed expression in order to protect religious feelings and the ECtHR found this suppression of expression justified. The analysis of the case law has indicated that the way to solve the conflict between freedom of religion and freedom of expression is not to declare that one right should automatically be favoured over the other but that a case by case enquiry should be taken in order to establish which right should prevail.

This chapter has established that a conflict between freedom of religion and freedom of expression does not exist under the ICCPR and it has discussed the approach used by the ECtHR to deal with the conflict between these rights. This mini-thesis will now discuss whether the right to freedom of religion and freedom of expression conflicts under the South African Constitution and how this conflict is dealt with.



Chapter Four

The Protection of Religious Dignity in South Africa

4.1 Introduction

We have recently emerged from a severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments. The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa. Those restrictions would be incompatible with South Africa's present commitment to a society based on a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours.³⁴⁸

During the apartheid era the authoritarian South African State censored its subjects and restricted their ability to take part in democratic dialogue affecting their personal freedoms.³⁴⁹ The move from parliamentary sovereignty to constitutional supremacy has resulted in a drastic change.³⁵⁰ During the apartheid era Parliament could make any law they wished in South Africa, however Constitutional democracy and the Bill of Rights are now supreme in South Africa.³⁵¹ The supremacy of the Constitution was confirmed by the Constitutional Court in the case of *Executive Council of the Western Cape Legislature v President of the RSA*. The Constitutional Court stated that 'it is of crucial importance at this early stage of the development of our new constitutional order, to establish respect for the principle that the Constitution is supreme'.³⁵² The Constitution of the Republic of South Africa, 1996 has been operational since

³⁴⁸*Islamic Unity Convention v Independent Broadcasting Authority and Others* (CCT36/01) [2002] ZACC 3; 2002 (4) SA 294; 2002 (5) BCLR 433 (11 April 2002).

³⁴⁹ de Vos P 'Is Everyone Going Completely Mad?' available at <http://constitutionallyspeaking.co.za/is-everyone-going-completely-mad/> (accessed 7 December 2012).

³⁵⁰*Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995).

³⁵¹ Van Der Schyff G *The Right to Freedom of Religion in South Africa* (unpublished LLM thesis, Rand Afrikaans University, 2001) 1.

³⁵²*Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995).

4 February 1997 and is the highest law of the land. Anything inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled.³⁵³

Deep scarring existed in the South African society as a result of the racism, discrimination, inequality and injustice caused by apartheid.³⁵⁴ This mini-thesis submits that humiliation, death and suffering were the legacy left to South Africans. Following the Apartheid era the African National Congress (ANC) became the dominant party and South Africa's focus was now on eliminating the scarring of the past by protecting human rights.³⁵⁵ The Constitution was the bridge which informed South Africans of the past and provided a vision for the future.

The sections in the Constitution which stand out in combating the apartheid past are:

- 1) The Preamble which states that the Constitution has been adopted to heal the divisions of the past and create a society based on democratic values, social justice and basic human rights.³⁵⁶
- 2) Section 1 of the Constitution emphasizes that human dignity, the achievement of equality and the advancement of human rights and freedoms is one of the founding values of South Africa.³⁵⁷
- 3) Section 7 states that the Bill of Rights included in chapter 2 of the Constitution, is the cornerstone of democracy in South Africa, and that it affirms the democratic values of human dignity, equality and freedom.³⁵⁸

The Bill of rights is the cornerstone of democracy in South Africa. It contains the rights of all people in our country and affirms the democratic values of human dignity, equality

³⁵³Haigh RF 'South Africa's Criminalization of Hurtful Comments: When the Protection of Human Dignity and Equality Transforms into the Destruction of Freedom of Expression' (2006) 5 *Washington University Global Studies Law Review* 192.

³⁵⁴*Islamic Unity Convention v Independent Broadcasting Authority and Others* (CCT36/01) [2002] ZACC 3; 2002 (4) SA 294; 2002 (5) BCLR 433 (11 April 2002).

³⁵⁵Haigh RF (2006). See also *Islamic Unity Convention v Independent Broadcasting Authority and Others* (CCT36/01) [2002] ZACC 3; 2002 (4) SA 294; 2002 (5) BCLR 433 (11 April 2002).

³⁵⁶Constitution of the Republic of South Africa, 1996, preamble.

³⁵⁷Constitution of the Republic of South Africa, 1996, Section 1(a).

³⁵⁸Constitution of the Republic of South Africa, 1996, Section 7(1).

and freedom.³⁵⁹ Every right in the Bill of Rights protects certain interests and conduct of people. All three branches of law namely the executive, legislature and judiciary, as well as private relationships are bound by the Bill of Rights.³⁶⁰ The right to freedom of expression and freedom of religion clauses are protected in the Bill of Rights under section 15 and sixteen 16. Bearers of the right to freedom of expression and freedom of religion are empowered by the Bill of Rights as it shields the protected conduct and interests from unlawful limitations.³⁶¹ The right to freedom of expression and religion are not absolute and may be limited in accordance with Section 36 of the Constitution, which is known as the limitations clause.³⁶²

Even in South Africa with its supreme democracy and respect for diversity the conflict illustrated in the previous chapters is not unknown. The first newspaper to publish the Danish cartoons in South Africa was the Mail & Guardian in its edition dated 3 February to 9 February 2006.³⁶³ An urgent interim order in the Johannesburg High Court to prohibit the publishers and printers of the newspaper from publishing and distributing the cartoons was sought.³⁶⁴ The right to freedom of expression gave rise to the complex issue of determining whether words which ridicule the religion of a vulnerable group are firstly protected by this right or denied by it, and secondly if the former was positively answered whether a limitation of this right would be justifiable.³⁶⁵

The primary purpose of this chapter is to determine whether the right to freedom of religion and freedom of expression conflict under the South African Constitution, thereby causing a constitutional dilemma. The secondary purpose is whether the courts' approach in the case of *Jamiat-UI-Ulama of Transvaal v Johncom Media Investment Ltd and Others* was the correct approach when dealing with a conflict between rights.

³⁵⁹ Constitution of the Republic of South Africa, 1996, Section 7(1).

³⁶⁰ Natural and juristic person are bound by the bill of rights, see Rautenbach IM 'The Bill of Rights Applies to Private Law and Binds Private Persons' 2000 *Tydskrifvir die Suid-Afrikaanse Reg* 296.

³⁶¹ Van Der Schyff G *The Right to Freedom of Religion in South Africa* (unpublished LLM thesis, Rand Afrikaans University, 2001) 1.

³⁶² Constitution of the Republic of South Africa, 1996, Section 36.

³⁶³ Pillay K 'The Cartoon Wars: Free Speech or Hate Speech?' (2010) 127 *South African Law Journal* 465.

³⁶⁴ *JamiatUI-Ulama of Transvaal v Johncom Media Investment Ltd and Others* (1127/06) [2006] ZAGPHC12 (3 February 2006).

³⁶⁵ *JamiatUI-Ulama of Transvaal v Johncom Media Investment Ltd and Others* (1127/06) [2006] ZAGPHC12 (3 February 2006).

4.2 Freedom of religion and freedom of expression under the South African Constitution

4.2.1 The right to freedom of religion under the South African Constitution

The right to freedom of religion is protected under Section 15 of the South African Constitution which guarantees the right to have a belief, to express that belief publicly, to manifest that belief by worship and practice, teaching and dissemination, of religious groups to manage their affairs without interference, not to be restricted from acting or refraining from acting in a manner contrary to one's religious beliefs.³⁶⁶ The right is guaranteed to both natural persons, individually and collectively, to juristic persons and unincorporated associations.³⁶⁷ However, bearers of the right to freedom of religion are not given carte blanche in the exercise and manifestation of their religious beliefs.³⁶⁸ The right to religious diversity and pluralism in society is protected in the Bill of Rights but this is qualified in that the right to practice one's religion may not be exercised in a manner that is inconsistent with the Bill of Rights.³⁶⁹

In order to receive protection from section 15(1) you do not have to prove that you are an adherent to a religion. The right not to believe at all is also protected, meaning that you can be a sceptic, agnostic or atheist.³⁷⁰ There is no establishment clause in section 15(1); this means that there is no clause mandating the separation of church and state.³⁷¹ In the *Prince v President of the law society of the Cape of Good Hope* case it was stated that section 15(1) protects religious belief and practice or manifestation of

³⁶⁶Constitution of the Republic of South Africa, 1996, Section 16. See *Prince v President, Cape Law Society and other* (2001)2 SA 388 (CC).

³⁶⁷Van Der Schyff G *The Right to Freedom of Religion in South Africa* (unpublished LLM thesis, Rand Afrikaans University, 2001) 52.

³⁶⁸Van Der Schyff G *The Right to Freedom of Religion in South Africa* (unpublished LLM thesis, Rand Afrikaans University, 2001)167. Discussing the limitations to the right to freedom of religion is unfortunately beyond the scope of this thesis for further reading on this topic see Van Der Schyff G *The Right to Freedom of Religion in South Africa* (unpublished LLM thesis, Rand Afrikaans University, 2001) 167- 186, Farlam P 'Freedom of Religion, Belief and Opinion chapter 41' in Woolman S & Bishop M *Constitutional Law of South Africa* 2 ed (2005) 30-50 and Currie I & de Waal J *The Bill of Rights Handbook* 5 ed(2005) 341-346.

³⁶⁹Currie I & de Waal J (2005) 341-346.

³⁷⁰Currie I & de Waal J (2005) 338 and Farlam P (2005) 12.

³⁷¹Farlam P (2005) 1-16.

belief and prohibits coercion or restraint of religious belief or practice.³⁷²

This mini-thesis submits that section 15(1) contains two parts, namely firstly to constitute the freedom to practice one's freedom without interference from the state and secondly to constitute religious quality. It further submits that the right to freedom of religion has an individual and collective element as it protects individuals and communities. The right to freedom of religion is a right with a wide scope and is viewed as both a liberty right and an equality right.³⁷³

4.2.2 The right to freedom of expression under the South African Constitution

The right to freedom of expression is protected under section 16 of the South African Constitution. Section 16 has two parts, section 16(1) and section 16(2); the first part deals with protected expression and the second part deals with expression specifically excluded. Each element in these two clauses will be discussed in turn. The Constitutional Court confirms the above statement in the *Islamic Unity Convention v Independent Broadcasting Authority and others* where it was stated that:

Subsection (1) is concerned with expression that is protected under the Constitution. If there is any limitation of this category of expression it must satisfy the requirements of the limitation clause to be constitutionally valid. Sub-section (2) deals with expressions that are specifically excluded from the protection of the right.³⁷⁴

Section 16(1) will be known as protected expression. The expression which is protected by this section includes any material that communicates or attempts to communicate.³⁷⁵ What this means is that it includes speech that may be considered of low value such as pornography, including child pornography, nude dancing and

³⁷²*Prince v President of the Law of the Cape of Good Hope and Others* 2002 (2) SA 794 (CC). Discussing Section 15(2) and 15(3) is unfortunately beyond scope of thesis. Further reading on these sections could be found in Van Der Schyff G *The Right to Freedom of Religion in South Africa* (unpublished LLM thesis, Rand Afrikaans University, 2001) 60-68.

³⁷³Du Plessis A 'The Fulfilment of Human Rights Related to Religion: Some Current Challenges in South' available at http://www.irmgard-coninx-stiftung.de/fileadmin/user_upload/pdf/archive/Anel_du_Plessis.pdf (accessed 8 December 2012).

³⁷⁴Constitution of the Republic of South Africa, 1996, Section 16. See also *Islamic Unity Convention v Independent Broadcasting Authority and Others* (CCT36/01) [2002] ZACC 3; 2002 (4) SA 294; 2002 (5) BCLR 433 (11 April 2002).

³⁷⁵Pillay K (2010) 476.

commercial speech.³⁷⁶ Section 16(2) contains explicit categorical exclusions; it is a closed list which means that the court cannot create new types of expression for categorical exclusion.³⁷⁷ In *Islamic Unity* the Court emphasized that any expression that is not specifically excluded under section 16(2) enjoys the protection of the right.³⁷⁸ If expression falls within one of the categories there is no room for balancing as freedom of expression will always lose.³⁷⁹

Section 16(2)(c) sets a high threshold for hate speech; in order for expression to be considered hate speech, two elements have to be present: (1) the expression must amount to advocacy of hatred on one of the listed grounds and (2) the advocacy of hatred must constitute incitement to cause harm.³⁸⁰

The first requirement in section 16(2)(c) is that advocacy of hatred must be based on one of the following grounds: race, ethnicity, gender or religion. Advocacy hatred according to Milo, Penfold and Anthony, occurs when the speaker promotes hatred or attempt to instil hatred in others.³⁸¹ According to Currie and de Waal, to advocate hatred is to propose or call for it, to make a case for it.³⁸² In the Canadian case of *R v Andrews* it was held that hatred is an extreme emotion and advocacy of hatred should be confined to statements manifesting detestation, enmity, ill-will and malevolence.³⁸³

In *Freedom Front v South African Human Rights Commission* an appeal committee of the South African Human Rights Commission (SAHRC) held that the chanting of 'Kill the Farmer, Kill the Boer' was advocacy of hatred.³⁸⁴ Govender, who wrote the decision, remarked that calling for the killing of people because they belong to a particular community or race must amount to the advocacy of hatred unless the context clearly

³⁷⁶Milo D, Penfold G & Stein A 'Freedom of Expression' in Woolman S & Bishop M *Constitutional Law of South Africa* 2 ed (2005)12.

³⁷⁷Constitution of the Republic of South Africa, 1996, Section 16(2).

³⁷⁸*Islamic Unity Convention v Independent Broadcasting Authority and Others* (CCT36/01) [2002] ZACC 3; 2002 (4) SA 294; 2002 (5) BCLR 433 (11 April 2002).

³⁷⁹*Islamic Unity Convention v Independent Broadcasting Authority and Others* (CCT36/01) [2002] ZACC 3; 2002 (4) SA 294; 2002 (5) BCLR 433 (11 April 2002).

³⁸⁰Constitution of the Republic of South Africa, 1996, Section 16(2)(c). See also Johannessen L 'A Critical View of the Constitutional Hate Speech Provision' (1997) 13 *South African Journal on Human Rights* 138-142.

³⁸¹Milo D, Penfold G & Stein A (2005) 80.

³⁸²Currie I & de Waal J (2005) 375.

³⁸³See the Canadian cases of *R v Andrews* 43 CCC (3rd) 193 at 211. See also *R v Keegstra* [1990] 3 S.C.R. 697.

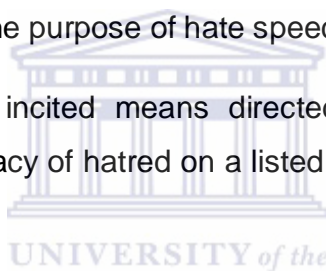
³⁸⁴*Freedom Front v South African Human Rights Commission and Another* 2003 (11) BCLR 1283 (SAHRC).

indicates otherwise'.³⁸⁵ However offensive advocacy of hatred does not amount to hate speech unless the second element, which is incitement to cause harm, is present.³⁸⁶

Harm includes physical violence but does it extend beyond physical violence?³⁸⁷ In the *Freedom Front v South African Human Rights* decision, the appeal committee held that harm could not be confined to physical harm, but should also include psychological and emotional harm.³⁸⁸ The committee further emphasized that speech must not merely be offensive, the harm must be serious and significant and it must be shown that the expression itself causes harm or is likely to cause harm.³⁸⁹

According to the SAHRC appeal committee, the South African Constitutional order is based on human dignity and the promotion of inclusivity and tolerance of diversity.³⁹⁰ According to Currie and de Waal, harm is not confined to physical harm but harm to dignity interests is included to the purpose of hate speech exceptions.³⁹¹

In terms of section 16(2)(c), incited means directed at or perhaps intended and therefore hate speech is advocacy of hatred on a listed ground, intended to cause harm to dignity.³⁹²



Based on the above, this mini-thesis submits that although freedom of expression lies at the heart of democracy it does not enjoy preference above other rights and it is also not an absolute right.³⁹³ It can further be concluded that all expression is not protected under this clause and if expression falls within section 16(2) it is excluded from constitutional protection. The scope of freedom of expression, which includes the protection of all expression which does not fall within Section 16(2), is very wide. Freedom of religion also protects a wide scope of application and therefore the potential

³⁸⁵ *Freedom Front v South African Human Rights Commission and Another* 2003 (11) BCLR 1283 (SAHRC). See also Milo D, Penfold G & Stein A (2005) 80-82.

³⁸⁶ *Van Loggerenburg v 94.7 Highveld Stereo* (2004) 5 BCLR.

³⁸⁷ *Human rights Commission of South Africa v SABC* (2003) 1 BCLR.

³⁸⁸ *Freedom Front v South African Human Rights Commission and Another* 2003 (11) BCLR 1283 (SAHRC).

³⁸⁹ *Freedom Front v South African Human Rights Commission and Another* 2003 (11) BCLR 1283 (SAHRC).

³⁹⁰ *Human rights Commission of South Africa v SABC* (2003) 1 BCLR.

³⁹¹ Currie I & de Waal J (2005) 377.

³⁹² Currie I & de Waal J (2005) 377.

³⁹³ Malherbe R 'The Mohammed Cartoons, Freedom of Expression and the Infringement of the Right to Religious Dignity' (2007) 2 *The Journal of South African Law* 334.

for an overlap of protected interests and values is a real possibility. It is further submitted that these rights do overlap and, as will be discussed below, the overlap is a result of freedom of expression protecting the right to ridicule religions and the right to freedom of religion prohibiting the right to ridicule religions as it infringes on a person's right to religious dignity.

4.3 Religious dignity in South Africa

The discussion thus far has focused on freedom of expression and freedom of religion. There is now a need to discuss right to human dignity. The reason for this need is because the right to human dignity played a central role in determining whether freedom of expression overstepped its limits in the case of *Jamiat-UI-Ulama v Johncom Media Investment Ltd and others*. A better understanding of the right to human dignity in South Africa is needed in order to understand the reason for this High Court's decision.

The right to human dignity is rooted in Roman law and is not an easy right to define. Broadly it is defined as treating people with respect whether in a public or private sense; it is also defined as a sense of self-worth that an individual has and it is also deemed to be the source of a person's right to freedom and the right from which other rights flow.³⁹⁴ In terms of International law, human dignity underpins human rights protection.³⁹⁵ Human dignity is protected under section 10 of the South African Constitution. The Constitutional Court stated the importance of this right in the case of *Khumalo and Others v Holomisa*.³⁹⁶

The apartheid past has resulted in South Africa creating non-derogable rights and the right to human dignity in South Africa is a right that may not be compromised. The right to human dignity is a non-derogable right under the Constitution and as such sets the

³⁹⁴Cheadle MH, Davis DM & Haysom NRL *South African Constitutional Law: The Bill of Rights* (2002) 131.

³⁹⁵Van Rooyen JCW 'Dignity, Religion and Freedom of Expression in South Africa' available at <http://www.ajol.info/index.php/hts/article/view/70876/59833> (accessed 8 December 2012).

³⁹⁶*Khumalo and Others v Holomisa* (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (14 June 2002).

restrictive standards by which other rights may be enjoyed.³⁹⁷

The right to human dignity is closely related to freedom of religion.³⁹⁸ Under the South African Constitution, human dignity is a core value and as a core value it guides courts in determining the purpose and scope of other rights contained in the constitution such as freedom of religion.³⁹⁹ The right to religious dignity is a right which incorporates freedom of religion and dignity. How this right is formed will now be discussed.

Freedom of religion is composed of five freedoms: (1) religious autonomy, (2) choice, (3) observance, (4) teaching, and (5) the right to propagate a religion.⁴⁰⁰ The freedom of religious autonomy refers to aspects of the relationship between the State and religion as well as other institutional aspects of religion. It also refers to the individual and collective element of the right.⁴⁰¹ Religious autonomy includes the right of a religious community to establish governing bodies, appoint or elect its leaders, determine its organisation and doctrine and decide on its membership.⁴⁰² The freedom of religious autonomy includes the right to dignity because it protects the right to non-interference by the state and others.⁴⁰³

The right to freedom of religion is a right which depends on other rights, particularly human dignity, to fully realise its scope of protection. Religion, in other words, relies on contextual rights to optimize the protection it offers.⁴⁰⁴ Freedom of religion is the founding principle for the advancement of individual, collective and institutional dignity in an attempt at creating a society predicated on respect and tolerance, while human dignity as a contextual right to religion supports the inherent dignity accruing to religious

³⁹⁷Haigh RF (2006) 194.

³⁹⁸Van Der Schyff G *The Right to Freedom of Religion in South Africa* (unpublished LLM thesis, Rand Afrikaans University, 2001) 109.

³⁹⁹Cheadle MH, Davis DM & Haysom NRL (2002) 133.

⁴⁰⁰Van Der Schyff G *The Right to Freedom of Religion in South Africa* (unpublished LLM thesis, Rand Afrikaans University, 2001) 79.

⁴⁰¹Van Der Schyff G *The Right to Freedom of Religion in South Africa* (unpublished LLM thesis, Rand Afrikaans University, 2001) 79.

⁴⁰²Malherbe R (2007) 333. Unfortunately discussing all the freedoms of the right to freedom of religion is beyond the scope of this thesis for a discussion on the freedoms see Van Der Schyff G *The Right to Freedom of Religion in South Africa* (unpublished LLM thesis, Rand Afrikaans University, 2001) 77-161.

⁴⁰³Malherbe R (2007) 333.

⁴⁰⁴Van Der Schyff G *The Right to Freedom of Religion in South Africa* (unpublished LLM thesis, Rand Afrikaans University, 2001) 109.

liberty⁴⁰⁵. The right to human dignity and self-worth of members of society is affirmed by their ability to express their thoughts and communicate; expressing oneself also allows each individual to determine what is true as well as realize his or her full human potential.⁴⁰⁶ In South Africa, freedom of expression is limited by common law rules, the non-derogable right to human dignity and by speech provisions of the constitution.⁴⁰⁷ Based on South Africa's past, it is understandable that freedom of expression is limited to promote and protect the freedom of dignity.

Bearers of the right to freedom of religion enjoy the right to advance and cherish their dignity while demanding respect from parties bound by this right.⁴⁰⁸ According to Malherbe, the dignity of a religious community or its members in respect of their beliefs, doctrine, structures and modus operandi may not be violated because it affects the exercise of their religious freedom in general.⁴⁰⁹ The right to religious dignity is a combination of the right to freedom of religion and the right to human dignity and it guarantees complete and total respect and dignity to the bearers of the right.⁴¹⁰

This mini-thesis submits that the Danish cartoons ridiculed the dignity of Muslims and therefore infringed on a Muslim's right to freedom of religion.

4.4 The Conflict between freedom of religion and freedom of expression under the South African Constitution

A conflict existed between freedom of expression and dignity long before the Danish Cartoons. It started when the African National congress established and adopted the

⁴⁰⁵Van Der Schyff G *The Right to Freedom of Religion in South Africa* (unpublished LLM thesis, Rand Afrikaans University, 2001) 109.

⁴⁰⁶John Stuart Mill states that 'speech is vital to the attainment and advancement of knowledge'. See American Civil Liberties Union 'Freedom of Speech: The Backbone of American Human Rights' available at http://www.occities.org/ensev_in_2000/freesp01.html (accessed 8 December 2012).

⁴⁰⁷Haigh RF (2006)194.

⁴⁰⁸Van Der Schyff G *The Right to Freedom of Religion in South Africa* (unpublished LLM thesis, Rand Afrikaans University, 2001) 109-110.

⁴⁰⁹Malherbe R (2007) 333

⁴¹⁰Van Der Schyff G *The Right to Freedom of Religion in South Africa* (unpublished LLM thesis, Rand Afrikaans University, 2001) 110.

Freedom Charter in 1955.⁴¹¹ This Charter protected conflicting interest as it guaranteed the right to speak but stated that preaching and practice of national, race, or colour discrimination and contempt shall be punishable as a crime.⁴¹² When the final Constitution was drafted, a lot of the principles of the Freedom Charter were included in the Constitution and therefore the conflicts between these rights were also included.⁴¹³

The Danish cartoons awoke and emphasised this conflict. This mini-thesis submits that the reason why the Danish cartoons caused a conflict between freedom of expression and freedom of religion was because the Danish cartoons, as a form of expression, ridiculed religious beliefs and practices which in turn affected the exercise of religious freedom as it violated the dignity of the bearers of the right to freedom of religion.

Conflict is part of law. The law aims is to prevent or settle cases where two or more parties have conflicting claims. When a party has a right, his claim must prevail over his opponent's, a right trumps other claims. If the Constitution gives both parties a right such that each has equal status and the rights are simultaneously enforceable then both parties would have a trump card and this would mean that the application of either right results in the violation of the other.⁴¹⁴ Such a wide range of actions are protected by constitutional rights that it's unavoidable that two of them sometimes overlap in a way that makes these rights mutually incompatible.⁴¹⁵

As indicated in section 3.1 of chapter 3, Zucca states that in order for there to be a conflict between rights, one norm must make it permissible to do X and the other norm must deny the permission to do X. The actions allowed by both rights are not jointly performable.⁴¹⁶ A conflict of rights is best explained in the following table:

	Intra-rights	Inter-rights
Total Conflicts	The right to expression v the	The right to expression v the

⁴¹¹The Freedom Charter, 1955.

⁴¹²The Freedom Charter, 1955.

⁴¹³Haigh RF (2006) 192-193.

⁴¹⁴Zucca L (2007) 3.

⁴¹⁵Zucca L (2007) 4.

⁴¹⁶Zucca L (2007) 50.

	right to expression	right to religion
Partial conflicts	The right to expression v the right to expression	The right to expression v the right to religion

To explain the above table there are two aspects of conflict: (1) rights can either clash in such a way that a total conflict or a partial conflict is caused or (2) we can also encounter conflicts between the supporting norms of human rights; this is known as inter and intra-right conflicts. Inter-right conflicts occur with different norms of human rights while intra-right conflicts occur between two of the same norms of human rights.⁴¹⁷ Inter and intra-rights conflicts can be total or partial; an inter-right total conflict occurs when the two rights cannot be waived without simultaneously being alienated; an inter-right partial conflict occurs when two rights conflict but a case by case regulation is still available.⁴¹⁸

This min-thesis submits that the conflict between freedom of religion and freedom of expression under the South African Constitution is an inter-right partial conflict.

4.4.1 Inter-Right partial conflict based on the protection and exclusion of ridiculing of religious beliefs

The question to be answered in this section is what type of conflict, if any, is present between the right to freedom of religion and freedom of expression. This question would be determined by establishing whether words which ridicule the religion of often vulnerable groups are protected or excluded from protection by the right to freedom of expression, and whether ridiculing of religious beliefs is protected or excluded from protection by the right freedom of religion.

Expression that is not specifically excluded under section 16(2) is protected under freedom of expression and ridiculing of religious beliefs does not fall under expression

⁴¹⁷Zucca L ‘Conflicts of Fundamental Rights as Constitutional Dilemmas’ in Brems E *Conflicts Between Fundamental Rights* (2008) 26.

⁴¹⁸Zucca L ‘Conflicts of Fundamental Rights as Constitutional Dilemmas’ in Brems E *Conflicts Between Fundamental Rights* (2008) 26-37.

that is specifically excluded, therefore it is protected under freedom of expression.⁴¹⁹

Freedom of religion under the South African Constitution is different from the freedom of religion clause under international law. The difference is that under international law, freedom of religion does not protect the feelings of believers who take offence at the criticism and ridiculing of their belief and practice, however freedom of religion under the South Africa Constitution takes religious dignity into consideration.⁴²⁰

This mini-thesis submits that right to freedom of religion does not protect the ridicule of religious beliefs and practices as it is a violation of the religious dignity. It further submits that the right to freedom of expression protects ridicule of religious beliefs as it does not fall under expression that is specifically excluded. Based on the above it can be concluded that an inter-right partial conflict between the right to freedom of expression and religion exists under the Constitution.

The reason this mini-thesis states that a partial and not total conflict exists is because the Constitution is supreme law in South Africa and if a conflict exists under the Constitution it would indicate that a constitutional dilemma exists. A total and not partial conflict would result in a constitutional dilemma.⁴²¹ A constitutional dilemma will occur when constitutional rights conflict with one another and there is no or little guidance. It would involve a deadlock where a solution cannot be found without sacrificing one or the other right.⁴²² Deep disagreement over who should decide and resolve the conflict and in what manner it should be resolved would take place and the unity and cohesion of a society and of a legal system would be threatened.⁴²³ The opposing parties could face a breakdown in communication which would be dangerous if the continuous disagreement and deadlock is not resolved.⁴²⁴

⁴¹⁹Refer to section 4.2.2 in chapter 4.

⁴²⁰Van Der Schyff G *The Right to Freedom of Religion in South Africa* (unpublished LLM thesis, Rand Afrikaans University, 2001) 108-115. See also Cherry M 'Speaking Freely about Religion: Religious Freedom, Defamation and Blasphemy' available at <http://www.iheu.org/files/Speaking%20Freely%20about%20Religion.pdf> (accessed 14 April 2011) and Temperman J (2008) Rights 545.

⁴²¹Zucca L 'Conflicts of Fundamental Rights as Constitutional Dilemmas' in Brems E *Conflicts Between Fundamental Rights* (2008) 26.

⁴²²Zucca L (2007)1-10.

⁴²³Zucca L (2007)1-10.

⁴²⁴Zucca L (2007)1-10.

Under the South African Constitution, Section 36, which is the limitations clause, prevents constitutional dilemmas.

4.5 Section 36 prevents Constitutional Dilemmas

Eltayeb states that there is no conflict between freedom of expression and religion because these rights are interconnected and interdependent and what is required is an approach that endorses the principle of universality, indivisibility and interdependence of the two freedoms, on the one hand, and strikes the balance and complementarity between them on the other.⁴²⁵

The above statement is very relevant to the South African situation for the following reasons: the Constitutional Court has consistently rejected that there is a hierarchy of rights under the South African Constitution as all the rights are interconnected and interdependent.⁴²⁶ The South African Constitution endorses the principle of universality, indivisibility and interdependence of two freedoms and strikes a balance and complementarity between them.⁴²⁷

All rights in the Bill of Rights are subject to the limitation clause in section 36.⁴²⁸ In terms of this clause, all rights may be limited if the limitation is in terms of the law of general application and is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This involves a proportionality enquiry,

⁴²⁵Eltayeb MSM 'The Limitations on the Critical Thinking on Religious Issues Under Article 20 of ICCPR and its Relation to Freedom of Expression' available at https://docs.google.com/viewer?a=v&q=cache:-3f5DAKAIE4J:www.ohchr.org/Documents/Issues/Expression/ICCPR/Seminar2008/PaperEltayeb.doc+Eltayeb+M.S.M+freedom+of+expression,+Conference+Room+Paper+9&hl=en&gl=za&pid=bl&srcid=ADGEEShG00aqN69WrmsS59Xajw_0NAPiR4cyrIT-Dbw0S7ptTgJcFFXbsHxz3Gly-6wsk8Jk-Xi-tNqDj80PGm4FHsvy3NqzWx1iaqbAtqm5YkKTitIKhRE3DJ-OgNASHwcBwDW2Ne7mC&sig=AHIEtbR6CLnMMDS45PzMsifRFncL-bZTgg (accessed 8 December 2012).

⁴²⁶Iles K 'A Fresh Look at Limitations: Unpacking Section 36' (2007) 23 *South African Journal on Human Rights* 79.

⁴²⁷Eltayeb MSM 'The Limitations on the Critical Thinking on Religious Issues Under Article 20 of ICCPR and its Relation to Freedom of Expression' available at https://docs.google.com/viewer?a=v&q=cache:-3f5DAKAIE4J:www.ohchr.org/Documents/Issues/Expression/ICCPR/Seminar2008/PaperEltayeb.doc+Eltayeb+M.S.M+freedom+of+expression,+Conference+Room+Paper+9&hl=en&gl=za&pid=bl&srcid=ADGEEShG00aqN69WrmsS59Xajw_0NAPiR4cyrIT-Dbw0S7ptTgJcFFXbsHxz3Gly-6wsk8Jk-Xi-tNqDj80PGm4FHsvy3NqzWx1iaqbAtqm5YkKTitIKhRE3DJ-OgNASHwcBwDW2Ne7mC&sig=AHIEtbR6CLnMMDS45PzMsifRFncL-bZTgg (accessed 8 December 2012).

⁴²⁸Constitution of the Republic of South Africa, 1996, Section 36.

in other words a balancing exercise.⁴²⁹

If two rights conflict with each other under the South African Constitution balancing of the competing interest against the backdrop of the limitation provision would take place.⁴³⁰ If two rights under the Constitution come into opposition with each other, one right would have to yield to the other. Determining which right should take precedence is always a fact specific enquiry and the outcome would vary from case to case. This means that right 'A' will not always be give precedence over right 'B' in a limitations enquiry because right 'A' is more important than right 'B'.⁴³¹

A total conflict between freedom of expression and freedom of religion does not exist under the South African Constitution and therefore a constitutional dilemma does not exist. The reason for this statement has two parts: firstly, the right to freedom of expression and religion as contained in the Bill of Rights are not in opposition with each other, they are interconnected and interdependent as are all the rights under the constitution.⁴³² Secondly, there is no constitutional dilemma under the South African Constitution because if rights do conflict with each other the Constitution offers direction in the form of the Section 36 proportionality test. A case by case regulation of the right to freedom of expression and freedom of religion is possible and therefore it can be concluded that a partial conflict between these rights exist.

4.6 The Danish cartoons in South Africa

On Friday 3 February 2006 Jamiat-UI-Ulama a voluntary Muslim association discovered that the Sunday Times was going to publish the Mohammed cartoons. The first thing they did was try to get an undertaking by the Sunday Times that it would not publish the cartoons and when this failed they sought an urgent interim order in the Johannesburg High Court to prohibit the publishers and printers of the newspaper from publishing and

⁴²⁹Milo D, Penfold G & Stein A (2005) 9. Unfortunately discussing each point of section 36 is beyond the scope of this thesis for a discussion on section 36 see Iles K (2007) 68-92.

⁴³⁰Van Der Schyff G *The Right to Freedom of Religion in South Africa* (unpublished LLM thesis, Rand Afrikaans University, 2001) 113 and Milo D, Penfold G & Stein A (2005) 9.

⁴³¹Iles K (2007) 79.

⁴³²Iles K (2007) 79.

distributing the cartoons.⁴³³

4.6.1 Applicant's submissions

The applicant in this matter is the Jamiat-UI-Ulama. Mr Cassim and Mr Boda appeared for the applicant in this matter. The relief the applicant sought was an Interdict restraining the respondent and their agents and employees from publishing in any newspaper, magazine or other publication any cartoons, caricatures or drawings of the Prophet Mohammed⁴³⁴. The applicant makes its submissions in an affidavit and states the following regarding the Prophet:

Islam does not know a depiction of Prophet Mohammed (PBUH) and it is a principle production of the holy Prophet (PBUH) in drawings, paintings etc. are blasphemous. The 25 drawings overstep even the bounds of a simple productive drawing but are characterised by insulting messages and innuendos that mock at and ridicule Islam and its founder. Prophet Mohammed (PBUH) is the cornerstone of every Muslim's existence. Muslims fashion their dress according to his manner of dress. They grow beards because he grew a beard. They live their daily existence as he lived from rules relating to prayer, dress, ablution, eating, etc.⁴³⁵

Jamiat-UI-Ulama, in its argument, mentions the world-wide anger at the cartoons in the form of threats of violence and boycotts. It also argues that Muslims in South Africa are also being stirred up by the cartoons and submits that it would result in violence and unsettlement in the country.⁴³⁶ It further submits that the cartoons are an infringement of the right to freedom of religion as it is blasphemous and contains insulting messages and innuendos that ridicule Islam and the Prophet Mohammed.⁴³⁷

⁴³³Pillay K (2010) 466.

⁴³⁴*JamiatUl-Ulama of Transvaal v Johncom Media Investment Ltd and Others* (1127/06) [2006] ZAGPHC 12 (3 February 2006).

⁴³⁵*JamiatUl-Ulama of Transvaal v Johncom Media Investment Ltd and Others* (1127/06) [2006] ZAGPHC 12 (3 February 2006).

⁴³⁶*JamiatUl-Ulama of Transvaal v Johncom Media Investment Ltd and Others* (1127/06) [2006] ZAGPHC 12 (3 February 2006).

⁴³⁷Pillay K (2010) 466-467.

4.6.2 Respondent's submissions

There are three respondents in this matter, the first respondent is Johncom Media Investment Ltd, a publisher of National newspapers of which the Sunday Times is one; the second respondent is the newspaper printing company and the third respondent is the Independent Newspapers (Pty) Ltd. Mr Campbell appeared on behalf of respondent one and two, respondent three was unrepresented.⁴³⁸

The respondents did not reply to the affidavit of the applicant however when the applicant sent a letter to the first respondent requesting it to give an undertaking that the cartoons would not be published the following was stated by the respondent:

We acknowledge receipt of your fax dated February 3, 2006 and take note of the content. We are well aware of our responsibilities as journalist. We recognise that our readers have different interests and that these may sometimes be in conflict with each other. We bear this in mind when we make our editorial decisions. However, we do not bow to any pressure though no matter how strongly their views are held or how correct they may believe their position to be. We will decide the issue of the cartoons according to the principles we apply to all stories. We are aware of the sensitivities involved in this matter and will take these into consideration. However we decline to give you any undertaking with regard to what our decision may be.⁴³⁹

The respondent's argument was that the media is extremely important for the development of a democratic culture. It submitted that the media has obligation to citizens to provide them with information and with a platform for the exchange of ideas. It further states that the media has a constitutional duty to act with vigour, courage, integrity and responsibility and if the media are reliable, democracy will be strengthened.⁴⁴⁰

⁴³⁸ *JamiatUl-Ulama of Transvaal v Johncom Media Investment Ltd and Others* (1127/06) [2006] ZAGPHC 12 (3 February 2006).

⁴³⁹ *JamiatUl-Ulama of Transvaal v Johncom Media Investment Ltd and Others* (1127/06) [2006] ZAGPHC 12 (3 February 2006).

⁴⁴⁰ *JamiatUl-Ulama of Transvaal v Johncom Media Investment Ltd and Others* (1127/06) [2006] ZAGPHC 12 (3 February 2006).

4.6.3 Legal reasoning behind the courts finding

Jamiat-UI-Ulama was granted the interdict by Judge Mohamed Jajbhay on the grounds that the 'right to dignity outweighed the right to freedom of expression in the context of this particular case'.⁴⁴¹

The court balanced the right to freedom of expression and the right to human dignity; it indicated that although freedom of expression is an important right for democracy it is not a paramount value and must be construed in the context of other values in the Constitution, particularly human dignity, equality and freedom. The court went on to discuss the value and importance of human dignity in South Africa stating that:

The value of human dignity in our Constitution is not only concerned with the sense of self-worth of an individual or a group of people but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her or their own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth of value of such an individual or group of persons.⁴⁴²

The court found that the Cartoons is characterised by an insulting message that ridicules Islam and its founder. It found the cartoons to be demeaning and undignified and therefore found that the limitation on freedom of expression was justified in the interest of human dignity.⁴⁴³ To further justify its decision the court argued that the Cartoon amounts to advocacy of hatred and stereotyping of Muslims which jeopardises the core value of the South African nation and reinforces patterns of discrimination and inequality. The limitation of this expression, which encouraged hatred according to the court, would achieve national unity.⁴⁴⁴ In concluding its balancing enquiry it found that the appropriate balance between freedom of expression and human dignity with regard

⁴⁴¹Pillay K (2010) 467.

⁴⁴²*JamiatUl-Ulama of Transvaal v Johncom Media Investment Ltd and Others* (1127/06) [2006] ZAGPHC 12 (3 February 2006).

⁴⁴³*JamiatUl-Ulama of Transvaal v Johncom Media Investment Ltd and Others* (1127/06) [2006] ZAGPHC 12 (3 February 2006).

⁴⁴⁴*JamiatUl-Ulama of Transvaal v Johncom Media Investment Ltd and Others* (1127/06) [2006] ZAGPHC 12 (3 February 2006).

to the interdict was to limit freedom of expression because the publishing of the cartoons would demean the dignity of an individual whom the Muslim community hold in highest regard.⁴⁴⁵

It is agreed that a balancing enquiry was necessary as the right to freedom of expression and the right to human dignity where in conflict and the South African Constitution endorses the principle of universality, indivisibility and interdependence of two freedoms and strikes a balance and complementarity between them.⁴⁴⁶ It is further agreed that limiting freedom of expression was necessary to protect the religious dignity of Muslims and to prevent a pattern of inequality and discrimination thereby healing the divisions of the past. What is not agreed with is the fact that the Cartoons amount to advocacy of hatred. What this judgement is missing is a proper determination of what advocacy of hatred as well as a discussion of hate speech entails and not just a submission that the Cartoons constitute advocacy of hatred.

4.7 The Danish Cartoons does not amount to hate speech

Pillay argues that the Danish cartoons constitutes hate speech in terms of Section 16(2)(c) of the Constitution as it can be argued to be an advocacy of hatred on the listed ground of religion and it constitutes incitement to cause harm taking the cartoons beyond the realm of free and protected expression.⁴⁴⁷ Based on the intention of these cartoons it is submitted that it does not amount to advocacy of hatred and therefore does not amount to hate speech.

This mini-thesis submits that the purpose of the Danish cartoons was not to promote hatred or attempt to instil hatred in others and it does not propose or call for hatred and

⁴⁴⁵ *JamiatUl-Ulama of Transvaal v Johncom Media Investment Ltd and Others* (1127/06) [2006] ZAGPHC 12 (3 February 2006).

⁴⁴⁶ Eltayeb MSM 'The Limitations on the Critical Thinking on Religious Issues Under Article 20 of ICCPR and its Relation to Freedom of Expression' available at https://docs.google.com/viewer?a=v&q=cache:-3f5DAKAIE4J:www.ohchr.org/Documents/Issues/Expression/ICCPR/Seminar2008/PaperEltayeb.doc+Eltayeb+M.S.M+freedom+of+expression,+Conference+Room+Paper+9&hl=en&gl=za&pid=bl&srcid=ADGEEShG00aqN69WrmS59XaJw_ONAPiR4cyrIT-Dbw0S7ptTgJcFFXbsHxz3Gly-6wsk8Jk-Xi-iNqDj80PGm4FHsvy3NgzWx1iaqbAtqm5YkKTitIKhRE3DJ-OgNASHwcBwDW2Ne7mC&sig=AHIEtbR6CLnMMDS45PzMsifRFncL-bZTgg (accessed 8 December 2012).

⁴⁴⁷ Pillay K (2010) 464,489.

therefore does not amount to advocacy of hatred. The original reasoning behind publishing the cartoons was based on an 'experiment to overcome what the editors perceived as self-censorship reflected in the reluctance of illustrators to depict the Prophet'.⁴⁴⁸ Self-censorship means 'the tacit acceptance of blackmail, threat or intimidation that makes someone stop saying, writing or drawing something they would say, write or draw if these conditioning factors did not apply'.⁴⁴⁹ This mini-thesis further submits that in actual fact the fight for freedom of speech is the reason for the publishing of the Danish cartoons by the Danish publishers. The Mail and Guardian's reason for publishing the cartoons was for the purpose of illustration and education, its intention was totally different from the Danish Newspaper.⁴⁵⁰

In order for speech to be considered hate speech two things have to be met: (1) the expression must amount to advocacy of hatred on one of the listed grounds, and (2) the advocacy of hatred must constitute incitement to cause harm.⁴⁵¹ Pillay makes a valid point that the Danish cartoon falls within section 162(c) because 'the publications reinforce particular stereotypes of Muslims that feed into pre-existing prejudices and are therefore dangerous and threatening for Muslims'.⁴⁵² However, based on the intention of the Publishers in Denmark and South Africa, the Danish cartoon does not pass the first hurdle of the high threshold test as it does not amount to advocacy of hatred. Because of this, Danish cartoons do not amount to hate speech and therefore is protected by the constitutional right to freedom of expression.

4.8 Concluding remarks

The primary purpose of this chapter was to determine whether the right to freedom of religion and freedom of expression were in conflict with each other and caused a

⁴⁴⁸Saloom R (2006) 2.

⁴⁴⁹Gamper D 'Free Speech in Tolerant Society: The Case of the Mohammed Cartoons' available at http://www.cac.cat/pfw_files/cma/recerca/quaderns_cac/Q27_EN_Gamper_.pdf (accessed 14 April 2011).

⁴⁵⁰Asmal F *Islamophobia and the Media: The Portrayal of Islam Since 9/11 and an Analysis of the Danish Cartoon Controversy in South Africa* (unpublished LLM thesis, Stellenbosch University, 2008) 47-49.

⁴⁵¹Constitution of the Republic of South Africa, 1996, Section 16. Refer to the discussion in section 4.2.2 of chapter 4.

⁴⁵²Pillay K (2010) 487.

constitutional dilemma under the South African Constitution.

To determine these issues the scope of freedom of religion and freedom of expression was discussed and it was determined that these rights protect a wide range of values and interests, making the potential for an overlap very real. The right to freedom of religion and human dignity contextualized forms the right to religious dignity. This right prohibits the ridiculing of the Islamic religion because the dignity of the religious community or its members, in respect of their beliefs, doctrine, structures and modus operandi, would be violated. The role human dignity played in the conflict between religion and expression is extending the scope of freedom of religion to include the protection of the religious dignity of the Islamic community thereby overlapping the scope of freedom of religion and freedom of expression and creating a conflict.

It was established that the ridiculing of religious beliefs created an inter-right partial conflict between the right to freedom of religion and freedom of expression meaning that a case by case regulation was still possible. The regulation came in the form of the limitation clause which offers direction on resolving this conflict thereby preventing a total conflict and a constitutional dilemma.

The approach the court used to solve the conflict between freedom of expression and human dignity was to institute a balancing enquiry. This mini-thesis agreed with the approach as there was a need to strike a balance and complementarity between them. It is further agreed that the limiting freedom of expression was necessary to protect the religious dignity of Muslims and to prevent a pattern of inequality and discrimination thereby healing the divisions of the past. The court's submission that the Cartoons amounts to advocacy of hatred was not agreed with, the judgment did not contain a proper determination of what advocacy of hatred is and did not discuss what hate speech entails, it just submitted that cartoons constituted advocacy of hatred. Based on the intention of the Publishers in Denmark and South Africa, the Danish cartoon does not pass the first hurdle of the high threshold test as it does not amount to advocacy of hatred. Because of this, Danish cartoons do not amount to hate speech and therefore is protected by the constitutional right to freedom of expression.

Chapter Five

Conclusions and recommendations

5.1 Introduction

The primary objective of this min-thesis was to determine if the right to freedom of religion conflicted with the right to freedom of expression under the South African Constitution and the secondary objective was to establish an appropriate manner in which this conflict could be addressed. This section summarise the major findings of the study.

5.2 Conclusion

The purpose of chapter two was to discuss incidents where the right to freedom of religion and freedom of expression have come into conflict with each other as well as theories on the conflict of human rights in order to establish how a conflict of human rights should be dealt with, the historical and philosophical aspects of the right to freedom of religion and freedom of expression was discussed and this chapter laid the foundation for the discussion on the conflict between these rights.⁴⁵³ Blasphemy in general and blasphemy in Islam were discussed and it was established that insults and depictions of the Prophet Muhammad is considered to be blasphemous under the Islamic religion.⁴⁵⁴ It was further established that the reason why most of the conflict between freedom of religion and freedom of expression stem from the religion of Islam is because Muslims have to accept all commandments, rules and values as they are *Allah's* rules; this is a big reason why Muslims cannot agree with Western law.⁴⁵⁵

The incidence of conflict discussed in this chapter between freedom of religion and freedom of expression where the Salman Rushdie affair and the Danish cartoon

⁴⁵³Refer to section 2.2 in chapter 2.

⁴⁵⁴Refer to section 2.3.2 in chapter 2

⁴⁵⁵Refer to section 2.3.2 in chapter 2.

controversy. These incidences provided little guidance on how to deal with a conflict of rights. The Salman Rushdie affair confirmed that blasphemy is a common law offence which only protects the Christian religion. Salman Rushdie and *The Satanic Verses* book could not be prosecuted for blasphemy against Islam because the religion of Islam fell outside the scope of blasphemy in the United Kingdom.⁴⁵⁶

In order to resolve the conflict caused by the Danish cartoons the UN implemented a resolution called defamation of religions, however the conflicting traditions, cultures and religions between Islam and the west have resulted in an on going debate over the purpose and content of the resolution. Although the Danish cartoon controversy did not provide us with guidance on how to deal with the conflict between the right to freedom of religion and freedom of expression, it was established that the core of the problem lies in the conflicting tradition, culture and religion of Islam and the west.⁴⁵⁷

Habermas' Theory on solving conflicts and Konrad Hesse's notion on *Praktische Konkordanz* was discussed in order to provide us with guidance on how to deal with the conflict of rights, and although both theories provide guidance on solving conflicts of rights, this mini-thesis has established flaws in both of these theories.⁴⁵⁸

The purpose of chapter three was to determine whether the right to freedom of religion and the right to freedom of expression conflicted under international human rights law. The ICCPR was discussed to determine the conflict under International law because it is a binding covenant and more than three quarters of the UN's member States are bound by the ICCPR under treaty law. It could be argued that all nations, regardless if they signed the covenant or not, may be bound by the ICCPR under customary International law.⁴⁵⁹ This chapter determined that a conflict between freedom of religion and freedom of expression does not exist under the ICCPR because freedom of expression protects ridiculing the religious beliefs of others and claiming the protection of religion is not a legitimate ground for limiting freedom of expression.⁴⁶⁰ It further

⁴⁵⁶Refer to section 2.4.2 in chapter 2.

⁴⁵⁷Refer to section 2.5.2 in chapter 2.

⁴⁵⁸Refer to section 2.6 and 2.7 in chapter 2.

⁴⁵⁹Refer to section 3.2 in chapter 3.

⁴⁶⁰Refer to section 3.2.2 in chapter 3.

established that the right to have one's religion or belief at all times exempted from criticism or ridicule is not included under international human rights law and no right or duty is placed on a person to respect another's religious feelings.⁴⁶¹ Insulting a person's religious beliefs and practices under the ICCPR is not a threat or limit to a person's right to freedom of religion and it also does not affect a person's freedom to have or adopt a religion or belief or to freely exercise the religion or belief in question and therefore would not be a justifiable limitation on the right to freedom of expression.⁴⁶²

As the right to freedom of religion and freedom of expression has not come into conflict under international law, the regional division of Europe was discussed. The ECtHR had the opportunity of examining freedom of expression in relation to freedom of religion in a string of cases relating to the protection of religious feelings; these cases are *Otto-Preminger v Austria*, *Wingrove v The United Kingdom* and *I.A v Turkey*. In each of these cases the States suppressed expression in order to protect religious feelings and the ECtHR found this suppression of expression justified.⁴⁶³ Based on these cases the mini-thesis concluded that when a conflict arises between freedom of expression and freedom of religion under the ECHR it should be looked at based on its facts and the ECtHR seems to indicate that the relationship between freedom of expression and freedom of religion should be decided by democratic governments based on the wide margin of appreciation given by the court.⁴⁶⁴ The analysis of the case law has indicated that the way to solve the conflict between freedom of religion and freedom of expression is not to declare that one right should automatically be favoured over the other but that a case by case enquiry should be taken in order to establish which right should prevail.⁴⁶⁵

The primary purpose of chapter four was to determine whether the right to freedom of religion and freedom of expression were in conflict with each other and caused a constitutional dilemma under the South African Constitution.

⁴⁶¹Refer to section 3.2.2 in chapter 3.

⁴⁶²Refer to section 3.2.2 in chapter 3.

⁴⁶³Refer to section 3.4.5 in chapter 3.

⁴⁶⁴Refer to section 3.5 in chapter 3.

⁴⁶⁵Refer to section 3.5 in chapter 3.

This chapter discussed the scope of freedom of religion and freedom of expression under the South African constitution and it determined that these rights protect a wide range of values and interest, making the potential for an overlap very real.⁴⁶⁶ This chapter established that the right to freedom of religion and human dignity contextualized forms the right to religious dignity and this right prohibits the ridiculing of the Islamic religion because the dignity the religious community or its members in respect of their beliefs, doctrine, structures and modus operandi would be violated.⁴⁶⁷ The role human dignity played in the conflict between religion and expression is extending the scope of freedom of religion to include the protection of the religious dignity of the Islamic community thereby overlapping the scope of freedom of religion and expression and creating a conflict.⁴⁶⁸

It was established that the ridiculing of religious beliefs created an inter-right partial conflict between the right to freedom of expression and freedom of religion meaning that a case by case regulation was still possible. The regulation came in the form of the limitation clause which offers direction on resolving this conflict thereby preventing a total conflict and a constitutional dilemma.⁴⁶⁹

The South African approach to solving the conflict between freedom of expression and human dignity was to institute a balancing enquiry. This mini-thesis agreed with the approach as there was a need to strike a balance and complementarity between them.⁴⁷⁰ This mini-thesis agreed that the limiting freedom of expression was necessary to protect the religious dignity of Muslims and to prevent a pattern of inequality and discrimination thereby healing the divisions of the past.⁴⁷¹ The court's submission that the Cartoons amount to advocacy of hatred was not agreed with, the judgment did not contain a proper determination of what advocacy of hatred is and did not discuss what hate speech entails, it just submitted that the cartoons constituted advocacy of

⁴⁶⁶Refer to section 4.2.2 in chapter 4.

⁴⁶⁷Refer to section 4.3 in chapter 4.

⁴⁶⁸Refer to section 4.3 in chapter 4.

⁴⁶⁹Refer to section 4.4.1 in chapter 4.

⁴⁷⁰Refer to section 4.5 in chapter 4.

⁴⁷¹Refer to section 4.8 in chapter 4.

hatred.⁴⁷² Based on the intention of the Publishers in Denmark and South Africa, the Danish cartoon does not pass the first hurdle of the high threshold test as it does not amount to advocacy of hatred. Because of this, Danish cartoons do not amount to hate speech and therefore is protected by the constitutional right to freedom of expression.⁴⁷³

This mini-thesis has established that the right to freedom of religion and freedom of expression does conflict under the South African Constitution but that this conflict does not create a constitutional dilemma.⁴⁷⁴ It further established that if two rights conflict with each other under the South African Constitution, balancing of the competing interest against the backdrop of the limitation provision would take place, a fact specific enquiry would be undertaken and the outcome would vary from case to case. This mini-thesis agrees that an appropriate manner to deal with the conflict between freedom of religion and freedom of expression is to balance them on a case by case basis.⁴⁷⁵

5.3 Recommendations on how to deal with the conflict between freedom of religion and freedom of expression

This mini-thesis has established that an inter-right partial conflict between freedom of religion and expression exist under the South African Constitution and various approaches to solving conflict of rights, including the South African approach, have been discussed. This mini-thesis is focused on the conflict between freedom of religion and freedom of expression. The conflict between these rights are essentially due to the different cultures and religions between Islam and the west, as is evident in the discussion of the Salman Rushdie affair and the Danish cartoon controversy. Therefore in order to solve this conflict we have to create a platform of understanding and respect between Islam and the west.⁴⁷⁶

The way in which understanding and respect between Islam and the west may be implemented is by the creation of channels to enable dialogue in order to clarify

⁴⁷²Refer to section 4.7 in chapter 4.

⁴⁷³Refer to section 4.8 in chapter 4.

⁴⁷⁴Refer to section 4.8 in chapter 4.

⁴⁷⁵Refer to section 4.8 in chapter 4.

⁴⁷⁶Refer to section 2.5.2 in chapter 2.

misunderstandings, bringing together the western media with the Islamic media and creating an assurance to the Islamic world of the respect of the papers and their home countries.⁴⁷⁷ A better understanding and awareness of the Islamic culture should be undertaken globally and better responsiveness to global requirements in the editorial work should not be as a restriction to free speech but as an addition to it.⁴⁷⁸

Finally, we should not only focus on respecting Islamic traditions; this will not find a true solution. There has to be reciprocity and respect in Islamic societies, for the democratic traditions of other countries should also be undertaken.⁴⁷⁹ In order to solve the partial conflict between freedom of expression and freedom of religion under the South African Constitution global, communication has to take place between Islam and the west.



⁴⁷⁷Refer to section 2.5.2 in chapter 2. See Haraszti M (2006) 15.

⁴⁷⁸Refer to section 2.5.2 in chapter 2. See Haraszti M (2006) 15.

⁴⁷⁹Refer to section 2.5.2 in chapter 2. See Haraszti M (2006) 15.

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