

Murder by YouTube – Anti-Islamic speech and homicide liability

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Abstract

Usually, hate-speech and its criminalisation are looked at from the angle of a separate hate-speech offence, and often in the context of human rights law, especially freedom of speech and religion. In the Islamic world, such issues are treated under blasphemy laws and the availability of severe sanctions for that offence, not infrequently the death penalty, may make a separate recourse to homicide offences unnecessary. Yet, recent events in the Islamic world suggest that it would not be unimaginable to entertain the idea of a liability for the deaths of those killed in unrests caused by hate-speech, in Western legal systems: Can it be acceptable any longer, in the age of YouTube and other (social) networks of instantaneous and easy-access worldwide information traffic, that people intentionally put out inflammatory messages which they know will lead to unrests with the risk of lethal outcomes, without having to bear any legal consequences? Is freedom of speech a panacea which allows them to wash their hands of these obvious effects of their actions? Can the criminal law accommodate liability in such circumstances or are we asking the system to do something that it should not and maybe even cannot do? Is that kind of thinking the first step on a slippery slope towards religious censorship and thought-crime? Against the background of events such as those triggered in 2012 by the dissemination of the film *Innocence of Muslims*, we will look at the specific anti-Islamic context as an example where the lines appear to be particularly bright, because general experience tells us that the adherents of no other religion tend to react to religious provocations as violently and as predictably as a certain conservative sector of the Muslim community. This is a sensitive area as it partly deals with non-Muslim perceptions about Muslim self-perception which may not be shared by everyone, least of all the moderate Muslims who are not part of the problem, either. Yet it is necessary to start a discussion about the issue. By doing so, we do not contend that Islam is in any special position as far as the need for protection from defamation is concerned, yet it cannot be denied that the vast majority of the current problems in this field are specifically Islam-related. The Islamic context thus lends itself well to drawing the contours of the problem.

Introduction – From defamation to homicide

In recent times, the religion of Islam has been increasingly at the centre of often aggressive public and international disputes: A Danish newspaper publishes caricatures of Muhammad to find out how far it can stretch the envelope. American soldiers defile copies of the Qur'an. An American Christian minister publicly burns a copy of the Qur'an. A radical Coptic Christian in the USA makes a movie besmirching Muhammad and disseminates it on the internet. These

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events become test cases for the freedom of expression. Their common consequence: Muslims in the Islamic world go on the rampage. Innocent people are killed by an enraged Muslim mob or die as a consequence of the response of law enforcement agencies trying to bring the situation under control. Advocates of the right to free speech, on the other hand, sometimes overlook that there are limits to that right as well, and that inflammatory intentional hate speech may not be deserving of such protection to the same degree as civilized, albeit engaged and even hard-hitting discourse. People who employ speech with the aim of debasing the Muslim target group may in fact be abusing their right to free speech – and the concept of an abuse of human rights has, for example, been recognised in one of the most advanced international human rights frameworks, in Art. 17 ECHR: In such cases, there is no real interest in triggering a civilized discourse with Islam (or any religion or ideology), but a desire to cause offence, and the protagonists are at best indifferent to the consequences of their actions; however, it would not be outlandish to assume that they mostly are aware of what is bound to happen and at least reconcile themselves to that². One can criticize Muhammad, even as a (cultural) Muslim, and address issues such as his relationship to women or the question of whether he really received the Qur'an by way of divine revelation, as recently done by the Iranian Kader Abdolah, who lives in the Netherlands, in his Dutch novel *De Boodschapper* (The Messenger)³. Critique and criticism of Islam and Muslim practices must be allowed, even if they touch the foundations of the faith. Yet, at the end of the day, there is always the same ideological stand-off: The West refers to its cherished freedom of speech and the famous dictum often – albeit wrongly⁴ – ascribed to Voltaire, “I disapprove of what you say but I shall defend to the death your right to say it!”, while the Muslims demand respect for their religion's tenets even from those who do not share their faith, and hold Western governments responsible for not censoring the dissemination of the controversial material⁵. Both positions in their extreme are untenable: No-one who is not a Muslim owes Islam as a religious

²See e.g. Ann Coulter who wrote “We should invade their countries, kill their leaders and convert them to Christianity. We weren't punctilious about locating and punishing only Hitler and his top officers. We carpet-bombed German cities; we killed civilians. That's war. And this is war”; see http://thinkexist.com/quotation/we_should_invade_their_countries-kill_their/343457.html or “This Is War” at [Web.archive.org](http://web.archive.org). 2001-09-14.

³De boodschapper – een vertelling, 2008.

⁴ See Burdette Kinne, Voltaire Never Said it! *Modern Language Notes* Vol. 58, No. 7 (Nov., 1943), 534-535. The phrase was coined by his biographer, Evelyn Beatrice Hall.

⁵ Sometimes this is done on the basis of domestic blasphemy laws, see for the example of Pakistan Michael Bohlander, “There is no compulsion in religion” - Freedom of religion, responsibility to protect (R2P) and crimes against humanity at the example of the Islamic blasphemy laws of Pakistan, (2012) 8 *Journal of Islamic State Practices in International Law*, 36.

concept any respect, just as no Muslim owes any respect to Christianity, Judaism or secularism⁶. They each, however, owe respect to other people and their bodily integrity, property and dignity – especially when what they say can entail physical rather than mere psychological harm.

Usually, hate-speech and its criminalisation are looked at from the angle of a separate hate-speech offence, and often in the context of human rights law, especially freedom of speech and religion. In the Islamic world, such issues are traditionally treated under blasphemy laws and the availability of severe sanctions for that offence, not infrequently the death penalty, may make a separate recourse to homicide offences unnecessary. Human rights discourse as understood in the West does not yet seem to have a large impact across the Islamic spectrum, and even less in an Islamist environment. We should, however, remind ourselves that anyone in the West who utters blasphemous statements can already be tried and sentenced under the laws of any Islamic country depending on which kind of jurisdictional regime it subscribes to for such offences: Territorial, personal or universal. Barring some sort of exceptional legal immunity, no state can under international *law* prevent the prosecution and trial of its citizens for crimes committed abroad, possibly even *in absentia*. That it does not always happen, is a question of political power relations, not law. Yet, recent events in the Islamic world suggest that it would not be unimaginable to entertain the idea of a liability for the deaths of those killed in unrests caused by hate-speech in Western legal systems: Can it be acceptable any longer, in the age of YouTube and other (social) networks of instantaneous and easy-access worldwide information traffic, that people intentionally put out inflammatory messages which they know will lead to unrests with the risk of lethal outcomes, without having to bear any legal consequences? Is freedom of speech a panacea which allows them to wash their hands of these obvious effects of their actions? Can the criminal law accommodate liability in such circumstances or are we asking the system to do something that it should not and maybe even cannot do? Is that kind of thinking the first step on a slippery slope towards religious censorship and thought-crime?

Against the background of events such as those triggered in 2012 by the dissemination of the film *Innocence of Muslims*⁷, we will look at the specific anti-Islamic context as an example

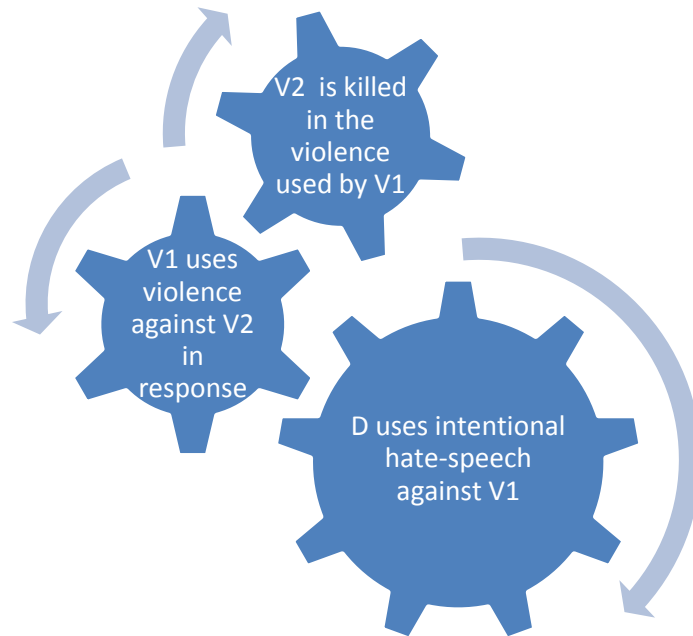
⁶ But see Michael Bohlander, Political Islam and Non-Muslim Religions - A Lesson from Lessing for the Arab Transition in (2014) *Islam and Christian-Muslim Relations*, 27.

where the lines appear to be particularly bright because general experience tells us that the adherents of no other religion tend to react to religious provocations as violently and as predictably as a certain, conservative sector of the Muslim community. By doing so, we do not contend that Islam is in any special position as far as the need for protection from defamation is concerned, yet it cannot be denied that the vast majority of the current problems in this field are specifically Islam-related. The Islamic context thus lends itself well to drawing the contours of the problem. We should also make it clear at this point that the object of study is not Islam itself, but the practices of some of its radical followers, which most will say do actually represent an aberration of the Islamic faith. The paper will therefore not address the writings of modern and/or moderate Muslims since they do not form part of the problem. Neither will we engage in an in-depth study of individual human rights systems or the relevant literature on where the threshold to the concept of an abuse of human rights should be located: It is sufficient for our purposes to state at the example of a few selected jurisdictions that *every* human rights system supports an abuse clause – where and when that clause is triggered in the individual system is a question of secondary significance.

This paper is meant as a first foray into the field of potential homicide⁸ liability for reactions to intentional hate-speech by the addressees of the hate-speech. In simple terms: D intentionally defames V1's religion, which leads V1 to use violence against property and people, among them V2 who dies in the violence. In graphic terms we have the following potential liability links:

⁷ The 14-minute film is available online at <http://www.youtube.com/watch?v=X6s8eFkt90Q&bpctr=1363867444>. – In essence, it is a poorly produced sequence of badly acted scenes which depict Muslims as inherently violent, Islam as a cause of terrorism, the Qur'an as a manuscript concocted at random from previous sources and portray Muhammad as a drunk and a womaniser, among other things. On the script of the trailer and of an original, apparently longer film see <http://gawker.com/5944290>.

⁸ Similar arguments can, of course, be made for personal injury or bodily harm arising out of reactions to hate-speech.



This graph shows that D’s actions may be seen as triggering V2’s death at the hands of V1: D’s wheel turns the cogs of that of V1 and thus the wheel of V2: D’s and V2’s wheels turn in the same direction, whereas V1’s wheel turns in the opposite, an observation which neatly encapsulates the discussion on causation which will follow below. This second result may be seen as (virtually) certain and attributable to D if the social relations between the three actors are of such a nature that a comparison to an almost mechanical sequence of events would appear justifiable. This diagnosis is at this stage more of a factual one and made outside classical legal terminology such as joint criminal enterprise, procuring an offence, use of innocent agents, or, in German doctrinal terms, *mittelbare Täterschaft*, *Nebentäterschaft*; *Anstiftung* etc. Whether and to what extent it fits any of those categories remains to be seen. The main premises we will thus investigate in this paper are the following:

- Recent history has shown how conservative/radical Muslims in many countries will react to provocations to their faith, and this experience has turned the risk of violent and often lethal Muslim reaction to such provocation into a social fact.
- Once we accept the factual nature of that risk, we open the discourse to relationships of causality which naturally underlie criminal liability patterns. In other words, there may be

a causal link between the hate-speech and the killing or the death of innocent people who are targeted merely on the basis of some – and often spurious – affiliation with the hate-speech offender as perceived by the Muslim killers. This is also a fact.

- Because the Muslim killer will normally him- or herself be criminally liable for the killing, the impact of third-party intervention on the causal chain started by the hate-speech user needs looking into.
- Even if we assume that causality exists, the hate-speech offender may be allowed to use such speech, i.e. take the risk of lethal outcomes, because of his freedom of speech.
- Finally, we need to ask ourselves whether the offender had the necessary mens rea with regard to the lethal outcome.

We will begin by laying the groundwork for the assumption of a potential cause-effect relationship between hate-speech and the death of third parties.

Setting the scene – The causes of the rage

If we want to establish the “typical” conservative/radical Muslim reaction to criticism of Islam as a fact for the purposes of showing causal connectivity, we need to understand the psychological background and undercurrents of the religious environment in which most Muslims live. This is a sensitive area as it partly deals with non-Muslim perceptions about Muslim self-perception which may not be shared by everyone, least of all moderate Muslims. Yet it is necessary to at least start a discussion about the issue. It needs pointing out that we are not discussing any qualities of Islam as a religion as such, but the qualities of some of its more conservative and/or radical adherents in their daily practice of it. Moderate or even modernist Muslims are not part of the problem addressed in this paper. Naturally, as in any society, there are people, often very young, who participate in riots for non-religious reasons, such as poverty, unemployment, lack of perspective, dissatisfaction with government policies⁹, a possible misapprehension of the meaning of democracy and the purpose of demonstrations etc. The religious aspect may for them

⁹ As was the case with the so-called Arab Revolution.

be a mere veneer, or maybe only one cause among many for their actions. For many protesters, however, it will be the main cause. That in turn requires us to try to understand conservative Islamic religious self-perception and the conservative attitude towards the meaning of tolerance.

Islam would seem to tolerate the existence of other religions and ideologies¹⁰ – yet (a certain section of) the conservative Muslim community does not tolerate (hard-hitting) non-Muslim criticism of its own foundations. Mere absence of retaliation is not necessarily equal to tolerance. It may be for this reason, and not out of a general genuine concern based on the equality of *all* religions (despite ubiquitous protestations to the contrary), that it puts such an emphasis on outlawing the defamation of religion¹¹. It does by theological pedigree not see itself as being on an *equal* footing with other religions, but as superior because it is based on the last revelation – a trait it shares, for example, with Christianity in some of its historical and modern evangelical forms which will in turn view Islam as a heresy in its entirety. The efforts of the Organisation of the Islamic Conference (OIC) to have an international legal ban on the defamation of religion have proven fruitless so far. Its 1990 Cairo Declaration of Human Rights in Islam¹² is based on the divine commands of Islam, not on human liberty, and consequently it is under the general proviso that none of those rights may be exercised contrary to the dictates of Islamic law (see below). It seems to be a peculiarly Muslim concern to have a rule against defamation of the faith enshrined in legal form. While devout believers of other religions would sympathize with the Muslims' motivation, none have found it necessary to take this matter to a political or even legal level to such a degree. This may to a large part be explained by the lack of a full secular disestablishment in most if not all Muslim countries – including recently Turkey – and by the nature of Islam as a religion that does doctrinally not distinguish between the private and public or even political exercise of religion: Its law, the Shari'ah, with its many rules and rituals, is part

¹⁰ See sura 5:48. That is, however, not the entire picture. Roots of the claim for Muslim superiority even versus the “People of the Book“, i.e. mainly the Jews and Christians, can be found in the Qur'an in suras such as 5:51 or 9:29 – 30 and 3:110. See also the statement in the *Common Word* of 2007, an open letter from the Muslim side about a fresh start in Muslim-Christian relations, which was signed by 138 Muslim religious authorities: “As Muslims, we say to Christians that we are not against them and that Islam is not against them—so long as they do not wage war against Muslims on account of their religion, oppress them and drive them out of their homes...” The above suras are not mentioned in the *Common Word*. – Online at <http://acommonword.com/index.php?lang=en&page=option1> at 14.

¹¹ It would in this context be interesting to obtain statistics from Islamic countries on the prosecution of slurs against Christianity, Judaism and other religions.

¹² Online at www1.umn.edu/humanrts/instree/cairodeclaration.html.

and parcel of the religion and it permeates every Muslim's life completely. Islam is a religion of law, of submission¹³, which is the very meaning of the word "Islam". In other words, traditional(ist) Muslims have no or at best very little choice – they cannot, must not enter into a compromise that restricts the exercise of Islamic tenets. These tenets, while ontologically non-negotiable, are in daily practice nonetheless defined with different stringency in different sectors of Muslim society and the public/private divide may play a role after all in deciding what a Muslim can or cannot do within his own four walls, yet any issues around pivotal factors such as the person of its prophet, for example, rank high on the list of very sensitive topics.

Because the traditional, conservative Muslim is restricted in the permissible range of avenues for social (and spiritual) intercourse, because he realizes that people in the West have a much more relaxed social (and spiritual) life, that this has to a large extent to do with the general set-up of (civil) society and the status of religion within it, yet that they are not all immoral individuals as radical Islamist propaganda is so fond of proclaiming¹⁴, he tends to react badly to fundamental challenges to his own self-imposed restrictions. His allegiance is not to a political idea that the vast majority of people living, for example, under Communism never really internalised – it is to God, to the very essence of his being. The traditional Muslim is aware that he lives in a kind of straitjacket, yet he does so out of obedience to God, who sent Man his rules to save him from the state of nature, from ignorance and darkness, from the *jahiliyyah*. His life is a sacrifice and he is keenly aware of the drawbacks this brings for his earthly existence, and he suffers those in expectation of a later reward from God. His submission is his honour. Yet, he is also a human being with human desires and may subconsciously fear that he may in reality be living, to put it very bluntly, in a cage that has an open door, and he can ill bear being taunted about his choice to remain inside. He might much rather prefer that people join him in enlarging his cage – yet at the

¹³ Especially in Islamic jurisprudence there has been for a long time a struggle about the interpretation of the law, whether the literal meaning should take precedence in order to avoid human interference with and distortion of God's will, and who is qualified to define the literal meaning; see Gleave, *Islam and Literalism – Literal Meaning and Interpretation in Islamic Legal Theory*, 2012. Reformers who advocate a teleological re-interpretation based on contemporary exigencies and changed societal circumstances are in the minority and can face serious retaliation from the traditionalists, as happened, for example, to the Sudanese reformer Mahmoud Mohamed Taha, who was executed in 1985 because he opposed the imposition of Shari'ah law in Sudan; see his book *The Second Message of Islam*, in the English translation by An-Na'im, 1987. An-Na'im, who was a student of Taha, was also detained without trial in Sudan during 1983 – 84.

¹⁴ This unease increases for many Muslims when confronted with controversial Egyptian Muslim reformer Muhammad Abduh's words : "I went to the West and saw Islam, but no Muslims; I got back to the East and saw Muslims, but not Islam." – see Anke von Kügelgen, "'Abduh, Muhammad", *Encyclopaedia of Islam*, Brill, 2009.

same time the Qur'an tells him that there must be no compulsion in religion¹⁵. As was mentioned before, these are reflections of a non-Muslim about conservative Muslim self-perception and – notwithstanding any good intentions on the part of the author based on his experiences with highly educated Muslim colleagues who do not fit this picture – will undoubtedly be controversial and considered stereotypical or even Orientalist in the sense of Edward W. Said's famous 1978 critical study¹⁶, yet recent research by the Welsh-Egyptian Shereen El Feki in Egypt after the 2011 revolution would seem to underpin that contention, when she writes of the views expressed by a moderate member of the Muslim Brotherhood: "Freedom and equality are our principles, but within borders or limits set by Islam and society. ... 'Freedom within a frame' is how many inside the Brotherhood and out describe their dream of Egypt's new order"¹⁷.

The reason for the Muslim's moral choice is his belief in the message brought by Muhammad. It is a message which forces him to engage in rituals the origins of which he does no longer understand, that clash with the patterns of life in the modern world, yet which make him feel guilty if he does not live by them; a message based on the Qur'an, the practical incarnation of which in the practice of Muhammad¹⁸ forbids him to think (too) independently about God and tells him to abide by the rules established by a class of more or less well-educated trained clerics-cum-jurists, the *ulama*. As Bassiouni states:

In addition to a combination of socioeconomic factors, there are two principal reasons for this contemporary phenomenon that links theological and legal doctrinal developments to political violence in the Muslim world. The first reason is that the level of knowledge about Islam among the masses in the Muslim world is not only basic, but in some social contexts, primitive. This is essentially because of a deficit in these societies' human development, which allows misleading teachings of Islam by unqualified *mullahs*, *imāms sheikhs*, and other (self-)titled religious "leaders". They are more likely political actors seeking to advance their views by propagating erroneous notions of Islam that the largely ignorant masses are ready to accept and follow, than true religious scholars. ... [M]uch of it is also because of the low level of knowledge among those who are, or claim to be, Muslim scholars and whose teachings are contrary to Islam, or at least to a better and more enlightened understanding of Islam.¹⁹

¹⁵ Sura 2:256.

¹⁶ Edward W. Said, *Orientalism*, Penguin Modern Classics, 2003.

¹⁷ *Sex and the Citadel – Intimate life in a changing Arab world*, 2013, 21.

¹⁸ See sura 5:3 and the famous hadith no. 5 of the 40 Ahadith by al-Nawawi about innovation, e.g. in Schöller (ed.) *Das Buch der Vierzig Hadithe – Kitab al-Arba'in*, 2007, 62 ff. as well as e.g. the collections of Sahih Muslim 9:3601 and Sahih Bukhari 96:7307. – The opposite to the problem of innovation is the so-called "Fatigue of the Shari'ah" (*fatur al shari'ah*) i.e. the concern of whether the Shari'ah will survive in the world once there are no more persons who can teach it and how a Muslim can guide his life according to it; see Ahmad Atif Ahmad, *The Fatigue of the Shari'a*, 2012.

¹⁹ See M Cherif Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace*, CUP, 2014, 5 – 7 – italics in the original.

The second reason, according to Bassiouni, is the conservative scholars' aversion against "intellectual openness" and the "denial of the role of reason as the framework for interpretation, or even as a method of interpretation"²⁰. The *ulama* have been and still are overwhelmingly male as well as traditional, and since in many Muslim societies veneration increases with the age of the teacher, this has the likely effect of making conservative attitudes more influential. Muslims live by a message the words of which they were told to learn by rote in an archaic form of Arabic without being instructed in its meaning and how to explore it – that is, if they understand Arabic at all, something the majority of global Muslims will not²¹. The traditional and often conservative *ulama* have had a stifling grip on the interpretation of both the Qur'an and the prophet's practice, the Sunna, for centuries – and as can be seen at the example of Saudi Arabia, sometimes for manifest power-political reasons. The sources they use and the schools of thought they follow reach back to now often outdated scenarios from the earliest days of corporate Islam, yet historical-critical research from outside the black box of the religion into the primary sources is virtually absent, and their adaptation to the needs of a modern society is a matter which only a caste of courageous intellectuals have so far attempted but who, it needs emphasising, do not yet come anywhere near to representing mainstream Islam. Innovative thinking, especially by lay people, is still strongly discouraged as flawed innovation or *bid'ah*²² – despite the fact that Islam knows no central clerical hierarchy and allows choosing freely between different schools as best suits the individual Muslim's plans on distinct occasions (*takhayur*). Thus it is no surprise that traditional, not to say anachronistic, perceptions of God and Muhammad and the origins of the faith still exist or are on the rise again under the Salafi movements²³, and any criticism of Muhammad and his message against this backdrop is thus considered as threatening the very fabric of Islam: Unlike, for example, Christianity, Islam is based on a book which is said to be the verbatim word of God down to the last *hamza*. In Christian terms, taking away the nature of the Qur'an as divine is the same as taking Jesus Christ out of the salvation story. Insinuating that,

²⁰ Ibid., 8.

²¹ The Qur'an is said to have been revealed in Arabic (e.g. Suras 42:7; 43:3; 44:58; 46:12) and any Muslim, no matter where he or she lives, has to memorise it in that language. It is sometimes said that there are no translations in the literal sense, only translations of the meaning of the Qur'an.

²² See fn. 18 above.

²³ Even when Muslims realise that they have for the longest time been under the kosh of the *ulama*, the reaction is often a "back to the roots" programme embraced, for example, by the Salafists – the name originates from the Arabic *al-salaf* for predecessor or ancestor -, which aims to weed out the centuries of scholarly extrapolation from the basic sources and a return to those sources. The problem which all of these movements inevitably face is that they will have to rely on someone to interpret the sources and the cycle starts anew.

for example, Muhammad made it all up and/or only imagined/pretended that the angel Gabriel was telling him the words of God²⁴ is tantamount to pulling the rug from under Islam²⁵ - and consequently considered a serious heresy. While many moderate, educated and perhaps well-travelled Muslims who understand the secularists' motivations and concerns about free speech as a fundamental political principle may still be deeply offended, they will counsel and practice restraint in reaction – yet the mobs who attack embassies, burn flags etc. will often be made up mostly of less well-educated or otherwise disenfranchised persons, who in not merely a few cases may also have been incited by their local traditionally and themselves badly educated imams and/or radical Islamist groups who have their own (political) agenda.

The recurring debate about a Muslim and particularly Arab inferiority complex vis-à-vis the West²⁶ and its historical achievements especially in modern history is also a factor to be taken into account²⁷ since it centres around questions such as the following: If the Muslims are God's chosen people, why is it that the unbelievers have a better life, better schooling and social security systems etc. and a vibrant civil society? Why is there so much abject poverty, illiteracy and political disenfranchisement among the Muslims in their own countries? Why did the Muslim conquests in Europe stop centuries ago, and were almost entirely reversed? Why did the golden age of Muslim scientists end so many centuries ago, to be replaced by a debate

²⁴ Which was one of the central messages of the controversial book *The Satanic Verses* by Salman Rushdie.

²⁵ Historical-critical approach to the Qur'an is in tension with the traditional Islamic interpretation that it is the verbatim word of God in a much stricter sense than this phrase was ever used in Christian theology. Historical-critical theory puts the origin of the Qur'an in a historical context and thus allows for a potential influence by the recipient of the revelations, Muhammad, or even of the Companions, on its content, something which is again the equivalent to blasphemy in Islam. Christianity has had to endure this particular critique for some time now, whereas historical-critical research with a perspective from outside the system seems to be still in its infancy within Islam. – See on this whole field Neuwirth/Sinai/Marx (eds.), *The Qur'an in Context – Historical and Literary Investigations into the Qur'anic Milieu*, 2010; Gabriel Said Reynolds (ed.), *The Qur'an in its Historical Context*, 2009, and id. (ed.) *The Qur'an in its Historical Context 2*, 2011; by the writer working under the pseudonym Ibn Warraq, *The Origins of the Koran*, 1998; and on a textual understanding of the Qur'an Nasr Hamid Abu Said, *Gottes Menschenwort – Für ein humanistisches Verständnis des Koran*, 2008. See also the highly controversial approach by Christoph Luxenberg (pseudonym), *Die syro-aramäische Lesart des Koran: Ein Beitrag zur Entschlüsselung der Koransprache*, 2011 (paperback ed.) (previous English translation: *The Syro-Aramaic Reading of the Koran*, 2007), and on the ensuing fierce debate Christoph Burgmer (ed.) *Streit um den Koran: Die Luxenberg-Debatte – Standpunkte und Hintergründe*, 2006.

²⁶ See for further reference Francis Robson (ed.) *The New Cambridge History of Islam – The Islamic World in the Age of Western Dominance*, vol. V, 2010; Robert W. Hefner (ed.) *The New Cambridge History of Islam – Muslims and Modernity Culture and Society since 1800*, vol. VI, 2010.

²⁷ See Dan Diner, *Versiegelte Zeit – Über den Stillstand in der islamischen Welt*, 3rd ed., 2011; Timur Kuran, *The Long Divergence – How Islamic Law held back the Middle East*, 2012; Bernard Lewis, *What Went Wrong – Western Impact and Middle Eastern Response*, 2002; Ibn Warraq, *Why the West is Best – A Muslim Apostate's Defense of Liberal Democracy*, 2011.

about “Islamic science”, with no revival of a non-imported scientific community and movement in sight?²⁸ All of these factors may serve to put the conservative devout Muslim under an enormous psychological stress, or as Mohammed al-Jabri has said:

“.. [T]he contemporary Arab reader is restricted by his tradition and crushed by his present, which means firstly that tradition absorbs him, robs him of independence and freedom. Since he entered the world he has been inculcated with tradition, in the form of a certain vocabulary and a certain attitude, language and way of thinking; in the form of fables, legends and imaginary ideas, a certain manner of relating to things and a manner of thought; in the form of knowledge and truths. He receives all this without any critical analysis and without an iota of critical intellect. Through these inculcated elements he perceives things; on them he bases his opinions and observations. The exercise of thinking under these conditions resembles more a memory game. When the Arab reader delves into the traditional texts, then his manner of reading is that of *remembering*, in no way, however, is it *exploring* or *reflecting*.”²⁹

None of this, naturally, excuses Muslim mob violence and the killing³⁰ of innocent people. The vast majority of Muslims will rightly tell you that this is not Islam, either, and that those engaging in it are a small minority who give Islam a bad name³¹. They are a minority but they act in the name of Islam, and not all of them are violent Islamist terrorists in disguise, but may simply be deeply offended conservative believers, whose education and social environment may not have provided them with different coping mechanisms in order to react to such intrusions into one of their central life-spaces.

Why is all this theological and sociological background important here? Because it may help explain why even otherwise sensible, friendly and generous conservative Muslims seem to undergo a dramatic change when it comes to attacks on their faith. Their faith is the one uniting and determining factor which they can cling to against the background of an otherwise mostly failed development of what we would call civil society, in many Islamic countries. Especially as far as the Arab world is concerned, there is a reinforcing combination with a cultural trait, in that

²⁸ See on this issue Nidhal Guessoum, *Islam’s Quantum Question – Reconciling Muslim Tradition and Modern Science*, 2011.

²⁹ Mohamed Abed al-Jabri, *Kritik der arabischen Vernunft – Die Einführung*, 2009, 86 - 87. The translation of the excerpt is by the author from the German version of al-Jabri’s book “*Naqd al-aql al-arabi*“, which in turn was translated from the French. For a more extensive discussion of the complexities surrounding the approach to Arab Reason see the volume by al-Jabri, *The Formation of Arab Reason – Text, Tradition and the Construction of Modernity in the Arab World*, 2011.

³⁰ Or incitement to murder by government officials, as committed by Pakistani minister for railways Bilour; see http://www.huffingtonpost.co.uk/2012/09/21/pakistan-government-minister-ghulam-ahmad-bilour_n_1905949.html.

³¹ To be fair, many Islamic countries are at the forefront of combatting Islamist terror – yet in many cases not least because of the threat it poses to their own ruling and sometimes Westernised elites.

an Arab's honour is defined to a large extent by what other people think of him: "Honour", an Arab saying goes, 'is what people hear about you: Your honour is your reputation'"³². This translates also to the level of group honour. To tell the average Arab to stand above things and to be calmly assured of himself no matter what people say will not easily resonate with his cultural DNA. Similar things can be said about the societies in other traditionally conservative parts of the Muslim world such as Pakistan, Bangladesh, Indonesia and Malaysia.

Therefore, as things stand now, it is highly likely, if not even virtually certain, that provocations such as those by the recent film about Muhammad, *will* trigger (lethal) violence in a certain segment of the Muslim population. It is also questionable, whether our Western, Middle-European attitude as to what constitutes sufficient reason to give in to a provocation would be viewed in the same way in the Arab or the wider Muslim world. We have to regard this difference as a social *fact*, whether we morally agree with its origins or not and whether it is to the Muslim world's credit or not. It may be desirable for it to change sooner rather than later and so far it has not changed significantly, yet is it not for those in the West to change it even if one could impute only the best intentions to such efforts, which realistically we cannot – the experience of Western colonialism in the Muslim world should have cured us of that fallacious assumption by now.

Facts come in two broad categories: causes and effects. This is where we move to the liability issue.

From cause to effect – Analysing the spheres of responsibility

Someone who intentionally disseminates highly inflammatory hate-speech, i.e. through any kind of publicly accessible media outlets, in a context where history and experience have shown the prevalence of an extremely low tolerance threshold on the recipients' side before violent action is taken, should have a good reason why he or she risks a reaction that can cost lives. Clearly, the actual killing is done by others and they are criminally liable for those acts themselves – even if

³² Allen, *Arabs*, 2006, 46; see also Nydell, *Understanding Arabs – A Guide for Modern Times*, 4th ed., 2006, 24, 43 ff., Patai, *The Arab Mind*, revised ed., 2007, 95 ff., 108 ff.

prosecutions are often impossible due to the absence of evidence. Yet, the ultimate trigger for the killing is the hate-speech dissemination. The factors to be considered are thus threefold:

- Does the hate-speech cause the deaths?
- If it does, is the disseminator allowed to take that kind of risk?
- Does the disseminator have the required *mens rea* for legal liability?

Causation – factual and legal

The usual definition of causation in the factual or scientific sense is the *conditio sine qua non* formula: A fact is the cause of another fact if the second fact would not exist but for the existence and effect of the first fact. It is immediately intelligible that this definition allows a regression *ad infinitum*: In the final analysis, in the realm of human agency, Adam and Eve are to blame for everything. Using this approach, factual causation is clearly made out: Had it not been for the dissemination of the hate-speech, the killing would not have occurred. However, it is equally obvious that the argument cannot only be based on simple factual causation. Any legal response must bear in mind that based on societal conventions, some kinds of conduct and some causes may lose their operational effect because of the behaviour of others which in our moral-ethical opinion extinguishes the effect of the first cause.

These cases are those of the so-called *novus actus interveniens*: A typical example is the accident victim who is brought to the hospital in an ambulance; on arrival she is killed by a suicide bomber who wanted to blow up the entire hospital. Factually, the person who caused the accident also caused her death because she would not have been there had it not been for the accident. Yet, we will frown upon holding the first person causally responsible because this kind of causal chain is so far removed from what you could ordinarily expect to happen, from what the usual risks connected with an accident and a hospital stay are. It seems morally wrong to say that the death was caused by the one responsible for the accident, especially if the accident was based on negligence and not intent, as in the case of someone running amok etc., and if the original cause was not lethal in itself. The general view seems to be that if someone intentionally intervenes in the course of events, even if they exploit the existing situation for their own ends without acting

in concert with the first person, then the chain of causation should be considered as broken. As the House of Lords stated for English law in *R v Latif*:

The general principle is that the free, deliberate and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is held to relieve the first actor of criminal responsibility³³.

Similar views are voiced, for example, in German law where, however, the attitude to (free, deliberate and informed) third party interventions is even more restrictive and requires extinction of the effect of the original cause³⁴. If the two people are acting in concert, they will both be liable under the rules of joint criminal enterprise or similar concepts on participation in other jurisdictions³⁵. What we need to be clearly aware of in this context, however, is that we are now no longer talking about factual causation in its literal sense, but about restrictions on the operation of factual causation based on moral and public policy considerations. This is called “legal causation” in some jurisdictions, and “objective ascription” (*objektive Zurechnung*) in others³⁶. This ascription can therefore in theory fluctuate with changing views on morals and public policy. In any event, all systems will agree that the new cause should be of such a degree that it does not just add to the existing cause but makes it appear irrelevant for moral purposes. Put another way, as long as the original cause has some morally discernible effect, it remains relevant: A cause does not have to be the only cause for a given result in order to create liability under law for the person who set that cause. Another important fact to be aware of in this context is that in order to decide upon legal causation or ascription, the mental state of the offender (intent, negligence, motivation) already comes into play, something that has no bearing whatsoever on factual causation: I may not even be aware, despite thorough checking, that the handbrake of the car which I parked at a steep incline two minutes ago is faulty and will snap in the next ten seconds, thereby allowing the car to roll down the hill and crush my wife out on a walk with our newly born twin-babies in the pram to death – factually, I caused their death. Would we say that morally the same should apply and that I should possibly be liable for

³³ [1996] 1 W.L.R. 104 at 115.

³⁴ Walter in Leipziger Kommentar zum StGB, 2007, Vor § 13 mn 103 ff.

³⁵ See for an in-depth treatment from a comparative perspective the volume by Alan Reed/Michael Bohlander (eds.), *Participation in Crime – Domestic and Comparative Perspectives*, 2013.

³⁶ Michael Bohlander, *Principles of German Criminal Law*, 2009, 18, 45 ff.

manslaughter? Again, it is essential to understand that here we are not yet talking about whether *actus reus* and *mens rea* overlap as far as causation is concerned, i.e. the so-called “correspondence principle” for an individual offence, but about the much earlier stage whether certain typical constellations of intent and more to the point, motive, and outcome require us to restrict factual causation based on moral reservations. This does, of course, not detract from the realisation that these typical constellations may partially be based on extrapolations from cases where this correspondence is typically missing in specific categories.

How does that translate for our purposes? We can safely say that the enraged Muslims are not acting in concert with the provoker, but that their interests and intents are diametrically opposed to his: They are enemies. They are not exploiting the situation for their own benefit. They would rather he had never uttered the hate-speech. They are acting on the very provocation. The idea behind *Latif* does not apply, even if we were prepared to accept it on its rather broad terms without qualification. Any attempts to construe some form of joint enterprise between inimical agents directly engaged in a conflict with each other, as the UK Supreme Court recently tried to do in *R v Gnanogo*³⁷ would appear futile and contrived. We thus have to look at the two sides to the interaction as separate potential causal elements that are not linked by a joint plan, that they are multiple independent perpetrators, in German terms, for example, *Nebentäter*³⁸, or possibly in some variations as a case of abetting (*Anstiftung*), where the knowledge of the principal that he is being incited to a criminal offence is not necessary³⁹; in English law terms it may be seen as an instance of procuring, which requires causation of the decision of the principal, but no consensus (unlike abetting and counselling) and hence no knowledge of the principal, either⁴⁰. It needs to be stressed, however, that the scenario of secondary participation requires some form of intention on D’s part to make P commit the retaliatory offence of homicide or assault, something that will not always be present in the hate-speech cases. This leaves us with the following scenarios, in all of which D intentionally uses hate-speech to begin with:

³⁷ [2011] UKSC 59. – See the critique by Bob Sullivan, *Accessories and Principals after Gnanogo*, in Alan Reed/Michael Bohlander *ibid* (fn. 35), 25.

³⁸ Michael Bohlander, *ibid*. (fn. 36), 160.

³⁹ Schönke/Schröder-Heine, *StGB*, 28th ed., 2010, § 26 marginal no.. 12

⁴⁰ David Ormerod, *Smith & Hogan’s Criminal Law*, 13th ed., 2011, 192 ff.

1. D, the disseminator, intends to make the Muslims (M) use lethal violence as a response and he knows or hopes they will kill members of certain target groups or people indiscriminately with intent.
2. D intends to make M use violence which he expects may generally cause lethal results either by M or the law enforcement authorities in their task to restore order, to which he has reconciled himself or to which he is indifferent.
3. D does not intend M to use violence, but foresees that it may ensue, with lethal consequences; he nonetheless hopes that no-one will be hurt or killed.
4. D does not intend M to use violence and does not foresee that it may ensue.

All four of these scenarios may need to be qualified further by the following subcategories as appropriate:

- a) M kill members of the target group intentionally.
- b) M kill people indiscriminately but intentionally.
- c) M kill people without intention but through recklessness or negligence⁴¹.
- d) The police kill people intentionally, recklessly or negligently in exercise of their duty to maintain public security and protect other important legal interests.

Let us perform a declension of these categories in order to gain an impression whether we would be willing to argue that the behaviour of M should exclude D's liability by morally restricting the operation of factual causality.

Scenario 1

D, the disseminator, intends to make the Muslims (M) use lethal violence as a response and he knows or hopes they will kill members of certain target groups or people indiscriminately with intent.

D's intention may be to arouse resentment and hatred of M in the global public opinion because of their violent reaction, and possibly even governmental action to repress them, whether by

⁴¹ Let us assume for argument's sake that the criminal law of the respective jurisdiction penalises negligent killing.

domestic or foreign governments, to engineer an ever tighter immigration regime for Muslims, their expulsion from Western countries or sheer racial hatred etc. The intentional killings by M are thus an essential part of D's plan. He will be disappointed if they do not occur and will consider his efforts as having failed. His desire to see lethal outcomes is not necessarily tied to deaths from certain target groups, such as, for example, Americans or other Westerners. In effect, he uses a typically terrorist stratagem which does not merely want to cause the primary harm to a target group, but uses the target group's response as a means of further escalating the conflict. It is also important to note that once he has publicly "launched the missile" of his hate-speech, he has no longer any control over the consequences. The death of the victims is not a too remote⁴² consequence of D's actions, either. In the sub-scenarios mentioned above, one can therefore say the following:

a) M kill members of the target group intentionally.

D achieves exactly what he wants to happen in the first place and based on experience with prior Muslim reactions to such provocations this course of events was objectively entirely foreseeable. The mere fact that the actual killing is done intentionally by M does therefore not represent a morally required restriction on the factual causality of his actions for the deaths.

b) M kill people indiscriminately but intentionally.

As with a) above, this was part of D's plan; if anything, the hope for indiscriminate killing may be considered even worse than a restriction to a certain target group. Should no member of the latter be among the casualties, we will hardly say that this morally exonerates D in causal terms: A life is a life, especially in contexts where D cannot control the effects of his actions, such as in the present case. We are not dealing here with individualised scenarios of *error in persona* or *aberratio ictus* because of errors of identity or missing the target in

⁴² See Jeremy Horder, Transferred Malice and the Remoteness of Unexpected Outcomes from Intentions, [2006] Crim. L.R. 383.

assassination cases which take place in the bad weather conditions so often used in criminal law textbooks.

- c) M kill people without intention but through recklessness or negligence.

As in a) but in this case, D does not achieve the full objective of his plan which was to cause maximum revulsion against M based on their intentional killings etc. It would, however, seem odd to see the fact that the killing was done unintentionally as in any way alleviating the moral blame to be placed on D: The moral difference related to the causal chain of events as far as the deaths are concerned is based on disappointed criminal energy, not on a fact that went *beyond* the damage that D had envisaged and hoped for and would thus be more difficult to attribute to his plans. It is merely a factual minus vis-à-vis the desired result. There is no objective moral reason to exempt D from the effects of factual causation.

- d) The police kill people intentionally, recklessly or negligently in the exercise of their duty to maintain public security and protect other important legal interests.

That the law enforcement authorities may have to use force to quell riots by M is again entirely predictable, and the actual degree of force used may be more or less so depending which region of the world we are talking about. Yet, that any police force may in certain cases have to use direct lethal force or that collateral damage may occur, is not out of the ordinary. The same goes for occasional violations of the rules of engagement and excessive use of force because of the heat of battle – this is also generally foreseeable. The only imaginable moral exemption would appear to arise in cases where the police themselves intentionally pursue illegal objectives in their use of (lethal) force not contemplated by D at all, such as, for example, taking the riots as a pretext to crack down on a political opposition movement or on an ethnic group in a campaign of persecution etc. Yet, if the police force is itself made up entirely of Muslims, even the latter exemption scenario may not apply, because then D can still point to the excessively aggressive nature of other M than those he may originally have targeted. In other, more general words, if the original aim is reached by other means, we may be merely dealing with a morally irrelevant deviation from the

(imagined) causal chain. If one wanted to apply the – in my view in the actual case rather bizarre – reasoning in *R v Pagett*⁴³ from English law, the use of defensive or otherwise legitimate force by the police in the execution of their duties would not even serve to create a second causal fact that could compete with the one triggered by D.

In sum, in Scenario 1 it would appear difficult to find moral reasons that would require us to release D from the effects of factual causation. If his very intention is the causation of death – maybe even in a country a few thousand miles away – then moral considerations do not require us not to view his actions as causal in almost any of the above scenarios.

Scenario 2

D intends to make M use violence which he expects may generally cause lethal results either by M or the police, to which he has reconciled himself or to which he is indifferent.

It would appear that this general category based on lower form of mens rea, which may be termed recklessness or *dolus eventualis*⁴⁴ unless one would still want to apply oblique *Woollin*⁴⁵ intent, depending on the degree of indifference and foresight of risk of death, does not fare any better than Scenario 1 in moral terms in any of the sub-scenarios. It is here that the absolute lack of control over the consequences once the “missile is launched” comes into play, together with the predictability of lethal violence by M. Although D may not directly intend to cause deaths and the use of violence by M as a means of response may be sufficient for his purposes, he still displays a total disregard for human life by taking an incalculable risk of major harm and treating its destruction as an acceptable means of pursuing his ulterior motives. From his point of view, the exact nature of the killing has actually even become irrelevant, which is why neither the intentional killing nor the other varieties set out in the sub-scenarios are morally relevant to denying the causal link.

⁴³ [1983] 76 Cr App R 279.

⁴⁴ Michael Bohlander, *ibid.* (fn. 36), 60 ff.

⁴⁵ [1998] 4 All ER 103.

Scenario 3

D does not intend M to use violence, but foresees that it may ensue, with lethal consequences; he nonetheless hopes that no-one will be hurt or killed.

These will be the ordinary cases of stretching the envelope, one would assume, such as the Danish newspaper cartoon case. The difference to Scenario 2 is the even lower degree of preparedness to countenance the possible realisation of the otherwise well-seen risk. We are moving in the sphere of *advertent* (gross) negligence, possibly still even in the lower reaches of *Cunningham*-style⁴⁶ subjective recklessness, and given the obviousness of the major nature of the risk and the total lack of control by D whether it materialises, this may be no more than a case of hoping against hope and thus in effect just another case of unacceptable risk-taking. As far as causation is concerned, no moral exemptions seem required.

Scenario 4

D does not intend M to use violence and does not foresee that it may ensue.

The difference to Scenario 3 is that here we are left with only *inadvertent* negligence, *Caldwell*⁴⁷ recklessness, or if the individual jurisdiction still subscribes to it, constructive liability, if one wanted to view the publication of the hate-speech as an inherently dangerous and criminal act⁴⁸. Whether they could be used as the basic offence for something like constructive manslaughter is thus doubtful, and excluded in jurisdictions such as Germany whose § 18 of the Criminal Code abolished the previous constructive concept of *versari in res illicita*⁴⁹. In any event, D would have to face the argument of creating an uncontrollable and to the average observer glaringly obvious and major risk. It is difficult to find cogent moral reasons to say that in this case the chain of causation should be regarded as broken.

⁴⁶ [1957] 2 QB 396.

⁴⁷ [1982] AC 341.

⁴⁸ Which can raise doctrinal problems because hate-speech offences are mainly public order offences and not necessarily meant to protect individuals from personal injury.

⁴⁹ Michael Bohlander, *ibid.* (fn. 36), 31.

In all of the above scenarios it is thus in the final analysis the seriousness and the obviousness of the risk taken by D which militate against finding any moral qualifier that could exclude the operation of factual causality. The differing degrees of intent and knowledge of the offender only serve to drive this realisation home more clearly, and the more so the more D knows. Regardless of whether M have contributed a cause to the victims' death, D's cause is still operating as well.

In this context, the law of the United States in 18 U.S.C. § 247 takes an interesting approach to deaths caused as a consequence of damage to religious property and obstruction of persons in the free exercise of religious beliefs. The intriguing part of this provision and others using similar language (ss. 241 and 242) is that it has been held that the lethal result is not an element of the offence but an aggravating circumstance that justifies enhanced punishment, and is a mere matter of "proximate causation", i.e. if it was a

"reasonably foreseeable consequence of his or her conduct in violation of the statute. The defendant need not have intended that the death result, nor need he or she have directly caused the death. In addition, even events over which he or she did not have control, including the acts of the victim or third parties, will not break the chain of legal causation if they were reasonably foreseeable. Courts also have held that the penalty enhancement applies even where the person whose bodily injury (or death) resulted was not the intended victim of the offense, and that, where multiple violations result in one person's death or bodily injury, the penalty enhancement may be applied to multiple counts"⁵⁰.

Overall, causation would thus not seem to pose an insuperable obstacle to liability at least in the majority of cases.

The effect of free speech protection on liability

On moral grounds, and despite having established legal causation, we may absolve D from liability if he was permitted to take the risk, even if it constituted an obvious lethal risk. Whether we view this as a question of negating the offence description, *actus reus* or *Tatbestand*⁵¹ already – possibly even as a further consideration in legal causation – or as a general defence of

⁵⁰ Lu-in Wang, WestLaw, HateCrimes, 7. Damage to Religious Property; Obstruction of Persons in the Free Exercise of Religious Beliefs: 18 U.S.C.A. § 247 and 18 U.S.C.A. § 248.

⁵¹ *Tatbestand* is the German term combining the external elements of the offence (*actus reus*) and some of the subjective ones, which are, however, not co-terminous with *mens rea* as understood in English law or common law more widely, because of the tri-partite structure German law adopts. See for a detailed description Michael Bohlander, *ibid.* (fn. 36), 16 ff.; 29 ff.

permissible action on a separate tier of the offence structure, is a secondary doctrinal issue which we will not delve into because it is irrelevant for the fundamental question we are pursuing here. The effects on liability of the principal offender – as opposed to secondary participants – will be mostly identical. There is no established general criminal law defence which presents itself, but we may say that if the law on freedom of expression allowed the offender to say or express what he did, then criminal liability should not attach to his actions. The laws on free speech thus have a gatekeeper function vis-à-vis liability: If the law allows you to say what you say without regard to the consequences then you cannot be liable even for lethal outcomes.

As we already indicated above, this question arises with full stringency only in Western or secular jurisdictions which subscribe to a wide interpretation of free speech. If the offender is arrested and tried in a country which does not use the same standard of free speech, as do most states in the Islamic world when it comes to defamations of their religious main tenets⁵², then the issue does not arise in law⁵³. Free speech laws are notoriously difficult to pin down when it comes to defining their criteria. Let us take a brief look at some jurisdictions to highlight the argument. Even in highly developed human rights regimes such as the ECHR, the judicial attitudes especially in the context of the clash between free speech and religious sensitivities are often on the one hand doctrinally not very sophisticated and, on the other hand, not always consistent, as Ian Leigh, for example, has convincingly shown at the example of the case law of the ECtHR⁵⁴. An initial conceptual objection which may be made with respect to any critical comments about a religion or its protagonists is that a human rights regime does not protect the religion as such from defamation but if at all, its human adherents i.e. the believers. This matter

⁵² See the overview in Marshall/Shea, *Silenced – How Apostasy and Blasphemy Codes Are Choking Freedom Worldwide*, 2011.

⁵³ It is an entirely different question whether under the diplomatic protection regime the home state of the offender must try to ensure his transfer home. Those efforts may or may not be successful and is at the end of the day more a matter of political comity than law. Free speech rules thus bite only in a secular jurisdictional context, and they do so in two manners: Firstly, they decide whether anyone can be prosecuted and tried under the domestic law, and secondly, whether a person could be extradited to a country which applies a lesser standard. The answer to the second question would appear to be straightforward under extradition principles: If the conduct of the offender is permitted under domestic free speech standards, the requested state might either invoke the political offence clause, which can include religious offences, or rely directly on its national *ordre public* which is a general residual exception to extradition. See e.g. Art. 2 of the European Convention on Mutual Assistance in Criminal Matters (CETS No. 30).

⁵⁴ Ian Leigh, *Damned if they do, damned if they don't: The European Court of Human Rights and the protection of religion from attack*, (2011) *Res publica* 55 at 72.

is sometimes treated under the heading of the “right not to be offended”⁵⁵. Leigh is correct that at least under the ECHR, there is no such right⁵⁶. There is no clash of the free speech right with the freedom of religion, either and arguments based on that dichotomy fail to appreciate the nature of both rights. They both are primarily directed against the state, not against other individuals i.e. there is no horizontal conflict between them: The state must protect the right to free speech and it must also protect the right to freedom of religion. However, even if an atheist activists’ organisation, for example, engaged in a major non-violent campaign against a particular religion, that would not stop the adherents of that religion from exercising their religion freely. The question thus becomes one of restriction of free speech as a human right on its own terms and in the context of the overall regime⁵⁷.

In the ECHR this idea has manifested itself in Articles 10⁵⁸ and 17⁵⁹. Any restriction of free speech should thus happen solely under the criteria of Art. 10(2) ECHR, and not based on a balancing exercise with the freedom of religion as a conflicting human right. That the religious feelings of the believers of the attacked religion will, however, come into play in the evaluation to be made under Art. 10(2) ECHR is obvious and, more to the point, so will the likelihood of a violent reaction with possible physical or lethal injury.

A related but distinct secondary preliminary objection is that expressing offensive or debasing opinions about a religion as such should not be caught by human rights protections but that the expression must be (also) aimed at a definable group of persons. Apart from the fact that this

⁵⁵ Aatifa Khan, A “right not to be offended” under article 10(2) ECHR? Concerns in the construction of the “rights of others”, (2012) *European Human Rights Law Review*, 191.

⁵⁶ Leigh, *ibid* (fn. 54).

⁵⁷ Leigh, *ibid*. (fn. 54).

⁵⁸ Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

⁵⁹ Article 17 – Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

distinction is not always an easy one to make⁶⁰ because an attack on the teachings of a religion may in many cases involve a collateral attack on the feelings of its adherents and that the scenario is easily amended for argument's sake to include an attack on a particular group (say the Muslims of Pakistan, the Muslims at a particular mosque etc.), the ECtHR seems in effect to have treated "the Muslims" as such a group⁶¹ and even employed the non-admissibility barrier of Art. 17 ECHR for certain Islamophobic statements, especially if they seem "gratuitously offensive"⁶². The ECtHR has more generally held in this context that

"... tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance..."⁶³

The issue at hand is thus not so much against whom the offensive speech is aimed, but what its substance is and whether that substance is permissible. The views on this will naturally diverge.

The Supreme Court of Canada in *Whatcott*⁶⁴ recently had an opportunity to elucidate freedom of speech restrictions under Canada's constitutional law and it held that three main criteria must be followed. Firstly, that courts must apply hate speech prohibitions objectively and ask whether a "reasonable person, aware of the context and circumstances, would view the expression as exposing the protected group to hatred". Secondly, the terms "hatred" and "hatred and contempt" should be "restricted to those extreme manifestations of the emotion described by the words 'detestation' and 'vilification'". Expression which are repugnant and offensive but do not "incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects" are excluded. Thirdly, the analysis must focus on the "effect of the expression at issue, namely whether it is likely to expose the targeted person or group to hatred by others. The repugnancy of the ideas being expressed is not sufficient to justify restricting the expression, and whether or not the author of the expression intended to

⁶⁰ Leigh, *ibid.*(fn. 54), 58.

⁶¹ *Norwood v UK* Application no. 23131/03, Judgment of 16 November 2004; and see also in the context of religion-related rights restrictions *Hizb-ut Tahrir v Germany* Application no. 31098/08, Decision on admissibility of 19 June 2012; *Pavel Ivanov v Russia* Application no. 35222/04, Decision on admissibility of 20 February 2007, *Gündüz v Turkey* (2005) 41 EHRR 59 and *Refah Partisi and others v Turkey* Application nos. 41340/98, 41342/98, 41343/98 and 41344/98, Judgment of 13 February 2003.

⁶² On the criticism of this approach see Leigh, *ibid.* (fn. 54).

⁶³ *Erbakan v. Turkey*, Appl. no. 59405/00, Judgment of 6 July 2006, para. 56.

⁶⁴ *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11.

incite hatred or discriminatory treatment is irrelevant”. The paramount consideration lies in determining the “likely effect of the expression on its audience, keeping in mind the legislative objectives to reduce or eliminate discrimination. In light of these three directives, the term “hatred” contained in a legislative hate speech prohibition should be applied objectively to determine whether a reasonable person, aware of the context and circumstances, would view the expression as likely to expose a person or persons to detestation and vilification on the basis of a prohibited ground of discrimination”.⁶⁵ The Court went on to define the underlying rationale as follows:

The objective for which the limit is imposed, namely tackling causes of discriminatory activity to reduce the harmful effects and social costs of discrimination, is pressing and substantial. Hate speech is an effort to marginalize individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to delegitimize group members in the eyes of the majority, reducing their social standing and acceptance within society. Hate speech, therefore, rises beyond causing distress to individual group members. It can have a societal impact. Hate speech lays the groundwork for later, broad attacks on vulnerable groups that can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide. Hate speech also impacts on a protected group’s ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy.⁶⁶

The stance of the US Supreme Court is recognised as one of the most liberal ones world-wide; in the landmark case of *Brandenburg v. Ohio*, Brennan J famously stated that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action".⁶⁷ German law, for example, regulates hate-speech based on religious grounds under §§ 166 f StGB⁶⁸. The thrust of the provisions is the protection of the public peace, not the religion as such.

⁶⁵ Ibid. (fn. 64).

⁶⁶ Ibid. (fn. 64).

⁶⁷ 395 U.S. 444 at 447.

⁶⁸ The text reads:

Section 166

Defamation of religions, religious and ideological associations

(1) Whosoever publicly or through dissemination of written materials ... defames the religion or ideology of others in a manner that is capable of disturbing the public peace, shall be liable to imprisonment not exceeding three years or a fine.

(2) Whosoever publicly or through dissemination of written materials ... defames a church or other religious or ideological association within Germany, or their institutions or customs in a manner that is capable of disturbing the public peace, shall incur the same penalty.

Section 167

In stark contrast, the traditional Islamic approach can be found in the 1990 Cairo Declaration on Human Rights in Islam⁶⁹, the words of which speak for themselves:

Article 22

(a) Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah.

(b) Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari'ah.

(c) Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith.

(d) It is not permitted to excite nationalistic or doctrinal hatred or to do anything that may be an incitement to any form of racial discrimination.

Article 24

All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah.

Article 25

The Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration⁷⁰.

What this anecdotal comparison of a few jurisdictions was meant to show is that while there are differences in the national attitudes about the exact point when the threshold is reached where speech becomes liable to censure, all systems agree that there is such a point. No system allows any kind of speech without at least some restrictions. The point of this paper is not to gauge precisely where in the different systems the film *Innocence of Muslims* in particular is to be located but it would seem fair to say even for the average free-speech supporting observer, after watching it, that any complaint against its censure under the ECHR could already run afoul of the abuse clause in Art. 17 ECHR as interpreted by the ECtHR: The film has no discernible purpose other than ridiculing and debasing the Islamic faith and its adherents, there is no colourable case in my view that the producer(s) intended it as a mere means in a serious societal

Disturbing the exercise of religion

(1) Whosoever

1. intentionally and inappropriately disturbs a religious service or an act of religious worship of a church or other religious association within Germany or

2. commits defamatory mischief at a place dedicated to the religious worship of such a religious association

shall be liable to imprisonment not exceeding three years or a fine.

(2) The ceremonies of an ideological association within Germany shall be equivalent to religious worship.

⁶⁹ Online at www1.umn.edu/humanrts/instree/cairodeclaration.html.

⁷⁰ Apologists of a specifically Islamic human rights discourse use such concepts as the ECtHR's "margin of appreciation" doctrine to allow for accommodation of particularly Muslim approaches; see for more detail and a critique Michael Bohlander, *ibid.* (fn 6) at fn. 14.

discourse, however aggressively that may be conducted. From the point of view of probably even the most liberal Muslims, it constitutes a grave case of blasphemy and defamation of Muhammad which goes well beyond the Danish newspaper cartoon instance in seriousness.

Mens rea – General trigger levels and mistakes

The question of which kind of mens rea D will have and must have depends on the one hand on the actual facts, and on the other on the legal framework within which he utters his statement. As recent research by Mohamed Elewa Badar⁷¹ on the difficulties of deducing a joint concept of mens rea categories in international criminal law has highlighted again, the doctrinal approaches vary widely. Some systems employ a more restrictive regime which supports an enhanced blameworthiness model where a high degree of culpability, both with respect to cognitive and volitional elements are required, others allow the use of negligence, simple or gross, or even constructive or strict liability to establish criminal liability. In most cases, the picture will be that of a mixture of the above. Here we return to the categories we already used in the context of our study of moral exceptions to physical causation above: D may intend for lethal violence to occur, he may only wish to see physical violence or violence against inanimate objects. He may not desire that at all but foresee that it is a virtually certain consequence of his actions, or that it is merely a risk which may manifest itself, he may be wilfully blind or he may simply have omitted to use the necessary diligence in finding out about the potential effects. Whether he is liable under a state's criminal law will depend on the *mens rea* regime that state applies. Whether D has foresight of the effects of his actions is a matter for the evidence in each case. As far as the violent reactions of Muslims to anti-Islamic hate-speech are concerned, it will become increasingly difficult for any offender to argue that he did not know or could not have known what consequences his conduct may be likely to trigger: The modern ubiquitous instant availability of media coverage in such high-profile issues would serve to eradicate any ignorance in the short- to mid-term.

⁷¹ Mohamed Elewa Badar, *The concept of mens rea in international criminal law – The case for a unified approach*, 2013.

This argument will naturally also apply to questions of mistake of fact and/or law. Most legal systems allow for some degree of exoneration if the offender was unaware of certain elements of an offence as far as they relate to simple facts. The classic textbook case is the *error in persona vel obiecto*, exemplified by the hunter who shoots at a bush in which he thinks a wild boar is hiding, while in fact it is a poacher. Other cases include the belief in the consent of the victim in sexual offences. These examples have in common that they relate to empirical facts: Consent is or is not given, the target is or is not a person etc. This category of mistake will not normally be problematic in the hate-speech cases: D knows what he says. It is the legal characterisation of the content of what is said which raises issues. Again, doctrinally they can arise as part of the *actus reus* or as a general defence: Whether a chattel is someone else's property is a question of law, but part of the *actus reus* of theft. D must thus in principle know the legal situation and this requires him to make a judgment of law. Similarly, whether under a tripartite system as the German model D is aware of the ambit of the criterion of permissible force in self-defence as a general defence outside the *Tatbestand* is a question of law. The exact classification is more or less irrelevant because most if not all legal systems tend to treat errors of law as not providing a defence, and judgments of law required of the offender in the context of normative elements do not have to reach the level of accuracy and expertise which a fully qualified legal practitioner might bring to bear, but the insight of the offender in laymen's terms will usually be sufficient; this will apply *mutatis mutandis* if the question of law is part of the general offence description, as in theft above⁷². Otherwise, only lawyers could commit offences. Whether D has this layman's insight will depend on the evidence in each individual case, if the issue becomes controversial at all, for similar reasons as above with foresight. In sum, once we have jumped the general policy hurdle of the legal exceptions of factual causation, the mens rea in the individual case does not present any fundamental systemic problems.

Conclusion

This preliminary study was intended to show that in cases of serious hate-speech or inflammatory speech in general, the question of liability is not restricted to mere specific speech offences. The particular context of the well-known scenarios surrounding anti-Islamic

⁷² Michael Bohlander, *ibid.* (fn. 36), 147.

inflammatory speech and the predictable violent reactions of a small but nonetheless sizeable group of indisputably misguided people should give us pause to think about a legal re-characterisation of the act of publicising egregious hate-speech in terms of homicide (or assault) offences. While the actual detailed doctrinal construction of that liability – which was not the aim of this paper – may vary from country to country, certain underlying criteria seem trans-systemically applicable. One is causation, the other that of the permissible risk. They both merge in the transformation of a moral question into two distinct legal categories: Is it, on the one hand, required to exempt an offender from the reach of factual causation for moral reasons, and on the other, where does the gatekeeper function of the freedom of speech protection end? We have answered the first question in the negative and left the second – by necessity – open to the regulation of each individual country.

It may be wishful thinking to hope that there will be a unified common stance at any time in the future, and even the mere thought of that may cause concerns about the rise of authoritarian thought and the abolition of free speech with wide sections of the readership. This paper does not advocate anything of the sort. Indeed, in the final analysis, freedom of speech must in a secular society always prevail over any attempts to declare a certain topic or the interests of a certain sector of society as exempt from hard-hitting criticism: Thought-crime is still a more sinister aspect than hate-crime. However, in the current popular political discussion many would seem to arrive at that moral singularity too quickly and without proper foundation. Hence, the invocations of free speech by media and other protagonists who engage in exercises of pushing the envelope with regard to freedom of expression have an occasional hollow ring to them, especially if there is a mixture with commercial interests. The simple truth is: The fact that you are allowed under law to say something does not mean that you should always say it, if it hurts someone else. That is a question of common civility. Especially if the harm arising from your speech moves from mere offence to physical injury or even death. This, of course, applies even more if you are not allowed to say it in the first place, only in this instance it does not seem outlandish to hold the speaker liable not only for the insult but also for the injury.