Offending International Law: A Comparative Study of Blasphemy Laws in International Law, the European Court of Human Rights & India

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Abstract

This thesis will ask the question of whether blasphemy and religious insult laws are legitimate. In doing so this paper will analyze an intellectual puzzle which has an impact on nearly every human rights regime. The question it will seek to give answers to is: whether mere offense can be a grounds to abrogate speech when an individual's religion is concerned. In answering this question in the negative, this paper will investigate when there is a legitimate reason to abrogate speech when it conflict with religious sentiments. The answer this paper will seek to defend is that the only situation in which there is actual harm to dignity and I will demonstrate how this is a high standard.

Using this standard, I will aim to demonstrate how the Indian Supreme Court and The European Court of Human Rights betray the right to free speech and expression by allowing for it to be abrogated on the grounds that speech and expression merely offends another person. I will use jurisprudence from International Law and the Theory developed in this paper to subject both jurisdictions to a rigorous critique.

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I Introduction

In 2013, a group of gun men stormed into the premises into the headquarters of Charlie Hebdo, a satirical magazine and opened fire.[1] The attack killed numerous people and sent shock waves around the world. Much of the debate was centered on the content and mode of delivering content that the controversial satirical magazine chose. In light of this, there was a movement titled as "*Juis Suis Charlie*" standing in solidarity with Charlie Hebdo.[2] The movement not only showed a commitment to free speech but, to the right to offend another.[3] Seemingly such a movement would tacitly side with the proposition that Blasphemy is problematic. However, such movements are often not black and white and there was little talk about abolishing Blasphemy laws in Europe that came out of this experience. It is almost typical of European attitudes, and indeed global attitudes towards the subject; which is to let the topic slide so long as it does not impact the majority.

The Charlie Hebdo attacks leave us with very deep questions which were not quite asked by the media after the attacks. The first is the relationship between speech and incitement to violence and the role of this nexus in preserving democracy.[4] The second is the nature of limiting speech and whether the limits of speech may tangibly protect an oversensitive society.[5]

What must be remembered is that the critical question that arises from the Charlie Hebdo attacks is one of causation. Did the attacks on the organization stem from the content of the magazine or from a group of men who were without a doubt religious radicals? While the question of proximity

[1] 'Gunmen attack Paris magazine Charlie Hebdo's offices killing at least twelve', The Guardian (2015) http://www.theguardian.com/world/2015/jan/07/satirical-french-magazine-charlie-hebdo-attacked-by-gunmen
[2] Roxane Gay, 'If je ne suis pas Charlie, am I a bad person? Nuance gets lost in groupthink', The Guardian (12th jan 2015) http://www.theguardian.com/commentisfree/2015/jan/12/je-ne-suis-pas-charlie-nuance-groupthink
[3] Ibid.
[4] Roger Kiska, 'Hate Speech: A Comparison Between The European Court of Human Rights & The United States Supreme Court Jurisprudence', (2012) 25 Regent Univ. L. Rev. 107.
[5] Ibid.

(causation) and public order is complex and indeed at the heart of questions around whether Blasphemy laws are acceptable, the question does not stand alone. It is one of a series of complex questions.

The second question is whether freedom of religion is hampered by the presence of Blasphemy laws. In answering this question in the negative, it clearly goes on to work on the assumption that Blasphemy laws cannot be justified on the proposition that blasphemous speech prevents individuals from exercising their right to religion. This has been an argument that was lost in the media based pandemonium in the post Charlie Hebdo attack scholarship. Investigating whether there is a tension between free speech and the right to profess religion is essential to understand the reasons why Blasphemy laws are problematic within a modern human rights setting.

Over the Course of this thesis I will attempt to clarify blasphemy and religious insult regulations in three jurisdictions; which are: international law, India and the European Court of Human Rights (herein after the Court of Human Rights). First and foremost, in Part I give a theoretical underpinning to the intersection between free speech and religions. I will argue that theoretically free speech can be abrogated by religious sentiments only in the event that the speech in question constitutes a hate speech by violating the dignity of religious believers due to its incitement to hostility, violence and discrimination. In part II of this paper, I will theoretically lay out the premise for the entire paper. In part III I will appraise the international legal order for achieving this threshold. I will then in part IV and V describe the European and Indian jurisprudence on blasphemy demonstrating the standards which they follow. Finally in part VI I will subject them to a rigorous critique using international legal standards and the theory which I elaborated on in the first to parts. However, before I get to the substantive parts of my paper, it would be prudent to clarify what blasphemy and religious insult as this forms the base of my paper.

a. conceptually clarifying blasphemy and religious insult.

"Blasphemy is a contemptuous or irrelevant utterance concerning the Deity"[6] while religious insult is a targeted attack on the practices of a religion and can rage in its severity from being mildly offensive to a full-fledged hate speech. Bede Harris classified religious insult and blasphemy as being fundamentally different. He referred to blasphemy as finding it's meaning in the correct understanding of a "vilification" argument.[7] He argued that Blasphemy consists of the vilification of religion and religious beliefs and not the vilification of believers.[8] Vilification according to Bede consists of: "[A] hostile expression directed towards a person on the basis of some characteristic".[9] Therefore, as per Bede's account blasphemy lacks the vilification of rights bearing individuals and is the vilification of religions.[10] Why then must religious insult and blasphemy be treated in a similar way in the eyes of human rights law?

In answering the question of why blasphemy and religious insult may be treated as being analogous to each other, what is critical to note is that both laws suffer from the same infirmity which is that they do not require incitement to either hostility or violence to take effect they merely require the sentiments of an individual to be offended? While religious insult can achieve the threshold of incitement it would no longer be an insult and would transcend the concept of insulting someone

[6] Peter Jones, 'Blasphemy, Offensiveness and Law', (1980) 10(2) British Journal of Political Science at 131. The etiology of the word Blasphemy can be found in two ways: Blapto (to harm) and Pheme (speech). It can widely be seen as the first manifestation of what we call hate crimes today, albeit with blasphemy relegated to the periphery (onto contested ground) when understanding whether it is hate speech or not. The encyclopedia of religion and ethics describes blasphemy as: "all utterances expressive of contempt of God, for His Names, attributes, laws, commands and prohibitions". The essence of blasphemy is routed in the attack on the fundamental tenant of a religion so as to cause an attack on the sentiments of it's followers.

[7] Bede Harris, Pell v. Council of Trustees of the National Gallery of Victoria: Should Blasphemy Be a Crime? The "Piss Christ" Case and Freedom of Expression, (1998) 22 Melb. U. L. Rev. 217.

[8] Ibid

[9] Ibid

[10] Ibid

into a tangible and dangerous hate speech.[11] Thus, I will use both terms interchangeably in this paper as the same critique I am going to use applies to both laws.

Historically the justification for blasphemy was the fact that a statement was deemed to wrong god was enough to have a person convicted for the crime of blasphemy. A community was driven by fear that there was a calamity in the making if an individual defied the will of god of defiled the commandment of god.[12] Religious insult was not at this point envisaged as a separate crime to blasphemy. The wide scope of blasphemy laws also made this analytically unnecessary as religious insults would amount to blasphemy in any case. Blasphemy was first declared an offence in the case of John Taylor. This case gave the second justification for Blasphemy laws which was that it wasn't simply a crime against god but, a crime against the state all at the same time.[13]

However, today blasphemy laws get sympathy from other justifications. The most common is a public order justification which is rooted in the theory of psychology of individuals. In this justification blasphemy laws find an alley in the argument which states that blasphemy laws offend religious sentiments. However

[11] For a distinction on insult and hate speech see generally, Eric Barendt, 'Freedom of Speech' (Oxford University press, 2nd ed, 2007, Originally published 1985).
[12] Pete jones n(6) at 131.
[13] Ibid.

II Theoretically Clarifying the Relationship Between Religion & Speech

It is hardly surprising that religion historically played such a vital role in the development of the state and it is unsurprising that an attack on religion has, in the past, been rationalized as an attack on the state.[14] This line of reasoning could partially be a result of an assumption which lies with the fact that religion was central to the legitimacy of sovereignty and was historically the source of sovereignty.[15] However, it is the trajectory taken by civilized nations born out of 'a social contract', which provides the backdrop to why religion is considered a source to limit rights and by necessary implication free speech.[16]

Civilization has theoretically moved from a stand point of unrivalled freedom to a voluntary reduction in this freedom in favour of public order and a society governed by the rule of law.[17] It is thus fair to argue that as humans are born free as moral agency only to give up some of this agency to the larger political will.[18]

As per this account of freedom, freedom can be curbed only by a legitimate sovereign who has been given power by the will of the people.[19] Sovereignty and absolute legitimacy of power, tied

[14] David Nash, 'Blasphemy in the Christian World: A History' (oxford university press 2007, 12-15. Here the description is of the case of Rex where the crime of blasphemy was treated as a crime against the state and this was how blasphemy was treated in the first English cases dealing with the topic. Perhaps this finds its origins in fear of divine wrath to fall upon a country.

[15] Immanuel Kant, *Groundwork of the Metaphysic of Morals* (1785) . In a lot of the theoretical work around reason and legitimacy of government which came out of the sixteenth, seventeenth and eighteenth century there was an underlying role of the Church. Scholars never openly rejected the role of religion in the legitimacy of government or reason. Analytical philosophy which was so integral to government at the time was clearly a very religious experience.

[16] Twana Hassan, 'A historical Analysis of the Development of Free Speech Justifications', (2015) 28 J.Jour 287, 287-90.

[17] Thomas Hobbes, Leviathan (first published 1651, Penguin 1985). Hobbes did not articulate the idea of rule of law and constitutionalism instead he had a concept of rule by man, with little limitation. The idea of rule of law first emerged through authors such as John Austin and Hans Kelsen who question the legitimacy of laws. However, it is clear with scholars after Hobbes such as Kant that the movement from a state of nature to an ordered society clearly has within it a concept of the rule of law and limits on power. Many of these limits come from rights and it is clear that free expression would be one of these rights.

[18] Ibid.

[19] John Rawls, *A theory of Justice* (Harvard University Press 1978).

to the will(a better word to describe this would perhaps be whim) of a solitary sovereign, is at the political theory that forms the basis of modern states.[20] The criteria to define a sovereign has varied. But, almost every account of modern society agrees that there is one sovereign who is capable of regulating and commanding debate. [21] Sovereignty has often had a close relationship with religion and historically was tied to a specific religious affiliation; be it Christian, Muslim or Jewish.[22]

As argued by Hassan, religion has traditionally been the oldest source of restricting free speech.[23] Primitive religions had the effect of limiting free speech through the use of superstitions and beliefs.[24] Most importantly religion served as a moral and ethical code, whose centralized power structure enabled society to exert the required moral authority required to ban free speech and m generally, curb freedom.[25]It was for this reason that Hassan argued that the institutional structure of religion allowed for and indeed encouraged the restriction of free speech.[26]

[20] Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty (1985). For Schmitt who is a best illustration of this point a sovereign is he who declares a state of exception therefore, the question of sovereignty is a question of fact as opposed to a normative exercise. However, there are other accounts such as the ones given by John Rawls which argue that sovereignty is a normative agreement by all citizens and the legitimacy of a factual decision lies with the authorization of the people.

[21] Jean Hampton, Democracy and the Rule of Law, in Ian Shapiro (eds) 'The rule of law' (Ian Shapiro eds. 2012). With little limiting sovereign power on a constitutive level, it is clear that religion prior to secularization could very well be a factor in the creation of a state.

[22] Hassan (n16)

[23] Twana Hassan, (n16)

[24] Ibid. 292; John Fiske, 'What is Mythology?',(1881) 48 Atlantic Monthly 85. Both articles describe the role of the religious sphere in creating superstition which regulate society. These superstition had the impact of regulating the individuals freedom and were largely interpreted by the religious heads who were in charge of regulating a religious order. This is specifically relevant to blasphemy laws as blasphemy as an offense seems to flow from a superstitious basis. As discussed in this paper blasphemy was considered a crime against the state due to the fact that an act of blasphemy was viewed by law and society in a superstitious fashion which essentially lead to the conclusion that there would be harm that comes upon all citizens due to a solitary act of blasphemy as it would bring about the wrath of God.

[25] Ibid. For a better understanding of the role of power in modern society Michel Foucault provides a comprehensive understanding of power and it's effects on individuals in mordernity. Michel Foucault, *Discipline & Punishment* (Pantheon 1975). Foucault was of the opinion that power not only had a repressive role but, also a constitutive role. Therefore society could tangibly seen as being constituted by religious superstitions and norms which regulate society. Therefore the centrality of religion before the onset of 'modernity'

[26] Rene Girrard, *Violence and the Sacred* (A&C Black 1972) Girrard often attributes religion to a large casche of social control which included governing the lives of citizens to the extent that it controlled a host of individual rights including the right to life. Religion in it's most primitive state according to Girrard mitigated violence in society by

What is very important to note historically, is the centrality of religion in the lives of people and the political process.[27] It was only with the emergence of the concept of secularism that the influence of religion in the lives and consequently the rights of individuals began to fade.[28] Secularism was a process of religious heads ceding authority to the state. A classical historical example of this is France where the state assumed control over religions and thus exercised power over them.[29] After the secularization of states where moral and legitimate authority no longer depends on the affirmative consent of the heads of religious organizations and therefore, the question we must ask is why there continues to be an emphasis on religion as a grounds to curb free speech. [30] In fact the theory indicates a conclusion to the contrary is that religion no longer has a more important role in society than free speech. Free speech, therefore must logically trump religious offense because of the centrality of speech to democracy.

The centrality of criticizing religion through the spoken or written word to the Democratic experience has been vastly undermined by Courts which retain religious offense as a grounds to limit speech. Even in the event that Blasphemous speech is allowed, Courts have in many instances, failed to grasp just how important the right to speech and the use of this right to criticize a religious order is.[31] As I will demonstrate the Indian Courts and European Court of Human Rights in particular have failed to grasp just how central religious speech is to a system of good governance.

attempting to authorize mass acts of violence by way of sacrifice. It was believed that by doing this collective violence against people reduced.

[27] Charles Taylor, *Secularism* (Harvard University Press 2007).

[28] Andras Sajo, 'Preliminaries to a Concept of Constitutional Secularism', (2008) 6 Int' J of Constitional law 605.

[29] Ibid.

[30] Hassan (n 16).

[31] Cantwell v. Connecticut, 310 U.S. 296 (1940). The U.S Supreme Court merely states that it is the public order which is paramount. They do not look into the fundamental democratic role played by actors who criticize religion. It is not merely criticizing religion to the extent that it shows a fundamental liberty. On the other hand it demonstrates a clear criticism of the hegemony of one specific belief.

The link between the Blasphemy and freedom was first made by Karl Marx and it has been a consistent theme running right through critical theory.[32] Marx was of the opinion that religion was a shroud that was used by society to cover up the real reasons for their discontent which was a lack of equality.[33] Therefore, he was of the opinion that critique of religion (a concept distinct from criticism),[34] was integral to expose the short comings of a specific method of governance. Marx thought the critique of religion which was a criticism of the very foundation of religion was essential to the growth of society.[35] Moreover, he believed religion to be the point at which society had to direct its attention in order to understand the shortfalls of the current age.[36]

The use of Blasphemy limits the ability of individuals to reflect and debate politically on relavent topics which makes democracy very difficult to achieve in its fullest sense. Religious criticism is thus central to a democratic order. I must at this stage clarify that it is important to question whether free speech and expression is truly vital to democracy and if so in what capacity? The answer to this will prove exactly why free speech must theoretically prevail over blasphemy/ religious insult based restrictions. Answering the question I just posed can be determined by understanding when and why free speech may be abroagated within a democratic setting.

a. Justifications of Free speech: The Gaps in these theories with respect to Blasphemy

The theory of when to restrict free speech has been contentious at the very least. Liberal theory has been divided on the question of when and not if free speech can be theoretically restricted. Courts have refrained from expressly answering this question with consistency and often seem to

[32] Wendy Brown, 'Introduction', in Tallal Hassan and Others (eds) *Is Critique Secular*? (Fordham university Press 2013) 9-15.
[33] Ibid 9-15.
[34] Ibid. 11.
[35] Ibid. 9.
[36] Ibid. 9-12.

go on a case by case basis. However, trends within systems allow us to understand the underlying theories that underpin cases.

It is at the outset, essential to look at the justifications for free speech in contemporary legal theory. Legal theory constants starts from the presumption that human beings are born free and then theorize into the justifications that are used to curb free speech. In order to understand just why such restrictions have to be in place, free speech scholars seem to be of the opinion that there is an underlying value to free speech or either inherent of instrumental which justifies its existence of freedom of speech.[37].

The first instrumentalist approach is that of the vitality of free speech to democracy. This is an approach that can implicitly be seen in the United States and in the European legal order. There are frequent references to it in international law as well.

This approach is of the opinion that free speech is essential to the proper functioning of the democratic system.[38] Within this system there is a clear demarcation between speech which is essential to the democratic system and speech which is not essential to the democratic system.[39] It causes political speech to have heightened value as opposed to speech that is in no way connected to the political system. It is for this reason that this theory looks at free speech as an instrument of democracy with the democratic process being the central theoretical value that the right is designed to protect. Democratic justifications for free speech have a very determinate view of human agency as political actors whose freedom arises out of a fidelity and agency which is owed to a system of

[37] Eric Barendt, (n 11).
[38] Ibid.
[39] Ibid.

governance.[40] On a secondary level free speech is justified as preserving pluralism within a democratic state and this pluralism of opinion is what is deemed essential to the accommodation of difference and diversity within a democratic culture.

Autonomy based views are also instrumental in nature, they argue that free speech preserves the instrumental value of preserving human agency and autonomy to comment upon a topic. Therefore, this view tends to maximize free speech rights as it is of the opinion that by curbing free speech the agency of an individual is undermined. Free speech is thus the instrument through which agency is expressed. Autonomy models lend themselves to an absolutist understanding of free speech which envisages no limits on free speech due to the fact that free speech preserves the inherent autonomy of individuals.

The next model is a constitutive justification to free speech. One of the most profound proponents of this theory was Ronald Dworkin. This theory is not specifically abhorrent to the instrumentalist justifications of free speech[41]Dworkin Observed that he termed it a constitutive theory as free speech: "*because it is an essential and "constitutive" feature of a just political society that government treat all its adult members, except those who are incompetent, as responsible moral agent*"[42] therefore as per this theory, Dworkin did not see Freedom of expression as having inherent value independent of an individual. [43] However, free speech was constitutive of individual agency,

[40] Ibid. It is a watered version of this logic as with most authors there is no duty to speak. There is a right to remain silent which is envisaged by free speech. This is specifically strong in the event where the justification for free speech is deemed to be free speech being instrumental to autonomy and democracy.
[41] Abigail Levin, *Pornography, '*Hate Speech, and Their Challenge to Dworkin's Egalitarian Liberalism', (2009) 23 Public Affairs Quarterly 357, 358-59.
[42] Ronald Dworkin, *Freedom's Law* (Harvard University Press 1996) 24. Levin (n 20) 357-60.
[43] Ibid.

and therefore had inherent moral significance when vested as a right which resided with an individual.[44]

Dworkin, believed that freedom of expression has inherent, non-instrumental value to the political make up of a country. Dworkins argument is in effect still argument is still founded on democracy. However, it is routed in an understanding of speech as not instrumental in its value to democracy but, as the value democracy seeks to preserve. Dworkin was further of the opinion that free speech was not an instrument used to preserve moral agency. But, it was constructive of moral agency in the first place. Therefore, he believed that while constituting moral agency, a fundamental tenant of a Dworkinian democracy free speech also served to preserve democracy and moral agency. Hence, moral agency was both constituted and to an extent instrumentally preserved by free speech. Speech was thus integrally constitutive of human agency and could not under any circumstances be abrogated, including in situations of a hate speech.

What each one of these theoretical justifications have is that they argue about the reasons why free speech exists and not why it can be limited. They instead seek to argue that the relevance of free speech lies in its normative roots and use this to evaluate when it can be abridged.[45] A school of thought which has been relatively successful in enriching the theory of limitation has been the theoretical school of feminists and Jeremy Waldron (from an classical legal theory based school of thought). [46]Both schools argue that free speech can be limited in the instance that it affected the targeted groups dignity *vis a vis* society.[47] Which was to adversely impact their standing in society when compared to a notional value of where all humans should be placed in society. This school

[44] Levin (n 41).
[45] Katherine McKinnon, feminism unmodified discourses on life and law (Harvard University Press 1987).
[46] Jeremy Waldron, Harm in Hate speech (Harvard University Press 2013).
[47] Ibid.

of thought provides a liberal justification for hate speech laws as well as a liberal defense for the abridging of speech on the basis of it harming the dignity of women as a blanket category. [48]

What is unfortunate is that none of these theories expressly seem to tackle the issue of Blasphemy. While it could be argued that stifling speech critical of religion would amount to the abridging of the democratic process and the agency of the speaker, we must truly understand the historical significance of Blasphemy laws to understand why the restrictions are truly problematic. This paper will aim to answer this question of Blasphemy. However, it is intuitive to note that the theories put forth by Mackinnon and Waldron will be applicable to blasphemy laws.

An application would lead to the following results. As per their theory, the only event in which it can be limited is when it violates the dignity of an individual. Dignity as defined by Waldron transcends mere offense.[49] Dignitarian harm flows from a categorical attack on one's identity (in certain cases religious identity) which has the impact of causing discrimination and therefore harms the relationship of an individual (or group) *vis a vis* the rest of society.[50] Naturally for this there is a relatively high threshold which needs to be reached. First and foremost, there must be a causal nexus between the speech or expression in question and the potential discrimination in the future and there must necessarily be a strong causal link to determine that the speech/expression in question is causally relevant enough to cause future harm.[51] Over and above this offense does not determine causation. An individual or group could be offended by a statement but that

[48] Ibid.
[49] Waldron (n 46).
[50] Ibid.
[51] For an account of causation see generally, H.L.A. Hart & Tony Honore, *Causation in Law* (2nd ed. Oxford University Press 1985). Causation in law is a wide topic and I will not engage with it in detail through the course of this essay. However, in a nutshell the standard to determine cause is whether a factor is a necessary element of a set of factors which are collectively capable of causing harm. The second question is whether the factor in question can foreseeably cause harm, therefore, foreseeability and necessity seem to be key considerations in determining causation. Thus a factor in a legal dispute has a high threshold to reach before it is jurisprudentially settled to be the cause. Once, a cause has been determined liability can actively be ascertained.

statement need not have the impact of having the rest of society get persuaded to discriminate or have feelings of hostility towards the offended group. Therefore, there must be clear proof that *dignitarian* harm takes places, which the mode of communication and religious insult must tangibly constitute a hate speech which incites future hostility, violence or discrimination. This is a standard which is reflected very aptly in International law. Sadly domestic jurisdictions such as India and transnational jurisdictions such as the European Court of Human Rights do not adhere to such strict theoretical consistency and they continually conflate offense with *dignitarian* harm.

III International law: A Saving Grace in Anti-Blasphemy Based Policy Making

International law contains several treaties which protect free Speech. The first declaration to emphases this right as a right protected under international law was the Universal Declaration of Human Rights in 1948.[52] However, many of the details surrounding the right in question has come from the International Covenant of Civil and Political rights. States have been polarized in their opinions on religious insult and blasphemy laws.

For instance Several Islamic states acting via the Organization of Islamic Conference (IOC) have in the past, issued resolutions in human rights council and UN General assembly condemning the "defamation of religions".[53] The General assembly and the Human rights council were highly

[52] Sejal Parmar, 'The challenge of "defamation of religions" to freedom of expression and the international human rights system', (2009) 3 E.H.L.R 353.

[53] GA res 60/150 of dec 16th 2005; 61/164 dec 19th 2006; 62/154 of Dec 18 2007; 63/170 18 dec 2008, commission on human rights resolution 1999/82, 2000/84, 2001//4, 2002/9, 2003/4, 2004/6, 2005/3; Human Rights Council res A/HRC/4/9 (30th apr 2007); A/HRC/RES/7/19 (27th march 2008); A/HRC/RES/10/22 (26th March 2009); A/HRC/13/L.1 (25th March 2010).

polarized during these resolutions and there a lot of pluralism expressed through the opinions put forth by states.[54]

Another classic example of where a state pushed for a lower threshold was in the case of Pakistan. In 1999 Pakistan proposed a resolution at the UN intended to curb the defamation of Islam.[55] In a move which echoes more correctly the position of international law on the matter Germany reintroduced the previous motion with a change in semantics. Germany amended the language to reflect a regret of the impacts which were xenophobia and stereotyping.[56] This change was widely supported by the international community but, does on some level reflect the deep seeded contradiction between the position of different states on the matter.[57]

Numerous special rapporteurs have also had their views put forward on the matter and they have all attempted clarified the scope of Article 19 and its relationship with Blasphemy and religious insult. Furthermore, the rapporteurs have often taken the time to consciously warn states against the risks of states having these laws in place and consequently warn against encouraging an over-sensitive society in the name of religion.[58] In their joint report of September 2006, Asma Jahangir and Doudou Diane in their joint 2006 report, restated that the right to freedom of religion and belief does not serve to protect an individual from religious offense.[59] Furthermore, they very

[54]Marloes van Noorloos, *Hate Speech Revisited: A Comparative and Historical Perspective on Hate Speech Law in the Netherlands and England & Wales* (Intersentia, 2011) 147-149.
[55] Summary record of the 61st meeting, 55th session, Geneva, apr 1999, UN doc. E/CN.4/1999/SR.61, 19 october 1999 1.
[56] Ibid.
[57] Noorloos (n54).
[58] UNCHR (Sub-Commission), 'Report submitted by Asma Jahingir, Special Rapporteur on Freedom of Religion or Belief (2005).' (2005) U.N. Doc. E/CN.4/2005/61, 15-20; Ariranga Pillay, 'The intersection between freedom of expression and freedom of belief: the position of the United Nations', (2010) 47 Science and Technique of democracy 97, 97-98.

[59] General Assembly [GAOR], Human Rights Council, Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council" U.N. Doc A/HRC/2/3 (2006) (prepared by Asma Jahangir)

critically noted that freedom of religion does not protect a religion from offense and therefore, effectively put to bed any doubts about whether blasphemy (defamation of religion) was permitted due to the presence of a freedom of religion clause.[60] In the 2006 report it was explicitly mentioned that international law did not confer a right on individuals to have a religious belief which had within it a sub-right to be free from criticism or ridicule.[61] The report went on to expressly argue that such a right would not only have a damaging impact on freedom of expression but, also on freedom of religion. This was justified by the authors on the grounds that such a right would have the impact of stifling tolerance and religious pluralism, not to mention the freedom of expression, all of which were integral to a democratic society. [62]

In her reports the special rapporteur Asma Janghir has noted that blasphemy laws are being used to persecute religious minorities.[63] It was noted in that same report that blasphemy laws were further being used by countries as a legitimate censure of dissenting laws and thus has the impact of being highly problematic. The report agreed with the parliamentary assembly of Europe and it advocated for the decriminalizing of European laws surrounding.[64] Therefore, it is clear from much of this analysis that international law has been very vocal and active in its condemnation of blasphemy as a crime. To add to this, it is also clear that the general structure of free speech jurisprudence contained in International law is completely malignant to the idea of blasphemy laws.[65]

[60] Sejal Parmar, (n52).
[61] Pillay, Ariranga, 'The intersection between freedom of expression and freedom of belief: the position of the United Nations', (2010) 47 Science and Technique of democracy 97, 97-98 Renata Uitz makes a similar argument in the European context where she argues that the European Court of Human Rights has acted in a manner contrary to sound reasoning by acknowledging such a right.
[62] Pillay, (n 61). 97-98; David Keane, Addressing the Aggravated Meeting Points of Race and Religion, (2006) 6 U. MD. L.J. race, religion & class 357, RACE, RELIGION, GENDER & CLASS
[63] Pillay, Ibid.
[64] ibid 97-98
[65] Ibid.

As a culmination of all the plurality of opinion which plagued international law, it would come as a relief to many that the Rabat action plan and General Comment 34 have conclusively ended debate on the issue of 'defamation of religion'.[66] International law has now unequivocally stated that blasphemy laws are incomparable with the international legal order.[67]

a. Doctrinal structure of free speech in International law and it's relationship with religious insult and Blasphemy.

At the outset, it is crucial to note that international law expressly makes a distinction between freedom of opinion and freedom of speech.[68] The freedom of opinion occupies a space in international law which is non-derogable while it is the expression of such an opinion which is subject to legitimate and necessary restrictions under the international legal order.[69] Therefore, mere Blasphemous or religiously insulting opinions cannot be banned. It is the expression of the same which can be regulated as per the international legal order. It is the expression of the same. The implication of this is that no religiously inflammatory idea can be banned because of the mere content of this. The content would amount to an opinion which cannot, under international law be regulated.[70] It is clear that the first fundamental principle in international law makes sure that Blasphemy laws (based on the content of the speech) cannot exist under any circumstances.

In a secondary point which is essential to note about the general structure of international law. Merely offensive speech cannot be banned on the grounds that it offends individuals. Speech must constitute a tangible incitement to hostility against a group in order for it to be legitimately

[66] Sejal Parmar n(52); Sejal Parmer, 'The Rabat Plan of Action: a global blueprint for combating "hate speech"', (2014) 1 E.H.R.L.R. 21.
[67] Ibid.
[68] UNCHR 'General Comment 34' United Nations CCPR/C/GC/34, ¶48.
[69] Ibid ¶48.
[70] Ibid.

banned.[71] A good illustration of international law's view of incitement is provided by the clarification given by the OSCE. In a joint report, the OSCE and the special rapporteur on Freedom of opinion and expression pointed out that under international law governments must abstain from: *"making it an offence simply to exacerbate social tension. Although it is legitimate to sanction advocacy that constitutes incitement to hatred, it is not legitimate to merely prohibit offensive speech*".[72]

The general structure of free speech in international law echoes this emphasis on prohibiting speech which criticizes religion only when it reaches the level of incitement to hostility. So it is clear that limitations on the basis of article 19(3) do not apply when it comes to the limitations on speech with respect to criticism of religion. While the legitimate heads of limitation laid out in Article 19(3) are necessarily important in cases concerning religion as they justify the limiting of speech, the threshold of incitement laid out in Article 20(2) must be met. It would be prudent to investigate why this is the case. At the outset, Article 19 (3) of the ICCPR states that: These limitations shall only be such as are provided by law and are necessary: "(a) for respect of the rights and reputations of others; (b) for the protection of national security or of public order, or of public health or morals".

The term necessity here unlike the European system is not interpreted to encompass solely the listed means which is necessary to uphold a democratic system.[73] Instead, Necessity is to be interpreted in a very narrow sense as envisaged by Article 19(3).[74]The narrow meaning under

[71] Manfred Nowak, CCPR Commentary (N.P. Engel, 1993) 490-94.
[72] www.osce.org/fom/23489 . It is vital to note that this report was erroneous to the extent that it used the term incitement to violence. However, what is crtical under international law is that incitement to hostility is prevented. Incitement to hostility is a lower threshold than incitement to violence and it was a compromise between European nations and the United states.
[73] Karen Reid, A practitioner's guide to the European Convention on Human Rights (Sweet & Maxwell, 4th ed 2011) 423.
[74] Nowak (n 71).

international law is simply that the means used must be proportional to the legitimate ends sought to be achieved. This acts in extention to the limitations laid down by Article 19(3) by way of the legitimate means.

It is clear that blasphemy and mere offense to religious sentiment cannot be justified by any of those means. Public order, for instance will not justify the abrogation of speech for the aforementioned purpose. The reason for this is while, the purpose of public order is quite broad and includes 'all universally accepted fundamental principles on which a democratic society is based'. Since it is this broad the necessity requirement here must be interpreted narrowly. [75] Therefore, it is clear that one cannot limit criticism of religion to maintain public order unless the incitement threshold is met.

Prohibition of morals as clarified in general comment 22, the limitations on the grounds of morals can't be derived from a single source (religious etc.) it must take into account a holistic picture of the understanding of morality.[76] This applies to article 18. However, it would be apparent that this could apply to article 19 as well.[77] Therefore, it cannot be said that states may legitimately protect the interests of religion due to a claim that public morality's solitary source lies in religion. It is clear that states cannot do this as morality is deemed to have multiple sources. As far as whether the right to religion is a head capable of being invoked, I have mentioned in detail earlier that international law rejects that the right to religion (under the rights of others) encompasses protection of the right to not be offended. Furthermore, it does not protect religions per se as clarified by the former special rapporteur. [78]

[75] Ibid 464.
[76] UNCHR 'General Comment 18' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (1994) UN Doc HRI/GEN/1/Rev.1, ¶para 22.
[77] Noorloos (n 54) 146.
[78] Sejal parmar, (n52).

It is clear from this that none of the grounds preset in article 19(3) would thus be wide enough to justify limiting free speech on the grounds of religious insult or blasphemy unless it reached the threshold of incitement. That brings us to the relationship between incitement and the grounds mentioned in article 19(3).

International law is categorical on the fact that blasphemy laws are not compatible with it.[79] General comment no. 34, the HRC clarified that the threshold of incitement must be met in order to ban speech under international law.[80] Therefore the standard to ban speech in an international context is to first consider whether it amounts to incitement under article 20 and then look at whether it falls under one of the justifiable ends in article 19(3).[81] While it is apparent that states can give a greater protection against speech than laid out in Article 20(2)[82] it must be in strict conformity with Article 19(3). However, as I have previously noted, religious insult and blasphemy cannot be justified under any of the previous heads due to the narrow scope of the limitations. Therefore, for a religiously motivated insult to amount to incitement, it is critical that it is in strict conformity with Article 20(2).[83]

Article 20 of the ICCPR ensures specific restrictions on freedom of expression. It is the only part of the covenant which not only gives rise to a right to ban speech but, gives a duty (or rather mandates, under international law) that a state ban a particular sort of speech.

20(2) is the specific article which is relevant for the paper at hand. In general comment 6 in paragraph 2, the HRC went on to state that article 20(2) forms part of customary international law.

[79] Sejal Parmer (n 66)
[80] General comment 34, United Nations18' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2011) UNdoc CCPR/C/GC/34. ¶ 48.
[81] Ibid.
[82] The article in question states that: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."
[83] Noorloos (n 54) 149-55.

Both general comments cited tied the duty to ban speech which is contrary to Article 20(2) to a duty which states had to prevent war genocide and therefore, this article was present to be in furtherance of such a duty which was to prevent propaganda to war.[84] This shows that what Article 20(2) is aiming to prevent is not just imminent violence but, it is also aiming to prevent a state from tacitly creating an environment where mass atrocities are capable of occurring. This is largely tied to ensuring that the dignity and equality of all citizens remains intact.[85]

General comment 11[86] and general comment 34[87]both clearly give the relationship between these two articles. The acts covered by article 20(2) are extreme in nature and are thus in pursuance of article 19(3). Any limitations on the grounds of article 20(2) must comply with the grounds laid out in article 19(3). *Malcolm Ross v. Cannada* also held that the restriction on the basis of article 20(2) must comply with restrictions on the grounds of article 19(3).

States may restrict speech to a greater extent and Article 20(2) constitutes specific law only when there is a definite threat to rights.[88] However, looking at the drafting process it is apparent that there is very little scope to deviate from Article 20 (2) for the purpose of hate speech.

Article 20(2) shows the concern of the drafters for the connection between advocacy of hatred and discrimination of groups (without causing immediate violence *per se*).[89] While drafting the protocol the United states clearly expressed its reservation to conflating the idea of incitement to hatred having the same value of incitement to violence, arguing that incitement to hatred would

[84] Ibid 151. See also, Nowak (n 71) 468. Nowak contends that the rigid structure of international law is to combat the horrors of national socialism. I contend that it does so in two ways it first mandates the banning of speech which is potentially problematic and second it ensures that the banning of speech is not for frivolous reasons which are potentially problematic.
[85] Waldron (n 46).
[86] General Comment 11, Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20) Un-Doc E/1992/23 (1999)
[87] General Comment 34 (n 80) ¶52.
[88] General comment 34 (n 80)
[89] Nowak (n 71)

open the door to any form of criticism being capable of being curbed. As mentioned in by Noorloos, it is difficult to distinguish between "hatred, Ill-feelings and mere dislike"[90]

Article 20(2) is a compromise between European Nations and the United States. It does not adopt a standard of imminent incitement to violence due to the concerns of states that this threshold is far too minimalistic. Therefore, it adopts a standard of incitement to hostility which on a linguistic plain elevates the causal requirement to long term adverse impact and incitement to discrimination and exclusion.

Therefore, it is clear that international law strikes a balance between being a tool to preserve public order from violence and a tool to protect the dignity of individuals. It is clear that this is a clear articulation of what Jeremy Waldron would call the protection of an individual from speech which adversely impacted him/her from harm to dignity vis a vis society. In essence international law prevents long term stigmatization, discrimination and other impacts of hostility by legitimately allowing speech that incites such hostility to be banned.

IV European Court of Human Rights: A Failure to Protect Article 10

The doctrinal structure of the European Court of Human Rights seems to lend itself to the loser interpretation of the convention. The restriction of speech is limited to certain heads given in article 10(2). 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*

[90] Ibid 153. Here it would be prudent to note the purpose of this article which is to eliminate speech that could potentially create an incitement to mass atrocities in the international order. Thus this article in some ways ensures that states perform their duty in condoning certain acts by their citizens and to ensure that states are not complicit in those acts.

maintaining the authority and impartiality of the judiciary."[91] Therefore, the scope of restrictions can be seen as been restrained by the following legal questions. Is it prescribed by law? Is there a textual basis to legitimize the restriction under article 10(2)? Whether there the interference is necessary in a democratic society.[92] Necessity as per the case of Handyside amounts to a "*pressing social need*".[93] Furthermore, the Court of Human Rights clarified that the reasons for speech to be abrogated must be "*relevant and sufficient*".[94] However, this has been relegated to mere rhetoric with the Court of Human Rights consistently deviated from this standard. The Court of Human Rights now persistently allows mere offence of sentiments to be a grounds for speech and this can under no circumstances meet the threshold of being a reason which is relevant and sufficient.

It is for this reason that Europe has long seemed to be a continent where blasphemy laws have thrived. Blasphemy and religious insult laws have continued to be part of many of the countries which are signatories to the European convention on Human rights. In resolution 1510, the European Parliament went on to observe that religious insult laws must not be used to hamper free speech. Instead, as per the discussions of the council, it needed to preserve the sanctity of the right *vis' a vis'* expression without unduly hampering the right to expression.[95] The observation made stated that: "*national law should only penalise expressions about religious matters which intentionally and severely disturb public order and call for public violence*".[96] From this observation, it would appear as though there is a movement within the European continent to liberalize laws pertaining to hate speech. However, this is empirically proving to be fallacious

[91] Article 10(2), European Convention on Human Rights.
[92] Handyside v. the United Kingdom , (5493/72) [1976] ECHR 5
[93] Ibid
[94] Ibid ¶15.
[95] Res(2006)1510 on Freedom of Expression and Respect for Religious Beliefs, adopted by the Assembly on 28 June 2006.
[96] Ibid

insofar as domestic laws continue to list religious insult and blasphemy as crimes and this is compounded by the European Court of Human Rights continuously holding that such laws do not violate Article 10 of the European Convention on Human Rights.

Empirically, it can be conclusively determined that numerous countries in Europe retain blasphemy and religious insult laws. Cyprus, Croatia, the Czech Republic, Denmark, Spain, Finland, Germany, Greece, Iceland, Italy, Lithuania, Norway, the Netherlands, Poland, Portugal, Russian Federation, Slovak Republic, Switzerland, Turkey and Ukraine continue to retain religious insult laws.[97] To add to this number; Austria, Denmark, Finland, Greece, Italy, Liechtenstein, the Netherlands, San Marino continue to retain Blasphemy laws.[98] This is an exceptionally large cache of countries which retain laws which are in some way restrictive of speech on the grounds that it conflicts with religion.[99]

Even with this overwhelming evidence of violations of human rights which are present in this situation. The European Court of Human Rights has been very reluctant to strike Blasphemy laws down as being in violation of the free speech guarantees under the convention. In the Earliest cases, the Court had constantly maintained that cases pertinent to blasphemy were manifestly ill-founded and essentially used this rhetoric for most religiously motivated cases.

The first case of Blasphemy that appeared before the Court of Human Rights which warrants consideration is the case of *Gay news & Lemon v. The U.K.*[100] The case was bourne out of a private prosecution of a poem titled as: *The Love that dares to speak its name*. This poem describes Jesus

[97] Venice commission, The relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred,(2008) Report by the Venice Commission Adopted by the Venice Commission at its 76th Plenary Session.
[98] Ibid 19.
[99] Ibid 19.
[100] Gay News Ltd. and Lemon v. UK (Appl. No. 8710/79), 5 Eur. Ct. H.R. 123 (1982). Hereinafter referred to as gay news.

as a sexual being who engaged in sexual activity with his disciples the poem further has paragraphs which depict an individual having intercourse with Jesus after the Crucifix. The private prosecution alleged that the poem offended religious sentiments and prosecuted it as a form of Blasphemous libel. The Courts in the U.K. sided with the prosecution and awarded damages. On appeal to the European Court of Human Rights, this case went on to become the first authoritative decision on the subject by the Court of Human Rights. While this case was finally ruled as inadmissible, the Court made a vital observation in the obiter of the case. In its admissibility based decision, the court went on to hold that there was a right not to be offended in his/her religious beliefs.[101]

It may be decisively inferred from the case of *Gay news* that the Court of Human Rights, believed that there was a right not to be offended as a subset of the right to religion within article 9 of the European Convention on Human rights. This demonstrates that in the earliest case of blasphemy in front of the Court of Human rights, it was classified as an issue where there was a tension between the rights of free speech with the right of free religion.[102] While the Court did not go into details about the scope of this right to be free from offense in a religious sphere it alluded it to it, albeit, vaguely in its judgement.

The previous judgement was culled out more specifically in the case of Otto Preminger v. Austria.[103] The facts of the aforementioned case are critical to it's outcome for various reasons all of which I will highlight below. The film in question was titled as: Das Liebeskonzil, directed by Werner Schroeter. It was seized by Austrian authorities on the grounds of it the provision in the

[101] Dorota A. Gozdecka, 'Europe's Changing Approach Towards Blasphemy: The Right not to be offended, Sensitive Identities and Relativism', in Cian c. Murphy and Penny Green (eds) *Law and Outsiders: Norms, Processes and 'Othering' in the 21st Century* (Hart Publishing 2011) 235.
[102] Ibid.
[103] Otto Preminger.

Penal code on the criminal offence of disparaging religious precepts. The film depicts Mother Mart as a wanton woman who all decided to punish the world for their immorality. The punishment was achieved through the devils daughter who was having sex with multiple men and spreading syphilis rampantly. The story included her having sex with members of the Church, leaders included. The commission initially found a violation. However, when the case came before the European Court of Human Rights, The Court of Human Rights overturned the convention and held that there was no violation of the convention.[104] The applicant claimed a violation of article 10 on the seizure and forfeiture of a film by Austrian authorities. To counter the Applicants claim the Austrian government said that the seizure and the forfeiture was intended to protect "the rights of others" and was aimed at the "prevention of disorder".[105]

In the case of *Otto Preminger*, the Court of Human Rights adopts two lines of reasoning. The first line of reasoning pertains to Freedom of expression considered as a free standing right and the second, deals with a balancing of freedom of speech with freedom of religion.[106] In a slightly tangential mode of reasoning, the Court of Human Rights also went on to make a public order argument justifying blasphemy and religious insult laws. I will highlight and analyze that argument at the end of my analysis of the case.

In the first line of reasoning the Court argues that freedom of speech may not extend as far as to encompass and protect words which are *gratuitously offensive* in the religious context. Therefore, the Court of Human Rights essentially argued that there was a duty which was present in article 10 which mandated a speaker/artist to ensure that religious feelings were not offended by words,

[104] Ibid.
[105] Ibid.
[106] Luis López Guerra, 'Blasphemy and Religious Insult: Offenses to Religious Feelings or Attacks on Freedom?' in Josep Casadevall et al. (eds.) Freedom of Expression (Wolf Legal Publishers 2012) 313

actions or expression which had no social value. In essence arguing that religious feelings could be offended only when absolutely necessary. In order to add force to this assertion, the Court of Human rights went on to observe that *gratuitously offensive* free speech in this context, lacks any tangible and quantifiable social value.[107] Karen Reid articulated the proposition that such a standard adopted by the Court Of Human Rights placed a strong burden on the individual expressing an artistic point to view to refrain from offending sentiments.[108]

The second line of reasoning is related to the first line of reasoning to the extent that it deals with limits of free speech. However, this line of reasoning unlike the first line does not deal with the

The Court in Otto Preminger also noted that: " *The Roman Catholic religion is the religion of the overwhelming majority of tyloreans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks*"[109]. In this paragraph, the Court ensured that it sided with the proposition that blasphemy is an offense against public order. By articulating the concept of religious peace the court tacitly sided with the proposition that offending people in some way disrupts the religious peace in a region and therefore, makes the region unstable and prone to religious disorder, which is the necessary outcome of the courts reasoning. While, this is implicit in the Courts reasoning, it is important to note that public order is the third head of reasoning used by the Court to justify blasphemy.

In subsequent cases, the term *gratuitously offensive* has been given more meaning. Secondly, the lines of reasoning remain the same. Furthermore, they have clarified in what circumstances offensive speech may hamper the ability to profess one's religion. Therefore, two of the three

[107] Ibid.
[108] Karen Reid, (n 73) 423.
[109] Otto-Preminger-Institut v. Austria, Application [1994] ECHR 26, ¶47; Athony Lester, 'Right to offend', in Josep Casadevall et al. (eds.) Freedom of Expression (Wolf Legal Publishers 2012) 300.

heads of justification given in Oto Preminger have been given more meaning. The case which first filled the gaps in the reasoning of *Oto Preminger* is *Wingrove v The U.K*[110].[111] In the case of *Wingrove*, the authorities in the United Kingdom refused to give a certification to a video due ti the presence of Blasphemy laws which were then in force. The applicant was of the opinion that these laws violated his right to free expression and challenged the laws on the grounds that it violated article 10 of the European Convention on Human Rights.

Unfortunately *Wingrove* while clarifying that there was a margin of appreciation while dealing with laws pertinent to the limitation of speech on the basis of religion did little to elucidate on the standard of *gratuitously offensive*. In *Wingrove* the Court observed that there was a margin of appreciation in "matters liable to offend intimate personal convictions within the sphere of morals or specifically religion". [112]Therefore, in doing so they accepted that gratuitously offensive meant what a state defined it to mean so long as it adhered to the broad tenants of European supervision.[113]

An important clarification that it made with respect to this was that offense stemmed not from the content of speech but rather from the mode of speech. The court clarified that restrictions on free speech could stem from: "The manner in which views are advocated, rather than the view themselves".[114] Therefore, the Court of Human Rights reasoning in Wingrove seemed to lend itself to the proposition that blasphemy laws could not punish content but, merely the mode through which content was expressed.[115]

[110] Ibid 300-307.
[111] Guerra, (n 104) 313
[112] Wingrove v. UK , Application no. 17419/90 (25 Nov 1996) ¶58.
[113] Guerra, (104) 314.
[114] Wingrove (n 112) ¶60.
[115] Ibid.

To give an illustration of it, the Court would believe that it would be valid to punish an individual for depicting a religious deity, seemingly one characterized by religious texts as a virgin, having sexual relations with another individual through the course of a pornographic skit. While the Court would not be willing to uphold a punishment for the same content portrayed through a well-researched academic book which depicts in no graphic detail a historically contested fact about the possibility of the deity having engaged in consensual intercourse. [116] A later case by way of *Aydin v. Turkey*[117] confirmed and added force to the holding of *Wingrove*. The *Aydin*, the Court of Human Rights argued that in order to justify restrictions on speech citing the heads of religion and the protection of the rights of others, there had to be an "insulting tone" in the words/expression. Therefore, it further confirmed that content was not the reason but, it was the method of portraying the content which was in question.[118] *Aydin v. Turkey* also confirmed the fact that there was a need for the work to have a redeeming social value in order to avoid being considered gratuitously offensive.

Wingrove was the final authority on blasphemy and religious insult laws for the best part of a decade. In the mid 2000's was the first instance where the Court of Human Rights had the occasion to clarify its position on blasphemy and religious insult.[119] As mentioned by Guerra these cases further clarified the relationship between the concepts of offence and insult with freedom of religion.[120]

[116] Guerra (n102); Lester (n 107). The minority opinion notes that the decision in Wingrove was more about free speech than it was about balancing free speech with freedom of religion. Thus it is slightly more nuanced than Oto Preminger.
[117] [1997] ECHR 75.
[118] This case follows the reasoning of Regina v. Hetherington, was where Blasphemy laws started to change, when Lord Denning instructed the jury to focus on the manner in which something was said and not on the actual statement itself. In this case, insults that were carried out in a sober way were permitted however, insults which were carried out in the heat of the moment were not allowed.
[119] Gozdecka (n99).
[120] Guerra (n 104) 314-15.

Klein v. Slovakia and Giniewski v. France [121], primarily set out to clarify the relationship between free speech and freedom of religion.[122] Both cases dealt with the criticism of a prominent religious figure. In light of these facts, both cases explored whether the criticism or degrading comments about a religious head could amount to speech which could be restricted. Therefore, the central question in both cases was: When do religious sentiments get adversely affected by speech which is critical of religions and their practitioners. In doing so, both cases clarified further the meaning of offensive speech and its relationship with freedom of religion.

Klein is specifically important as it clarifies the relationship between free speech and freedom of religion in a European context. Klein argues that the article in question did not "unduly interfere" [123]with the ability of individuals to practice religion. Therefore the threshold to determine whether religious sentiments were offended now stands as an investigation to determine whether the offense caused amounted to an undue interference.[124] While this is considerably narrower than previous cases, it continues to be analytically problematic; this is because it continues to determine that the right to religion is disrupted and interfered with in the event that there is an offense to religious sentiments.

Ginieswski on the other hand clarifies further that there is a lower threshold to incitement present in cases of religious insult and blasphemy in the jurisprudence of the European Court of Human Rights.[125] This is because it argues that the book in question "did not incite either disrespect or hatred"[126] From this standard it is clear that the threshold in Europe is low unlike international law

[121] Klein v Slovakia [2006] ECHR 909; Giniewski v. France, (2007) 45 EHRR 23
[122] I had earlier termed this as the second justification in the previous part of my paper.
[123] Guerra (n 104) 316-17.
[124] Gozdecka (n99) 235-37.
[125] Ibid. 317
[126] Ibid. 317.Giniewski (n 121).

disrespect is now the standard required to be cited to limit speech in cases of blasphemy and religious insult.

V Public Outrage: Characterizing the Indian Experience.

In February 2014 the world took notice of Indian blasphemy and religious insult laws when Penguin publishers withdrew an academic article by Wendy Donniger on the argument that fighting the case to exonerate her academic work was simply not worth it anymore.[127] It is light of this that one must sit up and take notice of how blasphemy and religious insult laws are being utilized to achieve sustained political ends and therefore, on the face of it have been used to target the content of work. The question we must consider is whether this is an anomaly in Indian free speech jurisprudence.

Blasphemy laws in India have been justified under two heads of Indian Free speech jurisprudence. The first being public order and the second being public morality. The former has lent itself to a far less restrictive interpretation of free speech in cases of blasphemy. However, the second justification for abrogating speech, which is on the grounds that the speech violates public morality, seems to have betrayed the court into a very rigid interpretation of the freedom of speech, leading to a very broad definition of offence being adopted by the Court. [128]

In the case of *Ramji Lal Modi*[129], the Supreme Court upheld the statute at hand in light of the general structure of Indian free speech jurisprudence. The case concerns a constitutional challenge of the blasphemy provisions in India.[130] However, this case gave us an incite into the values behind

[127] Wendy Doniger, 'India: Censorship by the Batra Brigade', NEW YORK REVIEW OF BOOKS (May 8th 2014).
[128] Gautam Bhatia, *Offend shock or disturb: Free Speech under the Indian Constitution* (Oxford University Press 2016).

[129] Ramji Lal Modi vs State of UP, [1957] 1 SCR 860
[130] Ibid

both Indian free speech and its relationship with blasphemy and religious insult. At the outset, it is important to note that unlike the European system, the Indian Supreme Court did not, in this case focus its interpretation religious insult laws on an individual and insult. Indian blasphemy and religious insult laws, focus the law on the preservation of public order and thus, it is more in line with international law. This runs parallel to most Indian jurisprudence on the topic of free speech. As indicated above, the general trend in Indian jurisprudence to limit speech is to theoretically tie it to the idea of public order.[131] Blasphemy on the other hand has existed as a limitation which is tied to both justifications of public order and public morality.[132]

Ramji Lal Modi upheld Indian free speech jurisprudence fundamentally changed to the extent that the Court went on to hold that the government could ban speech on the grounds that it had a *tendency* towards inciting violence.[133] In the case of Modi, the Supreme Court went on to clarify that tendency had a heightened threshold which meant that the speech needed to have a 'calculated tendency'.[134] As one can imagine this standard does not take into account causal proximity between speech and disorder and thus lends itself to the proposition that speech with the most minimal causal link to a threatened religious disorder could be banned.

What is crucial to note and understand in this case is that the Supreme Court rejected the relevance of causals connections to possible violence and further went on to note that all that was required was a tendancy towards creating violence. By doing this the Supreme Court was however,

[131] Bhatia (n128)
[132] Ibid.
[133] This in many ways is very similar to the United States, with cases such as Chaplinsky and Brandenberg v. Ohio. The critical distinction is that the Indian model does not in all circumstances require and imminent harm to public order, it on the other hand requires a notional harm, which must be causally attributed to the speech in question.
[134] Modi (n129). While this would seemingly imply that intent is was integral to the test due to the semantics of the test, it is apparent that intent does not matter as can be inferred from a later case which I will discuss at a slightly more advanced stage of this thesis.

interpreting hate speech laws as they existed at the time and therefore was not making an independent judgement on Blasphemy laws.[135]

However, subsequent cases clarified the scope of the term tendency used by the Court. In the case of *Ram Monohar Lohila*, In the case at hand, the Court went on to hold that there must be a proximate causal relationship between the words uttered and the public order which was sought to be preserved. I doing so, the Court stopped short of an imminent incitement standard. It did however, articulate a standard which meant that the causal connection between the words uttered and the public order which was in danger of being disrupted could not be too remote.

Unfortunately this very articulate and logical standard of incitement which was articulated by the Court later got lost as dead rhetoric in free speech cases. In fact, the standard never even managed to appear in cases conserving religious insult and blasphemy. As noted by Gautam Bhatia though, the Supreme Court has betrayed the good work which it did in the early nineteen sixties by later holding that free speech could be restricted in the name of public interest,[136] and for reasons which fell short of incitement. As clarified in future cases about blasphemy, the Supreme Court was of the opinion that the standard of causation to violence did not apply to cases pertinent to restrictions on the grounds of public morals and subsequently

Baragur Ramachandrappa v. State of Karnataka[137] as case concerning an award winning book which was accused of being hurtful (the term used in the case is insulting) to a sect of hinuism which was offended by the lack of historical accuracy by the book is the most important judgement in Indian blasphemy and religious insult jurisprudence. The case clarified that Indian blasphemy

[135] Bhatia (n128).
[136] Sakal Papers vs Union of India, [1962] 3 SCR 842; Ibid.
[137] Sri Baragur Ramachandrappa v. State of Karnataka, (2007) 3 SCC 11.

laws subscribe to not a standard of incitement but to a standard of offense.[138] *Baragur Ramachandrappa* further laid out a test to ascertain when this threshold of offense could be met. The case reaches the conclusion that the law serves to protect the interests of a "*reasonable, strong-willed man*"[139]. This test amounts to nothing more than a judge substituting himself to decide what is considered morally inappropriate about a comment. However, as Bhatia notes, the test confirms that this test has the value of determining an objective standard of offense. Therefore, subjective offense cannot be the sole grounds for invoking Indian blasphemy laws. The level of offense must meet an objective criteria which is to be judicially ascertained.

In light of the aforementioned judgement, Blasphemy laws in India, similar to Europe have the effect of holding religious sentiments on a different pedestal to other sentiments. With this in mind, it not difficult to see why the justifications of the laws on the grounds of public order firstly adopt a lower threshold and secondly why the argument of public morals and the protection of the same.

Recent developments in Indian Free Speech jurisprudence seem to have made a change in the structure of Indian Free speech Jurisprudence. The case at hand *Shreya Singal*[140]has changed the jurisprudence which forms the basis of the Court upholding blasphemy laws in the past. The Court has moved to hold that tendency towards violence cannot provide a legitimate basis for the banning of free speech and there must be a tangible incitement to have speech banned and furthermore, the Supreme Court has clarified that there must be a strong causal link between words and the public order which the state is seeking to preserve.

In the case of *Shreya Singal* the Supreme Court of India observed that "There are three concepts which are fundamental in understanding the reach of this most basic of human rights. The first is

[138] Ibid
[139] Bhatia (n128).
[140] Bhatia (n128).

discussion, the second is advocacy, and the third is incitement."[141] The Court went on to clarify that the threshold to amount to invoke a standard of incitement is high. Justice Narriman Observed that: "Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in."[142] It is in light of this that it is clear that India does not allow for the curbing of free speech for mere offense. Nor does mere offense lead to a public order crisis which is the only way blasphemy laws can and have been justified in the county.[143] This is a categorical misunderstanding of the law that the Court has on many occasions been guilty of.[144] However, the clarification in the aforementioned case clear leads to the conclusion that there is a high threshold required to ban speech.

Indian Blasphemy laws regardless of their wording must be held to the threshold I just mentioned. If it is held to such a threshold it is unlikely to be held constitutional. However, the issue at hand is that no challenge has been issued on the law for the last half a century. Section 295A deals with "Deliberate and Malicious"[145] which are "intended to outrage religious feelings of any class by insulting its religion or religious beliefs"[146]. On the face of it with respect to the aforementioned blasphemy laws, the standard is mere offense. As discussed above, the framework of Indian free Speech does not allow for a standard of mere offense and therefore, it must be abolished on these grounds. As I will discuss later there is a need to abolish the law as the presence of this law is used

[141] Shreya Singal v. Union of India, WRIT PETITION (CRIMINAL) NO.167 OF 2012 (2015) at ¶13. See also, Gautam Bhatia, Striking down 66A : How Indian Free Speech Jurisprudence Found it's Soul again (2015). https://indconlawphil.wordpress.com/2015/03/26/the-striking-down-of-section-66a-how-indian-free-speech-jurisprudence-found-its-soul-again/ . This blog post gives an overview of the case of Shreya Mudhgal.
[142] Ibid. at ¶13. Bhatia (n 128).
[143] Super intendent v. Ram Monohar Lohia, 1960 SCR (2) 821.
[144] Ibid. Bhatia (n 128).
[145] Section 294(A), Penal Code of India
[146] Ibid. Bhatia (n 128).

to harass authors and public speakers into withdrawing books or views.[147] What is vital to note at this stage is that Blasphemy laws seem to function as an exception to the general norm of free speech in India. It has a lower standard than incitement which has been clarified by the Supreme Court to be the threshold the speech needs to reach in order to be curbed.

VI Comparing the rational for blasphemy and religious insult.

Broadly speaking there have been three primarily justifications for blasphemy laws and religious insult laws across jurisdictions. As I have mentioned before, these justifications are: freedom of religion[148], offense amounting to a legitimate reason to hamper speech[149] and finally, a public order justification.[150] Through the course of this section I will compare the three jurisdictions which I have described in the previous section using the three justifications as a guiding stone. I will demonstrate in which jurisdictions which justifications hold weight and finally ask whether it is normatively appropriate to do so keeping in mind the theoretical framework laid out in this thesis.

At the outset, it is essential to note that all three jurisdictions which I will consider constantly reaffirm the important of free speech. The international legal order has recognized the right to free speech in various documents. General comment no. 34 emphasises how indispensable international law believes this right be to values of autonomy and dignity, which no doubt make up the foundation of democratic societies.[151] The Human Rights Committee states that: "Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing

[147] Martha Nussbaum, *The Clash Within: Democracy, Religious Violence, and India's Future* (2009)
[148] Guerra (n 104); Bhatia (n 128).
[149] Ibid.
[150] Ibid
[151] Ibid.

the vehicle for the exchange and development of opinions".[152] This quote fully explains the value of free speech to a democratic order and it goes further to show how integral free speech is in the preservation of values that underpin a democratic order.[153]

In the Indian context the case of *S. Khushboo v. Kanniamal & Anr.*,[154] stated that it was necessary to tolerate unpopular views and *Sakal papers*[155] reaffirmed this view.[156] However, the emphasis on the importance of free speech has often been conflated with the upholding of illiberal policies designed to clamp down on free speech and for decades there was little understanding on what was a reasonable restriction on free speech. In a recent judgement by the Supreme Court, the Indian position on free speech was clarified. This recent judgement could spell the end of many draconian laws with respect to free speech including Blasphemy laws.

European law has consistently reaffirmed the importance of free speech to a democratic society. Starting with *Handyside*,[157] the ECtHR has constantly observed how vital the right is to a democratic set up. However, the Court does have a gradation on speech. Political speech is afforded more protection than any other form of speech in the European context as it plays into its justification of free speech as an essential to preserve democracy.[158]

However, only two of the three jurisdictions retain blasphemy laws. Therefore, rhetorically similar systems appear to be achieving different results with respect to blasphemy laws. I have highlighted

[152] General comment 34. ¶2.
[153] Eric Barendt, (n 11). The author highlights the views that argue the centrality of free speech to a democratic order. In many ways, international law mirrors this theory.
[154] (2010) 5SCC 600 at ¶45.
[155] Sakal papers (n 136).
[156] Ibid. at 844, 866. Romesh Thappar v State of Madras, [1950] S.C.R. 594 at 602. In both cases there was an express recognition that freedom of expression was an essential right to the development of a democratic regime.
[157] [1976] ECHR 5.
[158] Id. This also however, as the Court repeatedly notes brings with it the rights and obligations to not exceed the democratic scope of the said right.

the individual justifications for this in the previous sections. But, the only system which practices what it preaches in rhetoric seems to be the international legal order.[159] Therefore, through the course of this section I will use international law as a normative guide to critique the Supreme Court of India and the European Court of Human Rights regarding their approaches to conceptually justifying blasphemy and religious insult laws. I will attempt to do this by comparing the reasoning that the two courts have adopted on different justifications.

a. Freedom of religion

The first justification which I believe is the most problematic of the lot is the justification that blasphemous or religiously offensive speech has the effect of hampering the ability of individuals to practice their religion. Using this justification is in effect is a Court stating that there is a need to protect religious practice to the extent that it accounts for a right to protect religious practices from offence. Justifying the presence of criminal blasphemy/religious insult laws which fall short of hate speech on the grounds that it interferes with the right to practice religious which is free from offence.

This argument has been expressly rejected by the international legal framework and would seemingly have to apply to all European states as well as India; both of whom are signatories to the relevant international agreements.[160] However, both the Indian Supreme Court and the European Court of Human Rights seem to acknowledge that offense to religious sentiments amounts to a violation of the right to profess religion. The Court of Human Rights is more explicit

[159] Sejal Parmar (n 52)

[160] The agreements being the ICCPR and the UDHR, both have had the provisions with respect to free speech clarified to the extent that it

in this articulation while, in India, the conclusion drawn above is a necessary implication of statutory law in sync with judicial interpretation of the same.[161]

The Court of Human Rights has expressly argued that there is a right which exists within the right to freedom of religion which amounts to a right not to be offended. Therefore, they have necessarily argued that freedom of religion amount to a trump on freedom of speech when the latter is abrogates or offends the former.[162] In India, this conclusion is drawn from the Supreme Court's interpretation of insult as a 'calculated tendency' to cause a disruption public order. The distinction with the two systems is that blasphemy structurally integrates into the larger framework of European hate speech jurisprudence while in India it situates itself as an anomaly.[163]

In Europe, the conclusion that religious insult amounts to offence is in sync with hate speech jurisprudence within the Court of Human Rights. This is consistent with the proposition the Court reached in other cases such as *Vajeland v. Sweden*[164] where the Court argued that offending the sensitivities of homosexuals would be enough of a justification to be banned under hate speech jurisprudence. Therefore, the proposition that offense to religious sentiments offering the same justification is a perfectly valid legal argument. Albeit one which lacks a normative justification

[161] Gautam Bhatia, (n 128). By retaining a provision that charges religious insult as a crime, there is an express concurrence by the Indian government with the view that religious sentiment are more volatile. This is not something that is alien to Indian jurisprudence. In a recent case the Delhi High Court, in a move which blatantly disregarded precedent came to the conclusion that individuals in Delhi were easily offended and therefore, reached the absurd conclusion that free speech must be limited to account for this easily offended society's trait of what can only be termed as intolerance. This case illustrates how easily Indian Courts disregard the larger framework of the constitution to allow speech to be impaired on the lose threshold of offence.

[162] Ibid

[163] Bhatia (n 128)

[164] Vejdeland & Ors v Sweden [2012] ECHR 242

under international law[165] and political philosophy.[166] I will elaborate more on this when I consider this argument in detail in the next part of this section.

In India, blasphemy laws exist as an exception to free speech jurisprudence. As mentioned in the previous section, recent case law has rendered the law irrelevant however, the Supreme Court did not through the course of the decision revise or read down blasphemy and religious insult laws.[167]Furthermore, the Supreme Court in upholding the law tacitly sided with the proposition that religion warrants stronger protection than other forms of insult. This is because the Indian penal code lends itself to the conclusion that there is an independent provision in the Indian Penal Code which criminalizes incitement to hatred.[168] The necessary level to reach there is considerably higher than the blasphemy and religious insult provisions present in the Indian Penal code.[169]It is for this reason that without expressly condoning the proposition that there exists a right within the freedom of religion provision to practice ones religion free from being offended, the Supreme Court has conclusively lends itself to agree with such a proposition.[170]

As demonstrated earlier,, neither system is in sync with international law on the matter and both systems allow for a hecklers veto when it comes to matters dealing with religion. This is in blatant violation of international law and makes little sense theoretically. In no way does the right to profess ones religion shield ones religious sentiments from insults.[171]

[165] Nowak (71).
[166] Bhatia (128)
[167] Ibid.
[168] Ibid.
[169] Ibid.
[170] Ibid.
[171] Sajo (n28) When practicing in private. However, it does not ensure that it protects people from insult. See generally, Choudhary v. U.K App no 17439/90 (1991) and Dubowska and Skup v. Poland app no 33490/96 (1997)

Logically the question involved in freedom of religion and it's protection is distinct from the question of whether there is a right to offend religious sentiments under free speech clauses. Certainly in some cases, the insult of religion will hinder the ability to practice religion but, these are in very extreme circumstances which will amount to incitement to violence, hostility and hatred. In such extreme circumstances an environment would be created which makes it impossible to practice ones religion. Hostility and hatred is a much higher threshold than offense though as it adversely impacts the dignity of individuals in a way which endangers them and their practices. Merely offending sentiments in a manner which falls short of the threshold mentioned above, in a society steeped in the values associated with free speech, will cause little obstruction to the freedom of religion in the event that a view on the religion shocks and disturbs the followers of the faith.[172]

There are two powerful counter arguments to this point which must be refuted if my argument is to fully hold weight. The first counter argument which needs to be considered is that protecting ones right to practice religion without being offended is an extension of an obligation on a state to refrain from violating the dignity of its citizens. The argument follows the line of logic which states that religion is fundamental to the identity of an individual and thus, an offending of one's identity or core values amounts to a damage to dignity. However, this argument can easily be refuted by the theoretical framework which I laid out in the previous sections of this paper. Offense is a threshold which does not dignity as it does not change the relationship between an individual and society.[173] Therefore simply by offending an individual his/her ability to assert his/her identity does not get hampered.[174] It is only when there is a form of speech which incites an environment

[172] Andras Sajo, (n28).
[173] Waldron (n 46)
[174] Ibid.

conducive to hostility and discrimination on the basis of an individual's religion that dignity is harmed.[175] A scenario such as the aforementioned one is however, a legitimate reason to abrogate speech in most jurisdiction bar, probably the United States and a few others.[176]

The second counter argument is rather persuasive. It argues two things, it first argues that purging blasphemy and religious insult laws are founded on the presumption that the state must not tacitly side with a religious proposition (secularism) and it goes on to argue that this notion of secularism is the seeding of authority of religions to the state.[177] Once this argument lays out this proposition it criticizes this on the grounds that it is an incorrect understanding of secularism and argues secularism to be not the seeding of authority to the state by religious heads but the gradual decline of religion from society in an organic way.[178] On reaching this conclusion the argument made by defenders of blasphemy laws argue that since religion is not expelled from society and retains authority even in secular states, blasphemy laws theoretically should be able to exist to legitimately protect religions and religious sentiments.[179]

The aforementioned argument can be refuted in the following way. It is important to note that the nature of secularism and the type of secularism is irrelevant to blasphemy laws. The drive to ban blasphemy laws comes from the proposition that it harms the democratic order as critique of religion is vital to democracy. Therefore any democracy must have a space for critique and vitally tolerate critique of religious views even if these views amount to state endorsed views.

[175] Ibid.
[176] Barendt (n 11)
[177] Lorenzo Zucca, 'The Cricis of the Secular State – A Reply to Prof. Sajo', (2009) 7 Int J. of Const. L. 494, 294-500.
[178] Ibid 494-505.
[179] Ibid

b. Freedom of expression & Public Order

The issue of the limits of freedom of expression has been a second head of justification for individuals. This justification seems to draw of the argument which states that offense is a legitimate grounds to limit free speech. In other words this seems to side with the theory that free speech brings with it a duty not to offend another individuals sentiments. International law as mentioned in the section which looked at it in detail, requires a threshold of incitement to hostility, discrimination or violence in order to ban free speech. On the face of it, international law thus protects the dignity of believers without unnecessarily encroaching on the freedom of expression.[180] It ensures that a believers standing in society is not hurt by speech yet at the same time ensures a higher standard than mere offence is used by Courts to abrogate rights.

At the outset, it is important to know that lowering the threshold of incitement inherently contradicts most free speech jurisprudence from arounds the globe. As noted earlier, both India and the European Court of Human Rights have persistently reaffirmed that the right to free speech includes the right to shock, offend or disturb.[181]

However, neither the Indian Supreme Court nor the Court of Human Rights has upheld this threshold in cases involving blasphemy or religious insult. In India, there is a specific problem wherein the Court presumes a volatile society and therefore, limits their threshold to ban speech to offense in cases involving religion or sedition for that matter. Therefore, in India, the standard of offense is an exception to hate speech jurisprudence which has been established since the 1960's. While the Court lost its way in its jurisprudence and allowed for the abrogation of speech for the purpose of public interest, this never changed the threshold of incitement when it came to

[180] Sajo, (n 28).
[181] Handyside (n 94) , sakal paper (n 136)

the limiting of speech vis a vis another person's rights. However, in cases of blasphemy, the law has been upheld since the late 1950's on the grounds that offense is a sufficient threshold to meet.

What is imperative to note is that India varies from the European model as the Court justifies it's use of the threshold of offense on a public order argument and not through an argument of the rights of others. This can be inferred by the method in which the Court persistently justified blasphemy laws. It did so by arguing that blasphemy and religious insult pose a danger to public order due to the volatility of individuals who had religious sentiments affected and further went on to justify that it was legitimate to abrogate speech for this reason. Ergo, the justification of offense as a threshold in India and the defense of its legitimacy on a theoretical level is founded on a different plain than the justification of the same standard in the Court of Human Rights.

The Court of Human Rights has in many situations apart from blasphemy laws, attached a hyper value on the sentiments of individuals and used that to limit speech. One instance of this is the case of defamation. The Court of Human Rights, over the last decade given very little leeway to journalists in cases involving defamation claims. Furthermore, it has persistently stated that offense is sufficient to constitute a hate speech.[182] The Court clarified this position in *Vajeland v. Sweden* when it held that *"*[t]he Court reiterates that inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner"[183]The Court of Human Rights seems to argue that offense in the case of blasphemous speech not only impacts sensibilities and public order but also the rights of others

[182] Gavin Millar, 'Whither the spirit of Lingens', (2009) 3 EHRLR 277.
[183] Vajland v. Sweden (n 164) ¶ 55.

(religious rights). Hence, it is clear that the Court of Human Rights does not have blasphemy as an exception to its hate speech jurisprudence but, it is very much a part of and symptomatic of general attitudes towards hate speech in the Court of Human Rights.[184]

Neither India nor the European Court of Human Rights follows a theoretical framework which is conducive to the protection of free speech when it comes to cases of blasphemy and religious insult. Indian jurisprudence clearly lacks the vigor to determine whether religious criticism is causally linked to created violence in its jurisprudence. The European Court of Human Rights on the other hand does not consider the distinction between offense and incitement to hostility and discrimination. By disregarding these two criteria, not only are the two jurisdictions in breach of international legal standards on the topic and they are not in sync with theoretically sound notions of when speech may be banned. Roger Kiska in his analysis of the Court of Human Rights jurisprudence identifies the problem which results from the low standards which are adopted to abrogate speech: "The result of such "hate speech" provisions is a reduction in the fundamental right to freedom of speech and freedom of expression. Instead of being free to disagree with one another, have robust debate, and freely exchange ideas, "hate speech" laws have shut down debate and created a heckler's veto. In the end, a chilling effect is created that leads to self-censorship and an overly sensitive society."[185] These effects are similar in India and it is clear that both jurisdictions provide undue protection towards religious sentiments and this is creating an over-sensitive society in both jurisdictions.[186]

Instead, it is important that both jurisdictions follow the model laid out by the international

[184] Roger Kiska, (n5) 112.
[185] Ibid 112.
[186] Ibid. 112.

VI Conclusion

Dignity has the impact of being one of the most fundamental values which we must protect. Moving beyond critiques of dignity as being a meaningless placeholder. It is clear that the value warrants protection from abuse.

Dignity has the impact of being a value which resides in the autonomy and the identity of an individual. Religion is a concept which often not only reflects one's lineage and identity but, is a concept which is definitive of identity. Thus, it is clear that an unwarranted abuse of one's religion and the unnecessary discrimination of an individual based on his/her religion is clearly an abuse of autonomy and human dignity. This is because it prevents an individual from asserting a core concept which is reflect or constitutive, whichever may be the case, of his/her identity. With this in mind, I am by no means trivializing the role religion plays in the larger rubric of human rights.

Human dignity is a fundamental value which society must strive to protect. Dignity, which is expressed through respect for and tolerance of multicultarism, diversity. However, dignity as a concept finds meaning in values of being able to live on an equal footing with society without having discrimination against identity based traits. Speech which incites such discrimination is liable to and normatively should be banned for the *dignitarian* harm which it creates. However, as mentioned before this is a very high threshold and merely offending sentiments through satire does not amount to this. Furthermore, critiquing the tenants of a religion in a manner which does not impact the standing of individuals in society (which is their relationship with society founded on the value of equality)

The protection of religious rights are paramount if we are to create a society which is well and truly plural. The protection of an individual's right to assert his religious identity is vital to an individual. However, we must crucially ask whether the protection of one's religious autonomy is

too stringent and consequently poses an unnecessary limitation on other rights which are vital to the modern state apparatus.

In the case of blasphemy laws which seek to protect religious sentiment from insults, we are most certainly going to far in our protection of religious sentiments and abrogating free speech to far. It neglects how vital free speech is to democracy; which has been a system of governance that has proved vital to the rights preservation agenda. Freedom to profess religion is very much a right founded in and through democratic systems and is subject to democratic restrictions. Therefore, it is important to protect free speech from excess degradation due to its inherent value to democracy.

It is for this reason that Blasphemy laws are flawed and this paper demonstrated the different frameworks which allow for blasphemy and critiqued them subjecting them to scrutiny from a normative base founded upon a theoretical abstraction as well as international law.

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