Introduction

I 'No explanation will suffice – it is an insult'

In 1925, the English cricketer Jack Hobbs equalled a long-standing batting record when he scored his one hundred and twenty-fifth century.[1] To celebrate the occasion, the English evening newspaper *The Star* printed a cartoon by David Low which depicted a 'gallery of the most important historical celebrities'. Standing on pedestals, Adam, Julius Cesar, Charles Chaplin, Mohammed, Columbus and Lloyd George were all gazing up at the towering figure of Hobbs in their midst. The cartoon was entitled 'It' – that extra something which Hobbs had and which lifted him above everyone else.[2] The cartoon drew numerous applauding and eulogising letters to the editor, with one admirer calling the selection of the minor statues 'almost a stroke of genius'.[3]

Yet not everyone was pleased. One letter by a Muslim convert maintained that Low had – if unwittingly – offended 'the susceptibilities of many Britishers and millions of fellow subjects of the Empire' by placing the name 'Mahomet' in a cartoon. Certainly, Low would not have

[1] In cricket, a batsman reaches a 'century' if he completes, in a single innings, a hundred or more runs. For a detailed explanation of the intricacies of cricket, the reader is referred to Marylebone Cricket Club, *The Laws of Cricket (2000 Code)* (4th edn, London: Gardners Books, 2010).

[2] David Low, 'It', *The Star*, 18 August 1925, at 3. The cartoon is reprinted, with a different caption, in Colin Seymour-Ure and Jim Schoff, *David Low* (London: Secker and Warburg, 1985), 63, and available on the website of the British Cartoon Archive, University of Kent, at <http://www.cartoons.ac.uk/record/LSE7298>. David Low (1891–1963) was the foremost cartoonist of his age and is particularly well known for his acid caricatures of the totalitarian regimes of the 1930s and 1940s and for the stereotypical *Colonel Blimp*.

[3] 'Low's Hobbs: Cartoon that Has Delighted "Star" Readers', *The Star*, 24 August 1925.

used the name of Jesus in the same way?[4] Another letter of protest by the *Aḥmadiyya* Moslem Mission in London also deeply resented Mohammed being represented as competing with a cricketer, or even being represented at all. In reply, the *Star's* editor expressed his regrets at the unintentional offence, and the affair was thought to be settled.[5]

Within a fortnight of the publication, however, the stir started by the *Aḥmadiyya* Mission in London had spread to India – and according to the correspondent of the *Morning Post* (another London paper), the British Muslims' resentment of the drawing had been mild compared to 'the bitterness which certain people [were] trying to engender in Calcutta'.[6] Further outrage was caused by the cartoon's portrayal and alleged profanation of Adam, another prophet revered by Muslims. Calcutta was placarded with Urdu posters prompting Muslims 'to give unmistakable proof of their love of Islam by asking the Government of India to compel the British Government to submit the editor of the newspaper in question to such an ear-twisting that it may be an object-lesson to other newspapers'.[7] Meetings were held and resolutions passed; the Government of India was called upon 'to make immediate representation to the British Government regarding measures to be adopted to prevent the recurrence of such outrageous conduct'.[8]

To Low the reactions to his drawing seemed slightly comical: he felt a 'twinge of regret' at the 'loss to history of a picturesque scene on Tower Hill, with plenty of troops, policemen and drums', where his unfortunate editor would have his ears twisted on his behalf.[9] Low confessed that his drawing of Mohammed and Hobbs had been 'a piece of mere facetiousness' that was void of any deeper meaning but had been given undeserved importance when, because of Hobbs' popularity, the editor decided to print the cartoon twice the usual size. With hindsight, the whole incident showed 'how easily a thoughtless cartoonist can get into trouble'. Low admitted that foolishly, he had never thought seriously about Mohammed. He confessed to being ashamed – 'not of drawing

[4] Letter from Khalid Sheldrake to David Low (Woking, Surrey, 18 August 1925), Beinecke Library, Yale University, GEN MSS 96 Box 11 Folder 514.
[5] David Low, *Autobiography* (New York: Simon and Schuster, 1957), 123. On the *Aḥmadīs* see below, p. 348.
[6] 'Mahommed Cartooned: Indian Fury at a London Caricature', *Morning Post*, 3 November 1925, at 3.
[7] 'Mahommed Cartooned: Indian Fury at a London Caricature', *Morning Post*, at 3; 'Protest against Cartoon: Moslems Indignant', *Melbourne Herald*, 12 October 1925, at 2.
[8] 'Mahommed Cartooned: Indian Fury at a London Caricature', *Morning Post*, at 3.
[9] Low, *Autobiography*, 123.

Mahomet in a cartoon, but of drawing him in a silly cartoon'.[10] To him, the strong reaction did not warrant abstaining from drawing the Prophet – rather, it warranted addressing the issue in a conscious and more deliberate way.

This sanguine view was not shared by the Calcutta correspondent of the *Morning Post*, who observed that,

> quite unwittingly, the cartoon has committed a serious offence which, had it taken place in this country [i.e. in India], would almost certainly have led to bloodshed. What was obviously intended as a harmless joke has convulsed many Moslems to speechless rage, for while there is some laxity among them as regards the religious law against the making of pictures, no one has ever dared to attempt to depict Mohammed. When a picture of the Prophet appears in a cartoon, no explanation will suffice; it is an insult.[11]

More than eighty years later, the warnings from the *Morning Post* correspondent should have sounded eerily prescient when the publication of another cartoon of Mohammed (this time not as a mere prop to a cricketing feat) did indeed lead to bloodshed. In September 2005, the Danish newspaper *Jyllands-Posten* published a drawing of a bearded Mohammed, a bomb with a lit fuse nested in his turban labelled with the *shahāda*, the Islamic profession of faith.[12] Under the heading *Muhammeds ansigt* ('the face of Mohammad'), the picture was accompanied by eleven other drawings, mostly of Mohammed, and an article captioned *Ytringsfrihed* ('freedom of opinion') by the paper's cultural editor, Flemming Rose. Rose recounted several occasions on which Danish authors or artists had recently restrained themselves from criticising Islam, fearing violent Muslim retaliation. In Rose's view, such fear led to increasing self-censorship, with the consequence that artists, authors and translators were 'steering a wide berth around the most important meeting of cultures in our time – the meeting between Islam and the secular society of the West, which is rooted in Christianity'. Deploring these instances of self-censorship, Rose maintained that Muslim insistence on special consideration for their own religious feelings was incompatible with the right to free speech in a

[10] Low, *Autobiography*, 123–4. Low had made similar humorous comments on cricket earlier, see David Low, 'The Relative Important of Things', *The Star*, 20 December 1920, at 3 (where cricket dwarves Christmas, the weather, and politics).
[11] 'Mahommed Cartooned: Indian Fury at a London Caricature', *Morning Post*, at 3.
[12] 'There is no god but God, and Muhammad is the messenger of God', Lynda Clarke, 'Shahādah', *OEIW* (2009), V, 116–17, at 116.

contemporary democracy, where everyone must be ready to put up with insults, mockery and ridicule. He conceded that religious feelings should not be made fun of 'at any price'; nevertheless, hurting such feelings was 'of minor importance' in times when Denmark was 'approaching a slippery ground, where no one can predict where self-censorship will end'.[13]

Soon after the publication of the cartoons, Danish Muslims staged a protest outside the offices of *Jyllands-Posten*, and the ambassadors of several Muslim countries requested – in vain – to meet with the Danish prime minister. Over the ensuing months, outrage over the cartoons and their republication by numerous European papers spread through the Muslim world: Danish goods were boycotted, and the embassies of Denmark and other European countries in Beirut, Damascus and Teheran were assailed and even torched by protesters. Since 2005, more than 100 people have died and over 800 were injured in protests related to the cartoon.[14] The cartoonists who created the offending caricatures received numerous death threats; Kurt Westergaard, who drew Mohammed with a bomb in his turban, only narrowly escaped an attempt on his life in 2010.[15]

The sense of outrage caused by the Danish drawings was very similar to what the *Morning Post* correspondent had observed in Calcutta in 1925 – except that this time, the convulsions of rage took place on a global scale, not merely by unfranchised subjects in a far-away colony. In both cases, the protesters' outrage was kindled by the violation of *religious* commands. In the case of the Low drawing, 'the religious law against the making of pictures' of Mohammed in particular had been breached.[16] The Danish cartoons, quite apart from depicting Mohammed, also denigrated and insulted the Prophet and were therefore blasphemous.[17]

[13] Flemming Rose, 'Muhammeds Ansigt', *Jyllands-Posten*, 30 September 2005, at 3. The English translation is taken, with minor adjustments, from *Kasem Said Ahmad and Asmaa Abdol-Hamid* v. *Denmark*, Communication no. 1487/2006, CCPR (18 April 2008), paras. 2.2–3.

[14] *Kasem Said Ahmad and Asmaa Abdol-Hamid* v. *Denmark*, para. 2.19.

[15] A more detailed account of the cartoon controversy is provided below in ch. 1.

[16] Above n. 11. On aniconism in Islam (which I will not discuss further in the following), see Silvia Naef, *Bilder und Bilderverbot im Islam: Vom Koran bis zum Karikaturenstreit* (Munich: C. H. Beck, 2007).

[17] OIC, Final Communiqué, Islamic Summit Conference, 11th sess., OIC/SUMMIT-11/2008/FC/Final (14 March 2008), para. 177.

In its vehemence and violence, the response to the Danish cartoons recalled the turmoil that had followed another perceived taint on the reputation of the prophet Mohammed: the publication of Salman Rushdie's novel *The Satanic Verses* in 1989. That book had been met by equally violent and global protests: in Europe, effigies of the author and copies of the book were burnt and large manifestations held;[18] in the Muslim world, the book was banned in numerous countries.[19] Most notoriously, Ayatollah Khomeini issued a fatwa sentencing the author of the book as well as its publishers to death.[20] Again, this sentence was passed based on religious considerations: Khomeini called *The Satanic Verses* a book that 'has been compiled, printed, and published in opposition to Islam, the Prophet, and the Quran'; by writing it, Rushdie had committed apostasy and was therefore sentenced to death, in accordance with Islamic law.[21]

But the response to the cartoons also differed significantly from the reaction to *The Satanic Verses* with regard to the effect, content, venues and proponents of protests. In the early 1990s, the assassination of publishers and translators of *The Satanic Verses* drew most attention. But in the wake of the cartoons, the numerous casualties occurred mostly among Muslims protesting against the cartoons, although several attempts on the cartoonists' lives were foiled.[22] Nor was the message of the protests against Rushdie and against the cartoons identical. Yes, there was an oft-reported call for a 'day of rage' by Yousef al-Qaradhawi, a prominent Muslim preacher.[23] But even this supporter of suicide attacks on Israelis[24] did not advocate executing cartoonists or editors, but called for pressure on Muslim governments 'to demand that the UN adopt a clear resolution or law that categorically prohibits affronts to prophets – to the prophets of the Lord and His messengers, to His holy books, and to the religious holy places'. What Muslims

[18] Amit Roy and Iqbal Wahhab, 'How Rushdie Lit a World Islamic Fire', *Sunday Times*, 29 January 1989.
[19] M. M. Slaughter, 'The Salman Rushdie Affair: Apostasy, Honor, and Freedom of Speech' (1993) 79 *Va LJ* 153–204, at 156.
[20] For a collection of documents, news reports and interviews see Lisa Appignanesi and Sara Maitland (eds.), *The Rushdie File* (Syracuse University Press, 1990).
[21] Appignanesi and Maitland (eds.), *The Rushdie File*, 84.
[22] See below p. 41.
[23] Yousef Al-Qaradhawi, 'Whoever Is Angered and Does Not Rage in Anger Is a Jackass – We Are Not a Nation of Jackasses', in Anders Jerichow and Mille Rode (eds.), *Profet-affæren* (Copenhagen: Dansk PEN, 2006), 133–4.
[24] Magdi Abdelhadi, 'Controversial Preacher with "Star Status"', *BBC News*, 7 July 2004, <http://news.bbc.co.uk/2/hi/uk_news/3874893.stm>.

wanted, he stated, were 'laws protecting the holy places, the prophets and Allah's messenger' so that 'nobody can cause them harm'.[25]

Consequently, the streets were not the only, or even the main, venue of protest against the cartoons. News commentators often ignored the notable fact that contrary to the haphazard and unco-ordinated manifestations against *The Satanic Verses*, there was a concerted response to the cartoons on several levels and within international legal and institutional frameworks. The official response by representatives of Muslim States was much more measured. Their reaction mirrored al-Qaradhawi's demands for new laws: Muslim States and regional organisations called for a normative response by the international community. This focus on legal remedies was replicated in the applications by Muslim individuals and organisations to the European Court of Human Rights and the UN Human Rights Committee, invoking a violation of their human rights; several criminal proceedings were also brought before national courts.[26] Even those who compared the cartoons to nuclear bombs with a 'psychological fallout' that 'obliterated the sun of civilisation almost everywhere',[27] saw legal proceedings against *Jyllands-Posten* as a 'more practical option having a greater potential for positive results' than burning embassies or setting bounties on the head of cartoonists.[28] Co-ordinated legal action in Denmark and elsewhere, relying, for instance, on provisions in EU countries that prohibit blasphemy or discrimination on racial or religious grounds, was advocated as the most promising counter-measure to the offence inflicted by the cartoons.

These judicial proceedings, however, came to naught, at least on the international level and in Western jurisdictions: there was no conviction or censure of cartoonists, or of editors responsible for the publication of the drawings. The recommendation of the Danish prime minister to outraged Muslims to seek redress through the legal system proved futile.[29] Yet significantly, this disappointing outcome did not lead to a wholesale abandonment of the law as a remedy to the offence caused. Instead, Muslim States and regional organisations saw the Danish cartoons as a confirmation that appropriate legal protection

[25] Al-Qaradhawi, 'Whoever Is Angered', 134. [26] See below pp. 64 ff.
[27] Muhammad Tariq Ghazi, *The Cartoons Cry* (Bloomington: AuthorHouse, 2006), 12.
[28] Ghazi, *Cartoons Cry*, 55, 36–8 (embassies), 45 (bounty). Ghazi points out that suing revisionists had served Holocaust survivors much better than burning down the houses of those denying the Holocaust (Ghazi, *Cartoons Cry*, 54).
[29] See below p. 40.

for religions was lacking on the international level. The unsuccessful prosecutions reinforced endeavours that had been initiated several years prior to the cartoons. In the view of Muslim decision-makers, the impunity of the Danish cartoonists validated their on-going efforts to push for new and better protection of religions and religious feelings under international law. The centre-piece of these efforts was to be the new concept of 'defamation of religions'.

The term 'defamation of religions' had emerged some years before the Mohammed drawings; it made its first appearance in the UN Commission on Human Rights in 1999.[30] Prior to the cartoons, however, this novel notion had drawn little international attention. Yet after the publication of the drawings, defamation of religions provided a conceptual framework for the grievances inflicted by the cartoons, and also a promising remedy. In the aftermath of the cartoon controversy, 'defamation of religions' has therefore gained increasing traction in international fora such as the UN Human Rights Council and the UN General Assembly.

The official response to the cartoons on the international level, rather than echoing the State-sanctioned execution orders after *The Satanic Verses*, was thus more in line with the calls of the Calcutta Muslims in 1925 to take measures that will 'prevent the recurrence of such outrageous conduct'.[31] Protesters in the streets invoked religious grounds for such measures: they considered the cartoons blasphemous. On the political level, the religious perspective was present, but complemented by references to human rights of Muslims and their persistent violation. Thus, the cartoons were referred to by the Organisation of the Islamic Conference (OIC) as an 'incident of desecration of the image of the Holy Prophet Mohammed', and the responsibility of all governments stressed 'to ensure full respect of all religions and religious symbols and the inapplicability of using the freedom of expression as a pretext to defame religions'.[32] Yet the phenomenon of defamation of Islam, it was insisted, also constituted a form of racism which should be criminalised by States as well as by regional and international organisations.[33] In the UN Human Rights Council (HRC), 'deep concern at the negative stereotyping of all religions and manifestations of intolerance and

[30] Below p. 165. [31] Above introduction, n. 8.
[32] OIC, Final Communiqué, Islamic Summit Conference, 3rd extr. sess. (7–8 December 2005), part II, para. 3. The Organisation changed its name to 'Organisation of Islamic Cooperation' in June 2011.
[33] OIC, Final Communiqué, 2005, part II, para. 10.

discrimination in matters of religion or belief' was expressed;[34] and it was emphasised that 'respect of religions and their protection from contempt' was 'an essential element conducive for the exercise by all of the right to freedom of thought, conscience and religion'.[35]

These statements do not immediately rely on the religious vocabulary of blasphemy and apostasy. Yet to the extent that the specific nature of the Muslim response as framed within traditional human rights language has been acknowledged by Western commentators, they found it the worse for it, denouncing it as a misuse of that very language and as an 'insidious blurring of categories'.[36] From their perspective, the concept of defamation of religions was little more than a cover for an agenda to suppress free speech, put forward by illiberal or even totalitarian regimes. Free speech advocates also criticised it as a veiled attempt to reintroduce blasphemy provisions. The law, they argued, should not be influenced by religious provisions; it protects individuals, not religions or the sensitivities of their followers. In the same vein, the efforts of Muslims to obtain legal remedies against religious insult under current legislation were denounced as a misuse of Western legal systems and guarantees by proponents of intolerance and religious extremism.[37]

II How does – or should – the law respond to offence?

There is no question that both in 1925 and in 2005, numerous Muslims were genuinely and deeply offended by the depiction (and, in the latter case, the alleged derision) of their Prophet. 'Offence', however, is a broad concept. In a legal context, it may simply refer to violating laws and committing crimes.[38] More generally, it denotes a transgression or misdeed, the resentment, injury or harm caused to a person, as well as the hurting of feelings.[39] Historically, offence has also been closely associated with tarnishing the honour of others.[40] Yet offence does

[34] A/HRC/Res/7/19, para. 1. [35] A/HRC/Res/7/19, para. 10.
[36] 'The Meaning of Freedom', *The Economist*, 4 April 2009.
[37] Shimon Samuels, 'Judicial Jihad: Engaging a New Battlefront', *Jerusalem Post*, 15 December 2009, at 15; Ezra Levant, 'Those Pesky Danish Cartoons Just Won't Go Away', *Globe and Mail*, 24 October 2009, at F13; Brooke Goldstein and Aaron Eitan Meyer, 'Legal Jihad: How Islamist Lawfare Tactics are Targeting Free Speech' (2009) 15 *ILSA J Int'l and Comp L* 395–410, at 396, 407–8.
[38] 'Offend, v.', *OED Online* (2010), at para. 2.
[39] 'Offence, n.', *OED Online* (2010), at paras. 2(a), 3(a) and 4(c).
[40] Rolf Lieberwirth, 'Beleidigung', *HRG*^{2} (2004), I, 514–16, at 514.

not just denote an action, but also an effect: not only offence committed, but also offence taken. In this context, it describes the mental state of the person or persons offended.[41] In the following, I use 'offence' to refer to the wounded feeling, to the umbrage caused, the potential hurt and harm inflicted – voluntarily or involuntarily – on another person through expressive means, and most notably through speech.

Which of these many conceptions of offence should the law address – if any? *Neminem laedere* – not to hurt others – has been considered a fundamental tenet of a just legal system for millennia.[42] It is the most basic function of such a system to regulate human behaviour so as to prevent mutual, unrestricted infliction of harm. But what exactly constitutes harm? When is the threshold reached at which my freedom of action is curtailed by a duty not to hurt others? And is that duty correlative to a right of others not be harmed? Can offence be equalled to harm?

John Stuart Mill famously stated that acts 'of whatever kind' may be interfered with if they cause harm to others without justifiable cause[43] – and he seems to have taken it for granted that readers would understand what exactly constitutes harm.[44] Bodily injuries clearly are harmful: as Zefariah Chaffee put it, 'the right to swing your arm ends where the other man's nose begins'.[45] But if Mill stated that the individual 'must not make himself a nuisance to other people' and refrain 'from molesting others in what concerns them',[46] it seems doubtful that reference is exclusively made to physical violence. Indeed, harm and injury are not only, perhaps not even predominantly, inflicted through physical force. Children will, for reasons of self-protection, insist that only sticks and stones may break their bones, whereas words can never hurt them.[47] They will learn soon enough, however, that words can be highly offensive and injurious, inflicting as much or even more hurt

[41] See Joel Feinberg, *Harm to Others* (New York: Oxford University Press, 1984), 46.
[42] *Inst.* 1.1.3 and *Dig.* 1.1.10; Cic. *off.* I, 7, 20.
[43] John Stuart Mill, *On Liberty* (London: J. W. Parker and Son, 1859), 101.
[44] Alan Ryan, 'Mill in a Liberal Landscape', *The Cambridge Companion to Mill* (New York: Cambridge University Press, 1998), 497–540, at 504.
[45] Zefariah Jr Chaffee, 'Freedom of Speech in War Time' (1919) 32 *Harv L Rev* 932–73, at 957.
[46] Mill, *On Liberty*, 101.
[47] The children's rhyme dates back at least to the mid-nineteenth century: G. F. Northall, *Folk-phrases of Four Counties (Gloucester, Stafford, Warwick, Worcester)* (London: Oxford University Press, 1894), 23.

than fisticuffs: that the tongue breaks bones though itself has none.[48] Words 'pierce our ears like daggers',[49] permanently afflicting the mind, leaving us smarting long after their sound has faded. Cuts will heal and broken bones be mended; but the damage inflicted on a teased and bullied student, or the diminished self-respect from which a member of an ethnic minority might suffer as a result of constant racial slurs, may last a lifetime.[50] Given this destructive potential of verbal attacks, should they not be considered equally harmful as physical violence? Should offence therefore not be equalled with injury (as was the case under Roman law, where *iniuria* covered injuries inflicted by physical force as well as verbal abuse)?[51]

The difficulty with offence taken over words is that the damage done is much more difficult to assess and to qualify. A broken nose can easily be diagnosed, and – leaving subjective susceptibility to pain aside – it affects everyone in the same way. Such an objective criterion to define harm is lacking 'if the mind is wounded'[52] and emotive offence has to be quantified. Some are left unperturbed by the most trenchant slights; to others who are less thick-skinned, even the slightest criticism is profoundly upsetting. How then to designate which degree of offence should still be tolerable? What standard to apply – subjective or objective? And who would rule on just what might constitute an objective standard in this context – in other words, whose subjective standard should be made objectively binding? The extent of harm inflicted may also be linked to the subject matter addressed. Maybe it is more offensive if hurtful comments are made on private matters, such as family life and sexual relations, than on professional behaviour? And perhaps one's political views bear insult better than one's religious convictions? Should intent – malice – play a role?

[48] Appropirately, this adage is much older, dating back at least to the thirteenth century: Martin H. Manser, *Dictionary of Proverbs* (London: Wordsworth Editions, 2006), 585.
[49] William Shakespeare, *Hamlet*, act 3, sc. 4.
[50] cf. e.g. Marla E. Eisenberg, Dianne Neumark-Sztainer and Mary Story, 'Associations of Weight-based Teasing and Emotional Well-being among Adolescents' (2003) 157 *Arch Pediatr Adolesc Med* 733–8; Brianna Barker Caza and Lilia M. Cortina, 'From Insult to Injury: Explaining the Impact of Incivility' (2007) 29 *Basic and Applied Social Psychology* 335–50; Christophger Hom, 'The Semantics of Racial Epithets' (2008) 105 *J Philos* 416–40, at 432.
[51] *Dig.* 47.10.1.
[52] Jeremy Bentham, 'Letters to Count Toreno', in John Bowring (ed.), *Works*, 11 vols. (Edinburgh: William Tait, 1843), VIII, 437–554, at 547. Bentham considered 'mental injuries', in a religious or non-religious context, of legal relevance, see Peter Jones, 'Blasphemy, Offensiveness and Law' (1980) 10 *Brit J Politcal Science* 129–48, at 137.