THE BINDING ROOTS OF FREE SPEECH

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Abstract

This thesis argues that the modern notion of free-speech was born within the Westphalian nation-state. It suggests that the legal rights framework - particular to the Westphalian nation-state - not only legitimizes and legalizes the right to free-speech, but also enables us to invoke legally the necessary limitations that demand the limitation of free-speech in certain contexts. However, such a legal-rights framework is exclusive to the nation-state and cannot be enforced on an international level, outside of the nation-state boundary. With reference to examples on an international level, this thesis demonstrates that calls for the limitation of free-speech are indeed legitimate and necessary but cannot be enforced on an international level for the reasons just mentioned. In order to address this problem, this thesis proposes a framework - based on a Kantian model - that enables us to invoke the limitation of free-speech on an international level without appealing to a legal-rights discourse to do so.

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Introduction: The context of the debate

The topic of this thesis emerged as a result of watching the unfolding furore and anger that emerged as a result of the publication of twelve cartoons in the Danish newspaper *Jyllands-Posten* on 30th September 2005. Public condemnation came from people of many different communities, cultures and religions, but the most vehement criticism came from Muslims. The anger and violence that emerged in the wake of the publication of the cartoons can be attributed to two factors; firstly, the content of the cartoons generated widespread anger for the way in which they depicted the prophet Mohammed. The cartoons had less than subtle insinuations, not only suggesting a link between Islam and fundamentalist terrorism, but also portraying the prophet Mohammed as an instigator of violence and bloodshed. The graphic descriptions can also be said to be less than accurate for the way in which the religions of Islam and Hinduism are conflated. In one cartoon, the prophet Mohammed is depicted with a turban on his head, which is a garment more synonymous with Hinduism than Islam. Secondly, the cartoons that were published in the *Jyllands-Posten* in Denmark were quickly picked up by newspapers in other European countries, such as *Die Welt* in Germany, creating even more widespread anger.

As angry Muslim demonstrators protested and decried the publication of the cartoons and the defamation of the prophet Mohammad, the Danish Prime Minister, Fogh Rasmussen, refused to entertain the idea of censoring the media as this might interfere with the much cherished right of freedom of speech (Rynning & Schmidt, 2006:13). The right to freedom of speech, as will be shown in Chapter One, was given birth and legitimised by the Westphalian nation-state. The incident sparked a hotly contested debate concerning the sensitive issue of free speech. One of the most interesting questions concerning the controversy was why there was no quick resolution. What is of particular importance for this thesis is that the publication of the cartoons had ramifications for free speech at an international level; although the cartoons were published by a newspaper within the sovereign Danish nation-state, the message of the cartoons had a direct impact on communities that transcend the nation-state. Muslims from different nation-states around the globe were equally hurt and offended by the publication of the cartoons. The boycotting of Danish goods and the rioting in countries ranging from Indonesia to Saudi Arabia is testament to this.

In the wake of protests around the globe, the following debate concerning free speech became an international issue. That is, the debate concerning the legitimacy and legality of censoring free speech became an international issue that had ramifications beyond the sovereign nation-state. It is important to state at the outset that it is not the intention of this thesis to distinguish between freedom of speech on an international level, outside of the nation-state, and freedom of speech within the nation-state as if they are two separate things. What this thesis is going to point out is that while freedom of speech is in part limited by the same social and historical restrictions outside of the nation-state as it is within the nation-state, the codification of these limitations in law that characterises the nation-state as juridical entity is absent at international level. As it will be argued in Chapter One, the *notion* of modern free speech emerged within the Westphalian nation-state, and while the Westphalian nation-state legitimises and legalizes the right to free speech, the nation-state also acts as a limitation of sorts. This is because the sovereign nation-state is the only political structure with the legal ability to limit free speech.

But why is the ability to limit free speech limited to the nation-state? The answer to this question, which will be explained throughout this thesis, is that the rights discourse associated with the sovereign nation-state that legalize the right and limitation of free speech cannot be extended outside of the sovereign nation-state boundary. It is true that member states of international organizations like the United Nations (UN) and the European Union (EU) have committed themselves to upholding legislation that is entrenched in the United Nations Charter for Human Rights (UNCHR) and the European Charter for Human Rights (ECHR); however, organizations like the UN and the EU do not actually have the legal right to intervene in matters pertaining to the sovereign nation-state such as the claims to freedom of speech of its citizens. As will be shown in Chapter Two, organizations like the UN and the EU are unable to fully engage with the sensitive issue of free speech on an international level as they are restricted to using a rights discourse particular to the sovereign nation-state. What the cartoon debacle made clear is that there is an equal need to limit freedom of speech on an international level as there is within the sovereign nation-state.

The problem is that we cannot legally invoke or legitimise calls for the limitation of freedom of speech on an international level because we cannot appeal to a rights discourse particular to the nation-state to do so. Such an argument will be elaborated upon in Chapter Three. As will be shown in Chapter Three governments are often unwilling to restrict free speech as

doing so is seen to be a violation of the individual rights discussed in Chapter Two. Within the nation-state, a rights discourse allows us to legalize what, in Chapter Four, I elaborate on as the historical and social limitations of free speech. Outside of the nation-state we are unable to legalize the same historical and social limitations even though the call for such limitations is legitimate and even though there may be a pressing need to do so. Outside of the nation-state, no sovereign body has the ability to legally invoke restrictions on free speech. This brings us to the critical question that this thesis aims to address: does this mean that we cannot conceive of limitations on freedom of speech at an international level or do we perhaps have to re-think the very notion of limitation itself? The aim of this thesis is to argue the latter.

Before such a task can be undertaken, it will be necessary to show how the modern *notion* of free speech emerged within the context of the Westphalian nation-state. This will be the objective in Chapter One. It will be demonstrated in Chapter Two that while the rights discourse inherent to the Westphalian nation-state legalizes – as in makes possible – free speech, such a rights discourse acts as a limitation of sorts because we cannot legally invoke limitations of free speech on an international level outside of the sovereign nation-state. By discussing the Danish Cartoon Controversy and the Defamation of Religions Act passed in 2006, Chapter Two will demonstrate the impossibility of legally invoking the limitation of free speech on an international stage using the rights discourse inherent to the nation-state.

This thesis is not an attempt to distinguish between nation-state free speech and international free speech as if they are two separate *notions*. It will be demonstrated that on an international level, free speech is subject to the same social-historical limitations as it is within the nation-state. The difference is that within a nation-state these socio-linguistic limitations are codified in law (as, for instance "hate speech"), which makes the limitation of free speech possible – a codification and enforcement that is absent at international level. This does not necessarily mean we cannot limit free speech at international level. Rather, in Chapters Three and Four I argue for a different way of conceiving limitations at this level with reference to the work of Jacques Derrida. This discussion starts by identifying the tension between absolute, unrestrained freedom of speech and the historical reality of limitations as a productive tension, more specifically as aporetic.

How are we to reconcile the claim to absolute freedom of speech with the social-historical limitations that demand the limitation of free speech? Is it even possible to reconcile the

absolute claim to freedom of speech with the social-historical contexts that demand its limitation? In order to address this problem I discuss Derrida's analysis of a number of *concepts* where a similar contradiction exists between the absolute and the historical. In discussing these concepts, Derrida uses the term *aporia* to describe the contradictions inherent in them. Derrida's analysis is particularly useful because he suggests a way to reconcile the absolute with the social-historical. If it can be suggested that the *concept* of free speech is similarly aporetic to the concepts discussed by Derrida, such an analysis may offer us a way of acknowledging both a person's claim to absolute free speech and the social-historical limitations that demand the limitation of free speech.

This is not a thesis in philosophy and I cannot here do justice to a philosophical exposition of the concept aporia with reference to its long history in Western thought. Instead, I shall proceed in Chapter Three by demonstrating, with reference to Derrida's work, how the concept of aporia *works* by analyzing four aporetic *concepts* in detail. These concepts are "forgiveness", "democracy", "hospitality" and "justice". As Derrida's analysis demonstrates, within each of these concepts is an aporetic tension between the absolute and the social-historical. Such an analysis is not an attempt to demonstrate how "hospitality", "forgiveness", "justice" and "democracy" are linked to freedom of speech. Rather, by analysing each of these concepts I shall merely demonstrate how the concept of *aporia* operates in order to proceed analogically, that is, by suggesting that the concept of freedom of speech operates similarly or is similarly aporetically structured.

Having outlined how the concept of aporia works in Chapter Three, Chapter Four will suggest that the concept of free speech is similarly *aporetic*. However, we are still left with the first problem just discussed; even though the suggestion that free speech is aporetic provides us with a way of conceiving the tension between absolute freedom and its limitation, we have to consider how the necessary social-historical limitations of free speech can be implemented on an international level. In order to answer this question, the conclusion of this thesis will describe in some detail a proposal by Kant (2006) for the adoption of universal codes of conduct by nation-states.

Kant's proposal is particularly attractive because it offers us a way to call for the legitimate restriction of free speech even in the absence of the possibility of codifying its socio-linguistic limitations as law, that is, without appealing to a legal-rights discourse particular to the sovereign nation-state. Kant (2006:75) was particularly concerned about the idea of a

global Leviathan that would have the legal ability to police the actions of states; he was well aware of the potential for such a global state to abuse its power. Without the ability to appeal to a legal framework as a means to policing the actions of states, Kant (2006:75-82) argues that the answer to global stability depends on what he refers to as "the internal perfection" of nation-states such that they will come to realize the necessity of controlling their actions. It will be suggested that Kant's argument offers us a way to conceive and appeal to the limitation of free speech without invoking a legal framework for doing so. Although we cannot appeal to a rights discourse to support the call for the limitation of speech, it will be suggested that such calls are nevertheless legitimate in a different, extra-juridical sense. Because of the absence of a means of legal enforcement, it will be suggested that the only solution is for nation-state governments to recognise the ethical imperative to limit free speech when prudence demands it. On the basis of such recognition, it is hoped that nation-states will voluntarily abide by international legislation that demands the limitation of free speech in certain contexts.

By way of illustrating this very different way of conceiving limitations on freedom of speech I shall briefly look at the decision by NATO to intervene in Kosovo during the Balkans conflict in March 1999. Such a case scenario is particularly pertinent for the purposes of this thesis because it demonstrates a way to conceptualize the notion of a "legitimate" action outside a "legal" framework. The decision by NATO to intervene in Kosovo was controversial because it was deemed "legitimate but illegal" (Wheeler, 2000:146). This example will show us that there are ways of legitimately calling for a moral code of conduct without appealing to a legal-rights discourse. Using Kant's (2006) framework, this thesis concludes by suggesting that it is possible to legitimately call for the limitation of free speech on an international level without appealing to a legal-rights discourse particular to the sovereign nation-state.

Chapter 1. The binding roots of free speech

1.1 Introduction

It is the objective of this chapter to trace the origins of the modern notion of free speech to the birth of the nation-state. Although the *concept* of free speech can trace its roots five hundred years before the birth of Christ to the Greek city-state of Athens, the modern *notion* of free speech and its association with individual liberty only emerged later with the birth of the modern nation-state. It is necessary to distinguish between a 'concept' of free speech, and a 'notion' of free speech. A *concept* is abstract and timeless. It is divorced from any particular socio-historical contexts. A *notion,* on the other hand, gains particular meaning from operating in a particular context or period. As Hargreaves (2002:3001) argues, free speech as a notion has had different meanings in different contexts. The understanding of free speech in Democratic Athens was different from an understanding of free speech in the context of the 'Enlightenment', particularly in its relationship to civil liberties and a democratic discourse. For the purposes of this thesis, it is necessary to trace the particular notion of free speech that emerged in the context of the nation-state and the democratic ideals associated with the rule of a democratic citizenry. Such an analysis of the notion of free speech and its emergence within the nation state is important because that context still determines our understanding of free speech today. If we want to engage the notion – its possibilities and limitations – we have to start with understanding this notion of free speech and how it came about in the context of the nation-state.

It is important to note that, throughout history, free speech has been justified as a means towards a particular end and not solely as an end in itself (Hargreaves, 2002:302). Within particular social-historical contexts, the notion of free speech has always been defended on the basis of a particular set of principles and beliefs. For the purposes of this thesis, it is necessary to look at how free speech has been justified as a means to two specific ends, namely truth and democracy. As two distinct arguments in favour of free speech, both the 'the argument from truth' and 'the argument from democracy' can be situated within the Enlightenment discourse that emerged in 16th Century western Europe and which still largely determines the possibilities and limitations of the way we think about freedom of speech. But first it is necessary to provide a very concise background to the concept "freedom of speech".

1.2 The roots of free speech

1.2.1 Free speech in the democratic city of Athens

According to Hargreaves (2002:5), the notion of freedom was inseparably bound to the Greek city-states and especially Athens. It is important to note that such freedom was not yet the individual freedom as it is associated with Westphalian nation-states. Nevertheless, such freedom in Athens allowed people to choose their own rulers and determine their own destiny. The fact that government by consent had succeeded government by compulsion was a sign of an early form of democracy (MacDowell, 1978:46). All adult male citizens of Athens became voting members of the *Ecclesia*, a council charged with making major decisions. The *Boule* consisted of a rotating Council of Five Hundred and was responsible for drawing up the agenda of the *Ecclesia*. A third arm of the Athenian democracy was made up of the *Dikasteria*, which consisted of up to two-thousand jurors who adjudged on private disputes and had the responsibility of calling the city's leaders to account (Hargreaves, 2002:5). As Hargreaves (2002:5) argues, free speech was an inseparable part of such a democratic order. Never before had democratic citizens been given the right to debate and determine rule on such matters as peace and war. Free speech was a necessary, though ancillary, right for the Athenian citizenry to participate in government. Hence, the equality of speaking rights became known as *isegoria* and was integral to the idea of the 'rule of the many' (Hargreaves, 2002:6). However, despite the profundity of the principle of *isegoria*, it was by no means applied universally. The right to participate in debate was a benefit only enjoyed by a privileged caste of native-born Athenian citizens and excluded women, slaves, and the large number of resident aliens in Athens that made up the merchant class. Although the Athenian notion of democracy bears a passing resemblance to the democratic notion of free speech synonymous with the Westphalian nation-state, Athenian democracy was exercised in a collective sense. Free speech could only be expressed by members of the polis and was not synonymous with individual liberty (Hargeaves, 2002:6). Hence, a person could only invoke his "right" to free speech as a member of a group rather than as a separate individual. Free speech also did not prevent the individual from being interfered with by the polis with regards to his private life. As Pericles (cited in Hargreaves, 2002: 6) stated:

> *We do not say that a man who takes no interest in politics is a man who minds his own business. We say that he has no business at all.*

A man's duty was always to the polis, even when the interests of the polis conflicted with his own individual interests. Despite the existence of a democratic framework in Athens certain forms of dissent were not tolerated (Mulgan, 1984: 61). For example, the philosopher Anaxagoras was exiled for spreading the blasphemous view that the sun was not a god at all, but a huge lump of stone 'larger than the Pelopennese' (Hargreaves, 2002:7). Anaxagoras had come to this conclusion after watching a meteorite fall to the earth. The politician Thucydides, too, was ostracized for opposing the building of the Parthenon. According to Thucydides, the city of Athens was decorating itself with temples as a harlot decorated herself with jewels, using tribute money stolen from Athenian allies (Hargreaves, 2002:7-8). Thucydides argued that the Allies had contributed the money in order to secure themselves from invasion by neighbouring states. Thucydides was banished from Athens for ten years for the sake of public well-being (Hargreaves, 2002:7).

Free speech in Athens did not extend to ideas that were thought to imperil the state. Athenian dramatists were also limited in their freedom of expression. They had to observe the laws relating to impiety and blasphemy and could be charged with sedition (Hargreaves, 2002:7). As Muller (1962:32) argues, despite the fact that Athens was the freest state in the ancient world, the liberty of expression had well-recognised limits. The notion of free speech in ancient Greece differed from the modern, democratic – and, I shall argue, Westphalian – notion of free speech in a number of important respects. Free speech in ancient Greece was not synonymous with individual liberty but only existed in relation to the polis. Free speech was also limited to male citizens of Athenian society of voting age. This brings me to a more precise discussion of our modern understanding of the notion of free speech.

1.2.2 Free speech: the Enlightenment and the nation-state

A very different notion of free speech developed in the Enlightenment period of the 16th century and was marked by the emergence of the nation-state. As Hegel (cited in Plant, 1973:18) points out, ancient Greece was characterised by a cultural and social homogeneity that ceased to exist with the emergence of the Enlightenment period. Hegel (Plant, 1973:18-19) was of course referring to the breakdown of an all-round capacity with regards to the participation of man[1] in civil society. Greek culture was homogeneous to the extent that there were no basic divisions or discrepancies between modes of experience. Civil society in Greek

[1] Where I use the generic term 'man' as a reference to human beings as a whole, I do so to conform with its use in traditional philosophical texts such as those of Milton (1929), Mill (1971) and Locke (1689). I am aware of the objection that such a term excludes women.

culture did not show the same level of complexity as Western Europe during the Enlightenment period. Societies in Western Europe differed, however, in that the increasing complexity of society synonymous with the Enlightenment period meant that civil society had become increasingly fractured or fragmented. The social cohesion associated with early Greek societies was being replaced in Western Europe with an autonomous individuality that was a product of societal fracture. Such changes in civil society had ramifications for the notion of free speech. Particularly important here was the manner in which free speech discourse started to revolve around the rights of the individual as opposed to the well-being of the nation-state or the polis associated with ancient Greece. According to Ferguson (cited in Plant, 1973:24),

> *[t]o the ancient Greek... the individual was nothing, the public everything. To the ... modern in too many nations of Europe the individual is everything and the public nothing ... We in times more polished employ the calm we have gained not in fostering zeal for those laws and the constitution of government to which they owe their protection, but in practising apart and each for himself the several arts of personal advancement or profit.*

The emergence of the Enlightenment symbolised the transformation of a person's ability to invoke rights solely as a member of the polis or community to the ability to invoke rights as an individual. Writing much later, the Frenchman Diderot began his work on the *Encyclopedia* in 1750 with the avowed intention of indoctrinating public opinion with the ideals of the Enlightenment (Hargreaves, 2002:56). Although the notion of free speech came relatively late to France, philosophers such as Voltaire and Diderot were already beginning to integrate the concept of free speech with the emerging ideas of the Enlightenment. It is crucial to point out that the evolution of modern free speech and its relationship to both "the argument from democracy" and "the argument from truth" was a slow process and emerged as a result of this Enlightenment discourse (Hargreaves, 2002:5-7). Along with the role of the Enlightenment, it is important to discuss how the notion of democratic free speech began to take shape in England in the 16th Century – particularly with regards to the shift in power from a monarchy or kingdom to a parliamentary democracy more commonly associated with the Westphalian nation-state.

1.2.3 Free speech in early modern England

Although the creation of the Magna Carta in Britain in 1215 signalled the beginning of the end of the absolute power of the monarchy in Britain, free political or religious speech was

still not tolerated by the authorities for a long time. In 1275, Parliament outlawed "any slanderous News ... or false news or tales where by discord or slander may grow between the King and the people ..." Thus, if we are to trace the origins of our modern notion of free speech, it is necessary to historicize the concept's emergence within the historical period of transformation in Britain that resulted in a shift in power from the monarch to citizenry and the redefinition of territoriality in terms of state formation, or the movement from a monarch to a parliamentary nation-state. Of particular importance is the role played by the Civil War that occurred in England between 1644 and 1649 and the Glorious Revolution of 1688.

The civil war between the Parliamentarians under Cromwell and the Monarchy under Charles I was to provide the setting for John Milton's *Areopagitica,* which was written in 1644 (Schwoerker, 1929:168). Milton's document was a response to the looming threat of an authoritarian state that would emerge with the overthrow of the Royalists in 1649. Anticipating this perceived threat, Milton's document is acknowledged as one of the first pleas directed at the British government to limit licensing and publication laws that constrained the ability of citizens to publish openly and freely (Hargreaves, 2002:101). The return of King Charles II from exile in 1660 was to symbolize a return of the monarchy to power over parliamentary rule (Hargreaves, 1992:55) evidenced in the attempt of Charles II and James II to free themselves from such restraints. Charles II returned to revoke the "rule of law" that had been formally declared in 1660 and which centralized sovereign power in the hands of the British government rather than the monarchy. However, the Glorious Revolution of 1688 re-established parliament as the supreme commander of British politics under King William, the ruler of Holland (Schwoerker, 1992:74).

The re-emergence of parliament as the supreme ruler of the land was to provide the basis for John Locke's famous work, *An Essay Concerning Human Understanding* (1694). Although Locke endorsed the belief that power should reside with the parliament and not the monarchy, like Milton he emphasized the need for the "sovereign" citizenry to retain power over the state. Writing in exile, Locke (1694) argued for the rights of citizens to "rouse themselves and endeavour to put the rule into such hands which may secure to them the ends for which government was first erected". Similarly to Milton, Locke's essay opposed press licensing on the grounds that free speech was a necessary means to ensuring that power remained with the sovereign citizenry for, without access to unlimited speech, citizens of the state would not be able to engage in rational deliberations when making decisions about how

to govern the nation. The arguments put forward by Milton (1684) and Locke (1694) provided the basis for the "argument from democracy" which will be discussed further on in this chapter.

The arguments forwarded by Locke (1694), Milton (1644), and later John Stuart Mill (1859), also provide the foundation for "the argument from truth" which will be discussed in the next section. It is important to note that, although "the argument from truth" and "the argument from democracy" are coterminous, it was not the primary intention of these thinkers that free speech should exist solely for democracy's sake (Hargreaves, 2002:301). It is true that the modern notion of free speech emerged as a product of these thinkers, but Mill, Milton and Locke proposed free speech for different purposes. Both Mill and Milton opposed government censorship on the grounds that truth can only emerge in an environment where opinions are freely expressed. Despite publishing his *Letter of Toleration* (1689), Locke still maintained that a distinction should be maintained between political rights and religious rights (Hargreaves, 2002:302). The point of mentioning this is that, although the modern notion of free speech emerged out of the nation-state, the kind of democratic ideals that exist in most countries today did not really come to fruition until much later. What is important for the purposes of this thesis is that the roots of modern free speech and their association with democratic governance are a product of "the argument from truth" and the Enlightenment. While the emergence of the democratic nation-state made our modern understanding of free speech *possible*, it will later be argued that the same nation-state context also and at the same time *limited* the understanding of free speech in important ways. How we are to think about this co-incidence of possibility and limitation is the subject of Chapters Three and Four. In the rest of this chapter, I shall elaborate on the meaning of freedom of speech with reference to two analytical arguments, one "the argument from truth" (henceforth "the truth argument") and two, "the argument from democracy" (henceforth "the democracy argument").

1.3 The "Truth Argument"

Of all the arguments that have been forwarded to justify a principle of unrestrained free speech, the most pervasive and ubiquitous has been the truth argument (Schauer, 1982:15). In order to understand the reasons why such an argument for unrestrained free speech has traditionally been so popular, the argument has to be contextualized within the Enlightenment discourse of mid 18th century Europe. In what is regarded as the birth of the social sciences, the Enlightenment movement, which is particularly associated with the French Enlightenment

era, aimed to assert scientific rationalism as the pinnacle means of accumulating "knowledge" about the world (Osborne, 1998:1-2). The argument is based on the principle that an "objective" truth exists independently of cultural relativity and subjective human interpretation. Juxtaposed against the existence of an "objective" truth is "absolute" falsity. Thus, the ontological view that "truth" or "knowledge" can be accumulated through the senses is allied with the *a priori* belief that absolute truth can only be verified through a process of rationality and commonsense reasoning. We can assume an opinion to be "true" if it makes logical or rational sense or we have direct evidence of the opinion being true through observation (Osborne. 1998:1-2). The emergence of Enlightenment thought is synonymous with the displacement of religion and more importantly of the church as guardian of knowledge. In the context of this thesis, what is more important is the fact that the emergence of the nation-state as the principle sovereign entity in Europe coincides with the emergence of the Enlightenment era (Osborne, 1998:29-30). Thus, the role of the church as the dominant sovereign entity within a monarchical system was to be replaced by the birth of the nation-state and modern science. As Osborne (1998:31) points out, "in the age of Enlightenment truth is closely related to the various ways in which humans seek to govern".

Control over humans is not determined solely on the basis of sovereignty or coercion but by appeals to the truth. In order for the nation-state to govern, it has to justify decisions based on rationality and scientific reasoning (Osborne, 1998:31). As Plant (1973:32) argues, the project of rationality and the emergence of scientific modernism are synonymous with the nation-state. The shift from oligarchic and monarchical systems of power to the secular nation-state is rooted in scientific principles that emerged with prominent Enlightenment thinkers in the 17th century such as Rousseau (1971) and Hobbes (1914). The "truth argument" has been particularly pervasive because of the commonly held belief that it leads to the discovery of absolute truth (Schauer, 1982:15). Such an argument is rooted in the positivist, scientific paradigm of modernist thought for, as Hargreaves (2002:302) argues, it is debatable whether truth would necessarily emerge in the "marketplace of ideas" if ideas were allowed free expression. Philosophical thinkers like Nietzsche have long questioned the association between power and knowledge. Is truth merely a subjective entity to be determined by those in power? Post-modern theorists would question the existence of objective truth and insist on acknowledging the relationship between truth and power – that is, that power is constitutive of truth and *vice versa*.

In the context of Western modernity, however, the "truth argument" is premised on the idea that truth is not only possible but also a means of good governance. The emergence of objective truth was seen to be synonymous with absolute "freedom" and the understanding that only through freedom could truth be manifested. As Osborne (1998:31) states, such an idea is prevalent in Mill's *On Liberty* (1859) where freedom of opinion is a precondition for the emergence of truth, which is, in turn, a precondition for good governance.

Historically, then, the emergence of rationalism is coterminous with the emergence of the nation-state. The philosophical reasoning behind a principle of unrestrained free speech rests on the belief that open discussion, free exchange of ideas, freedom of enquiry and freedom to criticise are imperative conditions in the search for such absolute truth (Schauer, 1982:15). The placement of limitations and conditions on the ability to criticise existing beliefs would, it has been argued, make it difficult if not impossible to distinguish between truth and falsehood. Instead we will inevitably end up wandering aimlessly between the two.

The "truth argument" rests on similar principles to *laissez faire* free-market capitalism. In the same way that the free market will function without government interference, the theory argues that truth will inevitably emerge when all opinions may freely engage in the "marketplace of ideas" without government hindrance or regulation (Schauer, 1982:16). By allowing competing ideas and opinions to engage with each other freely, we are providing a platform upon which 'truth' can emerge. By testing opinions within the marketplace, we are subjecting an opinion to a more reliable test than the appraisal of any government or individual. As already mentioned, such an idea has been criticised for two reasons. Not only would post-modernists question the existence of an "objective" truth that will emerge independently of those who have a power-related interest in expressing it, they would also argue Western societies have traditionally been dominated by liberal-democratic, capitalist ideologies. In the "marketplace of ideas", particular notions or ideas concerning truth will emerge as a product of certain dynamics related to capitalist ideology. There is a strong link between truth assertions and power.

The famous Darwinian theory of the "survival of the fittest" is an apt way to describe such a process. According to the logic of this theory, any opinion that manages to withstand criticism within the "marketplace of ideas" can claim to be "truthful". Outside of the "marketplace of ideas" it is doubtful whether an opinion would be subjected to as much scrutiny and criticism. Thus, according to the "argument from truth", unhindered free speech

is a necessary/indispensable means to acquiring the truth rather than existing as an end in itself.

It is clear, then, that the emergence of post-modernism has serious ramifications for such a justification for absolute free speech for if we can no longer acknowledge the existence of an "absolute" truth, but only a range of differing truths, the "truth argument" becomes redundant. Can we still invoke an absolute/necessary need for "absolute" speech if we can no longer ensure that it will lead to an objective truth?

According to Schauer (1982:15), the prominence of the "truth argument" principle is evident in the ubiquitous free speech discourse surrounding the nation-state and its relationship with its citizens. In the United States, for example, the basic tenets of the principle are evident in the writings of judges responsible for outlining the theoretical foundations of the First Amendment in the United States constitution. Holmes argues that "the best test of truth is the power of an opinion to get itself accepted in the competition of the market" (cited in Schauer, 1982:15). Frankfurter lends support to Judge Holmes by arguing that

> *... the history of civilization is in considerable measure the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other truths. Therefore the liberty of man to search for truth ought not to be fettered, no matter what orthodoxies he may challenge (cited in Schauer, 1982:16).*

Thus, the theoretical foundations of the First Amendment in the United States are built on the principle that the government should place no restrictions on free speech of any kind. Instead speech should be allowed to operate freely in order to ensure the maximum potential for truth to reveal itself.

If the theoretical foundations of constitutional documents such as the First Amendment have been driven by this particular argument for truth, it is because the history of free speech literature itself is dominated by this particular doctrine. John Milton's *Areopagitica* (1644) is commonly regarded as the earliest comprehensive defence in favour of unrestricted free speech (Canavan, 1971:50). It is interesting to note that Milton's discussion centres once again on the relationship between free speech and the nation-state. His argument is premised on the idea that the government is the greatest potential threat to unhindered free speech. Milton argued in favour of restricting government censorship and restrictions on publishing and licensing. According to Milton (1929:500), the removal of such restrictions will enable ideas and opinions to be tested and openly critiqued, thus enabling society to exchange truth

for error. Milton (1929:500) maintained that the Long Parliament, by its "licensing and prohibition", had injured truth. As Milton (1929:501) states, "Let truth and falsehood grapple; who ever knew truth put to the worse, in a free and open encounter?"

Following on from Milton, John Stuart Mill's famous *On Liberty* (1859) is also regarded as one of the earliest defences in favour of liberty of thought and discussion (Schauer, 1982:16). Like Milton, Mill subscribes to the view that the search for "truth" should be the ultimate goal for any society. Mill's justification for the right of speech to be completely unhindered is premised on the assumption that unrestricted freedom will increase the general utility of society. As Mill (1971a: 256) argues, utility can be defined as happiness, pleasure, or the satisfaction of desires or preferences. Thus, the fundamental idea behind utility is that the best action is the action that leads to the maximum amount of utility possible. If we define utility in this context as the satisfaction of a particular desire – in this case the accumulation of truth – Mill's justification for unrestricted free speech is utilitarian because such a process will lead to the emergence of truth, hence, the utility has been increased. The acquisition of truth is synonymous with absolute liberty and the right to question and disseminate opinions at will. While this view is contentious, before it can be criticised it will be necessary to outline the main tenets of Mill's argument.

1.3.1 Mill's utilitarian justification for free speech

Mill (1971b:142) argues that the unpopularity of a particular view is not a satisfactory reason to silence it in the public domain. As he states:

> *If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind (Mill, 1971b:142).*

For Mill, the might of the majority over the minority has no role to play in the dissemination and restriction of opinions and ideas. Even if a view is universally disliked by a majority of people, it is unjust to restrict such an opinion as to do so would be to the detriment of greater society as a whole. To suppress such views would be to "rob the human race, posterity as well as the existing generation, of the chance to exchange truth for error" (Mill, 1971b:142). Thus, according to Mill's reasoning, regardless of whether a particular view is true, false or a mixture of the two, society will never gain by refusing such a view expression in the public domain. By suppressing a true opinion society loses the opportunity to rectify a false belief that was originally believed to be true (Cowley, 1963:32). Even if we suppress an opinion

that turns out to be false, we still lose out on the chance to reaffirm an originally accepted true view (Wolff, 1996:118). For example, if a large portion of society was of the opinion that the earth was round but was not entirely sure, by offering critics the opportunity to express their arguments that the earth is flat society has the chance to add certainty to the view that the earth is round. Credibility is added to the "truthful" opinion because it has been critiqued and has emerged intact, thus adding more certainty to the true belief. However, despite the fact that credibility would be added to a true view were it to be challenged by a view that turned out to be false, one must ask whether allowing a false view is necessary or inescapable to add certainty (Schauer, 1971:20). For is it not possible to be absolutely certain of a belief without juxtaposing it against a false view?

Mill responds to this problem by arguing that we can never assume infallibility with regards to an opinion. As he points out, there is a difference between our being certain of a view and the view itself being certain (Mill, 1971b:181). There is plenty of evidence from history of opinions that were considered to be infallible and have later proven to be false. The original belief that the earth was flat is one such example. Wolff (1996:119) also alludes to an example from history where the ancient library in Alexandria was considered to be of no use by the Caliph Omar who had control over the fate of the library when the Arabs invaded Alexandria in 640AD. The Caliph argued that if the library contained the same information as the Koran, it was of no use as the Koran already contained all the necessary truths. However, if the library contained information that contradicted the Koran, the literature should be destroyed for leading people away from the "truth" contained in the Koran. Wolff (1996:119-120) specifically alludes to this example to demonstrate that society can never claim infallibility with regards to beliefs.

1.3.2 Rousseau's response to Mill

As supporters of the argument from truth, both Milton and Mill subscribe to the view that the replacement of falsity with truth is always a desirable objective for society. Thus, the search for truth is necessary for increasing the maximum utility possible for society as a whole. By arguing in favour of unhindered speech, both theorists also subscribe to the view that truth will inevitably emerge in the "marketplace of ideas" so long as there is no interference from the state (Schauer, 1982:18-19). Although offered as a retort to Mill's claim that it is in society's interest always to search for the truth, Jean-Jacques Rousseau's response can be considered as a repost to the "truth argument" principle as a whole.

In his *Discourse on the Sciences and the Arts* (1649), Rousseau (cited in Wolff, 1996:120-21) addresses the specific question of "[w]hether the restoration of the Sciences and the Arts has had a purifying effect on morals". His analysis, however, is also directed at the broader question of whether it is always better to know the truth than to remain ignorant. In a direct plea to God, Rousseau states, "Almighty God! Thou who holdest in Thy hand the minds of men, deliver us from the fatal arts and sciences ... give us back ignorance, innocence, and poverty, which alone can make us happy and are precious in Thy sight" (cited in Wolff, 1996:120-21). Rousseau highlights the possibility that there are times when the happiness of society as a whole is increased when opinions are suppressed. Regardless of whether they are true or false, certain opinions can have a detrimental affect on the happiness of society as a whole. Rousseau's argument seems to be based on the vigilant need to protect a breakdown in society's moral cohesiveness (Wolff, 1996:121). One could argue that morals and values are the cohesive bond that prevents society from falling into selfishness and moral decay. Hypothetically, regardless of whether a belief in a "god" is proven to be false, such a belief is important for the stability and happiness of society as a whole. The maintenance of the false belief is necessary to prevent society from disintegrating into a state of social upheaval. Rousseau's critique raises a pertinent objection to Mill's justification for unrestricted free speech. If Mill's argument is based on the premise that the revelation of truth will increase the general utility within society, Rousseau's objection surely highlights a major flaw in Mill's argument for it is conceivable that the dissemination of "true" beliefs may potentially decrease happiness in society (Wolff, 1996:121). Such a criticism is also directed at all theorists who defend the "truth argument". The principle subscribes to the belief or is premised on the assumption that the revelation of truth is a desirable end in itself. Thus, the search for truth does not need to be contextualized within a greater means to an end such as the increase of utility in society. The acquisition of knowledge is merely said to be a worthy aim in itself (Schauer, 1982:19).

Rousseau's argument is not limited only to moral or ethical opinions. He also indicates the possible dangers surrounding the dissemination of scientific truths. On the basis of Rousseau's argument, whether we allow opinions to be disseminated in society should not be based on their contribution to knowledge but rather on their utility for society. Thus, if an opinion or belief is likely to decrease happiness in society, there is an argument to suggest that such an opinion should be suppressed.

While Rousseau's reasoning is convincing, Mill responds with a criticism of his own. How are we to decide which opinions are detrimental to the general happiness and stability of society and which are innocuous? As Mill himself states, "The usefulness of an opinion is itself matter of opinion; as disputable, as open to discussion, and requiring discussion as much as the opinion itself" (Mill, 1971b:148). Thus, Mill points out the problem of deciding which opinions should be suppressed and which should not. How are we to know what effect opinions will have on society if we do not allow them to be expressed? It would require tremendous foresight to predict the detrimental effect of an opinion before it has even been disseminated. Mill (1971b:161) also rightly points out that we would need a select group of individuals to decide whether opinions should be suppressed. But despite the possibility that such a hypothetical panel would be knowledgeable on the effects of opinions, the decisions they make would not exclude a certain amount of guesswork or subjective opinion. This dilemma results in an obvious conundrum. There is the danger that the suppression of opinions would be justified with regards to the protection of society, but in actual fact such individuals may just find the opinions disagreeable with their own personal beliefs (Wolff, 1996:125). In other words, the protection of society is merely a front for advancing and protecting their prejudices. Truth is inseparable from power.

Such a problem is similar to one of the main criticisms aimed at Hobbes's version of social contract theory. Hobbes (1914) argues that individuals in a state of nature cannot form a social contract because of a lack of trust. However, as Hampton (1986: 190) points out, if people cannot form a contract in a state of nature, this begs the question of how they will commit to a contract to leave a state of nature. For if humans do not trust each other out of fear of making themselves vulnerable to their fellow men, why would they submit to a sovereign entity such as a government that has complete control over their fate? The creation of a state would result in a centralization of power in the hands of a few men (Hampton, 1986:190). The resulting apprehension is understandable as there is no reason to suspect that the state will not take advantage of this vulnerability and exert absolute control over humans who live under the rule of the state. This would put them in an even more vulnerable position than previously existed in a state of nature because the state is being given *carte blanche* to exert absolute control over all affairs (Hampton, 1986:190-1). This analogy is useful because it highlights the logical paradox alluded to by Mill in his response to Rousseau. If we were to select a panel of experts who have the sole authority to permit or restrict free speech, how would we go about such a process? This begs the question of whether all opinions would be

entertained or only the opinions of a select few. Who gets to decide which people sit on the panel? As with Hobbes's social contract, we encounter a fundamental circularity when we attempt to select representatives who control access to free speech – which really is the question of power and censorship. The solution to the problem inevitably duplicates the problem it tries to solve.

Despite the strength of Mill's objection, we must add that just because we are uncertain whether the dissemination of beliefs will cause harm, this does not give us *carte blanche* to say that opinions should not be suppressed at all. Mill still needs to prove that opinions will not have a detrimental effect on society (Wolff, 1996:122). Rousseau's argument sounds logical if "true" opinions are allowed to be expressed. However, we can only ascertain that they are true once we allow them into the arena. But is there anything wrong with allowing the expression of "false" opinions? Such an argument is purely academic as there is no way of knowing whether an opinion is absolutely "true" or "false" even when it has been expressed. Thus, we never have the luxury of knowing the effect of an opinion prior to its dissemination in the public domain. Although he never explicitly states it, Rousseau might argue that even "false" beliefs have the potential to cause harm simply through their ability to offend others. It is also possible that a belief will be considered "true" until it has been proven "false" and that during this period such an opinion has the potential to cause great harm. Mill (1971b:148) argues that we should always take "false" beliefs seriously. Such opinions often have the ability to usurp "true" beliefs simply because the "true" belief has not been forced to defend itself and refine its arguments in the past. In order to ensure that our "true" beliefs stand up to criticism, we need to keep testing them against differing and contradictory opinions. As Mill (1971b:161) states, "[i]f we do not consider challenges to our opinion, then however true it may be, if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth". As an example of such a scenario, Wolff (1996:122) points to the example of evolutionary theory in the United States. While acknowledging the existence of flaws in the evolutionary argument, Darwinists never seriously considered the possibility that a well-prepared and rigorous argument against evolutionary theory would be prepared by skilful, religious fundamentalists. Proposing their own theory of "creation science" as an alternative to evolutionary theory, religious academics have managed to catch the evolutionists off guard. Such an example indicates the dangers of a lack of competition in the "marketplace of ideas". In order for an argument to remain sound it has to keep refining itself against a number of opposing and contradictory beliefs and opinions. Such a view is

synonymous with the role that testing and falsifying has in Karl Popper's epistemology. Popper (1964:34) argued that rather than attempting to determine whether a view was true, we should instead attempt to refute such a view by testing it against competing hypotheses. If the belief is not found to be flawed against competing hypotheses, the belief can be said to be true. Once again, Mill's argument holds the search for "truth" to be the key to happiness and utility in society. Competition among competing ideas is crucial if "truth" is to survive. Mill seems to stubbornly support his belief that the search for "truth" is paramount (Wolff, 1996:123). He does not seem to agree with Rousseau that the suppression of a belief is mitigated by circumstances in which the general utility of society is at risk. Mill (1971b:181) would seem to stand by his opinion that "truth" should persevere.

That said, Mill does concede that there are occasions when it is necessary to limit freedom of expression. While he argues that we cannot always know when an opinion will have a detrimental effect, when the effects of such an opinion are blatantly clear he agrees that there is a need for suppression – that is, when emotional or physical harm is an obvious result. Mill (1971:184) states,

> *[a]n opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer.*

Such a scenario would be an example where the likelihood of an opinion causing harm is quite high. It is not so evident what Mill would say if the evidence were not so obvious. Would he still endorse the suppression of beliefs that *might, in the opinion of some*, cause harm or unrest? If there were a lack of certainty would he still be willing to concede his belief that speech should be unrestrained? Thus, as Wolff (1996:123-124) argues, Mill has been forced to concede that a government may suppress the speech of citizens when it has the capability to inflict harm upon others.

The idea that free speech can be suppressed when it poses a danger to others is indicative of the ambivalent relationship of modern free speech to the nation-state. While the nation-state makes modern free speech possible as individual, democratic right, the nation-state also enacts limitation on that right in the sense that government is entitled to rescind free speech when it infringes other human rights or when it poses a grave threat to the continued existence of the community s such. What Mill seems to be suggesting is that the democratic right to free speech is not always compatible with other civil rights, such as the right to be

free from harm. However, this raises the problem of the slippery slope: can we definitively define what we mean by harm? Mill defines harm as "the subjection of individual spontaneity to external control, only in respect to those actions each of which concern the interest of other people" (Mill, 1971b:136). It would not seem implausible to suggest that almost all actions can potentially cause harm to someone else. Mill (1971b:136) attempts to solve this problem by dividing actions into "self-regarding" and "other-regarding" actions. "Self-regarding" actions are those that only have consequences for the perpetrator. If such an action "harms" another person, it is only by their consent. "Other-regarding" actions are actions that "harm" or involve at least one other person (Mill, 1971b:136). An example of a "self-regarding" action would perhaps be someone who prays by himself in his room. An example of an "other-regarding" action would be someone who went onto the street corner and started preaching his or her religion to passing pedestrians. Such an action could be considered harmful because it is an attempt to subject the individual to external control.

At a first glance, Mill's solution would seem to distinguish between actions that cause harm and those that do not. A person praying alone in private would seem to cause nobody harm. However, were I trying to convert that person to my own particular religion, they would be doing me great harm by refusing to comply with my wishes. As Wolff (1996:124-25) points out, one would be hard pressed to highlight a "self-regarding" action that is completely divorced from harming others. Hypothetically, Mill might respond by arguing that the effects of such actions are so minimal that they do not warrant sufficient concern. We might decide that we should only concern ourselves with actions that cause physical hurt or extreme forms of emotional distress. The point, however, is that the distinction between a "self-regarding" and an "other-regarding" action is not absolute or clear cut. In other words, both have the ability to create "harm" simply because both actions inevitably encroach on other people. It is pertinent to note that it was important for Mill to retain such a distinction if he were to justify his principle of unhindered speech. An analysis of his writings would suggest a weary awareness of the dangers of the state and its ability to hinder free speech. Mill's (197b:126) objective in *On Liberty* (1859) was to chart "the nature and limits of the power which can be legitimately exercised ... over the individual". Despite the fact that he acknowledged the need for the state to restrict speech in certain contexts, he wanted such restrictions to be as limited as possible. Easton (1994:1) highlights Mill's concern by saying, "stimulated by his fears over the new majoritarianism, Mill saw it as crucial to identify a clear limit to

interference from the state and from custom, otherwise life for the individual would become intolerable".

It was Mill's prerogative to create a "Harm Principle" that would be able to outline the specific boundaries between the state and its citizens. Thus Mill (1971b:135) argues that the function of such a principle is: "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection". Mill stipulates the boundaries of the principle in two succinct points. Firstly, he argues that society may not regulate the actions of an individual that are purely "self-regarding". In other words, if the actions of an individual have no repercussions upon anybody else, society has no right to regulate such actions. The most society can do is offer advice, persuasion, instruction or tolerance. Secondly, he argues that society may intervene in the actions of an individual that have an effect on others. Thus, if the actions of an individual are "other-regarding", society is warranted in engaging with such actions in a manner deemed necessary. Such a response may be pursued through legal or social means (Mill, 1971b:135).

As has been mentioned however, the distinction between a "self-regarding" action and an "other-regarding" action is so vague as to render the "Harm Principle" meaningless when it is applied outside of its theoretical context. As Wolff (1996:125) points out, Mill would not be interested in such petty trivialities. Mill was at pains to differentiate between actions that individuals found intolerable purely because they found them disagreeable and actions that caused genuine harm (Wolff, 1996:125-26). Mill's definition of harm as "the subjection of individual spontaneity to external control, only in respect to those actions of each, which concern the interests of other people" (Mill, 1971b:203) is useful for explaining exactly what constitutes harm. However, what did Mill mean by the term "interests"? Wolff (1996:125) argues that although the term is used most commonly to refer to financial matters, Mill was not only concerned with people's financial well-being. His term "interests" also extends to an individual's personal safety and security. Thus, the prevention of murder, rape and theft would be considered in an individual's interest. Through an analysis of the "Liberty Principle", Mill's understanding of free speech could be perhaps be interpreted as a right to disseminate opinions or beliefs so long as the repercussions of such beliefs would not be harmful to other citizens. Thus Mill (1971b:205) outlines the boundaries of his "Liberty Principle" by saying:

> *Each person should be bound to observe a certain line of conduct towards the rest. This conduct consists ... in not injuring the interests of one another; or rather certain interests which, either by express legal provision or by tacit understanding, ought to be considered as rights.*

Mill's "Liberty Principle" is sound in theory but becomes problematic on a practical level because the list of activities that can potentially cause harm is so vast that almost any activity could be regarded as an "other-regarding" action.

The point of this discussion has been to highlight the historical foundations and principles of free speech by situating it in the Enlightenment discourse that emerged in the mid 18th century. Both the truth and democracy arguments rely explicitly or implicitly on the epistemological limits of nation-state discourse – individuals conceived as citizens living in a territorially bounded space ruled over by a sovereign authority – in order to illustrate why the pursuit of truth is a good thing. By highlighting the arguments of Milton (1929), Mill (1971a,b) and Rousseau (1971), the objective of this discussion has not only been to indicate the problematic notion of absolute unhindered free speech but rather also to make it clear that our contemporary understanding of the notion of free speech has emerged from the contextual canon of the relationship between the nation-state and its citizens. So, for instance, part of Milton's (1929) argument in *Areopagitica* is an attempt to prevent the British government from placing restrictions on publishing and licensing and Milton acknowledges that the existence of licensing is a tacit agreement that as a sovereign entity (or government) it has the authority to invoke or revoke the rights to free speech. The justificatory arguments put forward by Mill and Milton in favour of unrestricted speech have to convince the state that the absence of restrictions will be beneficial rather than detrimental to society constituted as nation-state. For is not the foundation of consensual contract theory that the nation-state's sovereign right to regulation over its citizens is dependent on its ability to protect such citizens from harm? Having provided a discussion of the "truth argument", it is now necessary to turn to a discussion of the "democracy argument".

1.3.3 Free speech and the ambivalence of sovereignty

Both Mill and Milton are aware that the success of their arguments depends on their ability to convince the state that no harm shall come from unregulated speech. It is important to note that Mill's and Milton's discussions of rights take place within a nation-state discourse. The particular context in which their discussion of rights takes place would have no meaning outside of the nation-state. Outside of the nation-state, there would be no need for such a

justification. In other words, outside of the boundaries of the nation-state, there is no need to justify unhindered speech on the grounds of stability. Outside of the nation-state, moreover, we cannot engage with arguments for and against the limitation of free speech within nation-state discourses. How can we refer to citizens without a nation-state? If the nation-state did not exist, the word 'citizen' would have no meaning. Even when we talk about an individual's right we mean the citizen's rights (the questions of human rights and an emerging global citizenry inhabiting a global civil society aside for the moment). Thus, it is important to note that the language we have traditionally used to debate free speech is firmly canonised within the context of the nation-state and its "sovereign" right to govern its citizens.

1.4 The "Argument from Democracy"

In a similar way to the "truth argument", the "democracy argument", as Schauer (1982:35) refers to it, has had a substantial impact on free speech legislation in many Western democracies – most notably the drafting of the First and Fourteenth Amendments in the United States and the Magna Carta in Britain. The "democracy argument" requires the *a priori* acceptance that *democratic principles* are crucial for the successful organization and governance of *the state* (Schauer, 1982:35, emphasis added). Crucial in this statement is the close nexus assumed to exist *a priori* between the right to freedom of speech, democracy and the nation state. While the logic of the "truth argument" can be applied to any form of social organization, the "democracy argument" cannot be applied to autocracies or oligarchies. Any defence of unrestrained speech based on the "democracy argument" must involve a basic acceptance that a state based on democratic principles is the best form of governance. Although autocracies and oligarchies still exist, they are far less prominent than in recent centuries. The belief in democracy as the best model of governance is becoming more universally accepted around the globe (Schauer, 1982:35-36). As a political model, democracy can trace its roots back to nation-states in Western Europe such as Britain and France and particularly to the writings of theorists such as James Mill, John Stuart Mill and Alexis de Tocqueville (Jacobs, 1997:4). The "democracy argument" maintains that free speech is an indispensable component of any democratic system. Democracy is premised on the idea that the population of a nation-state is "sovereign". In other words, actual power rests with the citizens of the nation-state. One of the foremost articulators of the "argument from democracy" is the American political philosopher Alexander Meiklejohn.

Meiklejohn (1965:1) envisioned the idea of a nation-state democracy as a larger manifestation of the participatory small town democracies that existed in the United States in the 18th century. In a small town, all members of the town assemble in a hall and vote on decisions that need to be made. Under such a system, there are no political representatives but only a moderator to chair the meeting and to make sure that everybody's opinions are heard. Members of the town propose ideas, debate those ideas and then vote on whether they should be implemented. The government is elected by the citizens to represent their interests and to satisfy the needs of the general population (Meiklejohn, 1965:38). Absolute power rests with the citizens of the town. Meiklejohn (1965:38) argued that nation-state democracies were merely a larger version of the small town meeting system. Despite the size and complexity of the modern nation-state, Meiklejohn (1995:38) argues that this should not detract from the fact that sovereignty still rests with the citizens of the state. Sovereignty implies that the power to implement decisions rests with the people and can only be endorsed by the people themselves. Political leaders are public servants designed to make sure that the wishes of the people are carried out (Meiklejohn, 1995:38). It is obvious why proponents of this system would argue that unrestrained speech is an absolute necessity. If the citizens of a nation-state are vested with the sovereign right to make decisions, freedom of speech is necessary to provide the sovereign electorate with all the information it needs to exercise its sovereign power. Without having access to all information, the citizens of a nation-state will not be in a position to make the most rational choice when deliberating over which decisions to implement. Because the citizens of a state cannot vote intelligently without having access to all available information, one may argue that denying the citizenry the right to information is as serious as denying them the vote (Schauer, 1982:38). Secondly, since governmental officials are essentially civil servants who are accountable to the people, freedom of speech is a necessary means of criticizing governmental officials when they fail to deliver on the demands of the citizenry. If the citizens of the nation-state are sovereign, the government officials are the servants of the citizenry. Any suppression of the citizenry's demands is inconsistent with the notion of a government that exists to represent the demands of the people. Hence, we would experience a breakdown in democracy were speech to be in any way suppressed (Schauer, 1982: 38-39).

Although, from a narrow interpretation, Meiklejohn's argument is convincing the "democracy argument" is problematically simplistic. The existence of differing models of governance in a democracy precludes the idea of the classical "town-meeting" system as

being the only viable democratic model. Jacobs (1997:17-19) highlights differing types of democratic models: a "Classical Model", which describes a participatory democracy and an "Elite Model" which is similar to a representative democracy. While the "Classical Model" of democracy is the model that directly appeals to Meiklejohn, a democratic state is not incompatible with an "Elite Model". The "Classical Model" is where the citizens of the nation-state play a direct role in the decision making process of governance. While this model may have been suitable for small constituencies it is highly impractical for a nation-state with a large population. Allowing every citizen the chance to express their opinions and have their desires represented would be next to impossible. We also have to question whether the "sovereign" citizenry are capable of making the right choices even when they have access to all available information. The "Elite Model" is different to the "Classical Model" in that it advocates a democratic system where the citizenry choose and elect representatives who make political decisions in the interests of the people (Jacobs, 1997:17-19). Under an "Elite Model", although political representatives would still be servants of the people, they would be responsible for making decisions deemed to be in the best interests of the general citizenry. Thus, the major difference between the two models is whether the citizenry decide what is in their own interests, or whether the governmental officials decide on behalf of the general citizenry (Jacobs, 1997:19). Thus, if the government decides that it is in the general interest not to release all information or to suppress criticism of the government, is it necessarily undemocratic? If the general citizenry have elected government officials into power to decide what is in their interests, it tacitly amounts to an endorsement that the government officials know what is best.

It is necessary to point out that 'classical' democratic theorists such as Meiklejohn would argue that final power should always rest with the citizenry, even if they have elected leaders to represent their interests. At the end of the day, "sovereignty" means that the citizenry should be able to overrule the government if they think it is acting against their wishes. In other words, the citizenry should always be in a position to decide what is in their best interests. However, the "democracy argument" fails to answer some of the major criticisms that have been directed at the "truth argument". Rousseau's response to Mill's claim that unrestricted speech would increase the general utility of society is not addressed by the "democracy argument". Although the "democracy argument" argues that speech should be unrestricted for the sake of democratic accountability, the argument itself does not account for the possible repercussions that could result from unrestricted free speech. Rousseau

highlighted the potential civil unrest that could result from unchecked speech. He also questioned whether it was always better to know the "truth" than to remain ignorant. By allowing unrestricted free speech, the "democracy argument" has to show that the well-being of society will not be affected by unchecked speech. Even though unrestricted speech may enable the citizenry to govern, there is still the possibility that the dissemination of opinions in the public arena can lead to a great amount of "harm" that can decrease the general happiness of society. The "democracy argument" has only made an attempt to justify unrestricted speech on the basis of checking the government's power. Thus, the "democracy argument" fails to provide a convincing argument in response to critics who argue that it is not in the interest of society for speech to be unregulated.

Meiklejohn's (1965) argument for unrestricted free speech seems to be premised on one particular democratic model. While such a theory is problematic, it has provided the ideological backbone behind prominent free speech legislation. The belief that the citizenry should have the right to openly criticise the government is one of the key principles behind the creation of the Magna Carta and the Bill of Rights in England in 1689 (Schauer, 1982:39). Both documents addressed the need for the right to express grievances on behalf of the citizenry against the English government. The creation of the two documents enabled the citizenry to criticise the government through unrestrained speech. Such examples are an indication that the history of free speech legislation in Western democracies has been constructed through a discourse that compels a right to reject and criticise leaders who do not serve the people. In 1720, John Trenchard and Thomas Gordon, writing under the pseudonym *Cato*, argued for the right publicly to examine and criticise government leaders through unrestricted speech (Schauer, 1982:39).

The history of free speech in Britain has been shaped around a discourse based on sovereignty and the nation-state. Similarly, the history of free speech legislation in the United States has also been constructed around a discourse that perpetuates the right to unrestrained speech based on the principle of democracy and the sovereign citizenry. Dworkin (1996:195) argues that the United States Constitution is perhaps one of the most progressive documents in view of its protection of the right to freedom of speech and of the press. The ratification of the First Amendment has played an important part in shaping free speech discourse in the United States. It is the first piece of legislation that restrained the ability of the American government to censor speech acts deemed inappropriate for public dissemination (Dworkin,

1996:195). The value of the First Amendment as an important piece of protective legislation is evident in its statement that government may "make no law ... abridging the freedom of speech, or of the press". This statement acknowledges the superiority of the citizenry over the state (Dworkin, 1996: 195). The emergence of the First Amendment has to be understood within the context of the history of the United States and its evolution as a democratic nation-state. As a country largely made up of immigrants escaping oppressive European theocracies, there was weariness among the American citizenry of the ability of an authoritarian power to censor speech deemed inappropriate. The document itself re-establishes the democratic principle that sovereignty rests with the citizenry and that the state exists to serve the interests of the people. Once again we are drawn to the "democracy argument" that supports the existence of unrestrained speech as a necessary means for governance by the citizenry.

Dworkin highlights the great court case of 1964, *New York Times v. Sullivan* as an important moment in the constitutional protection of free speech. On 29th March 1960, the *New York Times* published an article titled "Heed their Rising Voices", which dealt with the turbulent problem of racial segregation in the state of Alabama. The article itself contained a number of factual inaccuracies that were promptly picked up by L. B. Sullivan, a city commissioner in charge of the local police force in Montgomery. Sullivan claimed that the article would harm his reputation as it portrayed the Montgomery police force in a negative light. Sullivan sued the *New York Times* in an Alabama court. An all-white jury agreed that Sullivan had been libelled and awarded him $500,000 in damages. The *New York Times* appealed to the Supreme Court who eventually overturned the decision. The decision by the Supreme Court to overturn the original decision was monumental in laying the groundwork for the rights to free speech in the United States. Had the decision not been overturned, the *New York Times* would have been severely damaged and few papers would have dared to print anything deemed to be offensive because of the dangers of being sued. In justifying its decision to overturn the decision, the Supreme Court declared that a public official cannot win a libel verdict just on the basis of defamation and false information. The public official has to prove that the statement made occurred with deliberate malice and that the persons who had disseminated the belief had done so knowing it was false. Dworkin (1996:195) argues that the Court's decision gave greater freedom to the press to investigate and report news without the threat of being sued for factual inaccuracies or mistakes.

If we judge such a decision from the perspective of the "democracy argument", the Supreme Court enabled the citizenry to criticise their government without any ramifications. As Dworkin (1996:197) points out, without the intervention of the Supreme Court it is doubtful whether the press would have been able to expose future administrative scandals such as the Watergate saga in 1971 which eventually led to the resignation of President Richard Nixon. Since the "democracy argument" holds the sovereign citizenry as the true rulers of a society, such a ruling would grant the citizenry freedom to criticise without severe repercussions from the government.

In his book, *Make No Law*, Anthony Lewis (1991) traces the history of constitutional speech in the United States from the First Amendment in the eighteenth century to the Sullivan decision in 1964. Lewis argues that the First Amendment originally only protected the right to free speech without prior restraint. Put simply, a citizen was at liberty to disseminate an opinion without being restrained. However, once an opinion had been disseminated, that person could be liable to prosecution from the government if the opinion was offensive or dangerous. Such a view of free speech was evident in the earliest writings in Britain. Even John Milton argued that speech that was disrespectful to the church, once published, could be punished by "fire and executioner" (1929:64). The evolution of speech theory in the United States has ensured more liberty for citizens in terms of their right to disseminate opinions and beliefs at will without facing repercussions from the state.

The evolution of free speech as an indispensable tool for democratic accountability is a theme that has been critiqued by a number of theorists such as Dworkin (1996). The fact that our understanding of free speech has been canonised within a discourse involving the nation-state and the citizenry is potentially problematic particularly when we encounter statements made outside of the nation-state boundary that are justified through an appeal to "freedom of speech". The difficulties arising from the impossibility of justifying speech acts outside the nation-state through an appeal to "the right to freedom of speech" – a right which derives its very meaning from the *a priori* nexus assumed to exist between democracy, the right to freedom of speech and the nation-state – will be dealt with specifically in the next chapter.

1.5 Free speech and the assumption of equality

Catherine Mackinnon (1993:71) argues that our inability to conceptualise our notion of speech outside of the discourse of the democratic nation-state has serious ramifications,

particularly with regards to the inequalities that stem from unrestrained speech. The history of constitutional liberalism in modern democracies, particularly America, has portrayed the notion of free speech as an indispensable tool. As has been mentioned, free speech is seen as a necessary means to ensuring democratic accountability on behalf of the state towards its citizenry. In a democratic state, the idea of a sovereign citizenry posits the need for speech to be unrestrained so as to ensure that the general population can express their desires for how the nation-state should be run (Mackinnon, 1993:71-2). Unhindered speech is necessary to ensure that the citizenry have access to all the necessary information to make governable decisions and secondly to be able to critique the government when it fails to carry out the demands of the citizenry. Thus, by its very definition, democracy demands that speech be unrestrained. For without unrestrained speech, democracy exists in name only. Although the view put forward by proponents of the "democracy argument" is contentious – not least because of their narrow interpretation of the concept of democracy – Mackinnon (1993:71) argues that the law of freedom of speech often nullifies the law of equality, particularly in the United States.

Referring specifically to the United States, Mackinnon argues that the constitutional doctrine of free speech has developed at the expense of alleviating social inequality or legal inequality. When the First Amendment was written, its commitment to free speech did not have the same commitment to equality. Isaiah Berlin's famous essay *Two Concepts of Liberty* (1958) is useful here. Dealing specifically with the concept of liberty, Berlin (1969:122) distinguishes between negative and positive liberty. The core belief behind these two concepts is the belief, as stated by Berlin, that "to coerce a man is to deprive him of his freedom" (Berlin, 1969:122). Berlin defines negative freedom as "simply the area within which a man can act unobstructed by others" (Berlin, 1969:122). This form of liberty is negative because it requires the absence of something. Thus, a person has negative freedom when s/he can act unobstructed by others. There are no obstacles that prevent them from acting on their desires. The positive concept of liberty centres on the presence of something, most importantly, self-mastery. Thus, a person has positive freedom when they have control over their own actions. Coercing an individual diminishes his or her freedom because they are being denied the right to self-mastery. As Jacobs (1996:73) argues, Berlin stresses that in democratic politics negative freedom is more valuable than positive freedom. Thus, since democratic theorists have always been concerned with the regulation of state power, there has always been more of a focus on non-interference. Berlin maintains that positive freedom in a

democracy is often non-existent. In a democracy the government makes binding decisions on the whole population. Even if the decisions are a direct reflection of the citizenry, they are still likely to be decisions made by the majority. Thus in a democracy, the minority have no mastery over their fate, instead being forced to succumb to the wishes of the majority. Berlin thus felt that that one of the main objectives of a democracy should be to promote as much negative freedom as possible so as to ensure that even the lives of the minority are as uninhibited as possible. Berlin was effectively lending support to John Stuart Mill who claimed that the principal danger in a democracy is the decline of individual independence (Jacobs, 1996:73). Berlin has been criticised by a number of theorists such as Skinner (1984:1986) who argues that Berlin attempts to separate positive and negative freedom without realising that the two must exist hand in hand. The argument suggests that liberty theorists have been overly concerned with promoting negative freedoms with regards to non state-interference at the expense of promoting positive freedoms. Mackinnon (1993:72) argues that unrestrained speech actually has the potential to exacerbate inequality rather than alleviate it. While the First and Fourteenth Amendments have attempted to ensure negative freedom as far as preventing government interference with individual liberty, both bodies of law have neglected to address the pertinent issue that speech is not shared equally among all citizens in a democracy. Access to speech is often stratified along class, gender and racial lines (Mackinnon, 1993:74). The lack of awareness with regards to this unequal access to speech has meant that the power of those citizens who have access to speech has not only become more exclusive but has also been guaranteed by the American constitution. The free speech discourse in America has led to an obsession with preventing the state from infringing on the individual liberties of the citizen to the extent that the unequal access to speech is mostly ignored (Mackinnon, 1993:72-73).

Theorists who attempt to promote equality by arguing for restrictions on speech disseminated through hate crimes or pornography are often shut down. Thus, the attempt to ban a speech medium such as pornography is criticised as an attempt to restrict the negative freedom of the individual (Mackinnon, 1993:75-76). Whenever issues of inequality are addressed, for example racial inequality in education, it is always seen to be a separate issue from free speech. Thus, it would be incomprehensible to many freedom theorists that social inequalities are often entrenched or manifested through speech. Mackinnon (1993:74) argues that it is more than a coincidence that the use of the epithet "nigger" is synonymous with the fact that a disproportionate number of children who go to bed hungry in America are African-

Americans. The fact that the education system of America has a history of discriminating against people of colour is manifested in the high rates of illiteracy in African-American and Hispanic communities. Such inequalities are seen to be a separate issue altogether rather than having a close relationship with an unequal access to speech. In a similar vein to Dworkin (1996:195), Mackinnon (1993:74-75) argues that free speech discourse in America has been shaped by the vigilant desire to protect the rights of the individual from the state. While the evolution of free speech in Europe is also canonised in a discourse involving the nation-state and citizenry, European democracies are more vigilant of the dangers of inequalities manifested through speech. The role of hate propaganda in Nazi Germany is one such example that has created an awareness of the potential dangers of unrestricted speech. The history of speech in America has been shaped by events such as the McCarthy trials in the late 1950s in which senator Joseph McCarthy led a campaign against suspected Communists (Mackinnon, 1993:75). While the campaign itself was an infringement of civil liberties, such an event only helped to reinforce the belief that political dissent should not be stifled. The McCarthy trials are an example of what can happen when the government begins to exert authority over a sovereign electorate. The evil to be avoided at all costs is the ability of the government to restrict the ideas of individuals simply because they hold a different point of view. As Mackinnon (1993:75) explains:

> *the terrain of struggle is the mind, the dynamic at work is intellectual persuasion; the risk is that marginal, powerless, and relatively voiceless dissenters, with ideas we will never hear, will be crushed by government power.*

In what she describes as the 'speech you hate' test, a political culture has been created where the more disagreeable an opinion is, the more important it becomes to protect it. The more disagreeable an opinion is, the more "truthful" or pertinent it is likely to be. If it leads to anger and demands for restraint, particularly on behalf of the government, it must be allowed to flourish. The ultimate test of how principled a person can be is judged by their tolerance for beliefs that they find abhorrent (Mackinnon, 1993:75). The sign of a sound and healthy democracy is thus seen to be a state that allows criticality, especially criticism that is directed against the government. This is seen to be a sign that the state is serving the interests of the sovereign electorate and ensuring the civil liberty of its citizens by promoting negative freedom. When the sovereign electorate are given free reign to say what they please, it is a sign that the citizenry is in control (Mackinnon, 1993:75-76).

Theorists who defend such a culture have also turned to the famous "slippery slope" argument as a justification for their opinion that speech should have free reign. The restriction of free speech is seen to be a temptation for the state to resort to totalitarian methods of regulation and control. The argument follows that if the state is allowed to regulate some speech, it will see it as an endorsement from the citizenry to regulate all forms of speech whenever they please. The "slippery slope" argument also highlights the danger that the state will not be able to distinguish between speech that deserves to be regulated and speech that is innocuous. After all, without leaving the judgement of speech to be decided in "the marketplace of ideas", any decision on the value of speech would be purely a matter of subjective opinion anyway (Mackinnon, 1993:76). As long as speech is completely unregulated, it is objective and free. It is also in the interests of the sovereign citizenry to allow everyone's speech to be free. For if you partake in the suppression of another citizen's speech, such regulation could eventually come round to you. There is thus no such thing as a wrong idea, only an offensive one (Mackinnon, 1993:76-77). The only way to deal with offensive speech is to grow a thicker skin or to avert one's eyes. As Mackinnon (1993:76-77) mentions, this liberal attitude towards free speech is so ingrained in the political and cultural spheres of America that young children learn to absorb such ideas in primary school. They are taught about the value of their constitution as a progressive piece of legislation that acts as a check against the authoritarian state. It is perhaps ironic that in the modern era, little censorship occurs through state policy. Censorship tends to manifest itself through official and unofficial privileging of powerful lobby groups. The ability of publishers and editors to discriminate on what they print means that certain members of the citizenry have more of a voice than others (Mackinnon, 1993:77). It is also ironic that opinions that challenge the idea that speech in America is not free are often suppressed on the basis that it is a fascist attempt to regulate the citizenry. Legal accountability for speech that is unfairly distributed is seen as a creeping form of authoritarianism. Thus, Mackinnon (1993:77-78) argues that speech theory in the United States does not even consider how to address the issue of the powerful vanquishing the powerlessness. Instead it attempts to translate such an issue using the "truth argument" where truth vanquishes falsity.

It is interesting to note that while Dworkin (2006:132) supports the idea that free and unregulated speech is an incontrovertible necessity for a fully functioning democracy, there is a necessity to restrict speech when it has the potential to cause harm. In an interesting article concerning the recent "cartoon debate", Dworkin (2006:132) argues that newspapers such as

the *Jyllends Posten* in Denmark were right not to succumb to pressure from political lobbies aiming to prevent the dissemination of the "derogatory" material. His argument follows that as agents of stable democracies, it is the duty of the press to make sure that the public have full access to all opinions. His argument is obviously aligned with the views expressed in the "democracy argument". From the perspective of democratic accountability, Dworkin (2006:133) supports the opinion that the dissemination of the cartoons was the right thing to do. However, he later acknowledges that the potential civil unrest and anger in the Islamic world as a result of the publications was enough of a justification to stop the cartoons from further publication. One could perhaps argue that Dworkin initially failed to acknowledge the power dynamics highlighted by Mackinnon (1993:77) that give power groups more access to speech than others. In a continent like Europe where Muslims are a minority, it is not implausible to suggest that the Muslim community in general is often stigmatised and not given a similar platform to express their grievances as others. On the basis of such an idea, Dworkin must concede that it is not in the interests of democracy to have unlimited speech particularly when it favours the majority at the expense of the minority.

1.6 Conclusion

The objective of this chapter firstly has been to show how the argument for free speech arose in the wake of the enlightenment discourse that emerged in the 18th century. The Enlightenmentis synonymous with the emergence of the modern Westphalian nation-state. It has also been necessary to trace the evolution of the *notion* of free speech and how it emerged in the context of a discourse that assumed as constitutive *a priori* the existence of the nation-state and its relationship to a sovereign citizenry. By tracing the evolution of this specific notion of free speech and its relationship with the modern notion of democracy, it has been necessary to show how justificatory arguments for and against its suppression inevitably turn on this constitutive *a priori*: the rights of citizens and the obligations of the state. Even Mill and Milton, who are generally regarded as the forefathers of speech theory, operate within this particular canon to justify their arguments. As will be shown in the next chapter, this notion of free speech is also self-limiting, a self-limitation that becomes evident when we consider speech acts or statements made outside the boundaries of the nation-state. Once this occurs, we cannot refer to the traditional concepts of democracy and sovereignty as tools to analyse whether speech should be suppressed or not. This thesis argues that we need to re-conceptualise our very understanding of free speech – both the right and its limitations – if

we are to try and deal with speech acts made in a global community (that is, outside the nation-state). In the next chapter I argue the need for this.

Chapter 2. Free speech and the limits of sovereignty

2.1 Introduction

As a result of tracing the theoretical-historical lineage of modern free speech we are now in a position to analyse how speech becomes problematic when it is disseminated outside of the nation-state. It has been the principal objective of Chapter One to argue that the modern notion of free speech gains its legitimacy from and is made possible by the democratic nation-state. In fact, it is only in terms of nation-state discourse that our contemporary understanding of the notion of free speech makes sense at all. At the same time that the nation-state enables free speech to occur by guaranteeing it as a right, it is also a limitation of sorts. Although free speech gains its legitimacy as a democratic right of the nation-state citizenry, it is because free speech is bound to a notion of democratic rights that governments have the right to rescind free speech when it is deemed to be a threat to other citizens. As will be demonstrated in this chapter, there is an equal need to limit free speech on an international level as there is within the nation-state since the same sort of statements can be made globally that are limited locally. We are unable to legitimise the call for such limitations on an international level because we cannot appeal to a rights discourse outside of the nation-state. On an international level, we cannot appeal to state sovereignty as a means to legitimising the call for such limitations. At an international level, outside of the nation-state, the debate on free speech is parasitical on nation-state discourse. It is because the modern roots of free speech are irrevocably tied to the nation-state that it becomes pertinent to ask the question, 'How do we defend free speech as right or argue for the limitations of that right outside the nation-state boundary?' When speech acts are directed at cultural, and religious groupings that transcend state borders, arguments for and against the limitation of free speech become problematic and, outside the 'argument from democracy', we may not be equipped with the necessary language and discourse to argue for the need for speech to be censored.

Bearing this problem in mind, it is the objective of this chapter to argue that we are faced with a crisis of redundancy with regards to balancing the need to restrict speech. As long as our arguments are embedded in a discourse of 'sovereignty', we are not able to adequately evaluate contending claims for the right *to*, or limitation *of*, free speech. After all, both the 'argument from truth' and the 'argument from democracy' are justifications for unrestricted free speech that have been expounded and which only make sense within the nation-state framework.

To that end, one of the major objectives of this chapter will be to look at the various infrastructures designed to both regulate and promote free speech within the international community. Of particular interest will be the *United Nations Charter for Human Rights* and the *European Union Charter for Human Rights*. However, it will first be necessary to provide a theoretical background concerning the clash between international law and national law. Since this chapter will be looking at the relationship between international organisations such as the United Nations (UN) and the European Union (EU) with the sovereign nation-state, it will be necessary to provide a theoretical background concerning which laws should take precedence. As will be demonstrated further on in this chapter, differing arguments as to how constitutional law should be implemented are exacerbated by the plethora of diverse cultural, social and religious values of various communities not only within the international community but within the nation-state itself. By highlighting examples of speech acts made outside of the nation-state, it is the intention of this chapter to show that, although calls for the limitation of free speech are legitimate, such calls for the limitation of free speech cannot be legally enforced outside of the sovereign nation-state. Such arguments for the limitation or protection of free speech are limited to a legal-rights discourse particular to the nation-state. It is pertinent to acknowledge that such a discourse is eminent in international law and is the product of a historical lineage of a human rights' discourse within the nation-state. As Sturgess (2005:182) states, "the manifestation of any right in declarations, conventions, treaties, constitutions and laws is essentially the distillation or product of hundreds of years of philosophical debate". One could perhaps take Sturgess's statement a step further and argue that such philosophical debates are often contextualised around particular cultural and social traditions.

While philosophical debates are ongoing, they are exacerbated by differing cultural interpretations that depart from different ontological and epistemological assumptions. Hence, civil rights discourse materialised within the context of the liberal-democratic framework that emerged within the 17th Century transformation from monarchical to parliamentary power in Western Europe. Despite the fact that international bodies such as the UN and the EU transcend the nation-state, the constitutions of both bodies have been shaped by a nation-state discourse based around a liberal-democratic framework that, in turn, derives its meaning and legitimacy from state sovereignty. As will be shown, there is some debate concerning whether international law or national law should have precedence with regards to the implementation of constitutional rights. Bearing this theoretical framework in mind, this

chapter aims to identify the prominence of nation-state discourse by highlighting the constitutional legislation of the European Union and the United Nations at an international level. With regard to freedom of expression, the United Nations Charter for Human Rights (UNCHR) and the European Union Charter for Human Rights (EUCHR) will be analysed. It will then be shown how such a discourse is inadequate or historically limited by analysing two examples problematic claims to freedom of expression outside of the nation-state boundary. Firstly, the publication of the defamatory cartoons in Denmark in September 2005 will be analysed against the backdrop of the civil rights discourse used by the Danish media and government to defend the publication and dissemination of the cartoons. Secondly, the controversy surrounding the "Defamation of Religion" resolution that was passed in 2005 will be analysed. When the resolution was proposed in the European Union Parliament in 2005, all the member states refused to sign the resolution. Such a refusal is indicative of a civil rights discourse that is based on the notion that freedom of speech is an indispensable sovereign right of the democratic citizenry. Free speech can be rescinded when there is a clear threat to national security. However, member states of the European Union did not concede that "Defamation of Religion" constituted such a threat. Critics of the resolution have proposed two major arguments against the legislation. Firstly, that such a resolution will enable certain non-secular nation-states to engage in undemocratic and inhumane practices without fear of public condemnation from the democratic international community. Secondly, that there is no need for such a resolution as constitutional procedures within liberal-democratic nation-states ensure the protection of minority groups from defamation. It will be necessary to look at such arguments in more detail.

2.2 International law and national law

According to Triepel (cited in Sanders, 1979:215), the existence of international law as enforced by supra-state organisations such as the United Nations and the European Union is distinct from national law as enforced by the sovereign nation-state. These two distinct branches of the law hardly ever overlap and occupy separate legal spheres. This view as expressed by Triepel (Saunders, 1979:215) is known as the "dualist theory" and is based on the premise that the juridical and social norms of national legal systems and international law are completely different. The universalists or monists, on the other hand, argue that international law and national law together constitute one universal legal order. The universalists do acknowledge the distinction between international law and national law, but they differ from the dualists in that they argue that national law should be subordinate to

international law (Sanders, 1979:215). Although such a view exists in theory, Dixon (1993:69) points out that international law has to first be introduced and reconciled with national law before it can operate within the nation-state. The universalists argue that constitutional rights agreed on at an international level should take precedence over nation-state legislature as enforced within the sovereign nation-state. The clash between the monists and the dualists has created a debate in academic circles over which particular view holds sway in international relations (Sanders, 1979:215). As Sanders (1979:216) also argues, at the international level, the principal rule is that of the primacy of international law over national law. Thus, at an international level, legislation as expressed in the United Nations Constitution is above national law. Both monists and dualists accept this view. However, whereas the dualists argue that international law is only superior to national law at an international level (O'Shea, 1998:124), monists argue that international law takes primacy within the nation-state as well. As Sanders (1979:216) points out, international practice clearly indicates that the principle implies that states must arrange their national law in such a way that they are able to comply with their international legal duties. Such a view was reiterated by the Permanent Court of International Justice which spoke of:

> *a principle which is self evident according to which a state which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligation undertaken (Sanders, 1979:216).*

Although the International Court of Justice supports the subordination of nation-state laws to international law, international tribunals are reluctant to express themselves on the domestic effect of national law and to declare national law invalid. The national authority concerned must first be deemed to be illegal under international law before action will be considered. What, then, is the position of supra-state legislation with regards to free speech at international level?

2.3 The United Nations Charter for Human Rights

The *Universal Declaration of Human Rights*, as entrenched in the *United Nations Charter* of 1947, provides the foundation from which any analysis of free speech outside of the nation-state should proceed. The *Universal Declaration of Human Rights* is the pivotal document in which arguments for the preservation and limitation of free speech take place within the international community of states who are members of the United Nations. As Sturgess (2006:182) points out, the *Declaration* is a product of a range of perspectives on the rights to

freedom of expression. Thus, it is important to point out that the *Declaration* is the product of a history of philosophical ideas and opinions manifested in debates throughout history. What is important with regards to this thesis is the question of how the context in which these arguments occurred (the sovereign nation-state) influenced the *United Nations Charter*. Further, what limitations are revealed by this influence? For it is pertinent to acknowledge that, while the United Nations exists as an international body, its existence is based upon a collective group of nation-states who have agreed to follow the set protocols as proclaimed in the *United Nations Constitution*. Thus, the statement in the *Preamble*, "[w]hereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms" (cited in Sturgess, 2006:182) indicates that it is the responsibility of member nation-states themselves to uphold the laws and principles as expressed in the *United Nations Charter*. Hence, the concept of state-sovereignty is fundamental, constitutive of the relationship between the United Nations body and the individual member states that make up such a body. While the *Preamble* refers to "the equal and inalienable rights of all members of the human family" (cited in Sturgess, 2006:182), the preservation or manifestation of such rights can only take place within the particular context as citizens of independent sovereign nation-states. On one level we exist as members of a universal human race and as such are entitled to certain rights as prescribed in the *United Nations Charter*. However, such rights exist first and foremost at a nation-state level. This is where the crux of the problem lies. We cannot invoke or call for limitations on an international level because we cannot appeal to a set of sovereign rights. While the call for such limitations would be morally legitimate, the enforcement of such limitations would be illegal as we cannot appeal to a sovereign entity outside of the nation-state to legitimise such limitations. For the purposes of this thesis it is necessary to note that first and foremost we exist as citizens of the sovereign nation-state. Our existence as members of an international community comes second. Once again we are drawn to the idea that the sovereign nation-state legitimises and enables free speech to occur but also acts as a limitation. This is because we cannot engage with the sensitive issue of rights outside of the nation-state discourse. As will be shown, the *United Nations Constitution* argues that it is necessary for the nation-state to limit free speech when it poses a threat to other human rights. The problem arises in that international law cannot evaluate arguments for limitations on free speech outside of nation-state civil rights for, as mentioned, it does not have the legal authority to do so. International law can only engage with the notion of human rights in the context of the relationship between the citizen and the state.

In looking at legislation designed to address free speech on an international level, Article 19 in the *Universal Declaration of Human Rights* is the most indicative statement regarding the right to free speech. As the article states:

> *Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers (Universal Declaration of Human Rights, Article 19; emphasis added what emphasis?).*

According to Sturgess (2006:182), implicit within this statement there exist two separate, independent spheres in which the right to free speech can be expressed. The right to freedom of opinion is essentially a private right, for one can hold an opinion without actually expressing it publicly. The right to expression is a public right, for one is now allowed not only to hold an opinion or belief but is actually entitled to express such a belief in public. Thus, *Article 19* would seem to amount to a tacit *carte blanche* for citizens of member states to hold and disseminate opinions without interference from others. The legislature in *Article 18* lends support to *Article 19* by stating,

> *Everyone shall have the right to freedom of thought, conscience and religion; this right includes freedom to have or to adopt a religion or belief of his choice, and freedom, either alone or in a community with others and in private, to manifest his religion or belief in teaching, practice, worship and observance (Universal Declaration of Human Rights, Article 18).*

As Sturgess (2006:182) further argues, implicit in *Article 18* is the right to form a belief, change such a belief and to persuade others to change their beliefs as well. Hence, through teaching, a citizen is entitled to encourage others to change their beliefs and opinions without restraint. Thus, as paragraph 2 of *Article 18* states,

> *No one shall be subject to coercion which would impair his freedom to have or disseminate the religion or belief of his choice (Universal Declaration of Human Rights, Article 18)*

The immediate problems arising from the uninhibited right not only to disseminate beliefs but to persuade others to adopt those beliefs as well are numerous. Within the process of persuading others to change their beliefs, there will more than likely exist ideas or language that are derogatory towards the beliefs that those people currently hold (Feinberg, 1988:16). For example, in the hypothetical process of trying to convince a Christian that they should renounce their belief in God and become an Atheist, one will inevitably make use of language or ideas that are derogatory to certain Christian principles and beliefs. There is a large

likelihood that the attempt to persuade others to change their beliefs will inevitably result in remarks that could be deemed to be insulting or derogatory towards the people whose beliefs are being questioned or revised. Thus, *Article 18* would not appear to offer beliefs that are being challenged any protection from negative comment. However, paragraph 3 in *Article 18* states that,

> Freedom to manifest one's religion or beliefs may be subject only to such limitations as prescribed by law and are necessary to protect public safety, order, health or more fundamental rights and freedom of others (*Universal Declaration of Human Rights, Article 18*).

Thus, paragraph 3 indicates that while citizens of member states are entitled to hold beliefs and disseminate them in the public sphere, the ability to disseminate such beliefs is subject to certain restrictions dependent on the factors outlined above. Should the dissemination of a particular belief interfere with public safety, order, health or more fundamental rights and freedoms as entrenched in a democratic society, therefore, governments are entitled to restrict such opinions if they deem it necessary. The *European Convention on Human Rights*, ratified in 1950, offers similar protection to citizens of member states whose rights are potentially affected by the dissemination of particular beliefs and opinions inside the state. Taken almost word for word from the *United Nations Declaration of Human Rights*, paragraph 1 of Article 10 in the *European Convention of Human Rights* states that,

> *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises* (European Convention of Human Rights, Article 10).

While *paragraph 1* stipulates that citizens have the right to hold, receive and impart information and ideas without interference by public authority, *paragraph 2* stipulates that interference on behalf of the state may take place should there be a threat to other liberties stipulated in the European Convention

> *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial*

> *integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority or impartiality of the judiciary (*European Convention of Human Rights, Article 10*).*

Hence, *paragraph 2* of *Article 10* places limitations on the right to freedom of expression when it interferes with other basic rights. As Sturgess (2006:184) points out, the preservation of national security, territorial integrity and public safety are the principle reasons why states deem it necessary to limit freedom of expression. *Article 29* of the *United Nations Convention on Human Rights* justifies why it is necessary on occasions to limit free speech when it interferes with other basic rights. As *paragraph 2* of *Article 29* states,

> *In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society* (Universal Declaration of Human Rights, Article 29*).*

Article 29 stipulates that the law should be the main arbitrating mechanism when determining whether limitations are necessary in order to prevent the violation of human rights. Hence, since it is a common prerequisite for democratic nation-states to have an independent judiciary that monitors the actions of the citizenry and the government, the judiciary should decide whether it is necessary to restrict certain rights and freedoms if they interfere with other rights as stipulated in the *Declaration of Human Rights*. However, Sturgess (2006:184) further argues that the ability of the law to act as the main referee or arbitrator will not satisfy certain citizens who are victims or perpetrators of free speech. While the law may account for instances where other rights entrenched in the *Human Rights Charter* have been violated, victims or perpetrators of speech acts may feel that a more stringent test is needed to account for whether or not a speech act should be suppressed. The wider ramifications of this problem will be discussed further on in this chapter when it will be necessary to look at case studies where such discourses on free speech become problematic. While *Article 29* calls upon the judicial systems inherent within the nation-state to restrict speech that is infringing other human rights, *Article 30* creates the necessary legislature to do so. It states,

> *Nothing in this declaration may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein (*Universal Declaration of Human Rights, Article 30).

Thus, *Article 30* stipulates the limitations and responsibilities that come with the freedoms and rights outlined in the rest of the *Human Rights Charter*. While citizens of democratic member states are entitled to freedoms such as the right to disseminate beliefs in the public sphere, such rights can be withdrawn or limited when they interfere with other rights also entrenched in the *Charter*. As Sturgess (2006) argues, perhaps the most important right that can be potentially breached by freedom of speech is the right to dignity. However, as has been mentioned, it is often difficult to ascertain exactly when certain rights have indeed been breached and to what extent. As will be shown later in this chapter, the decision to limit or restrict free speech is taken particularly seriously in that such an action involves infringing on a citizen's civil liberties. Since the right to free speech is considered to be one of the fundamental tenets of the democratic state, it is understandable why governments are often reluctant to restrict such rights. While the *Declaration of Human Rights* compels individuals, groups and governments who have signed the *Declaration* to adhere to the rights expressed therein, the judicial courts within the member states are the only institutions that can intervene when such rights have been breached. This would seem to lend support to the dualist argument that national law is superior to international law within the confines of the nation-state. While nation-state governments are compelled to adhere to the statutory requirements implicit in international law, on a domestic level national law still has jurisdictional supremacy.

Since the idea behind a judicial system is to ensure that governments do not abuse the power invested in them, governments have to be particularly careful when taking away certain democratic rights, particularly the right to free speech as this is one of the principal tools that enable the citizenry to prevent the government from abusing its power. There is perhaps an irony in the fact that governments are given the authority to limit rights of citizens when those very rights are designed to limit government power in the first instance. Hence, the fact that governments have the ability to potentially increase their authoritarian control by limiting the right to free speech inevitably means that such power is not taken lightly. Governments thus have to provide good reasons for doing so (Sturgess, 2006:184-5).

2.4 The limits of nation-state discourse

In the following two sections I will look at two examples that reveal the limitations of our modern notion of free speech, limitations that derive from the very fact that free speech assumes a constitutive *a priori* relation to the state and citizenry. This *a priori* reveals the

limitations of free speech discourse when such speech acts are made at a global level, not between citizens but between larger religious groups, cultures and their representatives. When it comes to the need to address rights on an international level, we cannot do so because we are restricted to a discourse of rights that derives their legitimacy from the sovereign nation-state. Outside of the nation-state such a rights discourse becomes obsolete. It will now be necessary to look at this problem in more detail.

2.4.1 The Danish Cartoon Controversy

Despite the voices of disapproval and dissatisfaction emanating from prominent clerics, thinkers and academics within the Muslim Community around the globe, no one could have predicted the sweeping wave of public anger and violence that erupted as a result of the publication of twelve cartoons in the Danish newspaper *Jyllands-Posten* on 30th September 2005. With hindsight, we can look back at the controversy and argue that at the heart of the controversy lay two competing arguments. On the one side, the editors of *Jyllands-Posten* argued that their decision to publish the cartoons was a response to a growing "climate of fear" in European countries (Rynning & Schmidt, 2006:13). According to the Cultural Editor of *Jyllands-Posten*, Flemming Rose, a culture of censorship had arisen in the West as a result of the fear of breaching cultural and religious sensitivities and taboos, particularly with regards to the Islamic faith and culture (*Washington Post*, 19th February 2006). This culture of self-censorship and self-imposed totalitarianism was threatening to erode the foundations of free speech considered integral to the secular, Western, democratic nation-state. On the other side, prominent voices within the Islamic community, such as the Organisation of Islamic Countries (OIC), argued that the publication of the cartoons was symbolic of a growing vindictive attitude in the West towards the Muslim community (Rynning & Schmidt, 2006:14). Besides the fact that the Muslim faith forbids pictorial representations of the Prophet Mohammed, calls for restrictions on free speech by certain members of the Islamic community have been justified on the grounds that unlimited freedom of expression, used irresponsibly, potentially can, and often does, cultivate and perpetuate negative stereotypes of ethic minority groups in Europe that are both incorrect and harmful (Sturgess, 2006:181). As already mentioned, the response to such claims by defenders of free speech has been that the demand for respect in this case amounts to a desire for censorship and totalitarian forms of control, the aim of which is to suppress dissident voices in the public sphere (Sturgess, 2006:183). While the debate continues to rage, it is the objective of this chapter to highlight the events that happened around the publication of the cartoons. Secondly, it will be

necessary to analyse the discourse of the controversy in terms of arguments for and against free speech in an international domain. It is my intention to show that such discourses are firmly embedded in the dichotomous relationship between the nation-state and its citizenry. This means that while the democratic nation-state accounts for, and historically made possible, a discourse on free speech, by the same logic the nation-state limits the legitimacy of free speech and its self-evident application outside a sovereign discourse.

2.4.2 The cartoons: the event and aftermath

It is important to place the events surrounding the publication of the cartoons in the context of the political climate that had emerged in Denmark in the years preceding the cartoon controversy. In autumn 2001, the Social Democratic Party in Denmark lost power in the general elections. The Liberal Party, under the leadership of Anders Fogh Rasmussen, formed a minority government in alliance with the Conservatives (Rynning & Schmidt, 2006:12). Although minority governments are regular occurrences in Denmark, the majority behind the newly formed government was made up of the People's Party, a nationalist-populist right-wing party advocating anti-immigration in addition to enhanced national welfare programmes and reduced European integration (Rynning & Schmidt, 2006:12). In light of the People's Party manifesto, it was not surprising that the debate concerning the Danish "welfare state" and the traditionally Danish liberal attitude towards the immigration of different ethnic minorities sharpened. The People's Party expressed their concern at the rising levels of immigration and the emergence of cultural-religious protocols that had begun to permeate Danish society (Rynning & Schmidt, 2006:12). At the heart of the concern was the fear that the traditional democratic values of free speech and liberalism, which have been core to Danish society, were under siege from minority groups who were supposedly attempting to suppress free speech in the public sphere, particularly where criticism was directed at the Islamic culture and religion (Rynning & Schmidt, 2006:12).

On 30th September 2005, *Jyllands-Posten* published twelve cartoons of the Prophet Mohammed. Although the cartoons were caricatures, they suggested a link between Islamic faith and the current strain of global terrorism, pre- and post-September 11th 2001, particularly with regards to suicide bombers (Rynning & Schmidt, 2006:12). One of the cartoons depicts the Prophet Mohammad in a role similar to that of St Peter. He is standing at the entrance to heaven refusing entry to a group of Islamic suicide bombers who wish to enter. In justifying his reasons for refusing them he declares, "Stop, stop, we ran out of

virgins!" Despite the symbolic representation of the prophet Mohammad, which is seen to be blasphemous, the controversy of this particular cartoon lies with the association of the Prophet Mohammad and the Islamic religion with violence and terrorism.

Following the publication of the cartoons, a week went by without any reaction from the public. Shortly after this, however, the Islamic community in Denmark reacted and demanded an explanation. On 12th October 2005, eleven Muslim ambassadors formally complained in writing to Prime Minister Fogh Rasmussen and requested a meeting to discuss the defamatory nature of the cartoons. Fogh Rasmussen refused to entertain the possibility of taking action against the media and stressed the importance of freedom of speech *within Denmark* (Rynning & Schmidt, 2006:13). Despite pressure from the social-liberals and the social democrats, Fogh Rasmussen still refused to meet with the ambassadors arguing that a head of government cannot be summoned to discuss the issue of freedom of speech just because offence was taken by some local congregations against the Danish media. Up until this point the debate had been contained within the boundaries of the Danish state. However, and this is the *raison d'etre* of this thesis, on 7th December 2005 the issue was placed on the agenda at a high level meeting of the Organisation of Islamic Countries (OIC) which represents 57 Islamic countries (Rynning & Schmidt, 2006:14). The Organisation of Islamic Countries then wrote to the United Nations to complain about the refusal of the Danish government to meet with the eleven aforementioned ambassadors and for failing to take action against *Jyllands-Posten*. Following criticism from 22 former Danish ambassadors against the Danish government, foreign ministers of the Arab League criticised the Danish government in a statement made on the 29th December 2005. The ministers expressed their "surprise and indignation at the reaction of the Danish government which was disappointing considering its political, economic and cultural ties with the Muslim world" (*Arab News*, 30th December 2005). The criticism from the Arab League was also followed by a letter to the Danish government from the United Nations Human Rights Commission asking the Danish government to explain its actions. Following encouragement from various Islamic voices, on 26th January 2006 a boycott of Danish products began in Saudi Arabia (Rynning & Schmidt, 2006:14). In the wake of death threats, the editor of *Jyllands-Posten*, Flemming Rose, made an appearance on *Al Jazeera* television to make it clear that the publication of the cartoons was not an intention to hurt or insult Muslims (*Washington Post,* 19th February 2006). Following Rose's statement, *Jyllands-Posten* published a declaration on 30th January 2006 in which it apologised for the effects that the cartoons had on members of the Islamic

community. However, the newspaper refused to apologise for the publication of the cartoons claiming that the Danish public prosecutor and the judicial system had not found the newspaper guilty of violating sovereign limitations, that is, Danish law. Syria, Lebanon, Iran and Saudi Arabia chose to react diplomatically by closing their embassies in Denmark (Rynning & Schmidt, 2006:14).

Following the increasing hostility towards the Danish government and economic sanctions, Danish Prime-Minister Fogh Rasmussen decided to appear on *Al-Arabiya* television on 2nd February 2006 to state publicly that it was not the intention of the Danish media or government to insult the Muslim community (Rynning & Schmidt, 2006:14). As Fogh Rasmussen stated, "I personally have such respect for people's religious feeling that I personally would not have depicted Mohammed, Jesus or other religious figures in such a manner that would offend other people" (*The Miami Herald*, 19th February 2006). However, his statement failed to cease hostility towards the Danish government and on 3rd February 2006, Fogh Rasmussen met with the ambassadors of 76 countries to discuss how to solve the escalating crisis. On 4th and 5th February 2006, Danish embassies in Syria, Lebanon, Indonesia and Pakistan were attacked by protesters angry at the refusal of the Danish government to apologise. On 15th February, the president of the European Commission, Barroso, declared his full support for the Danish government and a day later, on 16th February, the European Parliament expressed its disapproval at the increasing wave of violence around the world, particularly the violence directed at the Danish embassies around the globe (Rynning & Schmidt, 2006:14-15). However, the European Parliament also encouraged the Danish government to take a more diplomatic route and follow a procedure of respectful dialogue. It is interesting to note that despite the UN Secretary-General Kofi Annan's pledge to offer the UN as a venue for settling the affair, most European countries and the United States were sceptical about the possibility of the United Nations' involvement in the controversy. Arguing that the controversy was instigated inside the boundaries of the Danish nation-state, they maintained that the issue should be resolved by the Danish government with international assistance rather than entering the complicated mechanisms of multilateral diplomacy (Rynning & Schmidt, 2006:15). The stance taken by the United Nations is indicative of a discourse that retains the sovereign nation-state as the principal power broker in international relations. By arguing that the crisis should be solved domestically, the United Nations argued that the free speech debate should be relegated to the confines of the nation-state boundary and thus should be resolved by the Danish judiciary. It

was thus inevitable that the sanctity of free speech as a non-negotiable democratic right should once again emerge when the debate was confined within the Danish state. The argument suggested that, since Denmark was a sovereign nation-state, the Danish government was entitled to resolve the dispute without international interference and this was despite the fact that *the offended community could not be limited to citizens of the Danish state and, hence, considered juridical subjects of Danish law.*

As Rynning and Schmidt (2006:19) argue, prominent nation-states within the United Nations community stressed the importance of free speech as a democratic right. The publication of the cartoons in Germany and France was symbolic of the fact that, while the German and French governments felt that the cartoons were distasteful, the principle of free speech should remain intact (Rynning & Schmidt, 2006:19). As the German Minister of the Interior, Wolfgang Schauble, argued, the German government could not apologise for the publication of the cartoons in the German media because such a stance would amount to interference in the German press (Rynning & Schmidt, 2006:19). Such a view was reiterated by Roger Koppel, editor-in-chief of *Die Welt*, who said:

> *It's at the very core of our culture that the most sacred things can be subjected to criticism, laughter and satire. If we stop using our journalistic right to freedom of expression within legal boundaries then we start to have a kind of appeasement mentality (*The Mail & Guardian, 3rd-9th February 2006*).*

Such an intervention would amount to an infringement of civil liberties by the German government. Similarly in France, while Jacques Chirac criticised the publication of the cartoons on the grounds that the cartoons were defamatory and insulting and called for respect for other belief systems and moderation, he naturally argued that freedom of speech was a right that could not be taken away from the citizenry. The ubiquitous nature of such a discourse was evident in the attitude of the European Union itself. The European Union countries adopted a final joint statement concerning the controversy on 27th February 2006. Following on from the reaction from the Danish government, they underscored the sanctity of freedom of speech but admitted that it must be used responsibly. However, while the European Union apologised for any insult caused by the publication of the cartoons, it refused to agree that the cartoons should not have been published in the first place (Rynning & Schmidt, 2006:19-20).

The outline of events that followed the publication of the cartoons would seem to suggest reluctance on the part of member states of the United Nations and the European Union to

engage with the issue of free speech outside of the nation-state discourse. In arguing that the publication of the cartoons was a domestic matter, the state actors essentially argued for confining the terms of the debate to nation-state discourse and the logic of sovereignty, that is democracy, conceived within the limits of the nation-state.

2.4.3 Something is rotten in the state of Denmark: free speech and the nation-state of Denmark

Responding to the cartoon controversy Issacharoff (2006:2) argues that the controversy provides "an illuminating window on what may be termed the problem of democratic intolerance". Although Issacharoff (2006:2) argues that the debate itself is complex and multifaceted, at the core of the controversy is the claim, made by a number of Muslim scholars and religious figures, that the Danish government should be held accountable for its refusal to censor the publication of the cartoons when they appeared in *Jyllands-Posten.* Dworkin (2006:132) argues that while the British and most of the American press were correct not to republish the Danish cartoons, the only reason why they should not do so is because reprinting would likely have led to more death and destruction of property around the globe. Such a response can be acknowledged as a pragmatic necessity and highlights the notion that free speech can be rescinded by the nation-state when it is deemed to be a threat to other civil liberties. Once again we are reminded of how free speech is both made possible and limited by the sovereign nation-state. However, Dworkin, 2006:132) does not agree that suppressing free speech for the purposes of preventing defamation or offence is justified. Dworkin (2006:132) does not agree with certain voices within the Islamic community that called for the Danish government to suppress the cartoons because they were distasteful or offensive. As he argues:

> *Freedom of speech is not just a special and distinctive emblem of Western culture that might be generously abridged or qualified as a measure of respect for other cultures that reject it, the way a crescent or menorah might be added to a Christian religious display. Free speech is a condition of legitimate government (Dworkin, 2006:132).*

Dworkin follows on by saying that the right to insult is a fundamental tenet of a democratic state. Commenting on the tradition of satirical cartoons in Western culture, Morreall (2005:63) argues:

> *Political cartoons have been part of newspapers almost as long as there have been newspapers, and the rise of democracy in the eighteenth and nineteenth centuries was correlated with the rise of sophisticated political cartooning.*

Here, Morreall is alluding to the idea that cartoons, and the satire expressed in their content, have a particular association with the need and right to criticise the nation-state. Thus, weak or unpopular minorities within the nation-state must be willing to take insult as a condition for making a claim on the majority for protective anti-discriminatory legislation. As Dworkin (2006:132) states, "[i]f we expect bigots to accept the verdict of the majority once the majority has spoken, then we must permit them to express their bigotry in the process whose verdict we ask them to accept". Put simply, if the minority are to make a claim against a majority, democratic reasoning demands that the minority allow the claim they are attempting to revoke to be expressed by the majority in the first instance. For in a democratic arena, only once claims have been allowed to be expressed can criticisms against the legitimacy of such claims be made. This, however, does not prevent us from citing certain general speech acts as defamatory and/or, in retrospect, from classifying them as such since doing so would set up a foundation for claims to be limited (as in the case of hate speech). Dworkin's (2006:132) particular argument in favour of unrestricted speech is synonymous with core liberal principles expounded by other liberal theorists such as Rawls. For Rawls (1971:217), "a person's right to complaint is limited to violations of principles he acknowledges himself. A complaint is a protest addressed to another in good faith." Thus, we can interpret Rawls as saying that the right to express dissatisfaction with a particular belief must necessarily endorse the right for such a belief to be expressed in the first place. We cannot limit the expression of opinions we find distasteful in the public arena and then expect others to accept our own beliefs. As Issacharoff (2006:2) argues, the intolerant may complain at the insults felt from the dissemination of an opinion in the public sphere. However, the fact that they have been insulted does not justify official censorship of speech in the public sphere. Resisting censorship is necessary to ensure the preservation of civil liberties that make democratic tolerance possible. Sturgess (2005:186) points out, however, that the case is altered when speech is directed at the beliefs and distinguishing characteristics of other groups. This would be a characteristic of hate-speech in particular. Hate-speech is a direct threat to the rights of others because it denies recognition of the "inherent dignity" of all human beings and their "equal and inalienable rights" as expressed in the preamble to the *Universal Declaration of Human Rights* (Sturgess, 2005:186)

Thus, Issacharoff (2006:3) argues that at the heart of Dworkin's (2006:132) argument is the call for liberal democracies around the globe to resist pressure imposed by intolerant groups to use governmental authority to silence unpopular speech. It is debatable of course whether

minority ethnic groups in Europe wish to censor some forms of speech simply on the basis that they find it offensive. Such a view is simplistic to say the least. As Mackinnon (1993:77-8) has argued, unchecked speech is a potentially dangerous weapon that can be used for destructive ends, particularly when it is unfairly distributed in favour of the majority against the minority. And as Mackinnon (1993:77-8) also argues, access to speech is often unevenly distributed in favour of powerful majorities within the nation-state. As a result, minority groups are voiceless and unable to defend themselves against victimisation and hurtful claims manifested within the public forum by the powerful majority. Issacharoff's (2006:1) claim that "[d]emocratic regimes around the world find themselves besieged by antidemocratic groups that seek to use the electoral arena as a forum to propagandise their cause and rally their supporters" would seem to insinuate that the Islamic voices that condemned the publication of the cartoons would fall into the category of the intolerant. For he later argues that, as a liberal democracy, no moral or legitimate claim can be made calling for the Danish government to act on behalf of others to censor material deemed to be offensive. As Issacharoff (2006:3) says, "[s]imply put, democratic tolerance should not succumb to claims for censorship demanded by forces of intolerance". Dworkin (2006;132) acknowledges the hypocrisy evident in the fact that, while many European countries are quick to defend the right to free speech, in several European countries it is a crime to publicly deny that the Holocaust ever took place. However, rather than calling for the even regulation of harmful or offensive speech across the board, Dworkin (2006:132) makes the claim that the remedy is not to make the compromise of democratic legitimacy even greater than it already is and that there should rather be an attempt to remove Holocaust-denial laws as well. Thus, Dworkin (2006:132) argues that it is necessary to work towards a new understanding of the *European Convention on Human Rights* that would strike down laws that violate free speech.

In contradiction to Mackinnon (1993), Dworkin (200:132) supports the notion that there should be no regulation of free speech of any kind such is his concern to alleviate the possibility of civil liberties being taken away. Issacharoff's (2006:3) support for Dworkin's argument is part of a broader question he aims to address, namely whether democratic governments have the capacity to resist the use of their electoral arenas as platforms of social intolerance, for as he points out, there is the danger not only that the state apparatus can be used to foster intolerance but also that the democratic state can potentially be usurped by intolerant parties. As a hypothetical example, Issacharoff (2006) asks us to imagine a scenario where dissident Islamic groups, dissatisfied with the refusal of the Danish

government to prevent the publication of the cartoons in the Danish press, took it upon themselves to form a political party, the objective of which would be to use the electoral arena as a means to come to power and rescind free speech legislation deemed to be religiously blasphemous or culturally insensitive. Stripped down to its essentials, all definitions of democracy return to the primacy of electoral choice and the presumptive claim of the majority to rule. While Issacharoff (2006:3) highlights the dangers around such a scenario, he does acknowledge that democracies are equipped with legislation and constitutional procedures which serve as a backdrop before any electoral procedures can take place. However, he points out that as an historical standpoint, an inquiry into the occurrence of such a scenario is far from abstract. There are numerous examples from history where politically intolerant parties have used democratic electoral platforms to come to power. Hitler's final push to power occurred within the confines of the Weimar Democracy and as Joseph Goebbels (cited in Fox & Nolte, 1993:32) famously said, "This will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed". Goebbels was, of course, alluding to the fact that the accommodating democratic arena provided the platform from which a totalitarian and fascist regime could take power.

Feldman (2006:9-10) argues that democratic tolerance becomes problematic in deeply fractured societies where different ethnic and religious ideologically driven movements are attempting to come to the fore. Referring specifically to the Middle East, Feldman (2006:10) argues that "the model of Islamist organisations that combine electoral politics with paramilitary tactics is fast becoming the new calling card of the new wave of Arab democratisation". Feldman (2006:9-10) points to the political manoeuvrings of Hezbollah and Hamas as examples of political movements that have searched for democratic legitimacy while at the same time engaging in paramilitary tactics on the side. In order to counter the potential threat from within, most democratic states prevent expression on extremist participation in the electoral arena. While the electoral arena can be used as a forum for the recording of preferences, it can also be used as a platform for the mobilisation of intolerant political forces (Issacharoff, 2006:4-5). Besides having access to political propaganda, if elected to parliament such anti-democratic forces often have the ability to cripple any effective governance within parliament. It is perhaps with this danger in mind that Rawls (1971:217) states, "just citizens should strive to preserve the constitution with all its equal liberties as long as liberty itself and their own freedom are not in danger". While Rawls

argues that citizens should generally strive to preserve liberty, there are times when it is necessary to restrict liberties when it threatens the freedom of the majority.

While Isacharoff's (2006) example of the creation of a Danish Muslim party in the wake of the cartoons is a hypothetical scenario, it is interesting to see how the interest in preserving Danish civil liberties has prevented the Danish government and media from entertaining the interests of dissident voices opposed to the cartoons. For, as the cultural editor of *Jyllands-Posten*, Flemming Rose (*Washington Post*, 19th February 2006) argues, the decision to solicit and publish the cartoons was, in his view, a response to the emergence of a climate of fear that had begun to permeate Danish society, particularly with regards to not breaching Muslim taboos. Rose saw this as a creeping form of totalitarianism that was contradictory to the principles inherent in a liberal democracy like Denmark. For instance, a Danish author who was seeking an illustrator for a book he had written about the Prophet Mohammed and Islam had been unable to do so because nobody wished to be associated with such a sensitive theme as the depiction of Islam (Shearmur, 2006:21). An illustrator who finally accepted insisted on anonymity with regards to his association with the book. As Rose (cited in Rynning & Schmidt, 2006:13) stated:

> *Last September, a Danish children's writer had trouble finding an illustrator for a book about the life of Mohammed. Three people turned down the job for fear of consequences. The person who finally accepted insisted on anonymity, which in my book is a form of self-censorship... So, over two weeks we witnessed a half-dozen cases of self-censorship, pitting freedom of speech against the fear of confronting issues about Islam.*

In the climate of such fear, Rose's decision to commission the cartoons was based on a desire to rebuke the culture of self-censorship that he believed had emerged out of a respect for democratically intolerant groups aiming to suppress dissident opinion from the public sphere (Rynning & Schmidt, 2006:13). As Rose (cited in Rynning & Schmidt, 2006:13) states, '[a]s a former correspondent in the Soviet Union, I am sensitive about calls for censorship on the grounds of insult. This is a popular trick of totalitarian movements". Some theorists such as Uft Hedetoft (2006) argue that the publication of the cartoons should be understood within the context of Danish migration discourse. As Hedetoft (2006) argues, *Jyllands-Posten* has the largest circulation in Denmark and is ideologically closest to the ruling political majority. This Danish migration discourse is considered to be fully in line with a particular brand of Danish Islamophobia and anti-immigrant scepticism. On the basis of such an argument, the decision to publish the cartoons could also be interpreted as a rebuke of cultural minorities

who live in Danish society. However they may be interpreted, Rose's comments allude to a discourse of liberal-democratic theory that argues in favour of unrestricted free speech as a fundamental right inherent in the constitution of a democratic nation-state in which such rights constitute the individual as a free political and juridical citizen. It is the existence of such a discourse that has made it impermissible for the Danish government to censor free speech no matter how offensive it might be.

It is pertinent to note that this analysis of the cartoon controversy and the debate surrounding free speech has focused on the internal sovereign discourse of rights. The claims to freedom of speech with regards to the publication of the cartoons have been justified within the context of a nation-state discourse of human rights. Outside of the sovereign nation-state, such claims to freedom of speech become redundant. This is because such a discourse that revolves around the sovereign nation-state does not apply in instances where a community is larger than or overlaps the nation-state or various nation-states. The Muslim community that was offended by the publication of the cartoons transcends the nation-state. This means that the problem of freedom of speech is an issue that immediately becomes relevant on an international level. As the above analysis has shown, we cannot address such a problem if we continue to operate in a sovereign nation-state framework.

2.5 Defamation of religion and the nation-state

It will now be necessary to look at the introduction of the *Combating Defamation of Religions Resolution* into the *United Nations Constitution* in 2005. The controversy surrounding the introduction of this piece of legislature is pertinent to this analysis because it highlights the friction or uneasy relationship between international bodies and nation-state governments. As will be shown, the introduction of the *Resolution* has been problematic because many nation-state governments have seen the act as a threat to their internal sovereignty. The sanctity of freedom of speech is defended within the framework of a nation-state discourse of human rights. As will be shown, governments are often weary of committing themselves to international law that threatens to restrict human rights outside of the nation-state framework.

2.5.1 The "Defamation of Religion" resolution

The introduction of the resolution, entitled *Combating Defamation of Religions,* through a series of provisions in 2002, 2003, 2004 and 2005 is another example of how interpretations

of free speech inevitably reveal the limitations of their origins in nation-state discourse. This includes the sovereignty of the political subject, the sovereignty of free speech and the sovereignty of the nation-state. The introduction of the resolution into the *United Nations Constitution* has been shrouded in controversy. While it is inevitable that any legislation that seeks to place limitations on free speech will be criticised by liberal theorists, one of the most controversial features of the resolution is that it partly defines defamation of religion as a "negative projection of Islam in the media and the association of Islam with terrorism and human rights violations" (Grinberg, 2006:1). While the criticisms directed at such a claim are ubiquitous, such criticisms argue that the introduction of the resolution violates the major tenets of the "argument from democracy". Grinberg (2006:1), for instance, argues that the resolution restricts expression on issues of public importance and prevents citizens from being able to criticise public officials. Also, because the resolution particularly prohibits negative projections of Islam in the media, this allows Muslim nation-states to escape international scrutiny. The existence of non-secular Islamic states such as Iran and Pakistan implies that a critique of the actions of Islamic governments can be struck down as an attempt to portray Islam in a negative light. According to Grinberg (2006:1-2), it is thus potentially feasible for Islamic nation-states not only to suppress criticism from the international community but also from the citizens of Islamic nation-states as well. Thus, inherent in the resolution is a *carte-blanche* freedom for totalitarian, non-democratic states to suppress criticisms directed at authoritarian regimes that violate human rights. Part of Grinberg's thesis is an attempt to show that the introduction of a resolution that prohibits defamation of religion is unnecessary within a democratic state since it already contains mechanisms to protect cultural groups from defamation or slander.

It is perhaps obvious that in the wake of such a controversial piece of legislature, an ideological divide has emerged between, on the one hand, countries such as America and Britain who are exponents of liberal democracies, and, on the other hand, those countries who favour the introduction of the resolution. As Heinze (2006:544) points out, under the *First Amendment* to the *United States Constitution*, the Supreme Court in the United States has traditionally struck down the type of hate speech bans that international norms require. Khan (2006:1) argues that certain countries have been particularly critical of the defamation resolution. It is perhaps not surprising that some of the foremost proponents of the resolution were member states of the Organisation of Islamic Conference. Such states would have a vested interest in protecting Islam from negative stereotyping within the media. Before a

critique can be made concerning the opposition to the resolution, it will first be necessary to highlight the context in which it emerged.

2.5.2 Preventing the negative stereotype

Although the September 11th attacks are widely considered to be the catalyst for the spread of Islamophobic attitudes around the world, the Commission on Human Rights passed a bill condemning defamation of Islam before 11th September 2001 (Grinberg, 2006:3). In 1999 Pakistan introduced a draft resolution to the United Nations in which it argued that "Islam ... was being slandered in different quarters ..." (Littman, 1999:3). The European Union's proposal to adopt a different title, 'Stereotyping of Religions,' was rejected by the Organisation of Islamic Conference. Shortly after this, the Organisation of Islamic Conference managed to have a resolution called the *Defamation of Religions* passed, citing the need for a bill to prevent the negative stereotyping of Islam in association with terrorism and human rights violations. When the United Nations Commission for Human Rights passed the bill entitled *Combating Defamation of Religions* in 2002, the Commission encouraged states to continue fighting against terrorism but urged them not to discriminate "on grounds of race, colour, descent or national or ethnic origin" and to "refrain from all forms of racial profiling" (Greenburg, 2006:3). This newly proposed resolution did not find favour with some Islamic countries, which requested a new resolution under the same name that highlighted the Islamic religion in particular as a religion "frequently and wrongly associated with human rights violations and with terrorism" (Muravchik, 2002:4). The decision to reconfigure the resolution highlighting Islam as a religion subject to a particular form of stereotyping was defended on the grounds that such an action would provide the grounds for future united tolerance by all communities. Besides condemning the use of the media to creative negative images of Islam, the resolution also condemned physical attacks on places of worship and religious symbols (Khan, 2006:1). Inherent in the final draft was a desire for states to "complement their legal systems with intellectual and moral strategies to combat religious hatred and intolerance" (Khan, 2006:1). In the original draft of the final resolution, it was noted "with deep concern the increase in anti-Semitism and Islamophobia in various parts of the world, as well as the emergence of racial and violent movements based on racism and discriminatory ideas directed against Muslim, Jewish and Arab communities" (Grinberg, 2006:4). This wording was deleted from the final draft of the resolution as some states were opposed to the use of the term "anti-Semitism" in the UN Constitution.

The resolution was supported by 101 states in total when the final draft was proposed in 2005. In 2006 the resolution gained the support of 10 more states, bringing the total to 111 states in favour. All Middle Eastern states except Israel, and an overwhelming majority of states from Africa, Asia and South America supported the resolution. In opposition, in 2005, 53 states voted against the *Defamation Resolution* including all members of the European Union, Australia, Canada, New Zealand and the United States (Khan, 2006:2). In 2006 South Korea and Japan agreed to oppose the resolution. In 2005, 37 states from Asia, Africa and South America did not commit themselves to lending support to or in providing opposition to the resolution (Khan, 2006:2). The theory that the voting blocs either providing support or lending opposition to the resolution represents a Christian-Islam religious clash is flawed in that a predominantly Christian country like Russia, and other Christian states in South America, endorsed the resolution. From a Western viewpoint, there has also been an attempt to explain the rift in terms of a liberal/non-liberal divide. Such theorists would argue that liberal-democratic states such as member states of the European Union, Japan and South Korea would oppose the resolution on the grounds that it poses a strong threat to the individual liberties of citizens within the nation-state (Khan, 2006:2-3). Such a theory has some credibility in that many members of the Western Non-Aligned Movement (NAM) do not consist of democratic systems. However, this does not account for the reason why strong democratic states like India and South Africa would lend their support to the resolution (Khan, 2006:3).

As mentioned, one of the foremost criticisms of the *Defamation of Religion Resolution* is that it does not provide a definition for the term "defamation". The prevention of group defamation is problematic in that it not only limits free speech in the public sphere but also enables certain groups or non-secular governments to continue with inhumane customs and practices directed at the nation-state citizenry (Khan, 2006:4). The fact that the resolution prevents the defamation of religion goes further than group defamation in that it also prevents criticism directed at religious ideas and doctrines. It is perhaps not coincidental that the "cartoon crisis" that was allowed to manifest itself within the media structures of liberal-democratic states in Western Europe emerged within a country that rejected the *Defamation of Religion Resolution*. In this context, how are we to understand arguments put forward by certain liberal-democratic states, such as the member states of the EU, that the Resolution threatens the right to free speech? How are such criticisms based on a discourse that places the right to free speech as an indispensable tool of the democratic nation-state?

2.5.3 The right to offend: the resolution as an infringement of civil liberties

As Khan (2006:4) argues, the absence of a legally sustainable definition of the term "defamation of religions" is problematic in that there are no legal parameters that can indicate exactly what constitutes a defamatory remark or gesture. The fact that potentially any speech with a religious theme can be suppressed on the grounds that it is defamatory is dangerous in that it poses a big threat to civil liberties. The *Defamation Resolution* has been interpreted by liberal democracies in the West as constituting an infringement of free speech. Since the right to free speech is a fundamental civil and political right that is protected in national constitutions and treaties around the globe, many Western liberal democracies will oppose the power of non-secular states to suppress speech on the grounds that it is defamatory towards religion. As Khan (2006:4) further argues, in Western liberal states, the sacrifice of artistic liberty and political liberty for cultural and religious deference is a bad bargain. The fact that the *Defamation of Religion Resolution* fails to distinguish between the dignity of religion, which must be protected, and valid criticisms of certain religious practices is also problematic. As *Article 18* of the *International Covenant on Civil and Political Rights* states, a citizen has a right to adopt a religion without coercion. While in many Islamic countries non-Muslims are encouraged to adopt Islam as their chosen faith, some Islamic states impose harsh penalties, such as the death penalty, for Muslims who convert to another religion. The existence of the *Defamation of Religion Resolution* will be seen to be problematic as it entitles certain states to engage in inhumane practices (Khan, 2006:5).

Entrenched within the *Universal Declaration of Human Rights* is the right to "freedom of opinion and expression". Such freedoms may be rescinded should a government deem it necessary "for the purpose of securing due recognition and respect for the rights of freedoms of others and of meeting the just requirements of morality, public order and the general welfare in democratic society" (Grinberg, 2006:8-9). As Grinberg (2006:5) points out, the *Universal Declaration of Human Rights* does not provide a solution for how to solve a dispute between two competing rights such as the right to free speech and respect for the freedom of others. However, Grinberg (2006:5) argues that the *Universal Declaration of Human Rights* does not sanction incitement of violence. For as (1-2) in *Article 20* of the *International Covenant of Civil and Political Rights* (ICCPR) states, the state is allowed to restrict freedom of expression to disallow "[a]ny advocacy of national, racial or religious hatred that constitutes incitement, discrimination, hostility or violence...". Representing the United States, Eleanor Roosevelt (Farrior, 1996) argued that *Article 20* would allow

governments to silence dissident criticism in the name of protection against religious hostility, which would render all other rights in the *International Covenant of Civil and Political Rights,* according to Roosevelt, null and void. Although, *Article 20* enables governments to silence speech deemed to be hostile or an incitement to violence, according to Henkin (1995:127), expressions of opinions, misstatements or distortions of fact do not fall under the category of "religious hatred" and could thus not be censored under *Article 20.* The publication of the Danish cartoons is particularly problematic in that it is difficult to ascertain whether they are a direct incitement to violence, in which case they could be censored under *Article 20*, or whether they are merely an expression of opinion or a distortion of fact and hence could not be classified as "hate speech". Henkin (1995) does concede that governments may prohibit group defamation under the stipulations of *Article 19* if speech is not rescinded under *Article 20.* As *Article 19 3(b)* states, a government may prohibit speech "[f]or the protection of national security or of public order or of public morals". Hence, the state is only justified in revoking speech when it can prove that censorship is "necessary" to maintain public order in a "democratic" society. It is because of the fact that infringing civil liberties in a democratic society is such a serious matter that governments are often reluctant to intervene in sensitive matters that may require censorship for the public good. In order for censorship to be justified on behalf of the government, there has to be a clear indication that such an action is not only pertinent but is in the best interests of the greater majority.

While one of the principal criticisms directed at the *Defamation of Religion Resolution* has been that it gives a *carte blanche* right for governments to censor dissident criticism, another question concerns whether such a resolution is necessary within a democratic state. For, if international law ensures that speech can be censored if it is deemed to be an instigator of public violence, this begs the question of whether a resolution is needed outside of the nation-state boundary. In *Article 10* of the *European Convention on Human Rights*, "the right to freedom of expression carries with it duties and responsibilities and may be subject to such ... as are necessary in a democratic society". Taken word for word from the *International Covenant on Civil and Public Rights, Article 10* is symbolic of a discourse that places the right to free speech as an indispensable tool of a democratic state. Free speech can only be rescinded if democracy itself is under threat.

While speech in a democracy can be censored for the sake of "national security" or "public safety", international tribunals are reluctant to rescind speech simply on the basis of insult.

Regardless of whether speech is defamatory, it has to be proven that such speech poses a threat to civil liberties as entrenched in the *International Covenant on Civil and Public Rights* and the *European Convention on Human Rights*. In 2002, the *European Convention on Human Rights* invoked *Article 10* of the *Covenant* to overrule a decision made by Turkish courts to sentence a lawyer to jail for criticising the Turkish government's policy towards the Kurdish ethnic group (Grinberg, 2006:8). According to the Turkish judiciary, the lawyer had made use of the terms "Kurds" and "Kurdistan" which were deemed to be part of separatist propaganda. The dissemination of such propaganda was supposedly an invocation for acts of terrorism against the Turkish government and hence was a threat to the public order and national security. While the *European Convention on Human Rights* recognised the Turkish government's concern for preventing terrorism, the court argued that limitations on expression as defined under *Article 10* did not have jurisdiction over matters of public interest or political expression (Grinberg, 2006:8). The court explained that the right to freedom of expression constituted one of the principal foundations of a democracy. Hence the Turkish citizenry had a right to be informed of the government's policies towards the Kurdish ethnic group. As a ruling body, the Turkish citizenry are entitled to be knowledgeable with regards to government policy regardless of whether the material that is presented to them is "offensive" or "shocking". The ruling of the *European Convention on Human Rights* was that such a restraint on free speech was not necessary in a democratic society (Grinberg, 2006:8-9).

However, in *Otto Preminger Institute vs Austria*, the *European Convention on Human Rights* upheld a decision by the Austrian government to seize a satirical film that investigated the relationship between religion and worldly mechanisms of oppression. In portraying God as a senile old man "prostrating himself before the devil" and the Virgin Mary as exhibiting "a degree of erotic tension", the decision by the Austrian government to ban the film was justified on the grounds that the film constituted a "wholesale derision of religious feelings" towards the church (Grinberg, 2006:9-10). The need to curtail such criticism of religious institutions outweighed the director's right to freedom of expression. The *European Convention on Human Rights* argued that the film did not contribute in any way towards public debate and was not capable of "furthering progress in human affairs" (Grinberg, 2006:10). Grinberg's decision to highlight these two examples is interesting in that both cases raise pertinent questions with regards to justificatory arguments for speech censorship. Grinberg alludes to these cases in order to answer the broader question of whether a

"defamation of religion" resolution is necessary in a democratic society. We could perhaps interpret such a question as an attempt to analyse whether liberal-democratic systems are equipped with the necessary legislative procedures to maintain the tricky balance between ensuring a citizen's right to free expression while at the same time limiting speech when it is deemed to be an invocation of violence towards a religious or cultural group. Inherent within the legislature of the *European Convention on Human Rights* is a fundamental right to criticise religions. For, while the constitution ensures freedom of religion, this does not exclude religious criticism. Dissident judges opposing the ruling of the *European Convention on Human Rights* argued that it should not be left to states to determine whether a speech act has contributed to public affairs in any sort of way, for vesting such power in governments enables the state to favour certain power groups over others (Grinberg, 2006).

Once again we are faced with a discourse centred on the sovereign citizenry. In both cases, the decision by the *European Convention on Human Rights* to enable or censor speech was based on the "public interest" and "political expression" of a well defined and constituted polity. Hence, if we are to view such a ruling based on the "argument from democracy", the *European Convention on Human Rights* is willing to revoke a speech act if it does not contribute to the greater good of the sovereign citizenry. If it can be proven that a speech act is necessary for the citizenry to govern and that it does not infringe other civil liberties, such a speech act is not rescinded. The controversy surrounding the introduction of the *Defamation of Religion Resolution* is based on two factors. Firstly, the *Resolution* fails to provide a clear definition of defamation and, secondly, the *Resolution* silences speech directed at non-secular oppressive states – that is, states not constituted along the Western, liberal, democratic line – because such criticism is seen to be an attack on religion or culture. Hence, authoritarian or oppressive regimes are allowed to continue engaging in inhumane practices without fear of public criticism. Hence, too, criticism of the *Resolution* is based on the argument that speech is a necessary component of a functional democracy and cannot be revoked on the grounds of defamation.

2.6 Conclusion

The objective of this chapter has been to indicate the impossibility of legally invoking limitations on free speech on an international level by appealing to a nation-state rights discourse. Within the nation-state, we are able to invoke the call for absolute or limited free speech by appealing to a rights discourse that is exclusive to the nation-state. Such a rights

discourse cannot be invoked to limit free speech on an international level, however, as no sovereign body has the legal authority to do so. As was shown in Chapter Two, the rights discourse inherent to the nation-state makes the modern *notion* of free speech possible. At the same time, this rights discourse acts as a limitation of sorts because we are unable to invoke limitations on free speech outside of the nation-state boundary. An analysis of the publication of the Danish cartoons in *Jyllands-Posten* in 2005 and the *Defamation of Religions* resolution passed in 2005 suggested that our ability to engage with free speech on an international level is limited by its origin in nation-state rights discourse. As will be demonstrated later in this thesis, there is an equal need to limit free speech outside of the nation-state. Although international bodies like the UN and the EU can call for the limitation of free speech, they do not have the ability to legally restrict free speech without violating a nation-state's sovereignty. Having highlighted this problem, we are left with the dilemma of how to conceive the limitation of free speech on an international level without appealing to the rights discourse particular to the nation-state. The argument for the limitation of free speech is a legitimate cause; however, we cannot legally impose such limitations on an international level because we cannot appeal to a sovereign body with the legal power to do so. It will be the objective later on in this thesis to propose a way to invoke limitations on free speech without appealing to a nation-state rights discourse.

In the next chapter I start exploring an alternative way of conceiving limitations at this level. Clue to re-imagining the very notion of "limitation" is the tension between our desire for absolute freedom (here, of speech) and the need to recognise limitation of that desire by context and history. To this end I look in the next chapter at Derrida's analysis of a number of concepts where a similar tension exists. It is useful to look at Derrida's analysis of such aporetic concepts because it will later be suggested that free speech is similarly aporetic. Besides describing the aporia of certain concepts, Derrida also suggests a way "beyond" the impasse suggested by the aporetic tension inherent in the concept. This "way beyond" entails a constant oscillation between or negotiation of the two extremes, the absolute and the historical: one only makes sense because of the other and in this co-constitutive relation lies a clue to conceiving limitations on the absolute freedom of speech in the global arena.

Chapter 3. The historical and the absolute: Derrida's aporiae

3.1 Introduction

In Chapter Two, the objective of the discussion was to identify and critique discourses surrounding the controversy of free speech outside of the nation-state. The intention of that chapter was to show that arguments for and against limiting or restricting free speech are historically rooted in a nation-state discourse that is irrevocably tied to various political models of democracy. These models cannot be assumed to exist and although they may in time come to exist and the arguments associated with them regain relevance, for now the arguments that derive from them are inadequate to address the issue of free speech at a global level. To state this differently, our modern notion of free speech emerged within the context of the modern nation-state and is thus irrevocably tied to democratic appeals for popular governance in the form of democracy. It is because free speech emerged in the context of the nation-state that we cannot reconcile claims to absolute or limited free speech outside of the nation-state boundary. Chapter Two showed how we are unable to argue for or against the suppression of free speech outside of the nation-state because we are restricted to discussing free speech in terms of a nation-state discourse with its appeals to the conditions for democracy (of which "truth" is one). It is therefore pertinent to ask how, beyond the nation-state, we are to address the need for the right to freedom of speech to be absolute (as a democratic understanding of the concept demands) with the equally necessary requirement for speech to be limited or restricted in certain contexts. How are we to reconcile both appeals to freedom and limitation without an appeal to absolute truth and the conditions for democracy?

The following two chapters will propose a solution for accommodating both necessities. The guiding theme of Chapters Three and Four is that perhaps the concept (not the notion) of "freedom of speech" should be considered *aporetic* in the way suggested by Derrida (2001:32); that is, that the concept contains within itself both that which enables and that which limits claims to freedom of speech. In order to show how such an approach can be used, it will be instructive to analyse how Derrida critiques certain problematic concepts that are similarly aporetic. To that end, this chapter will consider his analyses of forgiveness, friendship, democracy and justice. In each case the object of the discussion will be to show how Derrida identifies and then reconciles the structural aporiae within each concept. On the

basis of the analysis offered in this chapter, I shall, in the fourth chapter explore if and to what extent it is useful to consider the concept of free speech aporetic in a similar way.

Fritsch (2001:185) argues that, in the wake of post-structuralist challenges to the concept of truth and enlightenment thought, we are faced with the problem of how to respond ethically and responsibly to the violence incurred in recent history. In addressing a responsibility for such violence, Derrida (in Fritsch, 2001:185) argues that the responsible memory of violence cannot avoid a reflection upon an inescapable or "originary violence" for which we have to take responsibility. For Derrida, violence so considered has quasi-transcendental status. The idea of a "quasi-transcendental" concept of violence is inherent to the structural analysis of the concepts to be discussed in this chapter. For Derrida the idea of rectifying an "originary violence" or injustice is constitutive of the concepts of forgiveness, democracy, friendship and justice and it is to a discussion of these that I now turn.

3.2 Forgiveness

According to Bernstein (2006:394), Derrida's investigation of the concept of forgiveness is premised on three key issues. The first issue pertains to the several Truth Commissions that have been organized throughout the world. Although these commissions are not in any sense legal or juridical, the purpose behind their creation was to create some sort of healing process for the purposes of reconciliation (Bernstein, 2006:394). Despite being sympathetic to the function of such commissions, Derrida questions whether it is appropriate to speak of forgiveness with regard to such healing activities. Derrida argues that forgiveness, rightly understood, has nothing to do with the normalizing processes of political healing or redemption (Bernstein, 2006:394). The second issue that concerns Derrida regards the ubiquitous use of the concept of forgiveness in public discourse. Since the end of the Second World War it has become common for a number of state and non-state actors, such as sovereigns, heads of government, and corporations, to acknowledge past misdeeds and ask for forgiveness publicly. Again, Derrida argues that forgiveness rightly understood has nothing to do with such public requests. As soon as forgiveness becomes embroiled in what he refers to as an "economy of forgiveness", where forgiveness is exchanged for truth or an apology, forgiveness disappears and becomes something else entirely (Bernstein, 2006:394-5). To clarify what I mean by "forgiveness rightly understood" it will be necessary to look more closely at Derrida's genealogical and logical analysis of forgiveness. This traces its

roots to an Abrahamic discourse based on the three major world religions, Islam, Christianity and Judaism.

With regards to the third issue, it will be necessary to look at Derrida's response to an essay by Vladimir Jankelevitch (1967) entitled *Should We Pardon Them?* Jankelevitch (cited in Derrida, 2001:32) argues that some acts or misdeeds are so atrocious that they are beyond forgiveness, they are unforgivable. Derrida (2001:32) responds by saying that it is only because such deeds are beyond forgiveness that pure and unconditional forgiveness can occur or that it becomes possible. It will be necessary to go into such an argument in more detail, for it is here where Derrida unravels the aporetic nature of the concept of forgiveness. Lastly, it will be necessary to question why Derrida defends a pure, unconditional notion of forgiveness. Such a question will be answered by looking at what Kaposy (2005:204) calls the "Argument from Meaning" and the "Argument from Disappearance".

3.2.1 A genealogical analysis of forgiveness: its use in public discourse

According to Kaposy (2005:204), Derrida's analysis of the concept of forgiveness takes place on at least two levels. Through a *genealogical* analysis, Derrida (2001:28) aims to locate our understanding of forgiveness by tracing the historical conditions and contexts in which the concept first emerged in public discourse. Derrida (2001:28) argues that the concept of forgiveness has at its roots the "Abrahamic" tradition. By the term "Abrahamic", he is referring to the three monotheistic global religions of Christianity, Judaism and Islam. The emergence of the concept of forgiveness and the traditional way in which it has been understood in this "Abrahamic" tradition is what he refers to as the "heritage" (Bernstein, 2006:395-6). According to Derrida (2001:28), since the end of the Second World War the concept of forgiveness has become internationally ubiquitous on the world stage. It has become common for individuals, communities, professional corporations, sovereigns and heads of state to ask for forgiveness in public. The language of forgiveness has even been used by representatives of non-Abrahamic countries such as Japan and Korea (Bernstein, 2006:395-6). The spread of forgiveness on the world stage is associated with what Derrida refers to as "globalatinisation", which is a globalised normalisation of the influence of Roman Christianity. As Derrida (2001:32) argues, globalatinisation "overdetermines all language of law, of politics". This particular form of Abrahamic forgiveness has found a particular niche in the international discourse of human rights, particularly with regards to the phenomenon of "crimes against humanity" (Derrida, 2001:30). So what is the purpose of Derrida's

genealogical analysis of forgiveness? Critchley and Kearney (cited in Bernstein, 2006:395-6) argue that,

> *What Derrida is seeking to do in much of his recent work might be described as the historical analysis of concepts, a form of conceptual genealogy. He selects a concept from what he always describes as 'the heritage' – let's call it the dominant Western tradition and then proceeds, via an analysis that is at once historical, contextual, and thematic, to bring out the logic of that concept.*

While the "Abrahamic" religious tradition determines our understanding of forgiveness, our Western philosophical tradition allows us to understand forgiveness from a logical perspective. The distinction between a genealogical understanding of forgiveness and a logical understanding is important for Derrida (2001:34-5). Through a Western philosophical tradition, he analyses how forgiveness operates on a purely logical level. Such a logical analysis investigates the logical structure of the concept of forgiveness independently of particular social-historical contexts. Hence, an analytical investigation allows us to understand the logic of the concept of forgiveness and how it works. Such a distinction is important because Derrida distinguishes between conditional forgiveness, as expressed in the Abrahamic tradition, and unconditional forgiveness, which is associated with the Western philosophical tradition (Kaposy, 2005:202-3). It will be necessary to go into such a distinction in more detail.

3.2.2 Unconditional forgiveness: dependent yet in-dissociable

Conditional forgiveness is what we frequently mean by forgiveness according to Derrida (Bernstein, 2006:396). Having been used ubiquitously in the Abrahamic religious tradition, the key to conditional forgiveness is an "exchange in economy." Simply put, a sinner or a perpetrator who has committed a crime or injury acknowledges their crime or misdeed and asks for forgiveness from the victim or their representatives. There is an exchange or economy because forgiveness will only be granted in exchange for an acknowledgement of a misdeed and repentance on behalf of the perpetrator (Bernstein, 2006:396). Once forgiveness has been exchanged for repentance, a process of healing and reconciliation can occur. This particular form of conditional forgiveness has found its way into public discourse internationally, particularly with regards to the "Truth and Reconciliation Tribunals" that have been prevalent in a number of countries. However, Derrida (Bernstein, 2006:397) insists that conditional forgiveness taken on its own is not forgiveness. In order for conditional forgiveness to have any meaning, it must necessarily be in-dissociable from and dependent

upon unconditional forgiveness. Unconditional forgiveness is different from conditional forgiveness in that it can take no part in an economy of exchange. A victim of a crime or misdeed should thus forgive a perpetrator for a crime without expecting an apology or repentance on behalf of the victim. For this is the definition of unconditional forgiveness according to Derrida (Bernstein, 2006:397). In order for conditional forgiveness to have any meaning, it must be dependent upon unconditional forgiveness. As Derrida (2001:45) states, "[t]he unconditional and the conditional are, certainly, absolutely heterogeneous, and this forever, on either side of a limit, but they are also in-dissociable".

The use of conditional forgiveness in public discourse is often part of what Derrida refers to as "strategic calculations", where some sort of reconciliation is the main objective (Bernstein, 2006:396). While Derrida does not actually have a problem with the motives of heads of state, communities or individuals who attempt to achieve some sort of reconciliation and healing, he does have a problem with the use of the word forgiveness in such a process. For, as he (Derrida, 2001:56-7) argues:

> *Speaking of this equivocal use of the word forgiveness, we see that all these political scenes of forgiveness, of asking for forgiveness and repentance are often strategic calculations made in the view of healing away. I have nothing against that. I have something against the use of the word forgiveness to describe these cases. "Healing away" is a major term in South Africa. In France, each time a head of state, the prime minister, wants to grant amnesty and to erase crimes of the past, it is in the name of "national reconciliation to reconstitute the healthy body of the nation, of national community". I have nothing against that. But if the word forgiveness is used in view of such an economy or therapy then I would say no, that is not to forgive. It is perhaps a very noble strategy. So forgiveness, if there is such a thing, should be devoid of any attempt to heal or reconcile, or even to save or redeem.*

It will be necessary to analyse exactly why Derrida argues against the use of the word forgiveness in public discourses of reconciliation and healing. This will be looked at in detail with regards to what Kaposy (2005:205) calls the "Argument from Meaning." Derrida's principle concern is that as soon as forgiveness is used in public discourse, it becomes embroiled in and perhaps indistinguishable from other concepts such as clemency and amnesty. It is because forgiveness can become meaningless and indistinguishable from other concepts that Derrida insists on the need for conditional forgiveness to refer to the notion of unconditional forgiveness (Bernstein, 2006:397). Such an argument will be dealt with in more detail. For the moment it is necessary to look at Derrida's analysis of unconditional forgiveness from a logical perspective.

3.2.3 Possibility through impossibility: Derrida, Arendt and Jankelevitch

Rather than investigating the concept through a genealogical analysis, Derrida (cited in Kaposy, 2005:205) undertakes a more logical-analytical approach to investigating forgiveness. Conditional forgiveness takes it as a given that certain perpetrators, and the misdeeds they commit, can be forgiven as long as the perpetrator acknowledges their crime and asks for forgiveness. However, what do we do about acts or misdeeds that are beyond forgiveness? In asking this question, we are referring to deeds that are so horrendous, so extreme, and so evil that they are essentially *unforgivable* (Bernstein, 2006:394).

3.2.4 The duty not to forgive: Jankelevitch on not forgiving

Janekelevitch's (1967) essay entitled, "Should We Pardon Them?" provides the basis upon which Derrida explains his logical analysis of unconditional forgiveness (Bernstein, 2006:394). Referring specifically to the terrible deeds committed by the Germans during the Holocaust, Jankelevitch (cited in Derrida, 2001:55) argues that such acts are irreparable and inexpiable. Put simply, they are un-forgivable. For Jankelevitch, it is not a question of whether an economy of exchange can take place, as with conditional forgiveness for we owe it to the victims not to forgive the perpetrators of such heinous crimes against humanity. Forgiveness is impossible and should not be granted. As Jankelevitch (in Derrida, 2001:55) argues, "forgiveness 'died' in the death camps". Such a view is reiterated by Hannah Arendt when she argues in *The Human Condition* (1958:241) that,

> *Men are unable to forgive what they cannot punish and they are unable to punish what has turned out to be unforgivable. This is the true hall mark of those offences which, since Kant, we call 'radical evil; and about whose nature so little is known, even to us who have been exposed to one of their rare outbursts on the public scene. All we know is that we can neither punish nor forgive such offences and they therefore transcend the realm of human affairs and the potentialities of human power, both of which they radically destroy wherever they make their appearance.*

Through this statement, Arendt (1958:241) is supporting Jankelevitch's view that certain deeds are unforgivable or beyond forgiveness. On the basis of the claim that certain acts are so atrocious that they are beyond forgiveness, Jankelevitch is arguing that forgiveness is impossible. Such a statement is crucially important for it lays the foundation for Derrida's response concerning the aporetic nature of forgiveness.

3.2.5 Forgiving the unforgivable: the aporia of forgiveness

Derrida (Bernstein, 2006:395) agrees with Jankelevitch that certain deeds are so atrocious that they are beyond forgiveness. Indeed, he agrees that in such cases forgiveness is impossible. However, in what Bernstein (2006:395) refers to as a deconstructive twist Derrida argues that it is only *because such deeds are impossible to forgive that forgiveness becomes possible*. For as Derrida (2001:55) says:

> *Jankelevitch says that forgiveness has come to an end, died in the death camps. I oppose this. It is exactly the opposite. It is because forgiveness seems to become impossible that forgiveness finds a starting point, a new starting point.*

In order to understand Derrida's claim, it is necessary to go into his logical analysis of the concept of forgiveness in more detail. As stated, Derrida (Kaposy, 2005:203) argues that in order for absolute or pure forgiveness to occur, it is necessary to forgive the unforgivable. Such an idea is aporetic in the sense that forgiveness is made possible through its impossibility. Forgiveness can only occur when it comes to forgiving an act that is unforgivable. This idea of unforgivable forgiveness is aporetic in that unconditional forgiveness is both impossible yet necessary in order for forgiveness to occur. Derrida (2001:32-3) reiterates such a point by arguing:

> *If there is something to forgive, it would be what in religious language is called mortal sin, the worst, the unforgivable crime or harm. From which comes the aporia which can be described in its dry and implacable formality, without mercy: forgiveness forgives only the unforgivable.*

As Kaposy (2005:204) argues, Derrida's logical level of analysis of forgiveness is different to his genealogical analysis in that he focuses solely on how the language of forgiveness is used. A logical analysis of absolute or unconditional forgiveness is separated from particular historical and social contexts. Conditional forgiveness operates in a particular context where its logic is based on its means to achieve an objective. Thus, conditional forgiveness is used in an economy of exchange for the purposes of achieving some form of reconciliation or healing. Absolute or unconditional forgiveness cannot be manipulated to operate in such contexts. It is this very problem that causes Derrida to concede that if forgiveness is to occur in reality it must engage in a series of compromises or conditions (Kaposy, 2005:207). In other words, if forgiveness is to occur in reality it must become conditional forgiveness. It must engage in an exchange of economy. However, this begs the question that if Derrida concedes that forgiveness can only occur when it operates under a series of conditions, why is

it necessary to preserve a notion of unforgivable forgiveness in the first place? Such a question raises two pertinent issues. If forgiveness can only ever occur when it is conditional, how can Derrida maintain that the only real or pure forgiveness is unconditional? Secondly, why does Derrida see the need to preserve the concept of unconditional forgiveness in the first place? The answer to the first question is based on the logical structure of forgiveness just discussed (Kaposy, 2005:206-7). Derrida argues that it is logical to assume that forgiveness can only forgive what is unforgivable (Kaposy 2005:203). The answer to the second question brings us back to the problem highlighted by Derrida at the beginning of this discussion. While Derrida does not have an issue with the use of forgiveness as a tool used in public discourse for achieving reconciliation and healing, he is concerned that the concept of forgiveness can become indistinguishable from other concepts such as clemency and amnesty (Kaposy, 2005:205). Derrida argues that in order to prevent this from happening it is necessary to preserve what he refers to as a 'quasi-transcendental' notion of unconditional forgiveness. It will be necessary to look at this argument in more detail.

3.2.6 The "Argument from Meaning" and the "Argument from Disappearance"

Bernstein (2006:394) highlights three key issues that have provoked Derrida's questioning of forgiveness. The argument forwarded by Jankelevitch (1967) and Arendt (1958) that forgiveness is sometimes impossible provided the basis for Derrida's logical critique of forgiveness. Derrida's response to Jankelevitch forms the basis of what Kaposy calls the "Argument from Disappearance." Derrida (2001:32) says, "[i]f one is only prepared to forgive what appears forgivable, or what the church calls 'venial sin', then the very idea of forgiveness would disappear". As mentioned, Derrida (Bernstein, 2006:395) asserts that absolute forgiveness is made possible when it comes to forgiving acts that are so atrocious they are unforgivable. He (2001:32-3) maintains that, "[i]f there is something to forgive, it would be what in religious language is called 'Mortal Sin', the worst, the unforgivable crime or harm". Derrida is stressing the point that if one is only prepared to forgive what is forgivable the notion of forgiveness would disappear. Derrida agrees with Jankelevitch that certain deeds or acts are so atrocious that they are impossible to forgive. However, he argues that forgiving the unforgivable is necessary to prevent the notion of forgiveness from disappearing altogether. Without the notion of unconditional forgiveness, the meaning of forgiveness would disappear when it engages in an economy of exchange (Bernstein, 2006:395).

What Kaposy (2005:211) calls the "Argument from Meaning" is a critical response to the role played by conditional forgiveness in public discourse. Despite claiming that forgiveness must necessarily involve forgiving the unforgivable, Derrida is forced to concede that because of the impossible or aporetic nature of forgiveness, in order for forgiveness to occur or manifest itself in reality, it must engage in a series of conditions. Although Derrida expresses his scepticism about the theatricality and hollowness of the use of forgiveness in public discourse, nevertheless he acknowledges the import role forgiveness plays in the process of reconciliation and healing (Bernstein, 2006:394-5). Derrida's principal concern is that when forgiveness engages in an exchange of economy, there is a danger of forgiveness losing its meaning and becoming something else entirely. Any act of forgiveness granted for some reason other than forgiveness itself is in danger of losing its meaning. In essence, forgiveness would disappear. For conditional forgiveness to have any meaning, it is necessary that it refer back to a notion of pure, unconditional forgiveness (Kaposy, 2005:211).

Despite arguing that forgiveness can only occur when it engages in a series of conditions or an economy of exchange, Derrida still defends the necessity of preserving an absolute or pure notion of unconditional forgiveness. However, pure or unconditional forgiveness is impossible and cannot actually occur in reality (Kaposy, 2005:208). The complexity of unconditional forgiveness demands that it derives its meaning from having no meaning at all. Pure or unconditional forgiveness cannot be involved in an economy of exchange for if it does, it becomes conditional forgiveness. As Kaposy (2005:212) understands it, "meaning cannot be given to an instance of pure forgiveness by providing a reason for granting it. It must exist outside of reason and outside of any particular context". In other words, unconditional forgiveness derives its meaning from having no meaning at all. Unconditional forgiveness operates as what Levinas (1969:23) refers to as "a signification without a context". All the conditions placed on forgiveness can potentially threaten the purity of the concept itself. In order to preserve its purity, it must necessarily avoid all such conditions. By standing outside of any particular context, pure forgiveness is a condition of possibility of conditional forgiveness. In order for conditional forgiveness to have any meaning and to prevent its disappearance or assimilation with other concepts, it must necessarily refer back to the notion of pure or unconditional forgiveness (Kaposy, 2005:212). Derrida (2001:45) puts this point succinctly when he argues:

> *Despite all the confusions which reduce forgiveness to amnesty ... or some political therapy of reconciliation ...it must never be forgotten nevertheless, that all that refers to a certain idea of pure and unconditional forgiveness, without which this discourse would not have the least meaning.*

As Kaposy (2005:213) points out, pure or unconditional forgiveness can be regarded as a "quasi-transcendental". It is a quasi-transcendental, and not a real or traditional transcendental condition, because of its impossibility. It is impossible for pure or unconditional forgiveness to occur since one cannot forgive the unforgivable. Unconditional forgiveness must not be tainted by any other concept such as amnesty or clemency. It must stand alone and cannot operate in any context. For Derrida, the aporetic or impossible notion of unconditional forgiveness is necessary to provide meaning to any conditional forgiveness that occurs in certain historical contexts. Were unconditional forgiveness not to exist, conditional forgiveness would lose its meaning when it engages in an exchange of economy. Forgiveness would become indistinguishable from other concepts such as amnesty and clemency if it could not refer back to the quasi-transcendental concept of absolute or unconditional forgiveness (Kaposy, 2005:213). In this very specific sense, the absolute (unconditional forgiveness) is a quasi-transcendental possibility for the historical (conditional forgiveness).

3.2.7 Conclusion

Derrida's analysis of forgiveness is primarily motivated by his concern with the use of the concept in public discourse. Forgiveness has become ubiquitous in politics, particularly with regards to the "Truth and Reconciliation Tribunals" and its use on behalf of political leaders as a means to achieving some sort of healing or reconciliation. Perhaps Derrida's main objective has been to clarify how the language of forgiveness is used, particularly in conjunction with other concepts such as clemency and reconciliation. In fact, he asks us to "agree on some 'proper' meaning of this word" (Kaposy, 2005:210). His concern for the preservation of a pure or absolute notion of unconditional forgiveness has been the primary motivating factor behind his desire to ensure that the concept has meaning when it becomes involved in an exchange of economy. By highlighting the aporetic nature of the concept, Derrida has shown that unconditional forgiveness cannot manifest itself in reality. However, as a "quasi-transcendental" concept, it nevertheless adds meaning to any conditional forgiveness that might occur. For the purposes of this thesis, it has been necessary to show the important role that unconditional forgiveness plays in this process for, to pre-empt the

analysis of Chapter Four, I shall argue that the concept of "freedom of speech" rightly understood reveals a similar quasi-transcendental structure.

3.3 Democracy

Derrida's deconstructive analysis of "democracy" is closely associated with his analysis of the concept of "hospitality." It will be argued that Derrida's investigation into the aporetic nature of the concept of hospitality can be better understood within the broader framework of his analysis of democracy. At a conceptual level, an analysis of the aporia of hospitality is not limited to an understanding based on the relationship between a host and a stranger. It is true that Derrida explains the problem of hospitality within the context of the relationship between the host and the outsider; however such an analysis has a broader meaning at the level of the democratic nation-state. At the level of the nation-state, the relationship between the host and the guest is synonymous with the relationship between the citizen and the non-citizen (or outsider). The aporia that marks this relationship is prevalent in both democracy and hospitality. The idea of welcoming the other without restrictions or boundaries is a necessary part of both democracy and hospitality, at the same time both concepts demanding that there are necessary limitations with regards to welcoming the outsider. Because of the similarity of these concepts, it will be necessary to show how Derrida's analytical discussion of the aporia of democracy provides a foundation upon which the aporia of hospitality can be discussed. Thomson (2005:12) argues that the most extended analysis of Derrida's "democracy to come" can be found in his book, *The Politics of Friendship* (1997). As Thomson (2005:12) further argues, the book itself is based around the relationship between friendship and democracy. Derrida's analysis of such a relationship is based on Aristotle's reading of friendship in the *Nicomachean Ethics* (1941:1058). Here Aristotle characterises democracy as a political association modelled on the friendship between brothers. Derrida's reading of Aristotle is an attempt to use friendship as a base for a deconstructive critique of democracy (Thomson, 2005:12). In particular, Derrida aims to highlight the "self-delimitation" of democracy. Democracy is aporetic in that it acknowledges its own limits, but democracy also removes limits as well (Thomson, 2005:12). Such a deconstructive twist is also prevalent in the concept of hospitality. In order to be truly hospitable, the host is obliged to open their home to the stranger without placing any limitations or boundaries on the guest. However, the act of being a host demands some kind of limit or boundary with regards to how far the guest can cross the threshold. Before Derrida's argument can be elucidated upon, it will be necessary to provide a reading of Aristotle that is independent of Derrida's interpretation.

Once such a reading has been provided, we will be in a position to investigate how Derrida uses Aristotle's idea of friendship as a basis to highlight the aporetic concept of democracy. After that, I will show how the aporetic concept of democracy provides the foundation for the analysis of the concept of hospitality. This will be followed by an analysis of yet another closely related concept, namely "justice", for, as Thomson (2005:12) points out, it is friendship that forms the junction for Aristotle between the question of justice and that of the proper constitution of the city, between ethics and politics.

3.3.1 True friendship: reciprocity and equality

In the *Nicomachean Ethics*, Aristotle analyses what friendship consists of (1941:1059). For Aristotle (1941:1059), friendship is an active form of love towards another person. In order for a friendship to exist, love has to be reciprocated between two people. It is possible for a person to ascribe or wish goodwill on another person; if such goodwill is not reciprocated however, such an act of love cannot be considered as a basis for a friendship. But Aristotle goes further to question what reciprocal goodwill or love is based upon. According to him (1941:1060), there are three mutual or recognised types of friendship. The first kind of friendship deals with utility and pleasure. A friendship between two people that is based on utility or usefulness is not a friendship based on admiration for the people themselves. Rather, such an act of love is based on the utility or benefits loving that person provides. The same goes for pleasure for, according to Aristotle, men do not love ready-witted people for their character but because such ready-witted people provide some kind of pleasure (1941:1060). Thus, people who love for the sake of utility only love for the sake of what is good for themselves. Likewise, those who love for the sake of pleasure love for the sake of what is pleasant for themselves. Aristotle (1941:1060) refers to such friendships as incidental because they are only founded on the benefits they provide. Such friendships are fragile because as soon as one of the persons ceases to be useful or pleasurable, the friendship is ended.

The second form of friendship that Aristotle refers to is perfect friendship. Put simply, perfect friendship is the friendship of men who are alike in goodness and virtue. Such men wish well to each other, not because of some utility or pleasure, but out of genuine concern for each other's well-being. Such friendships are strong and not easily broken because they are built on the intrinsic goodness of character and goodness is an enduring trait (1941:1061). As opposed to friendship that is based solely upon utility or pleasure, two persons in a perfect friendship derive pleasure from the intrinsic goodness inherent to their own nature. It is

through wishing the best for each other that utility or pleasure is gained (1941:1064). Such a friendship is considered to be perfect not only because of its duration (which is long-lasting because it is based on goodness) but also because each person in the friendship receives equally from each other in terms of utility or pleasure. Those who are friends purely for the sake of utility or profit end such a friendship when such benefits or utility ceases. Good men can only be real friends, according to Aristotle, because they delight in each other's company and because they give equally to each other (1941:1064).

However, Aristotle also argues that there is another type of friendship, which involves inequality between the parties. An example of such an unequal friendship would be that of a father and son, a man and wife or a ruler and subject (1941:1065). These unequal friendships differ greatly, for the friendship between a man and wife is different from that between a ruler and subject. The virtue and function of each of these friendships is different for Aristotle along with the reasons for which they love. Unlike friendship that is based on equality, parties in an unequal friendship cannot expect the same from each other, nor should they aim to seek it. Thus, love is proportional to the merit or position that each person holds in relation to each other (1941:1066). For example, in an unequal relationship a king will receive more love than he shall give to his subject for such inequality is proportional to the difference in status or power. However, as Aristotle argues, when love is in proportion to the merit of the parties, equality in a sense emerges out of such a relationship. However, while an unequal friendship can be retained despite such inequalities, when one party is removed or distant to a great extent, friendship ceases altogether (1941:1066). Aristotle uses the example of a God to illustrate such a point. The stature of a God would mean that he would surpass us in all things. A friendship with such a being would be impossible. The idea of a distanced or removed God creates a dilemma with regards to the idea of an equal friendship according to Aristotle. If, in an equal friendship, one wishes the greatest good for a friend, this would amount to wanting a friend to become a God. However, were someone to become a God, the friendship would cease to exist. Derrida addresses this dilemma in more detail when he argues that a friendship based on equality is impossible. Such an argument will be dealt with in more detail at a later stage.

3.3.2 Democracy and equal friendship

Aristotle (1941:1069) argues that there are three kinds of political constitution and an equal number of deviations that form from them. Such distinctions are important for Aristotle

because he equates different types of friendship as being representative of these different constitutions. Highlighting these differing constitutions is crucial for the purposes of this discussion because Derrida builds upon Aristotle's analysis to uncover the aporetic nature of democracy. The three constitutions are monarchy, aristocracy and, thirdly, that which is based on property qualification which is referred to as "timocratic" or "polity" (1941:1069). Monarchy is defined as being the rule of one-man or a monarch in the form of a king. Tyranny is a deviation from a monarchy for, although both constitutions involve one-man rule, the tyrant looks to better his own advantage whereas the monarch looks to the welfare of his subjects. As Aristotle (1941:1070) argues:

> *a man is not a king unless he is sufficient to himself and excels his subjects in all good things; and such a man needs nothing further; therefore he will not look to his own interests but to those of his subjects; for a king who is not like that would be a mere titular king.*

Aristocracy passes into an oligarchy through the corruption of the rulers. Such rulers do not distribute wealth equally, as is required for the inhabitants of a city, but distribute it among themselves. The final constitution is that of timocracy. Aristotle argues that timocracy and democracy are coterminous since it is the ideal of a timocracy to be the rule of the majority, and all those who have property qualification count as equal (1941:1070). For Aristotle, one may find resemblances to the constitutions or patterns of them in the household. A monarchy bears a resemblance to the association between a father and his sons, for the father is in a position of higher authority and has a duty to care for his sons. Tyranny on the other hand would be the rule of a master over his slaves and the master appropriates any benefits for himself. The association of a man and wife is symbolic of an aristocracy, for the man rules over his wife in accordance with his wealth, and in those matters in which a man should rule, but the matters that befit a woman he hands over to her (1941:1070). If a man rules in relation to everything with regards to his wife, such a friendship passes over into oligarchy. This is because he is not ruling in accordance with their respective worth, and not ruling in proportion to his superiority. The association of brothers is associated with the model of timocracy. Brothers are equal except in so far as they differ in age (1941:1070). Unlike a monarchy or an aristocracy, democracy is found chiefly in master-less dwellings according to Aristotle. Thus, democracy is modelled on a friendship based on equality. A man and a wife are not equal according to Aristotle because the man is necessarily superior to the wife and thus holds more power as befits his elevated position. The friendship of brothers on the other hand is equal. No brother has more power or occupies a higher position than the other. Such

an equal friendship is associated with a timocratic government, for a democracy demands that all citizens be treated equally and fairly. Rule is taken in turns and on equal terms between citizens of a democracy. Thus, an equal friendship between brothers is most synonymous with a democracy according to Aristotle (1941:1071).

3.3.3 The aporia of friendship and democracy

It has been necessary to outline Aristotle's interpretation of friendship and its relation to the various constitutional forms of monarchy, aristocracy and timocracy because Aristotle's association of democracy with an equal friendship between brothers is built upon by Derrida to reveal an aporetic structure inherent within the concept of democracy (Thomson, 2005:12). Thomson (2005:13) argues that *The Politics of Friendship* is an analysis of the concept of friendship in the history of Western philosophy. Through tracing the lineage of the concept and its canonical formulation by a range of philosophers, most notably Aristotle and Nietzsche, Derrida aims to reveal the aporetic nature of friendship. It is by doing this that Derrida aims to show how an analysis of the aporetic structure of friendship can be used to highlight a similar structure inherent within the concept of democracy. In the *Force of Law* (1992:20), Derrida states that deconstruction is practised in two ways; firstly, deconstruction is an investigation into the a-historical allure of logical-formal paradoxes, and, secondly, it is an historical account based on tracing the genealogy or historical lineage of the concept through interpretations or texts. Derrida's analysis of the aporetic structure of friendship and democracy is deconstructive in the second way in that he aims to analyse the concepts through Aristotle's historical interpretation. Thus, Derrida aims to show how the deconstruction of friendship implies a deconstruction of democracy. It will now be necessary to go into Derrida's interpretation of friendship in more detail.

3.3.4 Aimance: the quasi-transcendental condition for friendship

As mentioned, Derrida's analysis of the aporetic structure of democracy is dependent on Aristotle's interpretation of friendship in the *Nichomachean Ethics*. As Thomson (2005:13) argues, Aristotle's definition of friendship is characterised by the "two values of reciprocity and equality between men who value each other". It is these very values underpinning friendship that will provide a foundation for the birth of the state and justice according to Aristotle. For Aristotle, the most perfect form of friendship is built on virtue and equality. However, Derrida (1997:13) questions the perfection of an equal or virtuous relationship. An equal friendship would be based on the ideal of wanting the best or the greatest good for the

other person. However as Aristotle acknowledges, wanting the best for a friend would amount to wanting them to become a God which would then nullify the friendship altogether. Aristotle counters such a problem by arguing that in an equal friendship, a friend wishes the best for their friend as long as they both remain men. Wishing the best for one's friend is limited in this context because one cannot wish for a friend to become a God. Since an equal friendship is based on equal reciprocity, a friendship would involve actively loving someone and having him or her reciprocating such love in return. However, as Aristotle (1941:1064) argues:

> *One cannot be a friend to many people in the sense of having friendship of the perfect type with them, just as one cannot be in love with many people at once (for love is a sort of excess of feeling, and it is the nature of such only to be felt towards one person); and it is not easy for many people at the same time to please the same person very greatly, or perhaps even to be good in his eyes.*

Aristotle reiterates such a point in the *Eudemian Ethics* when he argues that "it is not possible for affection to be active in relation to many at once since it takes time to test a friendship, and friendship is an experience reserved for humans (not immortals)" (cited in Thompson, 2005:15). Derrida agrees with Aristotle that a friendship is an active experience. An active experience of friendship must necessarily be exclusive. For as Derrida (1997:37) says, "one must choose and prefer: election and selection between friends and things, but also between possible friends". However, while an active friendship must necessarily be exclusive or limited, there is no limit to the amount of people one could potentially be friends with. Derrida tries to bridge this gap between active and passive friendship by arguing in favour of an experience of friendship that avoids such a distinction between active and passive friendship (Thomson, 2005:15). While it is not possible to actively love everybody, no one is excluded from the potential of being loved. While an individual could potentially be friends with anyone, it would be impossible to be friends with everybody at the same time. Friendship is exclusive since there is a limited amount of people one can love (Thomson, 2005:15). Through what Derrida refers to as "aimance", he tries to conceive of an experience of friendship which manages to avoid such a distinction between "active" and "passive" friendship. As Thomson (2005:15) argues, Derrida's idea of "aimance" would operate as a quasi-transcendental condition of friendship since it is neither active nor passive. Aimance exists prior to any activation or instantiation of friendship. Aimance would not be a present moment in friendship but rather the necessary condition for any friendship. It is necessary for aimance to bridge the gap between active and passive friendship because it is a

conceptualization of friendship outside of the aporia one encounters when it comes to actively loving people.

Friendship, then, is aporetic because, in order to be active, it necessarily requires one to choose or be selective about individuals with whom one can be friends. At the same time Derrida argues that one can potentially be friends with anybody as long as there could be a reciprocal friendship between two people. The availability of many possible friends is necessary for friendship to occur, although one betrays this multiplicity of possible friends by being selective (Thomson, 2005:15-16). This necessary betrayal and exclusion is what Derrida (cited in Thomson, 2005:16) refers to as "the logic of fraternisation". As a quasi-transcendental condition, aimance allows us to conceive of the concept of friendship. Like all quasi-transcendental concepts such as hospitality, forgiveness and justice, aimance can never actually occur because it demands a suspension of the necessary limitations or exclusivity placed on selecting friends and excluding others. The compulsion to choose certain friends over others is an act of fraternisation, according to Derrida, because of its exclusivity. Thomson (2005:16) argues that in order to gain an understanding of the significance of fraternisation, it is necessary to look at Derrida's thoughts on responsibility.

3.3.5 Responsibility and friendship

It is important to analyse Derrida's association of friendship with responsibility if we are to understand how he attempts to apply the aporia of friendship to an understanding of democracy. According to Derrida, irresponsibility would be the absence of an unfolding programme or a set pattern, in which case the individual cannot be held responsible because he has no control over the course of events (Derrida, 1995:68). Following a set pattern would involve following sets of rules and the individual can thus not be said to act responsibly in any meaningful sense of the word at all. However, if individuals choose their course of action, they are forced to betray others for, as Derrida (1995:68) argues, "I cannot respond to the call, the request, the obligation, or even the love of another without sacrificing the other other, the others others". With regards to friendship, the individual is forced into an absolute responsibility to choose an active relationship to a limited group of friends, and must necessarily break their responsibility to those who are excluded. The paradoxical nature of responsibility is that responsibility only exists in the absence of responsibility (Derrida, 1995:68). While one is not forced to choose certain friends, one has an obligation or a responsibility to love them all "actively", for that is what the concept of friendship demands.

In reality, however, this is not possible as one is forced to be selective. In such an event or obligation, responsibility ceases to exist (Derrida, 1995:68).

Having laid out the foundations of Aristotle's analysis of friendship, it is now necessary to look at how Derrida demonstrates how the aporetic structure of friendship can be applied to an analysis of a similar aporetic structure of democracy. Derrida's attempt to link friendship with democracy is built on Aristotle's analysis, for Aristotle is particularly interested in showing the association between friendship, brotherhood and democracy. Like Aristotle, Derrida takes democracy to be the exemplary form of brotherhood, since it is modelled on the equality of the relationship between brothers. Derrida argues, "[d]emocracy ... is rarely determined in the absence of confraternity or brotherhood" (1997:13).

3.3.5 The exclusivity of fraternisation

The paradox or double movement in the structure of friendship can also be applied to the model of democracy. If we recall, the act of choosing friends takes place in the context of absolute possibility. Thus, since a friendship is not only based on being loved by someone but also loving that person in return, an act of friendship must necessarily be active and not passive. However, this implies that friendship must necessarily be exclusive or limited. One cannot love everybody, therefore the number of friends one can have is necessarily limited despite the fact that anybody could potentially be one's friend. This aporetic structure can also be applied to the concept of democracy, according to Derrida (cited in Thomson, 2005:19). The primary attraction of democracy is its universal appeal or non-exclusivity. Democracy demands that everybody be treated equally and that everyone has the universal right to govern through equal participation in the making and application of decisions. However, while the preservation of equality inherent to the ideal of democracy demands that nobody be excluded, coexisting with such a universal appeal are limitations or conditions that necessarily restrict or exclude non-citizens from participating in a democracy. As Thomson (2005:19) argues, such a scenario invokes the logic of fraternisation, which is found in the concept of friendship. Democracy and friendship are limited to citizens of the state, to one set of boundaries or one people grounded in a spiritual or ideal identification. Like friendship, while the principle of democracy does not exclude or restrict people from equal participation, the amount of people who can actively participate in a democracy is limited to those members of the nation-state. Derrida identifies three sets of problems introduced into the concept of democracy by the structural homology with friendship. Such problems are

identified in Plato's *Menexenus*, for it is there that democracy is described as aristocratic. As Derrida (1997:117) explains, "a form of government which receives various names, according to the fancies of men, and is sometimes called democracy, but is really an aristocracy or government of the best which has the approval of many". The debate concerning whether a democracy can be called an aristocracy is poignant for Derrida because, like friendship, the question of democracy revolves around a question of number. For as he (1995:124) argues, "If the word democracy allies itself or competes with that of aristocracy, it is because of number, of the reference to the required approbation of the greatest number". Although Derrida does not build on this claim, Thomson (2005:19) argues that when democracy is juxtaposed against aristocracy or oligarchy, an uncertain borderline will emerge between the few and the many. While Aristotle distinguished aristocracy from democracy by defining aristocracy as "rule of the few" and democracy as the "rule by many", Derrida's point is that rather than attempting to distinguish between true democracy and an aristocracy, it is pertinent to recognise that such a question of numbers will occur in democracy itself. How much is the "many" raises similar questions with regards to "how many friends can a person potentially have?" The question of numbers will inevitably raise questions concerning the bureaucratization of the political sphere, according to Thomson (2005:19), with regards to the correct and most inclusive democratic decision-making procedures.

The second problem to which Derrida wishes to draw our attention pertains to the "fraternisation" or limitation of democracy to those citizens of a particular state, to the exclusion of others. Drawing on the assertion made in the *Menexenus*, Derrida (1997:95) highlights a part of the text to support his argument that, despite the fact that equality between brothers is inherent to the idea of democracy, such equality cannot be reconciled with the necessary exclusivity or limitation on the amount of friends one can have. Democracy is similarly aporetic or paradoxical because it is self-limiting or exclusive. Democracy is limited to a particular group of citizens who are citizens of a particular state. But what is the basis for such exclusivity within a democracy? According to Derrida, democratic equality is left to a principle of birth. For he (1997:121) argues, "equality at birth founds in necessity legal equality". The foundation of equality between men is thus entrenched at birth through a process of natural law and, hence, the common equality between men is founded on the citizenship of a nation. Such a process reflects the effect of fraternisation in a similar way to that of friendship. Because democratic equality is determined by a principle of birth, there is the same suspension of decision that resulted in

the necessary betrayal and exclusivity with regards to choosing friends. Such a view is reiterated by Derrida (1995:121) when he says:

> *Everything seems to be decided where the decision does not take place, precisely in that place where the decision does not take place qua decision, where it will have been carried away in what has always already taken place at birth.*

The fate of democratic equality as entrenched through birth is what Derrida refers to as "the law of the polis" that is determined in advance by natural law. As the concept of friendship fails to reconcile the notion of brotherhood with the necessary exclusion of others, so democracy fails to reconcile the principle of equality and the process of naturalization at birth that fosters a necessary exclusivity.

The third foundational limit with regards to the concept of democracy pertains to a question of gender and extends to a critique of Aristotle's political models based on forms of friendship. The traditional texts on friendship and democracy are primarily based on the association of friendship with brotherhood. For Aristotle, the highest model of friendship is that between men. The implication behind such a claim is that true equality as reflected in a democracy exists where there is equality between men. In describing a relationship between husband and wife, Aristotle argues that such a relationship cannot be grounded on equality and is based on the relationship between a superior and an inferior (1941:1066). This is the reason why Aristotle associates such an unequal relationship with an aristocracy. Derrida's concern lies with the fact that Aristotle makes no mention of a conceivable relationship between a man and a woman outside of a husband and wife relationship, or for that matter, between two women. As Derrida (1997:311) argues, "[t]his double exclusion of the feminine in this philosophical paradigm would then confer on friendship the essential and essentially sublime figure of virile homosexuality". As Thomson (2005:21) argues, the exclusion of women from this paradigm of friendship and democracy is problematic in that it raises the obvious question of whether the concept of democracy has been organized around a model that either excludes women completely, or neutralises their sexual difference. From this perspective, the woman is forced to become a sister to a brother.

Derrida's last two criticisms pertaining to the contradiction between fraternisation and naturalization and the exclusion of women from political-democratic discourse raises an interesting question about the notion of democratic equality. If democratic equality with regards to access to resources, welfare and security is necessarily or naturally limited to

citizens of a particular state united by birth, the resultant exclusion of non-citizens will not only amount to inequality but an act of injustice as well. This begs the question according to Derrida, that if justice is premised on or represents or invokes a principle of equality, and if equality is limited to the citizens of a state who are citizens by birth, can such democratic equality be regarded as just if it is exclusive? Surely the exclusion of non-citizens or neighbours would equate to an act of injustice (1997:197). With regards to these two criticisms, Derrida has attempted to show how the notion of democracy based on equality is aporetic. Like friendship, democracy is forced to be exclusive in order to operate within the boundaries and confines of a nation-state. A democracy has universal appeal but it is forced to be limited with regards to those who live in a democracy.

3.3.6 Aimance and democracy-to-come

It is now necessary to look at the contradiction between what Derrida calls "respect for irreducible singularity or alterity" and "the citizen as countable singularity". Derrida's account of democracy is based on the notion of democracy he develops in the *Gift of Death* (Thomson, 2005:23). Responsibility, according to Derrida, has the same aporetic structure that is prevalent in the concepts of friendship and democracy. As Thomson (2005:24) states, "[r]esponsibility only begins in this situation of infinitization, as we have seen, where my duty is owed unconditionally to each and every other, and not to some rather than others - whether this restriction is based on family, nation or state allegiances - or to my friends". It is in this space of infinite responsibility where Derrida situates his quasi-transcendental notion of "democracy to come" (Fritsch, 2002:205). As mentioned, the appeal of democracy is its commitment to equality and the rule of the many over the few. Such responsibility is infinite because it demands a commitment to treat everybody as equals under the notion of brotherhood. If we recall, the idea of infinite responsibility is present in Derrida's analysis of friendship. Infinite responsibility exists in the idea that anyone could potentially be one's friend. One has a collective responsibility to treat everybody who could potentially be one's friend equally.

Thus, in the sense that the ideal of democracy aims to embrace everyone as equals, there is an infinite responsibility to do so. However, as Thomson (2005:25) states, "there is no democratic state or democratic theory which will not limit this appeal by grounding it in an association of citizens organized around a naturalising principle which locks up and neutralises the possibility of political responsibility". Hence, as soon as democracy is forced

to be exclusive, responsibility is no longer infinite but is only confined to those citizens of a democratic state. The aimance of democracy exists in the idea of infinite responsibility that comes with treating everybody as equals. This aimance is what Derrida calls "democracy to come." It is a quasi-transcendental concept that defines what democracy ought to be, the principle of democracy strives to treat everybody as equals. However, the mere impossibility of treating everybody as equals means that such an ideal is immediately effaced. Like unconditional forgiveness, it never arrives but is always "to come". Yet it provides the principle upon which any state that claims to be democratic may be judged. For the concept of friendship, Derrida distinguishes aimance from fraternisation, with regards to democracy. "Democracy to come" is distinguished from the necessary limitations or exclusivity as enjoyed by citizens of a state decided at birth.

3.3.7 Conclusion

As Derrida (1997:104) points out, any criticism directed at democracy, such as its traditional exclusion of the "sister" from its fraternal and its exclusion of the outsider in favour of the natural born member of the state, does so in the name of democracy or democracy to come. In this regard Fritsch (2002:579) points out:

> *For democracy, by granting the right to free speech, free assembly, and a free press, is the form of political organisation that calls for its own critique and that admits the fundamental revisability, and openness to challenge, of its own self-understanding. With this admission, democracy opens up a space between its actual condition and its future space-which may or may not be a regulative idea- and situates itself between the present present and the future present, between presence and the future to come.*

Fritsch (2002:579) is alluding to Derrida's idea that "democracy to come" is an ideal or meaning that never occurs, and perhaps never should occur; nevertheless it exists to shape any meaningful deconstruction of democracy that exists. "Democracy to come" exists as a quasi-transcendental condition, which allows us to critique democracy in its empirical form. Having analysed Derrida's critique of democracy through Aristotle's interpretation of friendship, it is now necessary to turn to the aporetic concept of "hospitality". A deconstructive critique of hospitality is associated with the concept of democracy because it has strong connotations with the aporetic structure of democracy, that of reconciling the welcoming of the stranger with the implementation of necessary boundaries or restrictions.

3.4 Hospitality

The concept of "hospitality" resonates strongly with the concepts of democracy and justice. An analysis of the concept of democracy has shown that Aristotle's interest in the association between friendship, democracy and justice is implicit in *The Nicomachean Ethics*. As Thomson (2005:12) argues, "It is friendship which forms the junction for Aristotle between the question of justice and that of the proper constitution of the city, between ethics and politics". In seeking to provide another reading of friendship and democracy, Derrida attempts to escape the aporetic problem of the rhetoric of brotherhood and the "logic of fraternisation". Such an aporetic structure that is prevalent in both friendship and democracy also extends to the concept of hospitality. Hospitality is similarly aporetic in that it is necessarily limiting and de-limiting at the same time. As Kearney (2002:8) argues, "notions of self-identity in western thought have been constructed in relation to some notion of alterity or other".

Western philosophical thinkers such as Levinas and Derrida have pointed out that the western meta-physical heritage has generally discriminated against the other in favour of the same (Kearney, 2002:8). Such discrimination or hatred of the outsider has been referred to as the "ontology of sameness" by Levinas and "logocentrism" by Derrida. The pathological discrimination of the "other" or "outsider" is an act of injustice according to both thinkers. Justice requires a redressing of the balance so as to arrive at a more ethical appreciation of transcendence and alterity (Kearney, 2002:8). Discriminating against the outsider is seen to be an act of injustice because it is associated with "alien" scapegoating in the name of preserving a self-identity. As Kearney (2002:8) points out, most nation-states attempt to preserve their "body politic" by discriminating against the outsider. A process of deconstruction reveals that the national identity of "we" is often juxtaposed against the "other" or the foreign "them". The restoration of justice would require an act of reconciliation with the "other" – an act that, for Levinas, calls for the recognition of our "infinite responsibility" and, for Derrida, the need for absolute hospitality (Kearney, 2002:8-9). While Kearney himself attempts to create a critical hermeneutic capable of addressing the dialectic of others and aliens, this section aims to highlight the aporetic structure of the concept "hospitality". Kearney's main concern lies with the delicate need to balance the alleviation of essentialist binary exclusions with equally necessary ethical decisions regarding "others" (Kearney, 2002:7). According to Kearney, it is still necessary to distinguish between the harmless other or "alien" and the malignant outsider. The challenge of identifying the

outsider is difficult as we have to take care not to fall into a terminology that reduces "otherness" and "sameness" to a black and white discourse (Kearney, 2002:8).

The aporetic structure of hospitality is similar to that of friendship and democracy. As mentioned, "democracy to come" is based on the idea of universal equality. It is opposed to any form of exclusion that would amount to a manifestation of inequality. It is thus necessary that "democracy to come" embraces the idea of the other. However, at the same time it is necessary for communities to exclude the other, for this is the *sine quo non* of the very existence of any community. At the same time the quasi-transcendental concepts of friendship and democracy demand a de-limitation of sorts with regards to not excluding the "other". It will now be necessary to see how such an aporetic structure is prevalent in the concept of hospitality.

3.4.1 Hostile hospitality and hospitable hostility

According to Derrida (1997:53), the word "hospitality" means to invite and welcome the "stranger" or the "other" into one's home or community. An act of hospitality on behalf of the host is an invitation for the outsider or "guest" to transcend or cross the boundary in order to enter the host's home or space. Derrida (Derrida & Dufourmantelle, 2000:135) argues that to engage in an act of "hospitality" is aporetic. As Kearney (2002:10) argues, hospitality requires the gracious host as master to decide who to let into their home. The laws of hospitality require the host to evaluate, select and choose those they wish to include or exclude. Such a process of discrimination necessarily amounts to an act of injustice; however, the imperative to discriminate is part of the law of hospitality or "hospitalite en droit". The aporia or problem occurs with the need to restore justice, which would require absolute or unrestrictive hospitality. Derrida (1997:53) sums up this problem when he argues:

> *There can be no sovereignty in the classic sense without the sovereignty of the self in its own home, but since there is no hospitality without finitude, sovereignty can only operate by filtering, choosing and therefore excluding and doing violence. A certain injustice ... is present from the outset, at the very threshold of the right to hospitality. This collusion between the violence of power or the force of law (Gewalt) on the one hand, and hospitality on the other, seems to be radically integral to the very inscription of hospitality as a right ...*

Derrida's sense of the concept of hospitality does not only operate on a personal level, in the sense of an individual welcoming a stranger into their home, but also at a state level in the welcoming of foreigners in the form of immigrants, or minority ethnic groups (Derrida &

Dufourmantelle, 2000:151-55). The word "hospitality" is derived from the Latin word "hospes" which, in turn, emerged from the word "hostis". In its original form, the word "hostis" was a reference to a stranger, more particularly, an enemy or a hostile stranger ("hostilis"). Combined with "pets" (potentia) or the potential to have power, implicit in the definition of the word hospitality is the threat of the hostile stranger and his potential to usurp the host by entering their home (Caputo, 1997:110). In order to prevent the usurpation of the host by the stranger, it is necessary for the host to retain some form of self-mastery. In fact, in order for someone to be a host, they have to remain a master of their premises. They cannot relinquish their mastery of their premises since this would be tantamount to relinquishing their position as host (Caputo, 1997:135-6). Thus, according to Derrida (Caputo, 1997:147), when engaging in an act of hospitality, the host must manage to maintain that delicate balance between retaining power or "potential" as the host while at the same time inviting the stranger or "hostis" to freely partake of the premises as if they owned it themselves. Despite the fact that implicit in the very definition of "hospitality" is a necessary imperative that the host retains power over the premises, the restoration of justice demands that the host does not discriminate or engage in an act of hostility. The concept of hospitality is aporetic in the sense that an inequality of power between the host and the guest is both necessary yet contradictory to the restoration of justice (Derrida, 1995:68). If the host does not relinquish power or sovereignty over the guest, justice cannot occur. Instead, a paradoxical or contradictory moment arrives where the hospitality of the host becomes somewhat hostile because it is limited. In order to continue being the host it is imperative that a certain element of hostility should occur. As Caputo (1997:111) says:

> *When the host says, 'make yourself at home', this does not actually imply that the guest should treat the premises as their actual home by right of ownership; they may partake of the home as if they were in their own home, but they must remember that their ability to do so is limited, for they do not have actual sovereign mastery or ownership.*

Thus, Derrida's argument that hospitality is self-contradictory is based on the idea that the concept of hospitality is aporetic. The hospitality of the host towards the guest claims to be an open invitation but the invitation is in fact self-limiting because, despite the fact that hospitality claims to offer a porous and limitless invitation to the guest, the concept is dependent on limitations being placed upon the guest's access (Derrida, 1995:68-70).

3.4.2 Hospitality-to-come

Like aimance, democracy to come, and unconditional forgiveness, absolute hospitality can never actually occur. Absolute hospitality exists as a quasi-transcendental condition for any limited form of hospitality that does occur (Derrida, 2001:22). The paralysis or state of stagnation as a result of the innate impossibility inherent within the concept becomes a means by which hospitality can transcend its own limitations. Similarly to the concept of forgiveness, such a scenario demands a compromise or a moment of self-sacrificing madness (Caputo, 1997:111). In order for such a paradoxical or impossible scenario to be overcome, it is necessary for hospitality to cross the threshold of its own limitations in order for hospitality to become possible. It is pertinent to ask what type of sacrifice Derrida is referring to here. For, if hospitality is a product of the power dynamics between the host and the guest, is Derrida expecting one of the actors to compromise their position within the relationship? For Derrida, such an act of madness would require the host, in a moment of madness, to upturn the power dynamics of the relationship and relinquish all control or self-mastery of their premises (Caputo, 1997:111-2). The host would thus be expected to act with "excess" and make an absolute gift of their property by placing no limitations or boundaries upon the guest so that they may truly feel as if they were in their own home despite being in the host's home. It is only by foregoing all ownership and mastery of the household that true hospitality can occur on behalf of the host towards the guest. It is only through being made to feel absolutely welcome without any limitations or boundaries that the guest will be comfortable and made to "feel at home". For Derrida, true hospitality, like unconditional forgiveness and – as we shall see, justice - never actually occurs or manifests itself in reality; it is always waiting to happen or going to come (Caputo, 1997:112). Although hospitality is always demanded of the host, they can never be absolutely hospitable because to do so would be to relinquish self-mastery.

On a state level, absolute or unconditional hospitality would have to make a break with everyday conventions of national security such as treaties, duties, contracts and pacts. The necessary or guarded power dynamics that occur in reality prevent the host or state from foregoing self-mastery. Absolute or true hospitality exists as an ideal, an abstract concept waiting to be enacted upon. As Derrida (1997:29) argues, absolute hospitality:

> *requires that I open my home and that I give not only to the stranger (furnished with a family name and the social status of a stranger, etc.) but to the absolute other, unknown and anonymous; and that I give place (donne lieu), let come, arrive, let him take his*

place in the place that I offer him, without demanding that he give his name or enter into some reciprocal pact.

True hospitality would perhaps be an unconscious action, a self-defeating moment of absolute kindness and generosity. Similarly to Derrida's understanding of the aporia inherent within the "gift", the host cannot be aware that they are doing the guests a favour by opening up their home to them; a true act of hospitality would surely attempt to disguise any form of generosity at all. Absolute and conditional hospitality are heterogenous yet irreducible to each other (Kearney, 2002:12). The quasi-transcendental notion of absolute hospitality is what makes any form of limited hospitality possible. For the reasons mentioned, conditional hospitality can never be absolute but must engage in a series of conditions. The stranger can never be completely welcome. Absolute hospitality is both heterogenous and irreducible because although it is separate from conditional hospitality, it enables any form of conditional hospitality to occur (Kearney, 2002:12).

3.4.3 Conclusion

An analysis of the concept of hospitality sits well with the concepts of democracy, friendship and justice. The aporetic structure of friendship, democracy and hospitality attempts to grapple with what Kearney (2002:8) refers to as the "logocentric prejudice against otherness that informs the history of Western metaphysics". Like democracy and friendship, absolute hospitality is necessary in order for injustices to be rectified. However, like friendship and democracy, limitations with regard to inviting the stranger or the outsider must be adhered to. In this sense, absolute hospitality can never actually occur. At a quasi-transcendental level, Derrida attempts to situate absolute hospitality between justice and the social-historical conditions in which the concept operates. Like aimance and democracy to come, absolute hospitality exists as a quasi-transcendental concept that shapes or enables any limited form of hospitality to occur.

To conclude this chapter, and in order to return more directly to the general concern of this thesis with "freedom of speech", it is now necessary to analyse the aporetic structure of the concept "justice" itself. After all, the appeal or call for absolute democracy, friendship and hospitality is done in the name of justice.

3.5 Justice

As mentioned, Derrida's critique of forgiveness, friendship, democracy, and hospitality is an analysis of how these concepts attempt to reconcile the appeal for justice with the necessary exclusions, limitations or restrictions that each concept demands. The aporia of friendship represents the aporetic need to reconcile the un-reconcilable notion of brotherhood with the exclusive logic of fraternisation. Similarly, the restoration of justice is a call for democracy and hospitality "to come". The call for justice is a call for absolute or unlimited democracy and hospitality. The manifestation of absolute unrestricted democracy and hospitality is impossible, however, as the appeal for justice enables any limited form of the two concepts to occur by appealing to the quasi-transcendental absolutes they both represent. It is thus evident that justice is strongly associated with the concepts just discussed. As Aristotle (1941:1068) argues:

> *Friendship and justice seem, as we have said at the outset of our discussion, to be concerned with the same objects and exhibited between the same persons. For in every community there is thought to be some form of justice, and friendship too; at least men address as friends their fellow-voyagers and fellow-soldiers, and so too those associated with them in any other kind of community.*

3.5.1 Deconstruction is justice

The most prominent attempt by Derrida to describe the relationship between deconstruction, justice and the law is his text *The Force of Law: the Mystical Foundation of Authority* in *Deconstruction and the Possibility of Justice* (1992). Here Derrida is requested to respond to the assertion that deconstruction has nothing positive to contribute towards an analysis of the law. The principal criticism directed at the notion of deconstruction is that its nihilistic nature prevents it from affirming or adding meaning to the law (Caputo, 1997:128). It is the objective of deconstruction to analyse traditions, societies, institutions, beliefs and texts, to highlight the discourses upon which these pillars are built and to show how meaning has been constructed. Thus, deconstruction aims to show that such beliefs and institutions do not have definable meanings but rather such meanings are socially constructed through the discourses in which they are defined. As Caputo (1997:31) argues, it is the objective of deconstruction to bend meaning, to stretch beyond the limited boundaries of definitions that restrain concepts.

Perhaps the principal criticism directed at deconstruction is that it has nothing positive to contribute to law because it is lawless itself. Hence, rather than contributing to or building onto the foundations of law and thus enacting justice, deconstruction is said to have a

"negative" influence by breaking down the very foundations upon which laws are enacted and built (Caputo, 1997:128). Derrida boldly answers the question of whether deconstruction has the ability to enact justice upon the law by arguing that "deconstruction is justice" (cited in Cornell, Carlson & Rosenfeld, 1992:4). As Caputo (1997:128) argues, Derrida challenges the assertion that deconstruction is destructive and negative in its attempt to breakdown meanings; on the contrary, deconstruction is an attempt to affirm or an analysis undertaken in the name of something un-deconstructive. Deconstruction has no meaning or rationality if it is not undertaken in the name of something that cannot be deconstructed (Caputo, 1997:129).

While Derrida (1992:14) argues that the law must be deconstructed, it is imperative to his argument to claim that justice cannot; for it is the fact that justice cannot be deconstructed that allows deconstruction to take place. Justice provides the driving impulse from which the law can be improved or changed through deconstruction (Derrida, 1992:14). However, the paradoxical nature of the concept of justice means that while justice makes deconstruction possible, is indeed inseparable from it, at the same time justice is made possible through deconstruction and the ability of the law to be deconstructed itself. Such a scenario is paradoxical in that while justice enables the deconstruction of the law to occur, justice can only occur through the process of deconstruction. Hence, justice, law and deconstruction are mutually dependent on each other to exist (Caputo, 1997:131). In order for Derrida to assert the existence of such a paradoxical relationship, he has to prove that the law can be deconstructed in the first place. But what does Derrida mean by the law?

In describing the law, Derrida (Caputo, 1997:130) refers to the positive structures that make up judicial systems and in turn add legitimacy or legality that enable such judicial systems to exist. For Derrida, the law can be deconstructed because it is constructed in the first place. In other words, the law is not natural but has its roots in particular social and historical contexts. Thus, regardless of whether a law claims to be natural, conventional, written or orally passed down, divinely imposed by a supreme being or democratically composed by consensus, laws do not naturally exist but are the product of social or historical processes (Derrida, 1992:6-7).

3.5.2 The mystical roots of authority

The most detailed discussion in which Derrida addresses the historical or social processes that give birth to law centres on the subtitle of *Force Of Law*, namely: "The Mystical Foundation of Authority" (Derrida, 1992). The phrase itself actually originates from

Montaigne (Carlson, Cornell & Benjamin, 1992:10), whose analysis Derrida builds upon. Derrida's reading of Montaigne is slightly complex in that he is reading the text through that of Pascal (Derrida, 1992:11). Montaigne's expression, the "mystical foundation of authority", refers to the idea that the foundations or conventions that gave birth to law are shrouded in obscurity and that they derive much of their authority from the fact that these foundations remain obscured. Such a claim alludes to a statement made earlier in the text by Derrida that the legitimacy of law is circular (Derrida, 1992:6).

In order for laws to be legitimate, it is necessary that they appeal to force, for force provides the legitimacy upon which laws are to be obeyed. However, if force provides the legitimacy for laws, from where does such force gain its legitimacy? As Derrida points out, one cannot here refer back to the law as a legitimating factor, for to do so would be circular. Thus, because the legitimacy that provides the basis for laws is mysterious and obscure, Montaigne (cited in Derrida, 1992:12) argues that "custom is the sole basis for equity, for the simple reason that it is received; it is the mystical foundation of its authority. Whoever traces it to its source annihilates it." Montaigne is thus alluding to the idea that we cannot appeal to the foundation of authority as a basis for obeying laws, we can only appeal to authority itself. We cannot attempt to legitimise laws by tracing their socio-historical origins since to attempt to do so would be to de-legitimise the authority of law altogether (Derrida, 1992:12).

Montaigne (cited in Derrida, 1992:12) reiterates such a point when he argues that laws "keep their good standing, not because they are just, but because they are laws: that is the mystical foundation of their authority, they have no other ..." The only basis upon which laws gain their legitimacy is from their authority or appeal to force and nothing else. Thus, according to Derrida (1992:12), "Montaigne is clearly distinguishing laws, that is to say *droit*, from justice. The justice of law, justice as law is not justice. Laws are not just as laws. One obeys them not because they are just but because they have authority." Justice is not law but stands outside the law. Through deconstruction, justice permeates laws to change them and make them more just. Thus, Montaigne (cited in Derrida, 1992:12) distinguishes between natural law and positive law by claiming that "even our law, it is said, has legitimate fictions on which it founds the truth of its justice". Montaigne is thus referring to the idea that, in the absence of natural law, positive law or a "legitimate fiction" was created to legitimise the law. As Derrida claims (1992:12), all laws are based or derive their legitimacy from cultural artefacts such as documents, constitutions or ideologies.

Such a claim is necessary for Derrida as the purpose of deconstructing the law is to provide a "de-sedimentation of the superstructures of law that both hide and reflect the economic and political interests of the dominant forces of society" (Maley, 1999:53). The use of force as the primary mechanism for establishing these superstructures of law is implicit in the title of Derrida's (1992) essay, *The Force of Law*. Derrida maintains that both the law and force are mutually reliant in that the law is not only enforced and made legitimate but also comes into being as a result of the forces that create it. Such a view is expressed by Walter Benjamin in his book *A Critique of Violence* (cited in Derrida, 1992:12) who points out that, while law gains legitimacy from force or violence, law in turn provides legitimacy for such violence to be enacted in the name of the law. Hence, the terms "applicability' or "enforceability" do not imply some sort of exterior or secondary features that may be induced as a supplement to law; on the contrary, force is implied in the very concept of law itself. Law already implies force. For as Derrida (1992:6) says, "There are, to be sure, laws that are not enforced, but there is no law without enforceability, and no applicability or enforceability of the law without force".

If law is legitimised or comes into existence through force, this raises an interesting conundrum for, as Derrida points out (1992:7), how are we to distinguish between the "illegitimate" use of force to bring law into being and the so called "legitimate" force that is used to safeguard the law's interests? For in the moment when a law is brought into being, the force used to do so is neither just nor unjust as it cannot appeal to any anterior authority to give it legitimacy. Such a scenario is problematic in that one cannot appeal to the law as a legitimising condition for the use of force since such an argument is circular. If the legitimacy of the law is determined by the force that brought it into being, it cannot in turn be used to justify such an original force (1992:6-7). The constructability of the law, whether it be through legitimate or illegitimate means is unproblematic for Derrida in that he sees it as an opportunity for the law to be constantly rectified and restructured particularly during times of political transformation. If the law is positive rather than natural, this would imply that the law has been constructed and can hence be deconstructed. The ability to deconstruct the law is a contributing factor towards historical progress, for as Derrida (cited in Maley, 1999:54) argues, "each advance in politicization obliges one to reconsider and so to reinterpret the very foundations of law such as they had previously been calculated or delimited."

3.5.3 Deconstruction in the name of justice

It is pertinent, however, to question the driving factor behind the need to deconstruct the law. As has been mentioned, the principle criticism directed at deconstruction is the negative critique surrounding its desire to unravel suppressed meaning within a text or to reveal, as Johnson (1981:14) puts it, "warring forces of signification" within the text. Derrida's response to such criticism is based on the argument that deconstruction is carried out in the name of something that cannot be deconstructed. Otherwise, there would be no point to deconstruction (Caputo, 1997:128). The desire or even the ability to deconstruct the law is driven by the desire to make laws more just, to bring more justice about. Justice is what the deconstruction of the law intends to bring about. This mutual relationship between the law, justice and deconstruction is paradoxical in that both deconstruction and the law mutually support and render each other possible. As Derrida (1992:14) says, "[b]ut the paradox that I'd like to submit for discussion is the following: it is this deconstructible structure of law (*droit*), or if you prefer of justice as *droit*, that also insures the possibility of deconstruction". Hence, if law is constructed, this would imply that the law can in turn be deconstructed. The ability to deconstruct the law allows for the application of justice which would not be possible if the law were not able to be deconstructed. However, at the same time, it is because justice cannot be deconstructed that deconstruction is made possible. When we deconstruct the law we do so in the name of justice (Caputo, 1997:131). The law is never static and can constantly be rectified particularly with regards to formal legal procedures that often need to be guided by justice.

Caputo (1997:130) refers to examples from history where the law has folded in upon itself. Up until 1958, the law in the state of Alabama made it illegal for African-Americans to sit at the front of buses. However, the stance taken by Rosa Parks to invoke justice to punctuate the law led to a change in the laws that had previously been legitimate and thus allowed justice to manifest itself.

One can also point to the resistance of the media against oppressive censorship policies that were introduced by the National Party government in South Africa during Apartheid. Such an example is pertinent for this thesis because it highlights the censorship of freedom of speech by the state. In 1974 in South Africa, new censorship legislation was introduced that removed the right of appeal to the Supreme Court, except in cases of *mala fides* (Merrett, 1994:79). This new censorship enabled the Directorate of Publications to ban items for possession, as

well as the right to ban further issues of a periodical and all output of a publisher. In response to these censorship measures, black reporters became pivotal for fighting censorship (Merrett, 1994:87). The Black Consciousness-aligned Union of Black Journalists (UBJ) was targeted by the state. The creation of the newspaper *Bulletin* was banned for exposing the events unfolding in the black townships under the Publications Act on 26th August 1976 (Raubenheimer, 1991:98). A successor called *Azizi Thula* ("We won't keep quiet") was also banned. This was also followed by the banning of two newspapers, *World* and *Weekend World* in October 1977 under the Internal Security Act. Both newspapers had been pivotal in reporting news from Soweto and expressing black opinion. Within 1976 alone the circulation of both newspapers had risen from 131 000 to 159 000 (Woods, 1981:32-4).

Such examples allude to the idea that justice stands outside positive law, and is the principal driving factor behind the need to change the law. For, as Montaigne mentions (Caputo, 1997:130), law and justice are independent of one another. We obey laws not because they are just but because they have authority.

3.5.4 Justice-to-come

While the notion of justice is used to deconstruct the law, the concept itself exists as a quasi-transcendental concept in that, although we invoke a transformation in the name of justice, such justice never actually manifests itself. Instead, laws are changed or made as a result of the calculation of justice. As Caputo (1997:135) argues, "Justice solicits us from afar, from the future, from and as a future always structurally to come, calls 'come' to us, preventing the walls of the present from enclosing us in the possible." Hence, for Caputo (1997:135), "justice does not exist as a Platonic eidos or a Kantian regulative Idea, but rather exists as a 'remnant' or a 'fragment' that drops through the cracks of the law, not as a merely factual omission or defect of existing laws, but structurally, necessarily." Thus, in relation to the law, justice is a vision that becomes enacted into a "call" for justice through deconstruction. In what Derrida refers to as the "aporia of justice", justice is only enacted when justice has been revoked or denied by the law. When such a denial of justice occurs, the quasi-transcendental notion of justice is called upon to enact justice.

The application of justice requires a suspension of the law. A decision cannot be just by merely conforming and abiding by judicial procedures that are already in place; instead the law has to be lifted or suspended, only then can the invocation for justice be acted upon.

Caputo (1997:130) refers to the criminal justice laws in America as an example where the law continues to operate without being punctuated by justice. The "three strikes and you're out" system in America is an example where no suspension or deconstruction of the law occurs. Instead, such a principle merely requires conformity and an adherence to the legality of state laws. If felons commit three 'strikes', they are subject to penalties as imposed by the state judiciary. Such a system does not invoke or call upon justice because there has been no suspension of the law, deconstruction is not provided with a platform to take place. The aporetic nature of justice requires that the law be suspended before justice can be invoked.

3.6 Conclusion

As has been shown, laws can be deconstructed, because they are constructed in the first place. Montaigne's analysis (cited in Derrida, 1992) in *The Mystical Foundation of Authority* shows that the customs or principles on which laws are based are not rooted in any natural laws. Such customs are shrouded in obscurity. As a result, laws can only attempt to justify their legitimacy by appealing to force. This is circular in that the force used to legitimise the law has no appeal for legitimacy other than the law itself. Like the concepts of democracy, justice, friendship and forgiveness, absolute justice exists as a quasi-transcendental concept that enables the law to be deconstructed in the first place. Without an appeal to justice, there is no basis for deconstructing laws. However, absolute justice never takes place, perhaps never should take place. Instead, the concept shapes any limited or restricted justice or transformation in the law that does occur.

An analysis of the *concept* of aporia has been useful because we are now in a position to suggest that the *concept* of free speech is similarly aporetic. Like the concepts just discussed, by suggesting that free speech is aporetic, we are able to re-imagine the tension between the absolute claim to free speech and the historical and linguistic limitations of free speech. If we are suggesting that the *concept* of free speech is aporetic, this implies that this tension is present regardless of the historical or cultural contexts in which free speech operates. This means that free speech is aporetic both within and outside the nation-state. Within the nation-state, we can reconcile this tension or aporia through a rights discourse that legitimises the invocation or call for the limitation of free speech, while at the same time acknowledging the need for free speech to be absolute.

A problem arises on an international level in that we cannot legitimately invoke calls for the limitation of free speech; we have no sovereign body with the legal means to do so. We have to find a way of reconciling the need to limit free speech on an international level without appealing to a rights discourse inherent to the nation-state. This problem will be dealt with in the conclusion to the thesis. In Chapter Four, it will be necessary to demonstrate that the same historical and linguistic limitations of free speech present within the nation-state are also present outside of the nation-state. This will support the argument that the *concept* of free speech is aporetic both within and outside the nation-state.

Chapter 4. Transcending the nation-state: the linguistic and historical limitations of free speech outside the nation-state

4.1 Introduction

An analysis of the historical roots of free speech has shown that the democracy-based notion of free speech emerged as a function of the birth of the nation-state. It cannot be stressed often enough that while the nation-state legitimises our modern notion of free speech – with reference to truth and democracy – it also limits free speech through certain rights; as citizens of the nation-state, the right that made possible free speech was limited by other rights, most notably the right to be protected from hate speech. The modern notion of free speech is made possible as a result of a human rights discourse whose emergence is co-terminus with the birth of the nation-state. Although this rights discourse legitimises free speech, it also limits free speech that is deemed to be a threat to other rights associated with the nation-state. If the right to free speech is deemed to be a threat to the right not to be subjected to hate speech, governments reserve the right to restrict free speech.

We can thus see how the nation-state discourse legitimates free speech but also restricts it in certain contexts. We can also see how this nation-state discourse reconciles the claim to absolute free speech with the necessary linguistic and historical limitations of free speech. The nation-state has the power to both grant and limit the right to free speech. This means that a problem arises on an international level, outside of the nation-state boundary, when claims are made and defended with reference to the right to freedom of speech or attempts are made to limit such freedom – as the cartoon case illustrated.

In such cases, as I argued in Chapter Two, the historical and linguistic limitations of free speech are addressed within the nation-state by appealing to the rights discourse discussed in Chapter One. With regard to the "Defamation of Religion" resolution passed in 2005, the United States and most countries in the European Union have used such a rights discourse to question the validity and legitimacy of such a resolution. On an international level, the primary problem concerns the need to reconcile one's claim to absolute free speech – and here one refers to representatives of states as well as individuals who invoke the protection afforded them as members of specific nation-states – with the need to restrict speech in certain contexts. The thorny question then is: How are we to justify or even frame a call for

the limitation of freedom of speech outside of a nation-state rights discourse where there is no authority qua Leviathan to limit the right to free speech? Within the nation-state, limitations on free speech are justified on the grounds that absolute free speech infringes on other rights. However, outside of the nation-state, we cannot appeal to such limitations as we are outside the nation-state.

In order to solve the problem, we need to find a way of legitimising claims that argue in favour of limiting free speech on an international level without appealing to notions of authority implicit in nation-state rights discourse. It is the objective of this chapter to take a step back as 't were and, in a sense, to go prior to the conceptual distinction between local and global acts of free speech and to demonstrate 1) that free speech on an international level is bound by the same historical and linguistic limitations that pertain to free speech on a national level; 2) that, while the nation-state proceeds by codifying these limitations as law, thereby making limitations enforceable, a "crisis of limitation" arises on international level where such historical and linguistic limitations cannot be codified as law; 3) that in the absence of conceiving limitations as law we have to, at international level, appeal to the prior historical-linguistic limitations which make the concept of free speech aporetic, as point of departure for a re-interpretation of limitation, not as legal, but as ethical. In order to illustrate point three listed here, it is the objective of Chapter Four to extend Derrida's analysis of the aporetic to include the concept of free speech.

By suggesting that free speech is aporetic, one can claim that the right to *absolute* free speech has quasi-transcendental status and cannot, and perhaps should not, ever occur in reality. By suggesting that free speech is aporetic, we can find a way of reconciling the need for such limitations with the claim to absolute/unrestricted free speech. How is this possible? I shall argue that the quasi-transcendental notion of absolute free speech allows – as in makes possible and meaningful – any historical or particular claim to free speech. Just like justice, democracy and forgiveness, our understanding of the "free" in freedom of speech derives its very meaning and possibility from a quasi-transcendental notion of absolute freedom. Although we can invoke our right or claim to absolute free speech, it will be argued that such a right is subject to certain contextual conditions that necessarily place limitations on the concept.

In the previous chapter, it was illustrated how Derrida's analysis reveals the aporetic structure of other concepts like justice and forgiveness. On the basis of that analysis the suggestion is

made here that the quasi-transcendental notion of "free speech" is both heterogeneous and irreducible to conditional free speech. It is heterogenous because, as an idea it makes possible limited or conditional free speech while remaining unrealisable itself. It is the absolute that enables conditional free speech to take place, to have meaning, to be invoked at all, as a right. Without the idea of absolute free speech, we would not be able to engage with a conditional understanding of free speech in any form. However, the quasi-transcendental notion of absolute free speech is also irreducible to conditional free speech because it cannot ever actually occur and perhaps never should occur. Like absolute forgiveness, the notion or perhaps idea of "free speech" must remain pure and free from any contextual limitations. This is necessary in order for the concept of absolute free speech to have any meaning. In this chapter I will analyse the aporetic structure of the concept itself in order to reveal within the concept "free speech" a tension between the absolute and the historical.

As shown in Chapter Two with reference to the *United Nations Charter for Human Rights* (UNCHR) and the *European Charter for Human Rights* (ECHR), governments are only entitled to restrict speech acts that are deemed to be a threat to other democratic civil liberties. Such decisions revolve around a nation-state rights discourse that legitimises claims for the restriction or protection of free speech. Such a rights discourse does not apply on an international level outside of the sovereign nation-state – as was clearly illustrated by the inability to censor the cartoons or de-legitimise their authors' and publishers' claim to freedom of speech, despite the fact that others perceived them as a form of hate speech. This leads to the problem of how we are to conceive the very idea of "limitation" on an international level when we cannot appeal to the limitations and authority implicit in democratic nation-state discourse. After teasing out the aporetic structure of free speech in this chapter, the conclusion to this thesis will suggest that Kant's proposed solution of a voluntary rule of law that is observed among sovereign nation-states may be useful. Although Kant's analysis dealt specifically with the need to restrict or prevent conflict between warring nations, the principle of his argument may be of some use here. The attraction of Kant's argument is that it calls for the voluntary observation of law without appealing to force. The argument is based on moral reasoning and is useful for the free speech dilemma because it does not need to appeal to any legal legislation or enforcement to achieve the desired outcome. To build upon Kant's argument, I shall look at the controversy surrounding the decision by NATO (North Atlantic Treaty Organization) to intervene in Kosovo during the Balkans conflict in March 1999. Such a case scenario is useful for two reasons: firstly, it

highlights the discrepancy and tension between international law and state sovereignty, and secondly, the intervention has been called an "illegal but legitimate" action, suggesting that there are ways of conceiving "legitimacy" outside the narrow confines of what is considered legal. In the context of the debate in this thesis, such a case scenario is an example of how legitimate or moral codes of conduct should or could perhaps triumph or usurp legal or binding constitutional legislation, offering us a way out of recognising limitations, even the absence of their un-enforceability as law. In other words, that the notion of legitimate or binding moral codes of conduct can be invoked without appealing or adhering to state legislation. Good. Very nice

But first, I want to take a tep back an go anterior or prior to the distinction between local and global acts of free speech and to point out that the same historical and linguistic limitations of free speech highlighted in Chapter One exist on an international level as well. By way of illustrating this common source in socio-historical limitations it will be useful to look at the controversy surrounding George W Bush's use of the word "crusade" in a speech following the terrorist attacks on the World Trade Centre on 11th September 2001. An analysis of this particular example will highlight the point that free speech is characterised by the same historical limitations on an international level that exist in the nation-state which suggests that we should look for a solution to the problems generated by the former prior to the solutions found for the latter. The use of the word "crusade" was controversial in that it inescapably referred to the series of religious wars between the Christian West and the culture of Islam, which lasted for roughly 200 years and officially ended in 1291 (Kurtz, 2000:5-8). Although Bush argued that he used the word as a synonym for a modern day struggle against terrorism, it will be argued that the social-historical connotations of the word make its use problematic, particularly with the increasing tension surrounding "Islamophobia" and a discourse of a "clash of civilizations" made famous by Samuel Huntington's (1993) article of the same name. The significance of this is the limitation of our imagined absolute freedom to use words as we please is imposed on us by the very history and context in which those words appear as meaningful. But socio-historical context is just one limitation imposed on our absolute right to speak freely. There is a more fundamental limitation at play and I will look at that first before I return to a more extensive analysis of the socio-historical limitations of (free) speech. In the next section I look at the structural limitations implicit in using certain words from a linguistic perspective. To that end I discuss Saussure's analysis of the arbitrary nature of the sign.

4.2 Of language and speech: the primary limitation

An analysis of Saussure's (1966) revolutionary structural approach to language is pertinent for the purposes of this chapter. The second part of this chapter intends to analyse how language cannot be interpreted outside of specific social-historical contexts. Such a claim is crucial if we are to lend support to the idea that the right to free speech is always limited by certain contexts. In this chapter I argue that, although one may legitimately claim an absolute right to unrestricted free speech, the fact that speech operates in particular social-historical contexts suggests that speech acts take on specific meanings and connotations. The claim that language can operate (in the sense of generating meanings) outside historical contexts and free from its determination is flawed; in fact, that very imagined freedom is a function of the quasi-transcendental status of the word "free" in the phrase "freedom of speech". This much is suggested at the fundamental semiotic level.

Saussure (Hawkes, 1977:19) inherited a traditional view of linguistics that subscribed to the positivist belief that language consists of an aggregate of separate units, called "words". Such a traditional view held that words exist independently of each other and have separate "meaning". Complementary to this, was the view that there is a one-on-one relationship between words and the things they represent. However, there is also a distinction to be made between the relationship between words and the things they represent over time, and the meaning of such a relationship at a particular moment in time. Bearing this distinction in mind, it will now be necessary to look at Saussure's distinction between "synchronic" and "diachronic" language (Holdcroft, 1991:69).

The diachronic approach to language studies involves an understanding of language as an "aggregate" of separate words. The idea that language consists of separate words each with their own separate meaning implies that language can be studied objectively and is subject to specific laws of change. These laws of change allow language to be observed and recorded over a period of time. Saussure rejected such a "substantive" view of language and argued that language should not only be observed as an aggregate of separate individual parts, but also in terms of the relationship between those parts (Hawkes, 1977:19). Such a view is "synchronic" because it analyses language within a particular context *in time* rather than *over time*. Within a synchronic perspective, Saussure argues that language should be studied as a *Gestalteinheit*, a unified "field" and as a self-sufficient system. Thus, according to Saussure, language becomes meaningful by operating in a particular context in time rather than over a

period of time. It is on such a basis that Saussure distinguishes between *langue* (language) and *parole* (speech). *Langue* refers to the abstract language system, which takes the form of a set of abstract rules or patterns. Speech on the other hand refers to the practical use of language through everyday interactions (Kearney, 1986:241). Although they are distinct, *parole* and *langue* are connected in that speech is determined and made possible through language. Although language makes speech possible, it only exists on an abstract level and has no concrete existence until it becomes operational in speech. In what Saussure refers to as a system of distinct signs correlating to a set of distinct ideas, the construction of language or "the linguistic faculty proper" exists as a separate abstract entity beyond that of speech (Hawkes, 1977:20). Language only manifests itself or occurs in the momentary manifestations of human speech.

4.2.1 Language and the arbitrary sign

For the purposes of this chapter, it is necessary to note Saussure's ideas (1966) concerning the existence of language as a "system of signs". Saussure challenged the linguistic idea that language consists of a set of terms that exist in a one-on-one relationship to a set of objects. For example, Saussure rejects the idea that the word 'horse' is irrevocably tied to a particular animal. Saussure rather subscribed to the idea of language as consisting of a set of concepts represented by a sound-pattern or *signifier*. Such an idea is structural in that language is based on a relationship between concepts and sound-patterns. The concept would be what Saussure refers to as the "signified" and the sound pattern is what Saussure refers to as the "signifier". Together, the signifier and the signified combine to form the "sign" (Hawkes, 1977:21). Language thus consists of a series of signs that make up ideas.

However, it is important to note that the relationship between the signifier and the signified that combine to form a sign is arbitrary. For Saussure there is no rigid or necessary connection between a sound-image (signifier), the concept that is being signified, and the physical object or thing the concept alludes to in reality. The signifier does not bear any appeal or resemblance to "reality" beyond the structure of language (Hawkes, 1977:22). As Saussure argues, the arbitrariness of the linguistic sign is not reasonable. The signifier, used to describe that which is being signified, can be altered and changed. There is no reason to prefer any particular word over another. Language is self-defining and complete in the particular context in which it is being used. In essence, language constitutes its own reality and does not appeal to a broader reality beyond itself (Hawkes, 1977:22).

It is also pertinent to note Saussure's syntagmatic and paradigmatic distinction in language. As Saussure argues (Holdcroft, 1969:89), considered in isolation, signifiers and signified words are not linguistic entities. A succession of sounds has to support an idea in order to be linguistic. In what he refers to as a "primordial principle" or the "linear nature of the signifier", Saussure argues that a complex signifier needs to be segmented so that the resulting units must be distinct both from what precedes them and from what succeeds them in the chain. Thus, as Saussure argues, a linguistic entity needs to be delimited in order to be accurately defined. Put simply, the signifier needs to be separated and distinguished from everything that surrounds it on the phonic chain.

Saussure's relational theory of structuralism (Hawkes, 1977:19) is pertinent because it suggests that the meanings of words (like "crusade") are differential; that is, at a linguistic level they derive their meaning in relation to other words or signs. Words, as signs, do not have a positive meaning but derive their meaning from, or in relation to, other signs. [Illustrate brief illustration with reference to the word 'crusade']. The idea that language is relational suggests that meaning is derived from a specific "synchronic" way in which language operates. Thus, as will be shown, certain words invoke certain connotations and cannot be interpreted outside of the specific social contexts in which they operate. This is the first limitation that operates at conceptual level prior to the distinction between local and global acts of free speech. The limitation inheres in the very structure of language per se. A second limitation becomes apparent when we situate the use of language in its specific social-historical context. This will add a socio-historical limitations to the use of language and suggest a second way of re-thinking 'limitation'. In order to do this it will be useful to look at the controversy surrounding George W Bush's use of the word "crusade" in a speech shortly after the 9/11 bombings in 2001.

4.2.2 The crusade controversy: the secondary limitation

The linguistic limitation of language just discussed is fundamentally important and can be considered to be a primary limitation of how words are used irrespective of whether that is done on a national or international level. In what we can call a secondary limitation, it will be necessary to show how our use of words is limited by the socio-historical contexts in which they operate.

4.2.3 The "War on Terror" speech

Five days after the cataclysmic events that occurred on Tuesday 11th September 2001, George W Bush attempted to express in his own words the challenge that now faced the most powerful nation in the world. Speaking spontaneously, Bush described the need, not only for the United States but also for other nation-states equally horrified by the events that had unfolded on American soil, to commit to "this war on terrorism". Had his speech been crafted with the aid of speechwriters or advisers, it is unlikely that his words would have created the controversial response that they did (Carroll, 2004:5). The controversy surrounding his speech did not lie in the content of what he was saying, for most countries shared a similar abhorrence to the events that had unfolded on that fateful Tuesday morning. The most contentious part of his speech was his use of the word "crusade" to describe the impending battle that now lay in front of those nations opposed to terror. Summing up the aftermath of the attacks on the Twin Towers, Bush said (cited in Graham, Keenan & Dowd, 2004:209):

> *Today, millions of Americans mourned and prayed, and tomorrow we go back to work. Today, people from all walks of life give thanks for the heroes; they mourn the dead; they ask for God's good graces on the families who mourn, and tomorrow the good people of America go back to their shops, their fields, American factories, and go back to work ... This is a new kind of evil. And we understand. And the American people are beginning to understand. This crusade, this war on terrorism is going to take a while.*

As James Carroll (2004:3) points out, Bush's use of the word "crusade" was an offhand reference. Bush later suggested that the word was used as a synonym for an impending struggle against terrorism around the globe. As his aides attempted to argue, Bush's use of the word "crusade" in the particular context of his speech was devoid of any religious reference to Christianity versus Islam (Carroll, 2004:4). The word was supposedly a reference to the ideological struggle between the free world and those who aim to suppress individual liberties that liberal democracies like the United States supposedly stand for. Whether he used the term merely as a synonym for struggle or not is beside the point. Carroll (2004:3) for one argues that Bush meant to use the word "crusade" to describe a renewed clash between Christianity and Islam. However, it is necessary to ask how we are to reconcile the absolute claim to use certain terms without hindrance with the limitations necessarily invoked by language (as a system of signs) and context (of associations and history).

4.2.4 Sacrifice and the sword: marching on the infidel

The word "crusade" is derived from the Latin word for cross or "crux" and, as Kurtz (2000:5-8) notes, refers to the series of battles that occurred for roughly 200 years officially ending in 1291 but, in truth, carrying on well into the 16th Century. At the behest of Pope Urban II, the crusades amounted to a warlike march in the name of Christianity against the infidel Muslim. Far from representing the historical Christian representation with the humble and the poor (Sheppard, 1983:14), the crusades represent a long and shameful chapter of conquest in the name of Christianity. Kee (1982:5-8) argues that the crusades were foreshadowed by the Roman emperor Constantine. Constantine took the legacy of the cross to be a sign of war and it is a legacy that continues to haunt Christianity today. Believing that he had received a call from heaven to conquer the infidel Islamic world (*in hoc signo vince*), the calling supposedly justified the butchery and bloodshed that followed. As Carroll (2004:5) points out, before the crusades, Christian theology had given central emphasis to the resurrection of Jesus and to the idea of incarnation. However, the crusades invoked the idea of the bloody crucifixion itself as a primitive notion that violence can be a sacred act. The crusades thus began to assert the idea that violence could become a sacred act.

The cult of martyrdom emphasized in suicidal valour became institutionalized in the crusades (Carroll, 2004:5). Rather than reflecting the triumph of the cross in defeat and humility, the crusades were indicative of a conquest built on violence, bloodshed and self-sacrifice in the spread of Christianity through the sword (Moltmann, 1974:305). Carroll (2004:5) argues that the cult of martyrdom institutionalized in the crusades has also become entrenched in certain radical groupings among Muslims. Thus, there is a parallel between the culture of self-sacrifice and violence entrenched in the crusades and the suicide bombers of 9/11. The culture of suicide bombings justified in the broad category of "terrorism" is a result of the perverse desire to explore the link between the willingness to die for a cause and the willingness to kill for it.

It is here that Bush's use of the word "crusade" is so problematic simply because of the social-historical connotations it invokes. Despite an attempt to mitigate the use of the word as a synonym for a looming battle, the use of the word in such a context raises questions about the existence of *implicit limitations*. As Maddox (2003:403) argues, there is a haunting similarity between the Roman imperial power under Constantine and the imperial war machine controlled by Bush. Carroll (2004:5) argues that there is a deeper significance to

Bush's inadvertent reference to the crusades. Charged with outlining a response to the attacks on the Twin Towers, Bush, cognitively or not, made reference to a discourse that saw violence as a perfectly appropriate, even chivalrous, first response to what is wrong in the world. Thus, rather than portraying violence as a last recourse or a necessary evil, violence and self-sacrifice were explained as two of the unavoidable certainties of the war on terror.

As with the crusades in 1096, the "war on terror" demonstrated certain similar patterns of violence. One of the most evident similarities was the urgent purpose of a war against the "enemy outside" – or what Samuel Huntington (1993:22) has referred to as the "clash of civilizations". However, the search for the "enemy outside" quickly led to the discovery of an "enemy inside". The crusaders, en-route to attack the infidel far away, first fell upon "the infidel near at hand". For the first time in Europe, large numbers of Jews were being murdered and blamed for willing the murder of Jesus. As in 1096, the "war on terror" has resulted in the search for an "internal enemy" generally in the form of immigrant Muslims and people of Arabic descent coming under heavy pressure in the West. Although they do not suffer the same fate as the Jews did, Muslims in Europe and the United States are still subject to "profiling" and are demonized (Carroll, 2004:7).

The similar discourse used by the current American administration to initiate and justify the "war on terror" bears a shocking resemblance to what Carroll (2004:70) calls "a dark, seething religious history of sacred violence". In other words, the historical and cultural significance of the word "crusade" inadvertently and inescapably came into play the moment Bush used it in his speech. This necessary invocation of a socio-historical meaning derives further, more specific meaning from a pattern in war discourse identifiable throughout history according to Graham, Keenan and Dowd (2004:199). Using a discourse-historical approach, these authors attempt to highlight similarities in several "calls to arms" speeches across time – not only by Bush but also by Pope Urban II in 1095, Queen Elizabeth I in 1588, and Adolf Hitler in 1938. Constitutive of these speeches are four generic features. Firstly, there is the appeal to a legitimate power source external to the orator; secondly, there is an appeal to the historical importance of the culture in which the discourse is situated; thirdly, there is the construction of a thoroughly evil other and fourthly, an appeal for unification behind the legitimate external power (Graham, Keenan & Dowd, 2004:199).

There is a striking similarity between the speech made by Pope Urban II to the Church's Council at Clermont-Ferrand and the speech made by Bush in the immediate aftermath of the

"war on terror". In the speech made by Pope Urban II, he states (Graham, Keenan & Dowd, 2004:201):

> *Most beloved brethren, today is manifest in you what the Lord says in the Gospel. Where two or three are gathered together in my name, there am I in the midst of them; for unless God had been present in your spirits, all of you would not have uttered the same cry; since, although the cry issued from numerous mouths, yet the origin of the cry is one. Therefore I say to you that God, who implanted is in your breasts, has drawn it forth from you. Let that then be your war cry in combats, because it is given to you by God. When an armed attack is made upon the enemy, this one cry be raised by all the soldiers of God: 'It is the will of God! It is the will of God!' Whoever, therefore, shall determine upon this holy pilgrimage, and shall make his vow to God to that effect, and shall offer himself to him for sacrifice, as a living victim, holy and acceptable to God, shall wear the sign of the cross of the Lord on his forehead or on his breast. When, indeed, he shall return from his journey, having fulfilled his vow, let him place the cross on his back between his shoulders. Thus, shall ye, indeed, by this twofold action, fulfil the precept of the Lord. As lie commands in the Gospel, 'he that taketh not his cross, and followeth after me, is not worthy of me'.*

As Braudel (1993:32) points out, with this speech Pope Urban II successfully launched the Crusades, which lasted for roughly 200 years. As the speech demonstrates, the crusade he is calling for is not of his own willing but is the will of God. There is a strong resonance invoked in the idea that the crusader should be a willing sacrificial victim in a similar vein to that of Christ, offering his life in divine destiny and according to God's will. Behind such a discourse is the idea of an individual responsibility to serve a higher purpose.

In his speech delivered five days after the attack on the Twin Towers, Bush uses a similar discourse similar to that used by Pope Urban II. Perhaps the most obvious similarity is an appeal to an external force as a legitimization for the "call to arms". As Graham Keenan and Dowd (2004:205) argue, Bush draws on the support and authority of God, by aligning God with the nation-state in a quest against a new form of evil. Much has been made of Bush's Christian faith. However, as Carroll (2004:6) argues, Bush's God is more characteristic of the Old Testament. His saviour is the Jesus whose cross is wielded as a sword. In such a discourse, violence is presented as a legitimate necessity against an "evil" other (Carroll, 2004:7). In his "Clash of Civilizations", Huntington (1993:22) highlighted three irreconcilable blocks of culture in the Christian West, the Confucian East, and the scattered nations of Islam. The fact that Huntington refers to these cultures as "irreconcilable" would seem to support the idea behind some sort of inevitable violence. In his speech, Bush alludes to a clear-cut divide between good and evil, and as Colson (2002:80) points out, the 11th September attack signalled a "body blow to postmodernism". Colson (2002:80) further went

on to argue, "Can anyone who saw the incineration of thousands of innocent Americans believe, as postmodernists teach, that there is no objective reality, no good or evil, or that all cultures are morally equivalent?"

In announcing a crusade against a new kind of evil, Bush inescapably draws on thousands of years of history in his appeal to American citizens and other nation-states opposed to global terrorism. The fundamentalist Christian right in America even went as far as referring to him as "God's President" (Conason, 2002:80). The idea that President Bush had a responsibility to enact God's will and ensure the triumph of good over evil was reiterated by Morey (2001:40), who argued that:

> *In response to the Muslim holy war now being waged against us, we, the undersigned, following the example of the Christian church since the 7th century, do commit ourselves, our wealth, and our families to join in a holy crusade to fight against Islam and its false god, false prophet, and false book. We the under-signed, believe that Islam is the root cause of all Muslim terrorism, which is the fruit of Islam.*

4.2.5 Meaning and context

In response to the uproar surrounding his use of the word "crusade", Bush attempted to deflect criticism by stating that, as opposed to the views expressed by the Christian fundamentalist far right, he believed Islam to be a religion of peace (Beinart, 2002:6). Shortly after the speech Bush promptly visited Washington's principal mosque in order to appease the minds of Muslim academics, clerics and Muslim citizens who voiced concern over the insinuation that the wrath of the American nation would be directed at Muslims or Islam in general (Kepel, 2004:117). Already a plethora of Islamist websites claimed that the real "war on terror" was directed at Islam, just as Islam had been the target in the medieval crusades (Kepel, 2004:117).

As has been shown, Bush's use of the word "crusade" was controversial. It is debatable whether his use of the term was intended or not. It is perhaps possible to put it down to the President's inexperience in dealing with international crises. The possibility that the term was a Freudian slip that betrayed his subconscious desires can also not be discounted. Such arguments are not pertinent to the question being asked in this chapter. Bush defended his use of the term "crusade" as a synonym *that was not meant or intended by him* to be interpreted in the way it was.

Bearing this in mind, it is necessary to ask whether claims to absolute free speech can be justified on the grounds that words transcend the social-historical contexts in which they operate. If Bush really meant to use the term "crusade" as a metaphor for an impending struggle for terrorism, can he legitimately claim the right to do so?

The first part of this chapter intended to highlight the linguistic limitations of our use of language. As Saussure points out, language only has meaning in particular contexts. Building on from Saussure's claim, the second part of this chapter has attempted to indicate the possibility that the use of language or terms cannot be divorced from the particular social-historical history from which they derive and within which they continue to function meaningfully. Bush defended his use of the word "crusade" on the grounds that *he did not intend for it* to invoke the sensitive social-historical connotations it did. However, it can be argued that particular words cannot be divorced from their association or connection with history, that their meaning is beyond 'our intention'. The legacy of the word "crusade" and the particularly violent era it represents cannot be separated from the sensitive connotations it invokes in the "war on terror". It was perhaps unfortunate that terrorists who carried out the attacks on the World Trade Towers were Muslims themselves. Had the term "crusade" been used in the aftermath of the act of terrorism committed by Timothy McVeigh in 1995, the term might not have created such controversy. However, within the particular context of the attacks of 9/11, and the sensitive connotations surrounding the resurgence of the clash between Islam and the Christian West, it is easy to see why the term "crusade" would have such negative connotations.

The purpose of providing an analysis of the linguistic and historical limitations of free speech has been to show that 1) all meaning is constituted differentially – that is we do not determine the meaning of words; language and the free-play of signs determine meaning. This is true of all statements (whether in cartoon pictures or words), nationally or internationally; also, that 2) meaning is contextual and therefore historical. Not only do I not control the meaning generated by language, I do not control the context and history in which that meaning is embedded and of which it is a continued function. This tension between our desire to make meaning – that is, to be free of already made meanings – and the limitation of that desire by the working of language and the reality of history already indicates something of an aporetic tension between freedom and language, that is, between freedom and speech – a tension

inherent in *free speech*. I now turn to a more detail reading of free speech in these aporetic terms.

4.3 Reconciling the absolute with the historical: reading the aporia of free speech

Like the concepts of justice, democracy, friendship and hospitality discussed in Chapter Four, it is possible to suggest that a similar tension exists between the absolute *concept* of free speech and the necessarily limited historical *notion* of free speech. It will now be demonstrated that inherent within the concept of free speech itself, is an aporia similar to the concepts discussed by Derrida. When discussing the aporia of these various concepts, it is necessary to distinguish between a *concept,* which is timeless and a-historical, and a *notion,* which is situated in particular linguistic-historical contexts. In Chapter One, it was shown how the modern *notion* of free speech emerged out the birth of the nation-state and the rights discourse associated with a democratic citizenry. It will be argued that as a *concept*, the concept of absolute free speech is timeless and a-historical. It is also important to note that because it is being suggested that the concept of free speech is aporetic, such an aporia is therefore constitutive of all claims to freedom of speech whether inside or outside the nation-state. The *concept* of free speech exists without any restrictions or limitations. As a *notion* however, free speech is limited by the particular historical-linguistic limitations just discussed. This is why free speech is similar to other concepts like justice, democracy, friendship and hospitality. As *concepts* they are all absolute and unlimited. As *notions* they are limited by the particular historical-linguistic contexts in which they operate.

In his critique of Derrida's aporetic analysis of forgiveness, Kaposy (2005:206) makes reference to Derrida's (2001:32) claim that "forgiveness forgives only the unforgivable." Part of Derrida's logical analysis of forgiveness is his attempt to make explicit the aporetic structure inherent in such an argument. From a linguistic view, Derrida's *concept* of forgiveness does not make linguistic sense. For as Kaposy (2005:206) argues, if a person or an act is forgiven, linguistically this would imply that it *is* forgivable; if a person or an act cannot be forgiven, this would imply that it is unforgivable. This is what it means to have an adjective with the prefix "un-" and the suffix "-able". Such a linguistic formulation is necessary to provide meaning to language. For example, if something is "undrinkable", this would imply that it is something that cannot be drunk. *From a linguistic perspective, Derrida's paradoxical analysis does not make logical sense.* In answer to such critics it is

necessary to point out that the analysis is limited to a *conceptual* understanding of forgiveness. At a *conceptual* level it can be argued that it is possible for Derrida to make such an aporetic linguistic claim because a *concept* operates outside of any linguistic-historical context. A criticism concerning the linguistic inconsistencies of such an aporetic claim must extend to the *notion* of forgiveness.

Having suggested the historical-linguistic limitations for the *notion* of free speech outside of the nation-state rights discourse, it is necessary to question how we are to accommodate someone's *conceptual* claim to absolute free speech with the necessary limitations concerning the *notion* of speech. As with the other aporetic concepts Derrida discusses in Chapter Three, it is necessary to question how we are to reconcile the absolute with the historical or linguistic limitations.

4.4 Absolute free speech: a return to the "Argument from Meaning"

As with the concepts of justice, democracy, hospitality and friendship, the *concept* of absolute free speech is timeless and operates outside of particular social contexts. It is possible to argue that the *concept* of absolute free speech, like the concepts of justice, democracy, hospitality and forgiveness, cannot be and in fact is not restricted or limited by certain historical and linguistic conditions. However, as mentioned, if free speech is to occur or manifest itself in reality, like forgiveness or democracy, it must necessarily be recognised as always already subject to limitations and conditions that are at once linguistic and historical. In order to occur, claims to freedom of speech must necessarily be made in particular social-historical contexts. However, if free speech can only occur when it moves from being a *conceptual* absolute to a *notion* restricted by linguistic-historical contexts, it can be argued that there is a danger of free speech losing meaning. It can be argued that like the concepts of absolute forgiveness, justice or democracy, the *concept* of absolute free speech is necessary to give the *notion* free speech any meaning. It will be necessary to go into this argument in more detail.

4.5 The possibility of conditional free speech

Although one may claim a right to absolute free speech, free speech must necessarily be understood as always already limited because it cannot be divorced from social-historical contexts. In a similar way to the aporetic concepts highlighted in Chapter Three, it is possible to suggest that the *concept* of absolute free speech exists as a quasi-transcendental condition

for limited notions of free speech. As a quasi-transcendental *concept*, absolute free speech exists outside of any historical-linguistic contexts. As with other concepts, like forgiveness, absolute free speech would operate as what Levinas (1969:23) calls "a signification without a context".

The *concept* of absolute free speech cannot engage in social-historical contexts because, as soon as it does, it no longer remains absolute but must submit to a number of conditions and limitations. Like the criticism Kaposy (2005:212) directs at Derrida, it must be asked why it is necessary to preserve the concept of absolute free speech in the first place. It can be argued that were it not for the existence of an absolute concept of free speech, the limited notion of free speech would not have any meaning. Like the concept of forgiveness, free speech would be in danger of becoming something else entirely. Thus, like the *notion* of forgiveness, the conditional *notion* of free speech must necessarily refer back to the quasi-transcendental absolute in order to have any meaning.

This answers the important question of how we are to reconcile the need for the quasi-transcendental absolute with the necessary need to restrict free speech in certain contexts. While free speech can only occur when it engages in a series of conditions, any conditional *notion* of free speech must necessarily refer back to the quasi-transcendental absolute. For it can be argued that although free speech is necessarily limited by social-historical contexts on an international level and within the nation state, the quasi-transcendental concept of free speech is necessary to add meaning to any limited or conditional free speech. Without the concept of the quasi-transcendental, the meaning of free speech would disappear. When we invoke or claim a right to free speech, our ability or claim to free speech is nevertheless dependent on the quasi-transcendental absolute. As with forgiveness, democracy and hospitality, the quasi-transcendental concept of free speech cannot and perhaps should not ever occur. Absolute free speech must necessarily be divorced from occurring in specific social-historical contexts. The quasi-transcendental *concept* of absolute free speech can only have meaning outside of particular contexts. In the same way that conditional hospitality or conditional democracy are dependent on the quasi-transcendental absolute, absolute free speech gives meaning to and enables any conditional free speech to occur.

We can thus argue that absolute free speech is both "heterogeneous and irreducible" to conditional free speech. It is heterogeneous because absolute free speech can only occur by engaging in a series of conditions and limitations. At the same time absolute free speech

cannot and perhaps should not ever occur. It is thus also irreducible to conditional free speech. Without the idea of the quasi-transcendental absolute, the limited *notion* of free speech would cease to have meaning.

4.6 Absolute freedom-of-speech to come

Like "justice" and the "law", absolute free speech enables a process of deconstruction to take place. The quasi-transcendental concept of justice enables us to deconstruct and change laws. At the same time, the quasi-transcendental concept of absolute free speech allows a process of deconstruction to occur. It is this deconstructive process that allows conditional free speech as well as justice to occur. Like the concepts of "justice" and "democracy", absolute "free speech" is always waiting to come. Any limited or restricted free speech occurs in the name of absolute free speech. While absolute free speech cannot ever occur, the objective is to get as close as possible.

But why has it been necessary to suggest that free speech is aporetic? The answer to this question is that by suggesting that the concept of free speech is aporetic, we are able to reconcile the claim to absolute-unrestricted free speech with the historical and linguistic limitations discussed above. Having suggested that free speech is aporetic, we are faced with another problem. In the territorial boundaries of the nation-state, we are able to legally invoke limitations on free speech by appealing to a rights discourse discussed in Chapter One. Sovereign governments are entrusted with the legal right to rescind access to free speech when it interferes with other rights. Such a right emerged out of the birth of the Social Contract and the democratic Westphalian nation-state. As has been shown, free speech is subject to the same linguistic and historical limitations as exist in the nation-state. The problem is that no intra-state body on an international level is vested with the legal right to restrict free speech when circumstances require it. International bodies like the UN and the EU can impose sanctions or potentially expel a state from the global community; they are not however legally entrusted with the power or right to rescind the right to free speech.

If we cannot invoke limitations on free speech by appealing to a rights discourse particular to the nation-state, we have to, for the moment, find some other way of thinking limitations that are legitimate if not legal. In the conclusion I argue that the self-constituted limitation of free speech qua aporetic concept can be employed towards, if not the legal enforcement of

limitations, at least its invocation in an ethics of limitation. Given the limitations of this study I can only conclude with an example of what this may mean.

Conclusion

Reason without rights: Applying Kant's argument on an international level

At the end of the previous chapter, it was stated that we were left with the dilemma of how to invoke or legitimise limitations of free speech on an international level without appealing to a nation-state rights discourse. The fact that we are trying to regulate free speech on an international level implies that we cannot use such a rights discourse as we are operating outside of the sovereign nation-state. If we cannot appeal to nation-state laws as a means of regulating speech, how are we to invoke or legitimise, even understand such limitations? Dealing specifically with the issue of international relations between sovereign nation-states, Kant (2006:72) proposes a solution for the stability and peaceful interactions between nation-states that will be useful in proposing a solution for how to understand the relevance of the linguistic and socio-historic limitations inherent also in free speech at a international level.

The context for Kant's argument concerned the prevention of international conflict and the maintenance of stability between sovereign nation-states. During the time at which Kant wrote, the Westphalian nation-state system had created a new but somewhat unstable international order. The existence of many sovereign nation-states, with no system of law enforceable among them, with each state judging its grievances and ambitions according to the dictates of its own reason or desire, necessarily implied the inevitability of war or conflict. Such a view or image led to the birth of the 'Realist' school of thought in international relations (Kant, 2006:72-85). In an international order that consists of sovereign nation-states, the Realist view holds that there is no automatic harmony or peace between states. The idea is that states exist as separate and individual entities and are thus driven by their own goals or desires; the use of force is often deemed to be a necessary means of achieving such goals. According to the Realists, states are more than willing to sacrifice peace and stability and will resort to force in order to pursue their own selfish interests (Kant, 2006:160). In an international system consisting of sovereign nation-states, each state is the final judge of its own cause, and can resort to force whenever it is deemed to be necessary. Because any state may resort to force at any particular time, it follows that all states must necessarily be vigilant and be prepared to counter force with force in order to survive.

On the basis of such altruistic-selfish behaviour, the international system is unstable and peace is uncertain. States cannot afford to work together or to trust each other as this may

expose any particular state and will lead to vulnerability and weakness, making it vulnerable to attack from another state (Kant, 2006:160). In order to survive, states must necessarily pursue their own selfish interests. Survival is seen to be a more worthy pursuit than the maintenance of global peace or stability. This is not to say that periods of peace or stability do not exist in such an international order. It may be in a state's interest to avoid conflict, as the use of force may not be deemed an appropriate means to achieving a goal. The point is that any peace or stability that does occur between states is not the result of trust or a desire to work together for the purposes of global stability; it is rather the result of the selfish desire of each state to avoid conflict for the purposes of survival (Kleingeld, 2006:160). Such a period of peace is uncertain and only lasts until any particular state decides to resort to force to achieve a goal or objective.

Within such a Realist view, any attempt to understand the international system and the behaviour of nation-states cannot occur without an attempt to understand the nature of man. Under such a view, man, the state and the state system are so intrinsically linked that a political scientist cannot study one image without looking at the other two. In writing about the behaviour of states in the international order, Rousseau, Spinoza and Kant made specific reference to the reason or passions of man in order to explain the selfish behaviour of states (Kant, 2006:160-165). The relationship between the behaviour of states and the intrinsic nature of man could not be separated in such an analysis.

Spinoza (2002:680) attempted to explain the makeup of the international order by reference to the nature of man. According to Spinoza, reason is displaced by passion, the result being that men who should cooperate with one another in perfect harmony resort to violence as a means to achieving their goals. In explaining the behaviour of nation-states, Spinoza (2002:685-687) argued that states are like men; they are driven by a desire to survive but cannot order their desires by using reason. State actions on an international level are driven by passion at the expense of reason. Spinoza pointed out, however, that man, despite being driven by his passions, is forced to combine and depend on others for the purposes of survival. According to Spinoza (2002:611), states are "overcome daily by sleep, often by disease or mental infirmity, and in the end by old age". Man is forced to cooperate because of his vulnerability. States on the other hand can survive without the need to cooperate with each other. War is inevitable between states because they are not subject to the same vulnerabilities as man.

Kant's analysis is more complex than Spinoza's, and his analysis will be used to suggest a solution for how to conceive the limitation of free speech outside of its enforceability as law. Kant (2006:72) argues that man has the capacity to be rational and make decisions based on reason. However, man is also driven by instinct and passion, and it is passion that overcomes reason. The result is that rational behaviour is seldom followed in the state of nature and conflict and violence is inevitable (Kant, 2006:72-75). The civil state is necessary to prevent conflict and to prevent humans from harming each other. The civil state acts as a supreme judge and must be able to enforce decisions in order to prevent violence. According to Kant (2006:75), the civil state is necessary to ensure that men behave morally. The security of law is necessary to prevent humans from acting on their passions and secures the natural rights that man is entitled to in a state of nature but cannot actually enjoy. While the civil state is necessary to preserve internal order, this is not enough according to Kant. Peace *among* states is equally necessary as peace *within* states, for states are also governed by passion as much as reason, which results in international instability (Kant, 2006:75). Kant disagrees with the idea that the creation of a world state is the answer to ensuring global stability. The creation of a world state with supreme power and the sovereign ability to govern and control other states would run the risk of becoming a global despot that could potentially destroy liberty altogether. It could lead to member states revolting against such a despot in order to preserve their liberty resulting in global anarchy and war. In order to prevent such a scenario from occurring, Kant proposes a solution that may be of particular use for this thesis.

Kant suggested the possibility that all states in an international order act on universalised maxims or morals that they would in time come to recognise as obligatory without them being enforceable. The problem is that passion more often than not displaces reason, the result of which might be that a universally applied code of conduct could be abandoned (Kant, 2006:75-82). Does this once again imply a need for a global state to enforce such a moral code of law or conduct on an international level? Fearing the consequences of a despotic state, Kant prefers the idea that states may improve or learn from the suffering and devastation of wars so that they voluntarily ensure that passion does not usurp reason. If a moral code of conduct is to exist on an international level, it must be voluntarily observed, it cannot be enforced. The creation of a universally applied code of conduct or moral law on an international law is dependent on the internal perfection of states (Kant, 2006:75-82). Only once states have learnt from the dangers of war are they in a position to agree to the application of a universal law.

The second maxim is dependent on the first maxim. It is perhaps problematic or wishful to hope that the application and adherence to voluntarily obeyed universal laws will occur. Kant himself confessed that he had not established the "inevitability" of perpetual peace; however he believed that such a condition was not impossible. It is necessary to ask how Kant's proposed solution of a universally agreed upon code of moral law between states can help us address the problem of invoking limitations on free speech without appealing to a rights discourse on an international level (Kant, 206:75-82).

The triumph of reason: the potential application of a voluntary code of conduct between nation-states with regards to free speech

In Chapter Four we were able to reconcile the absolute claim to free speech with the linguistic and historical limitations of free speech in aporetic terms. Nation-states take the limitation constitutive of this aporia (historical association and meanings of words) and turn them into a legal limitation by calling such forms of speech "hate speech". However, outside of the sovereign nation-state, we are unable to legitimately invoke or enforce the necessary limitation of free speech because we cannot agree on a rights discourse to do so; we can appeal to a rights discourse but, as the cartoon episode made clear, it is a rights discourse without any enforceability. This is where Kant's proposed solution may be useful because it provides a way for us to legitimately call for the limitation of free speech *inherent in the meaning of words and the history of their usage* without having to appeal to a rights discourse enforceable by law.

On the basis of Kant's solution, it is possible to suggest the feasibility of calling for a universal law or code of conduct with regards to speech acts on an international level. We are unable to enforce the adherence to such a moral law or code of conduct because we cannot appeal to a rights discourse outside of the nation-state. Following on from Kant, such a moral law would have to be based on a voluntary agreement between states to adhere to the need to limit speech acts in certain situations *given the constitutive limitations of the historical meaning and associations of words.* Since such a moral law would have to be voluntarily observed rather than enforced, it must be assumed that states need to be convinced or persuaded of the need to limit free speech without appealing to a nation-state rights discourse. Such convincing would depend on a moral or ethical awakening among nation-states and an acknowledgment of the detrimental affects of unrestricted speech and the possibility that a war of words may erupt in a war of destruction. It is possible to argue that such a moral code

or agreement already exists among member states of international bodies such as the United Nations and the European Union or, at the very least, that there is precedent for it. One brief example will suggest that such a moral code is not as idealistic as it sounds; that there is precedent, for invoking limitations in a way that is legitimate even if illegal.

Legitimate but Illegal: NATO and the Kosovo Crisis

According to Wheeler (2000:145), the provocative challenge issued by the UN Secretary-General to the General Assembly during its 54th session in September 1999 encapsulated the conflict between legality and legitimacy posed by NATO's military intervention in Kosovo in March 1999. The controversy surrounding NATO's intervention in Kosovo lay in the illegality of such an action. The decision by NATO to bomb the Federal Republic of Yugoslavia (FRY) was deemed to be illegal because it contravened the laws stipulated in the UN Charter (Wheeler, 2000:145). However, the United Nations Security Council unanimously agreed that the FRY was committing an act of genocide against the Albanian minority and that this constituted a gross violation of human rights; the actions of the FRY were considered to be a threat to 'international peace and security' (Wheeler, 2000:145). Another mitigating factor in support of NATO was that the UN Security Council had demanded a cessation of violence in Kosovo in three successive resolutions that were adopted under Chapter Seven in the UN Charter (Wheeler, 2000:145). The gross violation of human rights and the decision by the FRY to ignore the resolutions were deemed to make the intervention by NATO a *legitimate* action. However, because the intervention in Kosovo could not be endorsed by UN Charter law, coupled with the threat of a Russian and Chinese veto against such an intervention, the intervention was deemed to be an *illegal* action.

Wheeler (2000:146) questions whether NATO's action in Kosovo represents a watershed in the development of a new norm of humanitarian intervention. The international order has consisted of a society of states built on the principles of sovereignty. The purpose of creating international bodies like the United Nations was to create a stable climate of peace and stability built on the principles of non-intervention and non-use of force. The creation of a stable international order was always meant to be built around the principles of sovereignty (Wheeler, 2000:146). As mentioned in Chapter Two of this thesis, there has existed a tension between the supremacy of international law and the sovereignty of national law. Although UN legislation creates laws that are meant to be respected and upheld, should any particular government wish to perpetrate acts within its own borders, the principle of domestic

sovereignty prohibits international bodies or other nation-states from intervening in another state's internal affairs. In the context of the international environment, Wheeler (2000:146) asks what the ramifications are concerning NATO's intervention in Kosovo. On the one hand, it is possible to argue that NATO's actions have signalled the arrival of a doctrine of humanitarian intervention that values the precedence of civilian protection over nation-state sovereignty. On the other hand, despite the legitimacy or moral value of such humanitarian thinking, such actions threaten to shake the very foundations of the international order. To break down the pillars of nation-state sovereignty is to potentially break down the international order itself (Wheeler, 2000:146).

However, it must be acknowledged that certain NATO governments, Britain in particular, have contested the 'illegality' of the intervention in Kosovo. Supporters of the intervention have contended that a legal right of humanitarian intervention is legal under two conditions: first, on an interpretation of UN Charter provisions relating to the protection of human rights, and second, on customary international law (Wheeler, 2000:147). In the preamble to the UN Charter, Articles 1 (3), 55 and 56 impose a legal obligation on member states to cooperate in promoting human rights. This is pointed out by Fernando Teson (1988:131) who argues that the 'promotion of human rights is as important a purpose in the Charter as is the control of international conflict'. Under Chapter Seven of the UN Charter, the Security Council has a legal right to authorise humanitarian intervention irrespective of whether it has found a threat to 'international peace and security'. Reisman and McDougal (cited in Arend & Beck, 1993:134) claim that rather than contradicting the principles of the UN, such humanitarian intervention upholds the very purposes for which the UN was created. Reisman and McDougal (cited in Arend & Beck, 1993:134) were responding in particular to the argument that unilateral humanitarian intervention violates Article 2(4), which prohibits the use of force by states:

> *Since a humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the state involved and is not only not inconsistent with the purposes of the United Nations but is rather in conformity with the most fundamental peremptory norms of the Charter, it is a distortion to argue that it is precluded by the Article 2(4).*

Wheeler (2000:148) argues that the majority of international lawyers restrict the legal right to use force under the Charter other than for the purposes of self-defence. According to these 'restrictionists', there are only two legally recognised exceptions to the general ban on the use

of force in Article 2(4): the right of individual and collective self-defence under Article 51 and Security Council enforcement action under Chapter Seven of the Charter (Wheeler, 2000:148). The issue is complicated somewhat by the difference between customary law and treaty law. Customary law is different from treaty law because it is not created by written agreements between states that set down the rules to regulate their interactions in a specific area. States cannot defend their actions that only have the status of customary law; they must also justify such actions as being legally permitted under treaty law. The decision concerning which norms of behaviour have become the customary rules that become legally binding upon states is called *opinio juris*. The 'restrictionists' have argued that state practice and *opinio juris* since 1945 do not support a legal right of unilateral humanitarian intervention (Wheeler, 2000:148-149). In particular, the 'restrictionists' have pointed to the 1965 Declaration of the Inadmissibility of Intervention that denied legal recognition to intervention 'for any reason whatever'; the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation and the 1987 Declaration of the Enhancement of the Effectiveness of the principle of Refraining from the Threat or Use of Force in International Relations. Under these Declarations, the 'restrictionists' argue that the NATO intervention in Kosovo was illegal (Wheeler, 2000:149).

Despite the controversy surrounding the 'illegality' of NATO's intervention in Kosovo in March 1999, it has been useful to allude to this particular case scenario as an example of the tension inherent in an action that is deemed to be illegal but legitimate. Could this case study in particular help us to address the sensitive issue of restricting speech on an international level? One can argue that such a case study legitimises a distinction between what is considered legal and what is considered legitimate; it allows us to consider legitimacy outside the juridical and that is exactly what we need in order to re-think "limitations" at an international level. As the cartoon case illustrated, the day will probably never come when states agree among themselves on what constitutes hate speech (particularly its religious version) and that such acts could or should be limited legally. What the category "illegal but legitimate" allows us to speculate on is the possibility that, once we recognise the aporetic limitations implicit in the working of the notion of free speech, such limitations could and should impose limitations on free speech that may not be juridical limitations but ethical limitations.

As argued earlier, Kant would be opposed to the use of force as a means to ensuring that international codes of conduct are not broken. Kant expressed particular concern about the potential threat of a World State and thus ruled out force as an option. A similar view to Kant's is expressed by pluralists who argue that, if a right of humanitarian intervention is conceded to individual states, this will open the door for powerful states to act on their own particular moral preferences. This could potentially result in a global despot that has the sole power to decide whether international law has been broken, and whether intervention is necessary. By lifting the general ban on Article 2(4), this will open the way for vigilante action on behalf of powerful states that can instigate interventionist actions at their will. Such a view is reiterated by Ian Brownlie (1973:147-148) who argued:

Whatever special cases one can point to, a rule allowing humanitarian intervention, as opposed to a discretion in the United Nations to act through the appropriate organs, is a general licence to vigilantes and opportunists to resort to hegemonial intervention.

On the basis of such criticisms, it could be suggested that the introduction of international codes of conduct pertaining to the use of speech cannot be enforced by any particular nation-state or international body. The adoption of free speech legislation would arguably have to be completely voluntary. For the reasons just discussed, the adoption of free speech legislation on an international level by nation-states would not have any legal basis. It would be illegal to attempt to force the compliance of nation-states with regards to abiding by free speech codes of conduct. As the Kosovo intervention illustrates, it is possible to defend interventionist actions by claiming to operate outside of juridical boundaries in those cases where there is nonetheless democratic, ethical support for such an intervention. This is why such actions have been described as legitimate but illegal. However, as Brownlie (1973:147-148) has pointed out, this could potentially threaten the stability of the international order as it opens the door to vigilantism that is deemed to be legitimate.

Going back to Kant's example, it is possible to conceive of a global hegemonic state or international body designated with the responsibility of deciding which actions are legitimate or illegitimate. This is problematic for two reasons; firstly, Kant alludes to the possibility that a global state or international body assigned with the responsibility of ensuring global order could easily become despotic. It is very possible that interventionist actions in the pursuit of selfish interests can be defended as legitimate. Secondly, as this thesis has suggested throughout, such a global body would not be vested with any rights or authority to decide

which actions are legitimate or illegitimate anyway. This suggests that the limitation of speech must be voluntary and cannot be enforced. Since the limitation of speech on an international level cannot be invoked by appealing to rights, it is necessary to describe such a need as legitimate but illegal.

Conclusion

As outlined at the beginning of this chapter, the claim exists that there is a need to limit free speech outside of the nation-state on an international level. Within the nation-state we are able to call upon a rights discourse that legitimises the enforcement of free speech legislation by nation-state governments. Outside of the nation-state, we cannot appeal to a rights discourse as a means to limiting free speech, and it is because of this that any attempt to enforce the restriction of free speech would be illegal. Using Kant's idea of the voluntary adoption of universal principles, this thesis has suggested a way to re-think the limitation of speech without appealing to legalised force as a means to do so. While such a claim would be legitimate, the example of the NATO intervention in Kosovo has demonstrated that such a need has no legally binding discourse of rights to refer to. Since we cannot resort to force, we would have to depend on what Kant refers to as 'the internal perfection of states'. It is only on such a basis that we may in a time yet to come recognise the limitations on free speech at an international level, not as juridical but as ethical limitations.

In short, the answer to the question: what is the relevance of pointing out the aporetic structure of free speech for international politics? The same ethical commitment that made the Kosovo intervention possible – although illegal – must compel us, not just to recognise the social-historical meaning of words and cartoons but to accept that recognition as ethical limitation. The recognition of an ethical need to recognise the social-historical meanings of words could make a voluntary universal recognition of the limitations of free speech possible.

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