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THE CARTOON CONTROVERSY IN CONTEXT: ANALYZING THE DECISION NOT TO PROSECUTE UNDER DANISH LAW

*Stéphanie Lagoutte**

INTRODUCTION

In September 2005, the publication of twelve cartoons in the daily newspaper *Jyllands-Posten* started a small storm in the Danish media.¹ A few months later, demonstrators around the world organized to protest the cartoons. In Syria, Lebanon, and Iran, demonstrators acted out against Danish embassies, making threats and setting fires.² The storm became a hurricane, and Denmark found itself in the middle of its biggest diplomatic crisis in recent memory. After a few weeks, the storm abated. A mere nine months had passed since the cartoons' initial publication when United Nations ("U.N.") Secretary General Kofi Annan visited Denmark on June 18, 2006. In comments to journalists, he observed that the page had turned in the cartoon controversy and consequently journalists should forego examination of the past in favor of looking ahead.³ Notwithstanding the need to avoid inflaming such controversies, a concern that no doubt motivated Annan's comments, it is equally, if not more important, to scrutinize such stories to understand their mechanisms and trajectories prior to looking ahead and moving on.

Before unraveling the events of September 2005, it is necessary to mention an important historical antecedent: Danish prosecution of Nazis for blasphemy. In 1938, the High Court of Eastern Denmark (*Østre Landsret*) confirmed the conviction of a number of Danish Nazis for blasphemy under section 140 of the Danish Criminal Code for having, among other things, distributed media that falsely stated that the Talmud permitted Jewish men to force non-Jewish girls to engage in sexual inter-

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1. See Flemming Rose, *Muhammeds ansigt [The Face of Mohammed]*, JYLLANDS-POSTEN (Den.), Sept. 30, 2005, reprinted in PROFET-AFFÆREN [THE PROPHET AFFAIR] 14–15 (Anders Jerikow & Mille Rode eds., Dansk PEN 2006) (reprinting the cartoons) [hereinafter THE PROPHET AFFAIR].

2. THE PROPHET AFFAIR, *supra* note 1, at 145–53.

3. *DR1 21 O'clock News* (DR1 television broadcast, June 18, 2006). *DR1* is a TV channel of the Danish Broadcasting Corporation, a public broadcasting company.

course.⁴ This case was the last time a court handed down a criminal conviction for blasphemy in Denmark. It reflects a Denmark that protected its minority population from abuses; this is all the more noteworthy because it took place at a time when anti-Semitism was widespread in Europe.⁵

In contrast, returning to the cartoon controversy of 2005, Danish authorities were of the opinion that there was no legal basis for a response to the *Jylland-Posten's* controversial publication.⁶ From the perspective of international human rights law, even though freedom of expression is a human right protected by a number of international conventions, governmental restrictions on freedom of expression are permitted by international human rights law.⁷ However, tolerating interference with freedom of expression is not the same as requiring such interference in order to protect the freedom and rights of others. In other words, although Danish authorities elected not to intervene in the cartoon controversy, they could have, had there been a legal basis for doing so, without violating the international law provisions protecting freedom of expression. By the same

4. UfR 1938.419 Ø(L) (Den.) (judgment of the High Court of Eastern Denmark); see Henning Koch, *Ytringsfrihed og Tro [Freedom of Expression and Belief]*, in *GUDEBILLEDER: YTRINGSFRIHED OG RELIGION I EN GLOBALISERET VERDEN. ANTOLOGI. [IMAGES OF GODS: FREEDOM OF EXPRESSION AND RELIGION IN A GLOBAL WORLD. ANTHOLOGY.]* 72, 76 (Lisbet Christoffersen ed., Tiderne Skifter 2006) (discussing prevalence of anti-Semitism in Europe during World War II).

5. U.S. DEP'T OF STATE, REPORT ON GLOBAL ANTI-SEMITISM (Jan. 5, 2005), <http://www.state.gov/g/drl/rls/40258.htm> (last visited Mar. 12, 2008).

6. See Statsminister Anders Fogh Rasmussen: Svar til 11 ambassadører [Letter from Prime Minister Anders Fogh Rasmussen to the 11 Ambassadors] (Oct. 21, 2005), reprinted in *THE PROPHET AFFAIR*, *supra* note 1, at 28; Udenrigsminister Per Stig Møller: Brev til Egyptens udenrigsminister [Letter from Foreign Affairs Minister Per Stig Møller to the Egyptian Foreign Minister] (Nov. 8, 2005), reprinted in *THE PROPHET AFFAIR*, *supra* note 1, at 34. Both letters reflect the Danish authorities' refusal to use political means to respond to the controversy. See also DPP Decision, *infra* note 9 and accompanying text (explaining the prosecutor's decision not to prosecute).

7. See, e.g., International Covenant on Civil and Political Rights art. 19(3), *opened for signature* Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]. Article 19(3) states:

The exercise of [the right to freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Id.

token, in refraining from such interference, the Danish authorities did not violate any positive obligations under human rights provisions.⁸

More time must pass before it will be possible to document and understand exactly all the interests at stake and the various processes involved in the cartoon controversy. The purpose of this Article is therefore simply to acquaint the reader with the Danish context, to explain the legal implications of the crisis in Denmark, and to root out some of the popular misunderstandings about both. It is not a goal of this Article to address the international dimensions of the crisis. Among other important elements, it will instead show how the crisis originated in a misunderstanding of competing values such that a choice was made to advance one value (freedom of expression) to the exclusion of certain others (non-discrimination, respect for other religions, protection of minorities, etc.), despite the fact that the Danish authorities, among them the Prime Minister, had a variety of solutions at their disposal for tackling the situation. Even though the ultimate decision not to take action was not a direct violation of international human rights obligations, a choice more consistent with Denmark's historical commitment to the support and protection of minorities probably could have been made.⁹

This Article explores the many components of the Danish cartoon controversy in an attempt to understand what really happened and has been happening in Denmark since late 2005. Part I sets forth a brief factual account of the genesis of the cartoon controversy. Part II then goes on to discuss the legal framework for the controversy—both in Denmark and internationally. Next, Part III looks at the Danish Director of Public Prosecution's decision not to bring criminal proceedings in response to the cartoons' publication. Finally, Part IV examines the emphasis placed on freedom of expression in both the Danish and international arenas.

I. A BRIEF SUMMARY OF THE EVENTS IN DENMARK

The twelve drawings at issue were published by *Jyllands-Posten*, a major Danish newspaper, in an article called *The Face of Mohammed* on September 30, 2005.¹⁰ In an excerpt from the article that appeared on the

8. See generally John Cerone, *Inappropriate Renderings: The Danger of Reductionist Resolutions*, 33 BROOK. J. INT'L L. 357 (2008) (discussing how international human rights law can accommodate both freedom of expression and freedom of religion).

9. See Director of Public Prosecutions [DPP], *Decision on Possible Criminal Proceedings in the Case of Jyllands-Posten's Article "The Face of Muhammed,"* No. RA-2006-41-0151, Mar. 15, 2006, available at http://www.rigsadvokaten.dk/media/bilag/afgorelse_engelsk.pdf [hereinafter DPP Decision].

10. See Anders Jerichow & Mille Rode, *Forord* [Foreword] to THE PROPHET AFFAIR, *supra* note 1, at 9.

front page, the newspaper reproduced one of the cartoons and explained that the newspaper had invited members of the Danish Newspaper Illustrators' Union to submit drawings of Mohammed "as they saw him."¹¹ This excerpt read in part: "Some Muslims reject modern, secular society. They demand a special position, insisting on special consideration of their own religious feelings. This is incompatible with secular democracy and freedom of expression, where one has to be ready to put up with scorn, mockery and ridicule."¹²

The Face of Mohammed was set out in three columns surrounded by the twelve drawings.¹³ The article, written by Flemming Rose, the newspaper's cultural editor, was headed *Freedom of Expression* and drew attention to recent incidents in which authors engaged in self-censorship (three were mentioned) to avoid provoking Muslims.¹⁴ In addition, the article noted that during a meeting with the Prime Minister "an imam urged the government to use its influence over the Danish media so that they can draw a more positive picture of Islam."¹⁵ The article opined that such incidents reflected a desire of some Muslims for special treatment, which presented a threat to the free exchange of ideas in the public forum.¹⁶ Although the article did not itself explain its choice to juxtapose

11. Flemming Rose, *Muhammeds ansigt [The Face of Mohammed]*, JYLLANDS-POSTEN (Den.), Sept. 30, 2005, reprinted in THE PROPHET AFFAIR, *supra* note 1, at 14–16.

12. *Id.* at 14.

13. For reproductions of the page from the *Jyllands-Posten*, see *id.* at 15. For a description in English of the twelve drawings, see DPP Decision, *supra* note 9, at 2–3. See also Joel Brinkley & Ian Fisher, *U.S. Says It Also Finds Cartoons of Muhammad Offensive*, N.Y. TIMES, Feb. 4, 2006, at A3.

14. Flemming Rose, *Muhammeds ansigt [The Face of Mohammed]*, JYLLANDS-POSTEN (Den.), Sept. 30, 2005, reprinted in THE PROPHET AFFAIR, *supra* note 1, at 14–16.

15. "[E]n imam regeringen til at gøre sin indflydelse gældende over for danske medier, så de kan tegne et mere positivt billede af islam." See DPP Decision, *supra* note 9, at 2 (quoting and translating Flemming Rose, *Muhammeds ansigt [The Face of Mohammed]*, JYLLANDS-POSTEN (Den.), Sept. 30, 2005, at KulturWeekend 3).

16. *Id.* (citing Flemming Rose, *Muhammeds ansigt [The Face of Mohammed]*, JYLLANDS-POSTEN (Den.), Sept. 30, 2005, at KulturWeekend 3). According to the DPP Decision, the Flemming article stated:

De anførte eksempler giver grund til bekymring, hvad enten den oplevede frygt hviler på et falsk grundlag eller ej. Faktum er, at den findes, og at den fører til selvcensur. Der sker en intimidering af det offentlige rum. Kunstnere, forfattere, tegnere, oversættere og teaterfolk går derfor i en stor bue uden om vor tids vigtige kulturmøde, det mellem islam og de sekulære, vestlige samfund med rod i kristendommen.

Id. The translation reads as follows:

the article with the Mohammed drawings, Denmark's Director of Public Prosecutions ("DPP") ultimately stated that the basic assumption "must be that *Jyllands-Posten* commissioned the drawings for the purpose of debating, in a provocative manner, whether, in a secular society, special regard should be paid to the religious feelings of some Muslims."¹⁷

Reactions in Denmark were immediate. A few days after publication, the illustrators at *Jyllands-Posten* received death threats.¹⁸ On October 5, 2005, a spokesman for various Danish Muslim associations¹⁹ appealed to the diplomatic missions of Muslim states to take part in an official protest.²⁰ Some of these associations issued a joint press release expressing

The cited examples give cause for concern, regardless of whether the fear experienced is founded on a false basis. The fact is that the fear does exist and that it leads to self-censorship. The public space is being intimidated. Artists, authors, illustrators, translators and people in theatre are therefore steering a wide berth around the most important meeting of cultures in our time—the meeting between Islam and the secular society of the West, which is rooted in Christianity.

Id.

17. DPP Decision, *supra* note 9, at 6. However, the *Jyllands-Posten* article itself has a much broader perspective:

Some Muslims reject modern, secular society. They demand a special position, insisting on special consideration of their own religious feelings. It is incompatible with secular democracy and freedom of expression, where one has to be ready to put up with scorn, mockery and ridicule. It is therefore no coincidence that people living in totalitarian societies are sent off to jail for telling jokes or for critical depictions of dictators. As a rule, this is done with reference to the fact that it offends people's feelings. In Denmark, we have not yet reached this stage, but the cited examples show that we are on a slippery slope to a place where no one can predict what self-censorship will lead to.

Id. at 2.

18. However, it was soon discovered that the threats had been sent by a seventeen-year-old boy who was mentally ill and could not be attributed to Muslim organizations. See *17-årig Sigtet for Trusler* [17-year-old Target of Threats], JYLLANDS-POSTEN [JUTLAND POST] (Den.), Oct. 15, 2005, available at <http://jp.dk/indland/article211610.ece>.

19. The organizations in question were: the Islamic Faith Community (*Islamisk Trossamfund*), the Islamic Federation (*Islamisk Forbund*), and the Group of Muslim Immigrants Associations (*Sammenslutningen af Muslimske Indvandrereforeninger*). The Islamic Faith Community, the most prominent of the three organizations, has been called "conservative." ULLA HOLM, THE DANISH UGLY DUCKLING AND THE MOHAMMED CARTOONS 1 (Danish Inst. for Int'l Studies 2006), http://www.diis.dk/graphics/Publications/Briefs2006/uho_muhammed1.pdf.

20. *Islamisk trossamfund m.fl.: Brev til muslimske ambassadører* [Letter from the Muslim Organizations to the Muslim Ambassadors in Denmark] (Oct. 5, 2005), reprinted in THE PROPHET AFFAIR, *supra* note 1, at 18–19.

their concerns and criticisms.²¹ The appeal to foreign diplomatic missions by the Danish-Muslim community is quite disturbing in itself; despite the variety of reasons that may have motivated the appeal, it leaves the strong impression that, at the time, some representatives of the Danish-Muslim community did not think the Danish government would protect their interests as a religious minority. Moreover, the involvement of foreign authorities in the crisis gave it all the dimensions of a diplomatic crisis at a very early stage.

A week after this appeal, ambassadors from Muslim countries responded with a letter to the Danish Prime Minister denouncing an “on-going smear campaign in Danish public circles and media against Islam and Muslims” and requesting an urgent meeting.²² In addition to the cartoons, the ambassadors cited various episodes: a racist program on a Nazi radio station, derogatory remarks against Muslims by a member of Parliament, and a statement by the Minister of Culture about the “war” against Muslims.²³ The Prime Minister responded in a letter that emphasized freedom of expression, religious tolerance, and the equality of all religions in Denmark.²⁴ He explained that Danish law prohibited blasphemous and racist expressions and that potential victims could bring a case before the Danish courts.²⁵ Although he dwelled on the importance of dialogue between cultures and religions in Denmark and the need for international cooperation between Denmark and the Muslim world, he made no mention of a meeting.²⁶

In the following weeks and months, a debate about these events raged in Denmark. The public debate took place on several levels: a legal discussion on the freedom of the press, freedom of religion, protection of minorities, blasphemy and hate speech; a media-ethics discussion on the role played by *Jyllands-Posten*; and a more general political discussion on the place of the Muslim community and religion in general in Denmark.²⁷ Various actors took part: politicians from both majority and op-

21. Islamisk Trossamfund i pressemeddelelse [Islamic Faith Community Press Release] (Oct. 11, 2005), *reprinted in* THE PROPHET AFFAIR, *supra* note 1, at 21–22.

22. Muslimske ambassadører: Brev til Danmarks statsminister [Letter from the Muslim Ambassadors to the Danish Prime Minister] (Oct. 12, 2005), *reprinted in* THE PROPHET AFFAIR, *supra* note 1, at 24.

23. *Id.*

24. Statsminister Anders Fogh Rasmussen: Svar til 11 ambassadører [Letter from the Prime Minister Anders Fogh Rasmussen to the 11 Ambassadors] (Oct. 21, 2005), *reprinted in* THE PROPHET AFFAIR, *supra* note 1, at 28.

25. *Id.*

26. *Id.*

27. *See, e.g.*, Islamisk Trossamfund, Pressemeddelelse [Islamic Faith Community Press Release], Vi Ønsker Værn Om Vores Borgerlige Rettigheder [We Wish to Protect

position parties; scholars, journalists, and news commentators; Christian Danes, resident Muslims, and Danish-Muslim citizens.²⁸ One of the principal characteristics of the debate was its polarization: freedom of expression versus protection of minorities and Danish traditionalists versus Muslim immigrants.²⁹ The internationalization of the crisis only aggravated the polemics. It would take more time for a nuanced attitude to enter the public debate.

II. THE LEGAL FRAMEWORK IN DENMARK

A. *The International Legal Framework*

Knowing now what happened in and around September 2005, it is important to examine the legal structures at play. As far as the international legal framework is concerned, Denmark has ratified all major human rights instruments, with only two exceptions: the Revised European Social Charter of 1996 and Protocol 12 to the European Convention on Human Rights.³⁰ The treaties that Denmark has signed, notably the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, contain substantive obligations to protect freedom of expression while

Our Civil Rights], *reprinted in* THE PROPHET AFFAIR, *supra* note 1, at 35–39 (listing a number of concerns expressed by some Muslims in Denmark); Marianne Jelved, *Om Ytringsfrihed Endnu Engang* [About Freedom of Expression One More Time], DET RADIKALE VENSTRE [RADICAL PARTY WEEKLY LETTER] (Jan. 13, 2006), *reprinted in* THE PROPHET AFFAIR, *supra* note 1, at 70–71 (describing Danish priests preaching tolerance in various churches for the New Year 2006).

28. See Enhedslisten [Red-Green Alliance], *Ytringsfriheden gælder for alle* [Freedom of Expression is for Everyone] (Dec. 3, 2005), *reprinted in* THE PROPHET AFFAIR, *supra* note 1, at 41–43 (comments from various politicians and political parties); Rikke Hvilshøj, integrationsminister [Minister for Integration], *Stop klyngeriet* [Stop Whimpering], POLITIKEN (Dec. 20, 2005), *in* THE PROPHET AFFAIR, *supra* note 1, at 58–59; Statsminister Anders Fogh Rasmussen [Prime Minister Anders Fogh Rasmussen], *Nytårståle* [New Year's Speech] (Jan. 1, 2006), *reprinted in* THE PROPHET AFFAIR, *supra* note 1, at 63–64; Pia Kjærsgaard, *Frø af ukræs . . . Fjenden indefra har presset Danmark ud i en ustyrlig situation* [Seeds of Weeds . . . The Enemy Within our Borders Has Pressed Denmark into an Uncontrollable Situation] (Jan. 6, 2006), *reprinted in* THE PROPHET AFFAIR, *supra* note 1, at 65–68.

29. See 22 tidligere ambassadører Udtalelse [Press Release, 22 Former Danish Ambassadors Denouncing the Toughening of the Debate], POLITIKEN (Dec. 19, 2005), *reprinted in* THE PROPHET AFFAIR, *supra* note 1, at 57. See also *supra* notes 27–28.

30. Council of Europe, European Social Charter (Revised) May 5, 1996, Europ. T.S. No. 163; Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 2000, Europ. T.S. No. 177.

permitting states to limit that freedom in certain circumstances.³¹ Although Danish authorities at the time maintained that these obligations did not permit remedial action on their part, in fact had they chosen to, they would not have violated any obligation.³² The two instruments that Denmark did not ratify are not directly implicated by the cartoon controversy but Denmark's decision not to ratify them is symptomatic of recent changes in Danish society that were a contributing factor in escalating the tensions surrounding the *Jyllands-Posten* cartoons. More specifically, these changes reflect a general skepticism of the Danish authorities regarding international human rights instruments. For example, concerning Protocol 12:

the Danish government is very concerned at the increasing transfer of legislative powers from the national parliaments to international non-legislative bodies which cannot be seen as democratically elected organs. Upon ratification, the European Court of Human Rights would be granted final jurisdiction in matters concerning whether Danish legislation is in compliance with Protocol No.12.³³

This statement is especially surprising coming as it does from a country that was one of the original state parties to the European Convention of Human Rights and that has historically been active in the Council of Europe.³⁴

31. International Covenant on Civil and Political Rights arts. 19 & 20, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 10 & 17, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]. See Cerone, *supra* note 8, at 363–64 (discussing the interrelation between freedom of expression and other rights and obligations under the ICCPR and the ECHR).

32. See Cerone, *supra* note 8, at 360.

33. See DANISH INST. FOR HUM. RTS., PROHIBITION OF DISCRIMINATION IN THE NORDIC COUNTRIES: THE COMPLICATED FATE OF PROTOCOL NO.12 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 107 (Stéphanie Lagoutte ed., 2005).

34. On November 4, 1950, Denmark was among the first states to sign the Council's Convention for the Protection of Human Rights and Fundamental Freedoms. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms Chart, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=7&DF=2/28/2008&CL=ENG> (last visited Feb. 28, 2008). Denmark was also one of the founding members of the Council of Europe, together with ten other Western European countries. Council of Europe, Statute of the Council of Europe Chart, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=001&CM=8&DF=2/28/2008&CL=ENG> (last visited Feb. 28, 2008). Since then, Denmark has signed and ratified all the protocols amending and completing the European Convention on Human Rights. See Charts of Ratifications of Protocols at Council of Europe, List of Treaties, <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=3&CM=7&CL=ENG> (last visited Mar. 13, 2008). Denmark has also signed and ratified major Council of

B. The Danish Legal Framework

Two provisions of the Danish Criminal Code (“DCC”)³⁵ are implicated by the cartoon crisis: the hate-speech provision and the blasphemy provision. Section 266b(1)—the so-called racism and hate-speech provision—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, insulted 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.³⁶

Section 140—the so-called blasphemy provision—provides 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.”³⁷ The object of protection of the hate speech provision, DCC section 266b, is a group of people belonging to a majority or a minority who are scorned or degraded, for example, on account of their religion.³⁸ On the other hand, the blasphemy provision, DCC section 140, seeks to protect religious feelings connected with religions doctrines and acts of worship.³⁹

Danish civil law provides little in the way of redress for victims of blasphemy and hate speech. The blasphemy provision appears in the chapter of the Danish Criminal Code concerned with prevention of public disorder, which reflects the fact that in Denmark an attack on religious beliefs is viewed as harming society at large (public order) and not merely individual interests.⁴⁰ Consequently, there is no civil liability provision that corresponds to the criminal provision on blasphemy. Likewise, there is no civil analog to the hate speech provision in DCC section 266b(1).

Europe human rights instruments. *See, e.g.*, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, Europ. T.S. No. 126.

35. The Danish Criminal Code is called *Straffeloven* (“Strfl”). An English translation of the Danish Criminal Code can be found in MALENE FRESE JENSEN ET AL., *THE PRINCIPAL DANISH CRIMINAL ACTS 9–74* (3rd ed. 2006).

36. Strfl. § 266b(1), *translated in* JENSEN ET AL., *supra* note 35, at 64.

37. Strfl. § 140, *translated in* JENSEN ET AL., *supra* note 35, at 45.

38. *See* Strfl. § 266b, *translated in* JENSEN ET AL., *supra* note 35, at 64.

39. *See* Strfl. § 140, *translated in* JENSEN ET AL., *supra* note 35, at 45.

40. Koch, *supra* note 4, at 74.

There is, however, a civil liability analog to the criminal defamation statute that could provide a private cause of action for both defamation and insult.⁴¹ According to section 26 of the Liability for Damages Act,⁴² “[a] person who is responsible for the unlawful violation of another party’s freedom, peace, honour or person shall pay the aggrieved party compensation for injury to feelings or reputation.”⁴³ Thus, a racist expression that also constitutes defamation could give rise to civil liability if it fulfilled the requirements of section 26 of the Liability for Damages Act. In particular, section 26 requires the aggrieved party to have suffered adverse effects, which would probably have been difficult to prove in the case of the cartoon crisis.⁴⁴

Because of the limited availability of civil remedies under Danish law for blasphemy and hate speech, the prosecution becomes especially important as it is the only actor that can bring such a case before the Danish courts.⁴⁵ Consequently, if the prosecution refuses to press the case, it is unlikely to be examined by any Danish court.⁴⁶

III. THE DECISION NOT TO PROSECUTE

On March 15, 2006, a decision of the Danish Director of Public Prosecution (“DPP”) announced its conclusion that there was no basis for criminal proceedings in response to the cartoon publication under either

41. Strfl. § 267, *translated in* JENSEN ET AL., *supra* note 35, at 64–65 (“Any person who violates the personal honor of another by offensive words . . . or by making or spreading allegations of an act likely to disparage him in the esteem of his fellow citizens shall be liable to a fine or to imprisonment . . .”).

42. Erstatningsansvarsloven [Liability for Damages Act], Consolidation Act No. 599 (Sept. 8, 1986) [hereinafter Liability for Damages Act].

43. Liability for Damages Act § 26 (“A person who is responsible for the unlawful violation of another party’s freedom, peace, honour or person shall pay the aggrieved party compensation for injury to feelings or reputation.”).

44. Building on the reasoning of the DPP under DCC section 266b, it can be argued that the cartoons were either too specific (they picture the Prophet) or too general (they picture no Muslims in particular). This view was later confirmed by the City Court of Århus. This court examined a private application from a number of Muslim associations based on the above-mentioned provisions, and the court ruled that the publication of the drawings and the article did not reveal an intention to insult the applicants. These two provisions required a direct link between the action and the victim; in this respect the court did not believe that the Muslim associations themselves had been insulted. The court also stated that the Muslim association could not show that it had a mandate to represent its members. *See* Århus City Court, Case No. BS 5-851/2006, *in* MENNESKERET I DANMARK. STATUS 2006, at 111 (Danish Institute for Human Rights 2006) (Danish abstract of the unpublished decision) [hereinafter MENNESKERET].

45. *See infra* Part III.D.

46. *See infra* Part III.D.

the blasphemy or hate-speech provisions in Danish law.⁴⁷ This decision resolved an appeal from the decision of the Regional Public Prosecutor of Viborg declining, after an investigation, to prosecute a claim filed by a private person with the Chief of Police in Århus. The decision of the DPP not to prosecute was final.⁴⁸ The following discussion summarizes the DPP's decision, explains why the DPP's decision foreclosed judicial consideration of the issues, and reflects on some of the DPP decision's main points.

A. The Decision Not to Prosecute Under the Blasphemy Provision

In analyzing the field of DCC section 140's application, the DPP explained that the statute protects "religious doctrines or acts of worship," which covers both the internal and external religious life of a religious community, i.e., the doctrines (a creed, if any, and the central texts of the religion), institutions, practices, persons, and things (ritual acts, etc.) through which the religious community expresses acts of worship. Relying on the legislative record of the statute, the DPP concluded, however, that the statute did not protect religious feelings that are unrelated to the religious community's acts of worship, thus excluding doctrines of an ethical or social nature. With respect to the element of "mockery or scorn" required by the statute, the DPP concluded that it encompassed expressions that convey either a lack of respect or contempt for the scorned object. In other words, "mockery or scorn" covered expressions of ridicule or contempt with a certain quantum of abuse. However, the DPP again invoked the statute's legislative record to conclude that "punishment can be incurred only in 'serious cases.'"⁴⁹

In applying the law thus explained to the facts, the DPP first concluded that because there is no general and absolute prohibition against drawing the Prophet Mohamed in Islam (although certain groups within the religion comply fully with the ban on his depiction), drawing the Prophet could not itself constitute a violation of section 140 of the Criminal Code.⁵⁰ The DPP noted, however, that because some drawings were more than a mere depiction of the Prophet—they were caricatures—those drawings required an assessment of whether the caricature of such a central figure in Islam implied ridicule of or contempt for Islamic religious doctrines and acts of worship; this required an analysis of the

47. DPP decision, *supra* note 9, at 9.

48. *See infra* Part III.D.

49. DPP decision, *supra* note 9, at 5.

50. *Id.* at 5–6.

drawings vis-à-vis the accompanying text.⁵¹ The DPP concluded that “the basic assumption must be that *Jyllands-Posten* commissioned the drawings for the purpose of in a provocative manner to debate whether, in a secular society, special regard should be paid to the religious feelings of some Muslims.”⁵² Consequently, according to the DPP, the caricature⁵³ was “not an expression of mockery or ridicule, and hardly represents scorn within the meaning of [section] 140 of the Danish Criminal Code.”⁵⁴ The DPP essentially reasoned that scorn within the meaning of section 140 is more serious, since it covers contempt and debasement. Thus, even if the intention of the newspaper was to mock, ridicule, and scorn, the means of expression did not reach a level serious enough to warrant prosecution under DCC section 140.⁵⁵

B. The Decision Not to Prosecute Under the Hate Speech Provision

The DPP’s analysis of the hate speech provision, DCC section 266b, found that the dispositive inquiry was whether the article and the drawings “insult” or “degrade” a “group of people,” here Muslims, on account of their religion.⁵⁶

Confronting this question with respect to the text of the article first, the DPP noted that the article did not refer to Muslims in general, but referred only to “some” Muslims, i.e., “Muslims who reject the modern, secular society and demand a special position in relation to their own religious feelings.”⁵⁷ Although the DPP concluded that this subset was within the meaning of “a group of people” as used in section 266b, he nonetheless concluded that the article could not be considered scornful or degrading towards this group, even when viewed in context with the drawings.⁵⁸

51. *Id.* at 6.

52. *Id.*

53. The only caricature that troubled the Director of Public Prosecution was one that:

show[ed] the face of a grim-looking man with a turban shaped like an ignited bomb. . . . [because it was a] depiction of the Prophet Muhammad as a violent person. This drawing must be considered an incorrect depiction if it is with a bomb as a weapon, which in the context of today may be understood to imply terrorism. This depiction may with good reason be understood as an affront and insult to the Prophet who is an ideal for believing Muslims.

Id. at 7.

54. DPP decision, *supra* note 9, at 7.

55. *Id.* at 7–8.

56. *Id.* at 8.

57. *Id.* at 9.

58. *Id.*

Next, the DPP considered whether the drawings themselves were insulting or degrading to Muslims. The DPP concluded that the drawings depicted the Prophet Mohamed as a religious figure, but that none of them intended to refer to Muslims in general because the drawings depicting individuals other than the Prophet did not contain any general references to Muslims.⁵⁹ For example, the DPP concluded that there was no basis for assuming that the drawing that represented the Prophet with a turban shaped like a bomb was intended to depict Muslims in general as perpetrators of violence or even as terrorists.⁶⁰ The DPP went on to state more generally that even if the drawings' depictions of Muslims were considered in context together with the text of the article, there was no basis to infer that they were scornful or degrading to Muslims at large.⁶¹ Accordingly, the DPP found that there had not "been any violation of Section 266b of the Danish Criminal Code."⁶²

C. The Clarification of the Director for Public Prosecution

After analyzing these legal issues at length and determining that there was no basis for instituting criminal proceedings in this case, the DPP concluded with an unusual general statement. He noted that the provisions of the Danish Criminal Code on blasphemy and hate-speech, as well as the provision concerning defamation of character, contain restrictions on the freedom of expression.⁶³ Consequently, to the extent that public expressions fall within the scope of these rules, there is no unrestricted right to express opinions about religious subjects.⁶⁴ This comment in effect means that under existing law, it was misleading for the *Jyllands-Posten* article to state that the right to freedom of expression is incompatible with special consideration for religious feelings and that people must tolerate "scorn, mockery and ridicule."⁶⁵ In light of the general debate, the DPP was making a broader point: freedom of expression is not absolute in Denmark. Expression that is sufficiently scornful or contemptuous will fall within the scope of one or the other of the two provisions.⁶⁶

59. *Id.*

60. DPP Decision, *supra* note 9, at 9. *See also supra* note 53 (describing the cartoon).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 10.

65. DPP Decision, *supra* note 9, at 10.

66. *See id.*

D. The Central Role Played by the Prosecution

The blasphemy and hate-speech provisions invoked in the DPP decision belong to a list of offences that are considered important both with respect to social order at large and in relation to civil liberties protected by the Danish Constitution.⁶⁷ Thus, according to the Administration of Justice Act, violations of sections 140 and 266b are subject to public prosecution only.⁶⁸ Consequently, the decision not to prosecute put an end to the legal controversy generated by the cartoons under Danish domestic law.

The Administration of Justice Act essentially ensures that the DPP's decision not to prosecute is, for all intents and purposes, final. Under the Act, the regional public prosecutor in the first instance and the Director of Public Prosecution on appeal play a central role in the procedure.⁶⁹ Although the DPP hears appeals from decisions made by regional public prosecutors in first instance,⁷⁰ a decision by the DPP cannot be appealed to the Minister of Justice.⁷¹ However, the Act does not give the Minister of Justice authority in the first instance to issue orders to public prosecutors concerning the treatment of specific cases, including whether to commence, continue, refrain from, or terminate prosecution.⁷²

In addition, even though there is no appeal to the Minister of Justice from the DPP's decision, section 63 of the Danish Constitution provides

67. European Commission for Democracy Through Law (Venice Commission), *Questionnaire on Domestic Law Concerning the Prohibition of Blasphemy, Religious Insults and Incitement to Religious Hatred*, at 34–35, Study No. 406/2006, CDL-FR(2007)002 (Mar. 8, 2007), available at [http://www.venice.coe.int/docs/2007/CDL-FR\(2007\)002-e.pdf](http://www.venice.coe.int/docs/2007/CDL-FR(2007)002-e.pdf) [hereinafter European Commission for Democracy Through Law].

68. Administration of Justice Act § 719(2)(3), reproduced in *Bekendtgørelse af lov om rettens pleje* [Notice of the Law on the Administration of Justice] (BK nr 1261 af Oct. 23, 2007), available at <https://www.retsinformation.dk/Forms/R0710.aspx?id=105378> [hereinafter Notice of the Law on the Administration of Justice].

69. This is an exception to the normal rule, which is that the Chief of Police decides whether to initiate criminal proceedings. See European Commission for Democracy Through Law, *supra* note 67 at 34.

70. Administration of Justice Act § 99(3), reproduced in Notice of the Law on the Administration of Justice, *supra* note 68.

71. *Id.* More generally, there is a principle in Danish administrative law according to which there is only one opportunity for administrative appeal.

72. Administration of Justice Act § 98(2), reproduced in Notice of the Law on the Administration of Justice, *supra* note 68. The instruction must be in writing and state the reasons for the decision. Furthermore, the Speaker of the Parliament must be informed (this safeguard was introduced in 2005). The potential for political interference in prosecutions and concrete cases has rightly been criticized by legal scholars, though actual use of the provision is very limited. European Commission for Democracy Through Law, *supra* note 67, at 35.

for judicial review of the decisions of administrative authorities, including those of the Director of Public Prosecutions.⁷³ The Ombudsman of the Parliament is also competent to review such decisions.⁷⁴ However, their authority to review the discretionary authority of the DPP to prosecute under these provisions is limited. The Danish courts and the Ombudsman are only permitted to review the DPP's decision for an abuse of discretion, i.e., whether the criteria applied were legal or whether all relevant criteria were included,⁷⁵ but they may not evaluate how the DPP balances these criteria in the exercise of his discretion.⁷⁶

As a result of these features of the Danish legal system, namely the lack of civil remedies⁷⁷ and the broad, nearly unreviewable discretion of the DPP, once the DPP made a legally sustainable decision not to prosecute (in the sense that the decision strictly but correctly follows Danish precedent interpreting DCC sections 140 and 266b), no remedies—whether administrative or judicial—were then available. Consequently, the decision of the DPP concluded litigation in Denmark, foreclosed any judicial consideration of the issue, and brought the legal discussion into the international arena.⁷⁸

E. Brief Comments on the Decision

Although the DPP's decision was well received in Danish legal fora, it deserves comment because the DPP chose to construe the Danish legal framework in an exceptionally narrow way.

Generally speaking, a basic tenet of interpretation in criminal law is that it should be interpreted narrowly. Following the principle *nulla*

73. Den. Const. art. 63(1) (providing that the courts of justice shall be empowered to decide any question relating to the scope of the executive's authority).

74. The Ombudsman Act, Act No. 473 (June 12, 1996), reprinted in *THE DANISH OMBUDSMAN 2005*, at 50 (Hans Gammeltoft-Hansen & Jens Olsen eds., 2005).

75. Kaj Larsen, *The Parliamentary Ombudsman*, in *THE DANISH OMBUDSMAN 2005*, *supra* note 74, at 57, 98.

76. *Id.* at 103.

77. Liability for Damages Act § 26. See also *supra* note 43. The Liability for Damage Act § 26 is the civil pendant of DCC section 267. See Århus City Court Case Abstract, in *MENNESKERET*, *supra* note 44, at 111.

78. A case was brought before the European Court of Human Rights, but the court declined to hear the case on jurisdictional grounds. *Ben El Mahi v. Denmark*, App. No. 5853/06, Eur. Ct. H.R. (2006), <http://www.echr.coe.int/echr/> (click "case-law" then "HUDOC," select "decisions" on the left hand column and search for the application number) (finding no jurisdictional link between the applicants, Moroccans living in Morocco, and the defending state, Denmark).

poena sine lege,⁷⁹ judges should not broadly interpret criminal laws so as to risk creating new offenses, which would violate fundamental human rights norms.⁸⁰ The DPP invoked this principle as reflected in the legislative record of the blasphemy statute:

[a]ccording to the legislative material and precedents, Section 140 of the Danish Criminal Code is to be interpreted narrowly. Therefore the affront and insult to the Prophet Mohammed, which the drawing may be understood to be, accordingly cannot, with the necessary certainty, be assumed to be a punishable offence under Section 140 of the Danish Criminal Code.⁸¹

Other Danish cases that are comparable to the cartoon case suggest that the modern practice has been to refrain from instigating prosecutions in such cases. As mentioned in the Introduction to this Article, the last conviction under the blasphemy law occurred in 1938.⁸² Since then, two cases have come before Danish courts—one in 1946 and the other in 1971—and neither resulted in a conviction.⁸³ Since the middle of the 1970s, public prosecutors in Denmark have chosen not to press charges in similar cases. For example, the most recent blasphemy case, brought in 1985, concerned the owner of a restaurant in North Jutland who had painted a crucified Jesus with an erection on the façade of his restaurant.⁸⁴ In that case, the DPP stated that it was customary to avoid prosecuting alleged blasphemy offenses and that he saw no reason to diverge from the general practice in that particular case.⁸⁵ The case was appealed to the Justice Ministry, and the Ministry responded that the proper course of action would be to bring the case before a court in order to determine

79. The Latin translates as “no penalty without a law.” See BLACK’S LAW DICTIONARY 1098 (8th ed. 1999).

80. The principle of the non-retroactivity of criminal law is one of the few non-derogable human rights. See, e.g., International Covenant on Civil and Political Rights art. 4(2), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 15(2), Nov. 4, 1950, 213 U.N.T.S. 222.

81. DPP Decision, *supra* note 9, at 7.

82. See UfR 1938.419 Ø(L) (Den.) (judgment of the High Court of Eastern Denmark); Koch, *supra* note 4.

83. See *Gennemgang af Relevante Retsregler Mv* [Review of Relevant Legal Regulations], BILAG 1 J.NR. RA-2006-41-0151 § 3.5 (Mar. 15, 2006) (DPP documentation discussing an unpublished 1946 case in which defendants were fined but not brought to court and an unpublished 1971 case in which defendants were acquitted) [hereinafter Mar. 15, 2006 Documentation].

84. See *id.* (discussing unpublished case file no. 133/85 in which the court concluded that the action was moot because the painting had been taken down).

85. See Mar. 15, 2006 Documentation, *supra* note 83, § 3.5.

the scope of the blasphemy provision. However, the Justice Ministry decided not to reverse the DPP's decision because the painting had already been taken down and a separate case had been brought against the owner of the restaurant alleging that the offending sign was in violation of city planning rules, rendering prosecution under the blasphemy provision unnecessary.⁸⁶

Although there is no disputed legal issue with respect to the DPP's interpretation of the blasphemy statute in declining to prosecute in the cartoon controversy case, there is an important, albeit subtle, distinction between the strict, technical legal decision of the DPP and the Justice Ministry's decision not to prosecute in the case just described. In the latter case, the Justice Ministry was implicitly critical of the DPP's decision, but declined to interfere with established practice. It is exactly this nuance, that is political sensitivity to and indirect support for the sentiments of the offended part of the population, that is absent in the cartoon controversy.

Unlike the blasphemy statute, the hate-speech provision has been the subject of a rather more weighty legal discussion, especially with respect to the gravity criterion.⁸⁷ The definition of the hate-speech offense punishable by DCC section 266b contains the requirement that the statement or dissemination of information should be threatening, mocking, or humiliating.⁸⁸ The statute does not require the prosecution to present evidence that the subject of the alleged hate speech was actually aware of or felt threatened, mocked, or humiliated by the statement.⁸⁹ Consequently, the statute requires an objective assessment of whether the statement in the specific context can reasonably be expected to produce fear or feelings of mockery or humiliation. An element of intent must also be present, which is closely linked to the offending statement being presented publicly and which requires that the perpetrator had the intention of mocking, humiliating, or threatening a group when making the statement.⁹⁰ When considered together with the fact that the test for whether the content is "threatening, mocking or humiliating" is an objective one, the assessment of intent will most often be linked to whether the perpetrator has realized that the statement could be perceived as "threatening, mocking or humiliating" according to normal usage. Finally, based on

86. *See id.*

87. *See* DANISH INSTITUTE FOR HUMAN RIGHTS, BRIEF ON FREEDOM OF EXPRESSION INSPIRED BY THE MOHAMMED DRAWINGS IN *JYLLANDS-POSTEN* 14 (2006), http://www.cihrs.org/Act_file/PDF/85_1812200653621.pdf.

88. Strfl § 266b, *translated in* JENSEN ET AL., *supra* note 35, at 64.

89. *Id.*

90. *Id.*

the legislative record for section 266b, it appears that the statement must also meet a minimum requirement of gravity.⁹¹ For example, general statements linking an ethnic group with serious types of crime usually meet this gravity requirement.⁹² Although in Denmark it is generally agreed that politicians who participate in public debates have wide freedom of expression when they make statements about controversial social issues, the practice of the Danish courts has shown that these politicians are not exempt from punishment.⁹³ Because of the criterion of minimum gravity, it can be assumed that, contrary to the practice concerning blasphemy,⁹⁴ a statement that meets the level of gravity required by section 266b will amount to hate-speech, even in an artistic or satirical context.

Strictly speaking, the DPP's decision not to prosecute under the hate speech provision is more or less consistent with restrictive Danish judicial interpretation. However, it is regrettable that the DPP's restrictive interpretation excludes any reference to the broader socio-political context within which the *Jyllands-Posten's* cartoons were published; this approach would be in line with the practice of the International Committee on the Elimination of Racial Discrimination ("ICERD") and of the European Court of Human Rights.⁹⁵ In this respect, it is problematic that the DPP overlooked the views expressed by the ICERD in its decision not to prosecute.⁹⁶

91. See UfR 1988.788 V(L) (Den.) (judgment of the High Court of Western Denmark in 1988).

92. See UfR 2004.734 H (Den.) (judgment of the Danish Supreme Court in 2004 concerning a Danish politician who had declared on his Web site that Muslims in Denmark perpetrated gross crimes and were a threat to ethnic Danes). See also UfR 2003.2559 Ø(L) (Den.) (judgment of the High Court of Eastern Denmark in 2003 concerning an anti-Semitic and Islamophobic song posted to a Web site).

93. See UfR 2000.2234 H (Den.) (judgment of the Danish Supreme Court in 2000); UfR 2004.734 H (Den.) (judgment of the Danish Supreme Court in 2004).

94. See Mar. 15, 2006 Documentation, *supra* note 83, § 3.5 (discussing the unpublished case file No. 133/85 concerning the Jesus painting).

95. See generally Cerone, *supra* note 8 (discussing the feasibility of reconciling freedom of speech with human rights principles under various human rights instruments).

96. The Danish Member of the U.N. Committee on the Elimination of Racial Discrimination and the director of the Danish Institute for Human Rights have suggested that the DPP decision lacked a comprehensive analysis of the international human rights instruments (such as the ICERD) that are directly applicable in Danish law. Section 266b was inserted in the DCC to bring Denmark into compliance with its obligations under the ICERD. See *Paragraf 266 b: Hvor Blev 266 b Af? [Paragraph 266b: What Has It Gotten To?]*, POLITIKEN, Mar. 16, 2006, <http://www.sf.dk/index.php?article=10803>.

IV. WHY THE EMPHASIS ON FREEDOM OF EXPRESSION?

As the above analysis shows, the Danish decision to refrain from prosecution in the cartoon controversy is not especially problematic in its interpretation of Danish law. That said, it may come as a surprise to many that the legal proceedings were ended by an authority (the DPP) under the auspices of the Ministry of Justice without any judicial consideration of the matter. Statements by the Prime Minister that offended parties could always bring their claims before the Danish courts were patently false;⁹⁷ once the DPP declined to prosecute, the Danish courts were precluded from hearing the case.

Returning to the debate surrounding the cartoons, the most striking element was the emphasis on the allegedly absolute quality of freedom of expression. Yet there are, as we have seen, provisions in the Danish Criminal Code that criminalize some forms of expression. In addition, the major international and regional human rights instruments call for limitations on freedom of expression as well as its protection.⁹⁸ Article 10(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention of Human Rights”), which has been incorporated into Danish law, states that the exercise of freedom of expression “carries with it duties and responsibilities, [that] may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society”⁹⁹

Within this well established legal context, the emphasis on the allegedly absolute character of freedom of expression in the early stages of the cartoon controversy most likely reflects a political choice detached from the legal and human rights issues at stake in the case. Not surprisingly, the consequences of this choice far exceeded its original context. The exact motivations for choosing—consciously or not—such a strategy will surely be analyzed in the future by political scientists and historians. My purpose here is merely to provide some initial observations that may help explain the events in Denmark in 2005 by placing them in a broader Danish context.

97. See Statsminister Anders Fogh Rasmussen: Svar til Den Islamiske Konference-Organisation [Letter from the Danish Prime Minister Anders Fogh Rasmussen to the Organization of the Islamic Conference] (Oct. 31, 2005), *reprinted in* THE PROPHET AFFAIR, *supra* note 1, at 29; Statsminister Anders Fogh Rasmussen: Svar til 11 ambassadører [Letter from Prime Minister Anders Fogh Rasmussen to the 11 Ambassadors] (Oct. 21, 2005), *reprinted in* THE PROPHET AFFAIR, *supra* note 1, at 28.

98. See Cerone, *supra* note 8, at 359–60.

99. Convention for the Protection of Human Rights and Fundamental Freedoms art. 10(2), Nov. 4, 1950, 213 U.N.T.S 222.

It is true that freedom of expression is an important and fundamental human right in both Denmark and the rest of Europe. According to the case law of the European Court of Human Rights, "freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfillment."¹⁰⁰

The European Court of Human Rights applied this reasoning to overturn the Supreme Court of Denmark (*Højesteret*) in *Jersild v. Denmark*.¹⁰¹ The conduct of the Danish authorities and the socio-political upheaval in the cartoon controversy may be understood as a consequence, in the form of a backlash, of this highly controversial decision. In *Jersild*, the TV station *DR* (the only Danish public TV channel at that time) broadcast a program in 1985 in which young men, the so-called "Green Jackets," expressed hateful and racist views about immigrants living in Denmark.¹⁰² A private party, the Bishop of Aalborg, filed a complaint against the young men, the program editor, and the journalist who conducted the interview. In 1987, they were all convicted under the hate speech provision in DCC section 266b.¹⁰³ The journalist, Jens Olaf Jersild, appealed the judgment to the Danish Supreme Court, which, in 1989, upheld the lower court's judgment.¹⁰⁴ In its judgment, the Supreme Court underscored that freedom of expression, as one of the most fundamental freedoms, deserved the strongest possible protection.¹⁰⁵ However, the Court concluded that the journalist had abused this freedom by publicizing the young men's offensive statements, especially because otherwise, it was unlikely that the young men would have had an audience.¹⁰⁶

100. See, e.g., *Handyside v. United Kingdom*, App. No. 5493/72, 1 Eur. H.R. Rep. 737 ¶ 49 (1976); *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) at 23 (1994); *Steel and Morris v. United Kingdom*, Eur. Ct. H.R., App. No. 68416/01, ¶ 87 (Feb. 15, 2005), available at <http://echr.coe.int/eng>.

101. *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) (1994). For some recent reflections on the *Jersild* case by a former Danish judge of the European Court of Human Rights, see Isi Foighel, *Reflections of a Former Judge at the European Court of Human Rights*, in *HUMAN RIGHTS IN TURMOIL* 271, 271–74 (Stéphanie Lagoutte, Hans-Otto Sano & Peter Scharff-Smith eds., Martinus Nijhoff 2007). See generally LENE JOHANNESSEN, *NEW LIMITS: LEGAL COMMENT ON A CASE ABOUT FREEDOM OF EXPRESSION AND HATE-SPEECH* (Danish Centre for Human Rights 1996).

102. *Jersild*, 298 Eur. Ct. H.R. (ser. A) at 10.

103. *Jersild*, 298 Eur. Ct. H.R. (ser. A) at 15 (citing an unpublished decision of the *Københavns Byret* [City Court of Copenhagen] dated Apr. 24, 1987).

104. UfR 1989.399 H (Den.) (judgment of the Danish Supreme Court in 1989).

105. *Id.*

106. *Id.*

The European Court of Human Rights rejected the Danish Supreme Court's view and found that Denmark's imposition of criminal sanctions violated article 10 of the European Convention on Human Rights.¹⁰⁷ The European Court concluded that the journalist had simply done his job: the program was informative, the context was not at all racist, and the intent was to illustrate that some marginal groups had very racist views on immigrants.¹⁰⁸ For the European Court judges, the balance tipped in favor of freedom of expression. This shocked the Danish legal world. Judges and legal scholars thought that the Danish Supreme Court, sensitive to the Danish domestic context, was correct: the statements were outrageous, and the young men and those who had promoted the statements deserved punishment.¹⁰⁹ The outcome in the European Court never gained acceptance in Denmark and as a result was misunderstood. As a consequence, an egregious misinterpretation spread among the Danish audience, namely that journalists could report anything in any way they chose because there was no limit to their freedom of expression.

There are many differences between the *Jersild* case and the cartoon controversy, one being that the latter never became an actual case. In addition, there are two other important differences. First, publishing the cartoons seems to have been designed as a provocation and not as a public information piece. If the newspaper had wanted to inform its readership about self-censorship based on the fear of reprisals by Muslims, the journalists could merely have documented the alleged threats. Second, in 1985, the racist comments made by the young men outraged Danish citizens on a large scale.¹¹⁰ Cartoons offending the religious feelings of part of the population more than twenty years later did not inspire the same outrage.

In this new context, there were several ways the Prime Minister, the government, and the newspaper could have reacted, yet they chose to emphasize free expression to the exclusion of all other values as follows: 1) freedom of expression is absolute; 2) absolute freedom of expression is a pillar of Danish society and culture, and therefore self-censorship is unacceptable; 3) because freedom of expression is absolute, the Prime Minister and government cannot criticize newspapers and journalists for exercising it. Yet, as demonstrated above, freedom of expression in Denmark is not absolute. Moreover, journalists often engage in self-censorship, consciously or not; for a variety of reasons, journalists do not

107. *Jersild*, 298 Eur. Ct. H.R. (ser. A) at 24–26.

108. *Id.* at 19.

109. See Foighel, *supra* note 101, at 273.

110. *Id.*

write or disseminate all of the information at their disposal.¹¹¹ Finally, the Prime Minister and members of the government can, of course, criticize the media and journalists. Such criticism is part of the democratic process—it does not amount to interference with freedom of expression.

Indeed, this absolutism is troubling in light of its questionable legal foundation and in light of other features of the broader Danish context, which, when taken together, may indicate an environment that was inhospitable, if not implicitly hostile, to Muslims.

In the years preceding the cartoon controversy, the depiction of Muslims in the Danish media and in public debates had been, if not directly negative, very often related to some kind of problem. In this respect, it is important to recall that the various incidents mentioned by the eleven ambassadors from Muslim countries in their letter to the Prime Minister were already well known.¹¹² In addition, for some years the media had participated—more or less aggressively—in the ongoing over-exposure of problematic issues purportedly of concern to Muslims: wearing of scarves, circumcision, religious divorce, ritual slaughtering, forced marriages, honor killings, and so-called “re-education trips” for youngsters to their parents’ countries of origins. These topics made for catchy headlines in the Danish media, often with very little documentation as to the reality, accuracy, and extent of the issues.¹¹³ Moreover, despite a growing Muslim population, at the time of the cartoon controversy there were no publicly funded places of worship or cemeteries for Muslims in Denmark.¹¹⁴ Finally, Denmark had for some time been subject to criticism

111. See, e.g., Brinkley & Fisher, *supra* note 13 (describing U.S. newspapers’ decisions not to republish the cartoons).

112. Islamisk trossamfund m.fl.: Brev til muslimske ambassadører [Letter from the Muslim Organizations to the Muslim Ambassadors in Denmark] (Oct. 5, 2005), *reprinted in* THE PROPHET AFFAIR, *supra* note 1, at 18–19.

113. For a vivid description of the problems linked to the attitude of the Danish media, see Council of Eur., Eur. Comm’n Against Racism and Intolerance, *Third Report on Denmark* ¶¶ 89, 104–06, Doc. No. CRI(2006)18 (2005). In its report, the “ECRI urges the Danish Government to give a more balanced view of issues pertaining to minority groups and their role in Danish society.” *Id.* ¶ 107. It also “strongly recommends that the Danish Government encourage and provide financial support to initiatives aimed at training journalists on issues pertaining to human rights in general and to racism and racial discrimination in particular.” *Id.* ¶ 108. See also Danske forfattere [Danish Writers], *Pas På Tonen! [Watch Your Tone!]* POLITIKEN, Oct. 15, 2005, *reprinted in* THE PROPHET AFFAIR, *supra* note 1, at 54–56 (dwelling on the tone in the Danish media). Finally, on the anti-Islamic rhetoric, see RUNE ENGELBRETH LARSEN & TØGER SEIDENFADEN, KARIKATURKRISEN. EN UNDERSØGELSE AF BAGGRUND OG ANSVAR 24–33 (Gyldendal 2006) [hereinafter Larsen & Seidenfaden].

114. Concerning these issues, see Jørgen Bæk Simonsen, *Constitutional Rights and Religious Freedom in Practice. The Case of Islam in Denmark*, in RELIGIOUS FREEDOM

and scrutiny regarding its legal treatment of foreigners, citizenship, and discrimination on the grounds of ethnic origin.¹¹⁵ The toughening up of the laws concerning foreigners or Danes with close ties to other countries of origin raised concern and criticism, both nationally and internationally.¹¹⁶ Both the general climate in Denmark and the growing awareness of international and national observers shows that the publication of the cartoons did not occur in a vacuum. A context was already in place—one that might have elicited a more nuanced and sympathetic reaction from those in power.

CONCLUSION

The restrictive approach followed by the DPP in his decision excluded any reference to the broader context within which the *Jyllands-Posten's* cartoons were published, and it did not question the motives of the newspaper in publishing these cartoons. This is regrettable, but it does not necessarily mean that the decision of the DPP was legally incorrect. That said, the narrow construction of Danish law that the DPP applied also reflected its broader context because the outcome weighed so heavily in favor of freedom of expression.

Human rights, like freedom of expression, should not be reduced to absolutes. International human rights law is also based on the central value of respect for other human beings and on a common goal to ensure peace.¹¹⁷ In this respect, the cartoon controversy seems to be less about

AND THE NEUTRALITY OF THE STATE: THE POSITION OF ISLAM IN THE EUROPEAN UNION 20, 26 (W.A.R. Shahid & P.S. van Koningsveld eds., 2002).

115. For instance, a statement made by a member of the Parliament likening Muslims to pedophiles and rapists was reported to the police and the Prosecution service. See Mohammed Hassan Gelle v. Denmark, U.N. Doc. CERD/C/68/D/34/2004 (2006). During its sixty-eighth session (Feb. 20–Mar. 10, 2006), the Committee on the Elimination of Racial Discrimination concluded that Denmark failed to carry out an effective investigation to determine whether an act of racial discrimination had taken place. *Id.* ¶¶ 7.1–7.6.

116. See Council of Europe, Office of the Commissioner for Human Rights, *Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on His Visit to Denmark* ¶¶ 1–7, Doc. No. CommDH(2004)12 (July 8, 2004). This report strongly criticized the new provisions concerning spouse reunification, family reunification for children, and the general lack of precision in the new provisions of the Aliens Act. See also INSTITUT FOR MENNESKERETTIGHEDER [DANISH INSTITUTE FOR HUMAN RIGHTS], UDREDNING NR. 1: ÆGTEFÆLLESAMMENFØRING I DENMARK [ANALYSIS NO. 1: SPOUSE REUNIFICATION IN DENMARK] 7–16 (2004) (reporting on the tightening up of the provisions of the Aliens Act concerning family reunification in 2002 and 2003).

117. See Universal Declaration of Human Rights, G.A. Res. 217A, pmb., U.N. GAOR, 3d Sess., 183d plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR]; ICCPR, *supra* note 7, pmb. Both of these sources dwell on human rights as the founda-

the law and more about questions of decency, respect for others, and responsible behavior. At the time of publication, it seems that the political climate in Denmark made the cartoons' publication completely uncontroversial to the Danish authorities—to them, that freedom of expression of the majority outranked the freedom of religion of the minority was self-evident.

The ensuing international reaction shocked Denmark at large, but also resulted in important changes. The crisis gave greater visibility than ever before to Danish and non-Danish Muslims in Denmark.¹¹⁸ Within Denmark, the debate on Muslims, the role of the press, democratic values, and the place given to religion in the public sphere forged new connections between these groups in Danish society. Public authorities undertook concrete initiatives concerning separate burial grounds for Muslims, and in September 2006, Denmark's first Islamic cemetery opened in a suburb of Copenhagen.¹¹⁹ The media took steps to ensure more balanced coverage of the Muslim community in Denmark.¹²⁰

The Danish authorities' insensitivity to the sentiments of the minority and the hostile socio-political context in which the cartoons occurred exacerbated the controversy and precipitated a diplomatic crisis. Although the decision not to prosecute the Danish newspaper was a relatively uncontroversial application of Danish law, had the Danish authorities exercised greater sensitivity, much of the crisis could have been averted.

As is often the case concerning the relation between the state and religion,¹²¹ an open dialogue could well have defused the conflict. To para-

tion for peace in the world. *See also* UDHR, *supra*, pmb1. (insisting on the importance of promoting the development of friendly relations between nations).

118. *See generally* Simonsen, *supra* note 114.

119. On September 22, 2006, Denmark's first Islamic cemetery opened in Brøndby, near Copenhagen. *Islamic Cemetery Opens at Last*, COPENHAGEN POST, Sept. 22, 2006, <http://www.cphpost.dk/get/98096.html>. The two major building projects concerning mosques in Denmark, close to the two largest cities, Århus and Copenhagen, are still having trouble finding private funds. *Byg En Moske I København [Build a Mosque in Copenhagen]*, POLITIKEN, Feb. 1, 2006, <http://www.dr.dk/Nyheder/Indland/2006/02/01/074757.htm> (last visited Apr. 7, 2008).

120. For instance, the Danish public TV station was quite exemplary in this respect. Its coverage of Ramadan in 2006 provided much needed insight into the life of Muslim families (Danes and foreigners) in Denmark during this holy event. *See* DR, *Ramadankalenderen*, <http://www.dr.dk/DR2/Ramadan> (last visited Mar. 13, 2008).

121. Concerning dialogue as a means to renew the relationship between state and religion in Europe, see Stéphanie Lagoutte & Eva Maria Lassen, *Meeting the Challenge: Re-defining Europe's Classical Model for State Intervention in Religious Practices*, 24 NETH. Q. HUM. RTS. 33, 57–59 (2006).

phrase the Director of English PEN, Jonathan Heawood,¹²² we must not allow a choice between our commitment to freedom of expression and our respect for religious and minority rights to be forced upon us. We must all learn to conduct an argument, a debate, and most importantly, a dialogue between all interested parties.¹²³

122. See English PEN, About English PEN, Staff and Officers, <http://www.englishpen.org/aboutenglishpen/staffandofficers/> (last visited Feb. 29, 2008). PEN, a worldwide association of writers with 145 centers in 104 countries, exists to promote friendship and intellectual cooperation among writers everywhere, with the goal of protecting freedom of expression and the integrity of world literature. See International PEN, Who We Are, <http://www.internationalpen.org.uk/> (last visited Feb. 29, 2008).

123. Jonathan Heawood, *Publish and be Damned? Free Speech, Religious Hatred and the Cartoon Controversy*, in THE PROPHET AFFAIR, *supra* note 1, at 277.