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Should New Bills of Rights Address Emerging International Human Rights Norms?

The Challenge of “Defamation of Religion”

Robert C. Blitt*

I. INTRODUCTION: DRAFTING A BILL OF RIGHTS IN THE 21ST CENTURY

¶1 The decision to draft a bill of rights heralds a momentous event in any country’s history. In the latter half of the 20th century, crafting a document that addresses the fundamental rights of individuals and groups and their relationship to the state has typically involved a flurry of public consultations, negotiations, drafting, and rewrites. Increasingly, however, such endeavors remain incomplete without some effort to observe, understand, and account for comparative trends related to human rights on the international level as well as in other states. Although writing about constitutions specifically, A.E. Dick Howard’s observations are equally relevant to standalone bills of rights:

The international human rights revolution has had undeniable impact upon comparative constitutionalism. It is hard to imagine drafters of a new constitution going about their task unconcerned about human rights standards ... For half a century, the Universal Declaration of Human Rights has served as a model for constitution makers. Countless

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This work would not be possible without the tremendous support of the University of Tennessee College of Law and the active encouragement of my faculty colleagues. I am also grateful to Joe King, Jennifer Hendricks, and Erin Daly for their helpful insights into the state of U.S. defamation law, to Greg Stein for his invaluable comments on an earlier draft, to Jenny Tang for her rapid editorial input, and to Anna Forgie and the rest of the team at the *Northwestern Journal of International Human Rights* for their professional assistance getting this article to print. This paper is dedicated with love to my wife Stephanie, whose ability to make time never ceases to amaze, and to our son and traveling companion Noah Leib.

constitutions written since 1948 contain guarantees that either mirror or draw upon the Declaration.¹

¶2 Numerous examples across a wide range of states confirm this tilt in favor of consulting international norms.² Recent drafting efforts in Iraq,³ Afghanistan,⁴ New Zealand,⁵ South Africa,⁶ and all the states of the former Soviet Union and Warsaw Pact⁷ leap to mind, to name but a few. In each of these cases – and with varying degrees of success – national drafters held their country’s unique cultural, historical, and political experiences up against the collective database of international experiences to divine commonalities, mutual priorities, shared aspirations, and points of divergence. Although no bright line rule has emerged requiring states drafting new bills of rights to undertake such a comparative assessment or import wholesale the standards contained in the major international human rights instruments, the pattern of consultation and endorsement is undeniable and may even signal an emerging international customary norm.⁸ Indeed, in the past, the European Union has made diplomatic recognition of states conditional on their willingness to pledge respect for human rights and provide legal “guarantees for the rights of ethnic and national groups and minorities.”⁹

¶3 Along this line of reasoning, a further issue arises as to whether established international standards represent the normative ceiling or only the floor. Should states

¹ A.E. Dick Howard, *A Traveler From An Antique Land: The Modern Renaissance of Comparative Constitutionalism*, 50 VA. J. INT’L L. 3, 18 (2009).

² The majority of these states integrated bills of rights into their new constitutional documents. New Zealand focused exclusively on drafting a standalone bill of rights, a process currently being contemplated by Australia.

³ Though ultimately deleted from Iraq’s 2005 constitution, a draft version contained a provision that would have explicitly provided individuals “the rights contained in international human rights agreements to which Iraq is a party as long as those rights did not contradict the provisions of the constitution.” Ashley S. Deeks & Matthew D. Burton, *Iraq’s Constitution: A Drafting History*, 40 CORNELL INT’L L.J. 1, 32 (2007). The final constitutional text specifies that Iraq “shall observe the principles of good neighborliness...and respect its international obligations.” IRAQ CONST., 2005, art. 8.

⁴ Afghanistan’s constitution requires the state to “abide by the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights.” Afg. CONST., 2004, art. 7.

⁵ New Zealand’s 1990 Bill of Rights stipulates that one of its purposes is “[t]o affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights.” New Zealand Bill of Rights Act 1990, 1990 Public Act No. 109 (N.Z.).

⁶ It is widely acknowledged that South Africa’s constitution drafting process borrowed from international treaties, national constitutions and international and foreign jurisprudence. Jeremy Sarkin, *The Effect of Constitutional Borrowings On the Drafting of South Africa’s Bill of Rights and Interpretation of Human Rights Provisions*, 1 U. PA. J. CONST. L. 176, 177 (1998).

⁷ In central and eastern Europe generally, international law, including the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), was “universally perceived” as one of the most important sources of human rights used for modeling new constitutional regulations. Wiktor Osiatynski, *Rights In New Constitutions of East Central Europe*, 26 COLUM. HUM. RTS. L. REV. 111, 161 (1994).

⁸ This paper is limited to exploring the relevancy of one possible emerging international human rights norm on the bill of rights dialogue unfolding in Australia. The larger question of whether states may be obligated to incorporate international human rights standards under customary international law when drafting a bill of rights is set aside for another occasion.

⁹ *Declaration on the “Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union,”* Dec. 16, 1991, 31 ILM 1485, 1487 (1992).

engaged in a bill of rights drafting process aspire to adopt not only minimalist existing norms but also emerging ones that arguably embody the natural normative extension of human rights but have yet to become entrenched? As Jacek Kurczewski and Barry Sullivan point out, the notion of minimum standards in human rights law “dialectically entails as well the notion of something more demanding than the minimum – that is, the possible expansion of rights to which people are entitled.”¹⁰ From this perspective, many additional questions follow: How much further should a state go? What is the international status of cutting-edge issues such as intersex and transsexual rights, the right to an adequate standard of living,¹¹ and migrant rights? What, if anything, should a newly drafted bill of rights say on these issues?

¶4 At least in part, these questions can be addressed procedurally within the discussion over whether the bill of rights will be a succinctly worded statement that takes a general approach, or a longer document that engages specificities. Substantively, however, drafters also have a duty to inform themselves of what, if any, emerging human rights issues are relevant, and how they should be addressed.

¶5 Using this understanding as a point of departure, the following article posits that beginning the arduous task of drafting a bill of rights from a standpoint of openness toward comparativism and engagement with international norms affords the process several advantages. First, it informs the public at large that the discussion over the nature and scope of rights does not occur in the vacuum of domestic politics alone, but rather implicates larger ideas relevant to humanity as a whole.¹² Second, it allows a state the ability to consciously check any drafted domestic standards against its pre-existing international obligations under treaty or customary law. This in turn affords drafters an opportunity from the outset to furnish clear answers for basic questions such as whether international or regional human rights treaty obligations will be directly enforceable on the municipal level. Even where existing treaty rights are determined to be non-justiciable, drafters can still test to what extent proposed domestic standards measure up against international norms.¹³ Finally, exploring comparative and international experiences situates the debate in a broader context that is necessarily more diverse, more informative, and more comprehensive. By plugging into this fecund ideascapes, drafters can build up a robust domestic understanding of the content of rights and their related limitations, the dynamics of public-private and individual-group relationships, and the

¹⁰ Jacek Kurczewski & Barry Sullivan, *The Bill of Rights and the Emerging Democracies*, 65 LAW & CONTEMP. PROBS. 251, 259 (2002).

¹¹ The National Human Rights Consultation Report has recommended that “if economic and social rights are listed in a federal Human Rights Act, those rights not be justiciable and that complaints be heard by the Australian Human Rights Commission.” NATIONAL HUMAN RIGHTS CONSULTATION, NATIONAL HUMAN RIGHTS CONSULTATION REPORT (Sept. 30, 2009), at xxxv, http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads#pdf (hereinafter NATIONAL HUMAN RIGHTS CONSULTATION REPORT).

¹² By this, I simply mean that the experience of one state’s drafting process and final instrument may in the future help inform the drafting process of the next state contemplating a new or revised bill of rights.

¹³ This advantage resonates with the Australian Human Rights Commission’s existing mandate, which includes “making human rights values part of everyday life and language” and “keeping government accountable to national and international human rights standards.” *About the Commission*, AUSTRALIAN HUMAN RIGHTS COMMISSION, <http://www.hreoc.gov.au/about/index.html> (last visited Oct. 11, 2010). Australia’s federal parliament established the Commission (formerly the Human Rights and Equal Opportunity Commission) in 1986 as an independent statutory body that reports to Parliament through the Attorney-General.

existing mechanisms for balancing competing interests where inevitable conflicts may arise. Related to this, exploring comparative and international sources affords the benefit of alerting drafters to emerging rights or norms that otherwise might not figure in the domestic debate, providing additional opportunity to tweak the proposed language. Ultimately, such efforts – although more time-consuming and complex – can challenge pre-existing ideas and limitations, resulting in a more vibrant drafting process and more thoroughly “beta-tested” final product.

¶6

With these advantages in mind, the following article considers the emerging norm of “defamation of religion” – one recent flashpoint in the international human rights dialogue – in the context of Australia’s bill of rights drafting process. Incorporating an earnest assessment of comparative experiences and benchmarks into a bill of rights drafting process is a natural and worthy step for the government of Australia, particularly in light of the country’s long history of international engagement¹⁴ and its ongoing commitment to international human rights.¹⁵ This approach also respects the stated desire of many Australians to ensure their government “protect[s] and promote[s] all the human rights reflected in its obligations under international human rights law.”¹⁶ Indeed, the Australian government has identified the advancement of human rights as every nation’s responsibility: “[T]he function of government is to safeguard the dignity and rights of individuals, whose lives should be free of violence, discrimination, vilification, and hatred. ... [W]e do not rest on our laurels. We continue to strive to protect and promote human rights and to address disadvantage.”¹⁷

¹⁴ For example, H. V. Evatt, an Australian, served as President of the UN General Assembly during the adoption and proclamation of the Universal Declaration of Human Rights. Australia was an original signatory to that Declaration. *Doc Evatt: A brilliant & Controversial Character*, THE EVATT FOUNDATION, http://evatt.labor.net.au/about_evatt/ (last visited Oct. 11, 2010).

¹⁵ In the words of the Australian government: “Australia’s commitment to the aims and purposes of the Universal Declaration of Human Rights reflects our national values and is an underlying principle of Australia’s engagement with the international community.” *Australia: Seeking Human Rights for All*, DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, http://www.dfat.gov.au/hr/hr_for_all.html (last visited Oct. 11, 2010). Australia is a state party to all but two of the nine main human rights treaties. It regularly reports to each of the bodies responsible for overseeing the implementation of these treaties. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR) - REGIONAL OFFICE FOR THE PACIFIC, *RATIFICATION OF INTERNATIONAL HUMAN RIGHTS TREATIES: ADDED VALUE FOR THE PACIFIC REGION 15* (2009), available at <http://pacific.ohchr.org/docs/RatificationBook.pdf>. Australia has not signed or ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which entered into force on July 1, 2003. As of November 2010, this treaty had mustered only 44 state parties. With the exception of Bosnia and Herzegovina, no western or central European state has ratified the treaty; Serbia is the only other European signatory to the convention. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, *adopted Dec. 18, 1990*, 45 U.N.T.S. 158, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en. Australia also has not signed the International Convention for the Protection of All Persons from Enforced Disappearance. This treaty has not yet entered into force because it lacks the minimum number of state parties; twenty ratifications are required, only 19 have been secured to date (status as at: November 11, 2010). International Convention for the Protection of All persons from Enforced Disappearance, *opened for signature Dec. 20, 2006* 61 U.N.T.S. 488, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en.

¹⁶ NATIONAL HUMAN RIGHTS CONSULTATION REPORT, *supra* note 11, at 73.

¹⁷ Human Rights, ATTORNEY-GENERAL’S DEPARTMENT, http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_Humanrights (last visited Oct. 11, 2010) (emphasis added).

¶7 Given this firm commitment to an expansive understanding of rights, Australia can and should aspire to adopt not only minimalist existing norms but the emerging ones that embody the natural normative extension of human rights. Indeed, as the Law Council of Australia suggested during the recently completed National Human Rights Consultation process, “Australia should actively engage with the process of developing new human rights principles through its interaction with international human rights bodies.”¹⁸ Obviously, this responsibility doesn’t begin and end with the international bodies. Rather, it logically entails that Australia adopt the same position vis à vis the process of developing new human rights principles on the home front as well.

¶8 This said, the notion of defamation of religion poses a challenge to the presumed desire to incorporate and strengthen domestic and international human rights regimes. As will be argued below, this putative norm has the effect of attenuating rather than reinforcing the traditional scope of freedom of expression and freedom of religion or belief. Yet it has consistently garnered strong support on the international level and therefore may be trending in the direction of an emerging customary norm. Faced with this possibility, the question arises as to whether Australia’s bill of rights process should account for defamation of religion, and if so, how.

¶9 In the next section, I offer a brief comparative history of the offense of blasphemy to help contextualize the intended meaning of defamation of religion. The third part of this article discusses how defamation of religion became the focus of dozens of United Nations (UN) resolutions, assesses the challenges associated with grafting the legal concept of defamation onto the mercurial notion of religion and its potential implications for existing international law, and finally takes stock of the ongoing debate as it stands today. The fourth part of this article draws some preliminary conclusions concerning the possible impact of enforcing a norm against defamation of religion, and addresses to what extent—if at all—Australia should incorporate a response to this emerging norm in any future bill of rights.

II. A COMPARATIVE OVERVIEW OF THE OFFENSE OF BLASPHEMY: A FOUNDATION FOR UNDERSTANDING DEFAMATION OF RELIGION

A. *Blasphemy in the West*

¶10 In theological terms, blasphemy is equated with “a direct criticism of God and sacred objects.”¹⁹ The legal definition of blasphemy “developed historically to meet various, primarily political rather than religious, perceptions of a need for the law to protect institutions, originally the State itself.”²⁰ In other words, the challenge posed by alleged heretics and blasphemers represented nothing less than an act of state treason threatening the very foundation of a society held together with the brick and mortar of an exclusive religious conviction.²¹ The state could level blasphemy-related charges against

¹⁸ NATIONAL HUMAN RIGHTS CONSULTATION REPORT, *supra* note 11, at 72.

¹⁹ Reid Mortensen, *Blasphemy In A Secular State: A Pardonable Sin?*, 17 U.N.S.W.L.J. 409, at 409 (1994).

²⁰ SELECT COMMITTEE ON RELIGIOUS OFFENCES IN ENGLAND AND WALES, REPORT-APPENDIX 3: BLASPHEMY Para. 7 (2003), <http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldrel/of/95/9515.htm>.

²¹ For example, in recognizing blasphemy as a common law offense in 17th century England, the court held that “to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved,

an individual to protect the social or ideological underpinnings of society, or more specifically, use such charges to “suppress the expression of religious beliefs or opinions” that the dominant group believed to be false.²² As U.S. Justice Felix Frankfurter famously observed, “Blasphemy was the chameleon phrase which meant the criticism of whatever the ruling authority of the moment established as orthodox religious doctrine.”²³

¶11 In many states today, the offenses of blasphemy and heresy are viewed as antiquated tools for protecting a given ruler’s religious worldview at the expense of all other differing opinions. Indeed, as religion and state gradually decoupled in the west,²⁴ charges of blasphemy grew more infrequent. While prosecutions for blasphemy in the United States became “no more frequent than the sightings of snarks,”²⁵ the common law offense persisted in England until its abolition in 2008.²⁶ Prior to this, UK courts concluded that blasphemy required little in the way of intent,²⁷ could result in a sentence of hard labor,²⁸ and only operated to protect the Church of England and its specific

and that Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law.” *R v. Taylor*, 1 Vent. 293 (1676); 86 Eng. Rep 189 (K.B.). In this brief quote, the court made plain the linkage between safeguarding the dominant faith and preserving the social and political order of the day.

²² Tad Stahnke, *Proselytism and the Freedom to Change Religion in International Human Rights Law*, 1999 B.Y.U. L. REV. 251, 289 (1999). Consequently, any nonconformist criticism of the dominant church—whether real or perceived—was not only dangerous, but considered “necessarily wrong when emanating from inferior subjects against their masters.” LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 5 (1985).

²³ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 529 (1952).

²⁴ This trend may be linked to broader conditions of modernity leading to the secularization of society, wherein religion “becomes increasingly a private concern of the individual and thus loses much of its public relevance and influence.” Riaz Hassan, *Expressions of religiosity and blasphemy in modern societies*, NEGOTIATING THE SACRED: BLASPHEMY AND SACRILEGE IN A MULTICULTURAL SOCIETY 119 (Elizabeth Burns Coleman & Kevin White eds.) (2006).

²⁵ LEONARD W. LEVY, *TREASON AGAINST GOD x* (1981) (referring to LEWIS CARROLL, *THE HUNTING OF THE SNARK: AN AGONY IN EIGHT FITS* (1876)).

²⁶ Criminal Justice and Immigration Act 2008, Section 79 (2008) (Eng.), http://www.opsi.gov.uk/acts/acts2008/ukpga_20080004_en_1. The 2006 Racial and Religious Hatred Act arguably prohibits some acts that may have previously constituted blasphemy, however its provisions apply equally to all religions. Part 3A of the 2006 Act addresses “[h]atred against persons on religious grounds.” Under Section 29B(1), “[a] person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.” The term “religious hatred” is defined as “hatred against a group of persons defined by reference to religious belief or lack of religious belief.” In addition to the offense requiring the impugned communication to constitute a threat, Section 29J provides detailed protection for freedom of expression:

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

Racial and Religious Hatred Act 2006, http://www.opsi.gov.uk/acts/acts2006/ukpga_20060001_en_1. The issue of incitement is discussed at greater length below.

²⁷ In 1979, the House of Lords affirmed a minimal threshold of intent for the offense of blasphemy, endorsing the trial judge’s direction that “guilt of the offence of publishing a blasphemous libel did not depend on the accused having an intent to blaspheme, but that it was sufficient for the prosecution to prove that the publication had been intentional and that the matter published was blasphemous.” *R. v. Lemon (Denis)*, [1979] A.C. 617, 618 (also known as *Whitehouse v. Lemon*).

²⁸ William Gott, the last individual in the UK sentenced to a prison term for blasphemy, served nine months hard labor for distributing pamphlets describing Jesus Christ entering Jerusalem “like a circus clown on the back of two donkeys.” [1922] 16 CR. APP. R. 87, 89.

doctrines rather than all religious beliefs.²⁹ In other states where blasphemy was not abolished outright, alleged violations were left unprosecuted or became unenforceable “either through stricter intent requirements or judicial attempts to strike a balance between conflicting rights.”³⁰

¶12 In Australia, the last successful prosecution for blasphemy occurred in 1871.³¹ The 1990s ushered in an era of renewed interest related to the common law offense of blasphemy, in part triggered by the Salman Rushdie affair in the United Kingdom.³² In 1991, the New South Wales (NSW) parliament requested that the Law Reform Commission explore “whether the present law relating to the offence of blasphemy is adequate and appropriate to current conditions.”³³ In undertaking its mandate, the Commission acknowledged two key questions: first, “whether the offence [of blasphemy] is anachronistic in a modern society ... which is multicultural, pluralistic, and secular, and maintains a strict separation between Church and State”; and second, “whether the offence of blasphemy improperly impinges upon the fundamental right of freedom of speech.”³⁴ Because the offense of blasphemy had not been successfully prosecuted in over a century, the Commission also observed that there was “a real question whether blasphemy still exists in the criminal law of New South Wales, even if it was ‘received’ as law in colonial times.”³⁵

¶13 As part of its findings, the Commission identified “several pieces of legislation in New South Wales ... [that] assume[d] the existence of the crime” despite uncertainties regarding its reception from England.³⁶ Surveying the status of blasphemy in Australia’s other states and territories, the Commission also found that apart from section 574 of the Crimes Act 1900 (NSW), only the Tasmanian Criminal Code contained another express statutory reference to blasphemy.³⁷ In contrast, other Australian jurisdictions had either abolished the offense altogether or maintained it only as a common law crime.

¶14 After weighing various options regarding the common law offense of blasphemy, including retention, progressive codification, selective replacement, and outright abolition, the Commission endorsed abolition without a substitute offense as the best option for NSW.³⁸ The Commission’s recommendation stemmed from the status of

²⁹ In *Choudhury v. UK* (1991) 12 HRLJ 172, members of Britain’s Muslim community sought unsuccessfully to prosecute author Salman Rushdie for allegedly blaspheming against Islam in his novel, *THE SATANIC VERSES*; see also *Q & A: Blasphemy law*, BBC NEWS, Oct. 18, 2004, http://news.bbc.c.uk/2/hi/uk_news/3753408.stm.

³⁰ Osama Siddique & Zahra Hayat, *Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan—Controversial Origins, Design Defects, and Free Speech Implications*, 17 MINN. J. INT’L L. 303, 354 (2008). For example, Germany’s criminal code forbids insulting religion publicly or by dissemination of publications. However, successful prosecution requires “the manner and content” of the insult to rise to such a level that an objective onlooker could reasonably conclude it would disturb the peace of those targeted. *Id.* at 355-56.

³¹ *R v. Jones* (Unreported, New South Wales Supreme Court Quarter Sessions, Simpson J, 1871) (Austl.), in Butterworths, 23 HALSBURY’S LAWS OF AUSTRALIA 365, 695 (1996).

³² Siddique & Hayat, *supra* note 29.

³³ *NSW Blasphemy Report*, 74 Terms of Reference, available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R74TOR> [hereinafter *NSW Blasphemy Report*].

³⁴ *Id.* ch. 1, ¶¶ 1.2-1.3.

³⁵ *Id.* ¶ 1.4.

³⁶ *Id.* ch. 2, ¶ 2.14.

³⁷ *Id.* ch. 3, ¶ 3.2.

³⁸ *Id.* ch. 4, ¶¶ 4.3, 4.81.

the offense in NSW, its finding that there had been “no prosecutions for blasphemy in other Australian states, Scotland, Ireland, New Zealand or other comparable jurisdictions for over 50 years, and ... the fact that every law reform commission which [had] considered blasphemy law reform ... recommended abolition of the offence.”³⁹ As a potential alternative, the Commission also found that anti-discrimination statutes were:

better designed to preserve public order and social cohesion in a modern democratic society, given several important considerations: the emphasis on education and conciliation in the first instance; the clarity of the elements of the offences, and the protection of debate or discussion carried out in good faith; the more realistic penalties; and the requirement of the consent of the Attorney General before criminal proceedings may be instituted.⁴⁰

¶15 On the federal level, Australia’s early legislation revealed several efforts to enforce anti-blasphemy measures, particularly in literature, television, and film.⁴¹ However, in 1992, a federal Law Reform Commission recommended that: “All references to blasphemy in federal legislation ... be removed. Offences that protect personal and religious sensibilities should be recast in terms of ‘offensive material.’”⁴² This recommendation stemmed from the Commission’s opposition to extending the law of blasphemy for the purpose of covering religions other than Christianity. In the Commission’s view it “would be very difficult to devise a satisfactory definition of religion [to encompass faiths other than Christianity] and would be an unreasonable interference with freedom of expression” to perpetuate the offense of blasphemy.⁴³ In the wake of these findings, Australia’s federal government acted to repeal much of the legislation containing blasphemy-related offenses.⁴⁴

¶16 More recently, in the “Piss Christ” case,⁴⁵ Melbourne’s Catholic Archdiocese sought an injunction against the display of an allegedly blasphemous photograph by artist Andres Serrano. The photo, to be exhibited at the National Gallery of Victoria, depicted a crucified Jesus Christ which the artist had immersed in urine. The Supreme Court of Victoria, noting that there was “no evidence ... of any unrest of any kind following or likely to follow the showing of the photograph in question,” held against the plaintiff, and also stated the need to contextualize the dispute with “regard to contemporary standards

³⁹ *Id.* ¶ 4.80.

⁴⁰ *Id.* ¶ 4.31.

⁴¹ *Id.* ch. 3, ¶ 3.12.

⁴² Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC Report 57, Chapter 7, ¶ 7.59 (1992).

⁴³ *Id.* ¶ 7.59.

⁴⁴ The Classification (Publications, Films and Computer Games) Act of 1995 repealed the previous Customs (Cinematograph Films) Regulations of the Commonwealth. The prohibition against blasphemous works or articles contained in the 1956 Customs (Prohibited Imports) Regulations was discarded by an amendment. Likewise, section 118 of the Broadcasting Act 1942, prohibiting the broadcast of blasphemous material, was similarly excised by virtue of being replaced with the Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992.

⁴⁵ *Pell v. Council of Trustees of the National Gallery of Victoria* (1998) 2 V.R. 391, available at <http://www.austlii.edu.au/au/cases/vic/VSC/1997/52.html>. For a discussion of this case, see Bede Harris, *Pell v. Council of Trustees of the National Gallery of Victoria: Should Blasphemy Be A Crime? The ‘Piss Christ’ Case and Freedom of Expression*, 22 MELB. U. L. REV. 217.

in a multicultural, partly secular and largely tolerant, if not permissive, society.”⁴⁶ The Court concluded that if it were to “grant the relief sought by the plaintiff, [it] might thereby use the force of the law to prevent that which, by the same law, is lawful.”⁴⁷

B. *Blasphemy in Muslim States*

¶17 As noted above, blasphemy at its origin represented an ecclesiastical offense. In the Christian west, government implementation and enforcement of blasphemy laws through the common law often protected only specific iterations of the Christian faith. All other comers – including Muslims, Jews, and Hindus – had no means of bringing the wrath of the law to bear against the perceived disparagement of their respective religions.

¶18 Governments in the Muslim world similarly sought to outlaw offenses equivalent to blasphemous conduct. Authorities invoked religious or statutory law to impose a variety of penalties against blasphemy, apostasy, and other related acts.⁴⁸ Like their western counterparts, these offenses⁴⁹ also shared a clearly identifiable connection with notions of treason or sedition against the state. This resulted in part due to the absence of any bright line separation between religion and state under the banner of Islam.⁵⁰ As Cherif Bassiouni has remarked, Islam provides a “holistic conception of life, government, law and hereafter. There is no division of church and state; there is no division between matters temporal and religious, and between different aspects of law.”⁵¹

¶19 While the current trend in the West indicates a tendency to discard blasphemy offenses into the trash bin of history,⁵² there appears to be no parallel movement within Muslim states. For example, in Pakistan, a declared Islamic state,⁵³ existing blasphemy laws continue to result in miscarriages of justice and “exacerbate a growing environment of dogma and intolerance – spawning a culture of extremism and violence.”⁵⁴ The United States Department of State has observed that Pakistani

⁴⁶ *Pell*, (1998) 2 V.R. 391.

⁴⁷ *Id.*

⁴⁸ See, e.g., Anthony Chase, *Legal Guardians: Islamic Law, International Law, Human Rights Law, and the Salman Rushdie Affair*, 11 AM. U. J. INT’L L. & POL’Y 375, and Perry S. Smith, *Speak No Evil: Apostasy, Blasphemy and Heresy in Malaysian Syariah Law*, 10 U.C. DAVIS J. INT’L L. & POL’Y 357.

⁴⁹ Although no exact offense parallel to the Judeo-Christian offense of blasphemy exists under Islam, insulting God, Mohammed or any other aspect of divine revelation amounts to an offense under Sharia. See Donna E. Arzt, *Heroes or Heretics: Religious Dissidents Under Islamic Law*, 14 WILLJ 349, 351-352. The article provides a long list of examples of blasphemy-type offenses prosecuted in the Muslim world. See also Hassan, *supra* note 24.

⁵⁰ See, e.g., Ann Elizabeth Mayer, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS, 167-68 (4th ed. 2007), and Donna E. Arzt, *The Treatment of Religious Dissidents Under Classical and Contemporary Islamic Law in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES* 387 (Johan D. van der Vyver and John Witte, eds., 1996).

⁵¹ M. Cherif Bassiouni, Professor, DePaul Univ. Coll. of Law, Speech, Religious Discrimination, and Blasphemy, Remarks at the American Society of International Law Proceedings (Apr. 7, 1989) in 83 ASILPROC 427, 433.

⁵² An exception to this trend is evident in Ireland’s recently passed Defamation Bill, which includes provisions covering the offense of blasphemy. See *infra* Part IV.

⁵³ For a closer examination of how the constitutional systems of Muslim states address religion-state relations, see Tad Stahnke & Robert C. Blitt, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries*, 36 GEO. J. INT’L L. 947 (2005).

⁵⁴ Siddique & Hayat, *supra* note 30, at 384. For example, consider the 14-year imprisonment of a mentally ill woman suspected of blasphemy and the Pakistani government’s failure to protect the Ahmadi

authorities “routinely use[] the blasphemy laws to harass religious minorities and vulnerable Muslims and to settle personal scores or business rivalries.”⁵⁵ Most recently, gunmen in Pakistan’s Punjab province shot and killed two Christian brothers as they returned to prison after a court appearance on blasphemy charges,⁵⁶ and several other Christians faced jail sentences⁵⁷ for violating Pakistan’s Penal Code ordinances against blasphemy. Under the Code, any individual who “directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad” is subject to “death, or imprisonment for life.”⁵⁸

¶20 In Malaysia, the federal constitution declares Islam as the official religion, but authorizes states rather than the federal government to legislate in the area of Islamic law.⁵⁹ Within the Federal Territories (Kuala Lumpur, Putrajaya and Labuan), Part III of the *Syariah [Sharia] Criminal Offences (Federal Territories) Act 1997* enumerates “Offences Relating to the Sanctity of the Religion of Islam and its Institution,” which include “[i]nsulting, or bringing into contempt . . . the religion of Islam.”⁶⁰

¶21 This Act also proscribes “acts in contempt of religious authority” and “def[y]ing, disobey[ing] or disput[ing] the orders or directions [of the *Majlis Agama Islam Wilayah Persekutuan* (Federal Territory Islamic Council)] expressed or given by

community, as well as its lackadaisical response in the face of violence targeting that community. See Mubasher Bukhari, *Pakistan Court Frees Mentally Ill Blasphemy Suspect After 14 Years*, REUTERS FAITH WORLD (Jul. 22, 2010) <http://blogs.reuters.com/faithworld/2010/07/23/pakistan-court-frees-mentally-ill-blasphemy-suspect-after-14-years/>; *Attackers Target Lahore’s Ahmadi Worshipers; 70 Dead*, DAWN, May 29, 2010, <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/metropolitan/04-lahore-blasts-qs-07>.

⁵⁵ U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2009 (Oct. 26, 2009). During the previous reporting period, Pakistani “authorities arrested at least 25 Ahmadis, 11 Christians, and 17 Muslims on blasphemy charges.” U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2008, <http://www.state.gov/g/drl/rls/irf/2008/108505.htm>; see also *infra* text accompanying note 77.

⁵⁶ Fareed Khan, *On Trial for Blasphemy, Two Christian Brothers Murdered in Faisalabad*, ASIA NEWS (Jul. 19, 2010, 5:58 PM), <http://www.asianews.it/news-en/On-trial-for-blasphemy,-two-Christian-brothers-murdered-in-Faisalabad-18977.html>; see *infra* text accompanying note 77.

⁵⁷ See, e.g., Fareed Khan, *Karachi, A Christian Sentenced to Life Imprisonment for Blasphemy*, ASIA NEWS (Feb. 27, 2010, 11:38 AM), <http://www.asianews.it/news-en/Karachi,-a-Christian-sentenced-to-life-imprisonment-for-blasphemy-17749.html>; Brian Sharma, *Pakistan’s ‘Blasphemy’ Laws Claim 3 More Christians*, THE CHRISTIAN POST (Mar. 11, 2010, 9:17 AM), <http://www.christianpost.com/article/20100311/pakistan-s-blasphemy-laws-claim-three-more-christians/index.html>.

⁵⁸ See Art. 295-C, PAK. PENAL CODE (Act XLV of 1860). The code also establishes punishments for other blasphemy-related offenses including “[d]eliberate and malicious acts intended to outrage religious feelings” and against anyone who “defiles, damages or desecrates a copy of the Holy Qur’an.” See Arts. 295-A and 295-B, PAK. PENAL CODE (Act XLV of 1860).

⁵⁹ Under Art. 3(1) of Malaysia’s Federal Constitution, “Islam is the religion of the Federation.” However, List II of the Constitution assigns significant legislative powers to the states pertaining to Islam (with certain limitations), including the creation and punishment of offences against precepts of Islam, as well as the constitution, organization and procedure of Sharia courts. Malay. CONST., 1994, arts. 3(1), 367 (incorporating all amendments up to August 1994).

⁶⁰ Article 7 of the *Syariah Criminal Offences (Federal Territories) Act 1997* provides:

7. Any person who orally or in writing or by visible representation or in any other manner—
 - (a) insults or brings into contempt the religion of Islam;
 - (b) derides, apes or ridicules the practices or ceremonies relating to the religion of Islam; or
 - (c) degrades or brings into contempt any law relating to the religion of Islam for the time being in force in the Federal Territories . . .

SYARIAH CRIMINAL OFFENCES (FEDERAL TERRITORIES) ACT 1997 §7, ACT 559, LAWS OF MALAYSIA (2006). For an overview of the situation related to blasphemy in Malaysia, see Smith, *supra* note 48.

way of fatwa . . .”⁶¹ Upon conviction of either insulting Islam or defying an Islamic Council fatwa (a decision based on Islamic law), an individual is liable for a fine, prison sentence of up to two years, or both.⁶² According to the *Administration of Islamic Law (Federal Territories) Act 1993*, once a fatwa is issued by the Islamic Council and published in the official Gazette, it gains the status of enforceable law in the Federal Territories.⁶³ In turn, such fatwas are binding on every Muslim resident in the Federal Territories, each of whom is obligated by a “religious duty to abide by and uphold the fatwa . . .”⁶⁴ The *Administration of Islamic Law (Federal Territories) Act 1993* further mandates that all courts in the Federal Territories recognize gazetted fatwas “as authoritative of all matters laid down therein.”⁶⁵ Even in the event that a fatwa is not published, at least one former high-level government advisor has contended that the ruling demands respect as a religious decree.⁶⁶

¶22 The influence of Malaysia’s various fatwa councils is far-reaching. On the federal level, the National Fatwa Council, a body intended to harmonize state-issued fatwas, has sought to prohibit Muslims from practicing yoga on the grounds that it risked “destroy[ing] a Muslim’s faith,”⁶⁷ ban the “unacceptable” practice of women “dressing in the clothes men wear,”⁶⁸ and prohibit exhibitions concerning ghosts.⁶⁹ In a similar vein, the Islamic Religious Council in the central state of Selangor threatened to sue the Malaysian Bar Association for using the word “Allah” on its website.⁷⁰

¶23 In Indonesia, where the constitution is silent with regard to favoring secularism or Islam, the government actively invokes criminal ordinances to prosecute alleged blasphemy-related offenses. Under the Criminal Code, publicly “giving expression to feelings of hostility, hatred or contempt against one or more groups of the

⁶¹ Syariah Criminal Offences (Federal Territories) Act 1997 §9, Act 559, Laws of Malaysia (2006).

⁶² *Id.* §§ 7, 9.

⁶³ ADMINISTRATION OF ISLAMIC LAW (FEDERAL TERRITORIES) ACT 1993 § 34(3), Act 505, LAWS OF MALAYSIA (2006).

⁶⁴ *Id.* According to Dr. Abdul Hamid Othman, a prime ministerial adviser on religious affairs, “The National Fatwa Council has been entrusted to deliberate on [questions of Islamic law] in depth and come out with edicts on them. And in an evolved world like ours . . . such a council plays an important role in providing ‘guidelines’ for these grey areas to Muslims.” Hariati Azizan, *In a Twist Over Fatwa Ruling*, THE STAR ONLINE, Nov. 30, 2008, <http://thestar.com.my/news/story.asp?file=/2008/11/30/focus/2683235>.

⁶⁵ ACT 1993, *supra* note 63.

⁶⁶ Azizan, *supra* note 64.

⁶⁷ Niluksi Koswanage, *Muslims Warned to Avoid Blasphemous Yoga*, WELT ONLINE (Nov. 22, 2008), <http://www.welt.de/english-news/article2766685/Muslims-warned-to-avoid-blasphemous-yoga.html>; see also Robin Brant, *Malaysia Clerics Issue Yoga Fatwa*, BBC NEWS (Nov. 22, 2008), <http://news.bbc.co.uk/2/hi/asia-pacific/7743312.stm>. Ultimately, Malaysia’s Prime Minister intervened to assure Muslims that yoga was still permissible, despite the fatwa’s stated prohibition. *Malaysia Backs Down From Yoga Ban Amid Backlash*, REUTERS, Nov. 26, 2008, *available at* <http://www.reuters.com/article/idUSTRE4AP2CA20081126>.

⁶⁸ *Malaysian Religious Council Issues Ban on Lesbian Sex*, AFP, Oct. 23, 2008, *available at* http://afp.google.com/article/ALeqM5izKo_RKkF40cfljjibbi3Yai-5Tw.

⁶⁹ According to the National Fatwa Council chair, the decision was taken to avoid undermining the faith of Muslims by exposing them “to supernatural and superstitious beliefs.” *Malaysia Issues Fatwa on Ghosts*, AL JAZEERA (Apr. 13, 2007), <http://english.aljazeera.net/news/asia-pacific/2007/04/200852513106697452.html>.

⁷⁰ The Becket Fund for Religious Liberty, *Malaysia: Legal Body Faces Lawsuit for Using Word ‘Allah,’* INTERNATIONAL RELIGIOUS FREEDOM NEWS BLOG, (Mar. 23, 2009), <http://becketinternational.wordpress.com/2009/03/23/malaysia-legal-body-faces-lawsuit-for-using-word-%E2%80%9EAllah%E2%80%99/>.

population of Indonesia,” is punishable by a maximum imprisonment of four years or a fine.⁷¹ While the Indonesian law is admirable for its attempt to move away from protecting the majority faith exclusively, the U.S. Department of State has concluded that enforcement actions in practice “have almost always involved blasphemy and heresy against Islam.”⁷² Human Rights Watch likewise has concluded, “Indonesian laws prohibiting blasphemy are primarily applied to practices perceived to deviate from mainstream Islam.”⁷³ Blasphemy charges have been invoked in a variety of situations, including an art exhibit containing photographic representations of fig leaf-covered Adam and Eve,⁷⁴ and against various individuals claiming to be reincarnations of the Prophet Muhammad⁷⁵ and the archangel Gabriel,⁷⁶ among others. On a much broader scale, the government has severely restricted and even banned certain activities of the Ahmadi community,⁷⁷ including public religious worship, as part of a clamp-down pattern targeting groups deemed “heretical,” “deviant,” or heterodox.⁷⁸ Following Malaysia’s lead, Indonesia’s Ulema Council issued a similar *fatwa* prohibiting Muslims from practicing yoga for fear it might corrupt their faith.⁷⁹

¶24 From this brief overview – and in contrast to the present situation in most Western countries – snark sightings remain quite a common occurrence in the Muslim world. Many Muslim states continue to shield Islam from even minor criticism, and in certain instances use anti-blasphemy measures as an offensive tool to stifle the free exercise of religious belief for minority faiths and Muslim dissidents alike. As illustrated, such practices are not exclusive to religious regimes but rather may be observed across the spectrum of Muslim constitutional models – including in states that make no declaration regarding Islam as the official religion.⁸⁰ It is from this milieu that the

⁷¹ PENAL CODE OF INDONESIA arts. 156-56(a), <http://www.unhcr.org/refworld/docid/3ffbce24.html>. For the purpose of these provisions, the term “group” is defined as a sector of the population that is distinguished by “race, country of origin, religion, origin, descent, nationality or constitutional condition.” *Id.*

⁷² U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2008 (2008). The State Department report notes dozens of individuals charged and convicted under Indonesia’s criminal code. *Id.*

⁷³ HUMAN RIGHTS WATCH, WORLD REPORT 2009 261 (2009), available at http://www.hrw.org/sites/default/files/reports/wr2009_web.pdf.

⁷⁴ *Indonesia: Blasphemy case against Adam and Eve photo exhibit*, INDO-ASIAN NEWS SERVICE, Feb. 3, 2006, available at http://religion.info/english/articles/article_227.shtml.

⁷⁵ Peter Gelling, *Indonesia Bans Sects It Deems Blasphemous*, N.Y. TIMES, Nov. 16, 2007, <http://www.nytimes.com/2007/11/16/world/asia/16indo.html>.

⁷⁶ Andra Wisnu, *Lia Eden sentenced to prison, again*, THE JAKARTA POST, June 3, 2009, <http://www.thejakartapost.com/news/2009/06/03/lia-eden-sentenced-prison-again.html>.

⁷⁷ The primary differentiation between Ahmadis and Muslims relates to the Ahmadi belief in the prophethood of Mirza Ghulam Ahmad (founder of the Ahmadiyya faith). Recognition of this designation by Ahmadis contravenes the basic teaching under Islam that Mohammed was the final prophet. However, Ahmadis consider themselves devout Muslims faithful to the teachings of Islam. See M. Nadeem Ahmad Siddiq, *Enforced Apostasy: Zaheeruddin v. State and the Official Persecution of the Ahmadiyya Community in Pakistan*, 14 LAW & INEQ. J. 275, 279-82 (1995-96); see also Amjad Mahmood Khan, *Persecution of the Ahmadiyya Community in Pakistan: An Analysis Under International Law and International Relations*, 16 HARV. HUM. RTS. J. 217 (2002-03).

⁷⁸ U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, 2009 ANNUAL REPORT 171 (2009), available at <http://www.uscirf.gov/images/final%20ar2009%20with%20cover.pdf>.

⁷⁹ Niniek Karmini, *Indonesian Muslims Banned From Practicing Yoga*, ASSOCIATED PRESS, Jan. 26, 2009, available at http://www.kilil5.com/news/19970_indonesian-muslims-banned-from-p.

⁸⁰ Because of space constraints, examples on anti-blasphemy measures in Turkey, a declared secular Muslim state, have been omitted. See Robert C. Blitt, *The Bottom Up Journey of 'Defamation of Religion' from Muslim States to the United Nations: A Case Study of the Migration of Anti-Constitutional Ideas*

movement to prohibit “defamation of religion” (originally expressed in the more specific and decidedly less ecumenical slogan “defamation of Islam”) emerged a decade ago to begin its journey in search of international legitimacy.

III. DEFAMATION OF RELIGION: BLASPHEMY GOES INTERNATIONAL

A. *Origins of Defamation of Religion at the United Nations*

¶25

The Organization of the Islamic Conference (OIC), whose fifty-seven member states represent “the collective voice of the Muslim world,”⁸¹ is responsible for spearheading the effort to secure international condemnation of acts deemed defamatory of religion – and more precisely, defamatory of Islam. In addition to its own reporting and resolutions on the issue,⁸² the OIC – working through its individual member states – has focused for the past ten years on adding the creation of a norm prohibiting defamation of religion to the agendas of various UN bodies. The first step in this effort came in 1999 when Pakistan, acting on behalf of the OIC, submitted a draft resolution entitled “Defamation of Islam” to the now defunct Commission on Human Rights (UNCHR).⁸³ This proposed resolution sought to combat perceived negative international media coverage of “Islam as a religion hostile to human rights.”⁸⁴ In the view of Pakistan’s UN ambassador, this negative media coverage amounted to a “defamation campaign [sic]” against the religion and its adherents to which the UNCHR had to react.⁸⁵ The draft of the resolution sought to have the UNCHR both express “concern at the ... spread [of] intolerance against Islam,”⁸⁶ and call upon the Special Rapporteur on

(Univ. of Tenn. Legal Studies Research, Paper No. 132, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1729783. Despite the apparent unity in governmental approach across all four Muslim constitutional systems, recent sociological data on blasphemy hints at the possibility that differentiation may exist among the citizenry of these states, with public opinion more closely mirroring the expectation that declared secular states would demonstrate little interest in upholding blasphemy-related offenses while their more religious counterparts tend towards favoring such laws. See Hassan, *supra* note 24.

⁸¹ *About OIC*, ORGANIZATION OF THE ISLAMIC CONFERENCE, http://www.oic-oci.org/page_detail.asp?p_id=52 (last visited Oct. 13, 2010).

⁸² For a more detailed account of these activities, see Blitt, *supra* note 80.

⁸³ The first reference to defamation of Islam at the UN may be traced back to 1997. In reaction to a report addressing “Islamist and Arab Anti-Semitism” prepared by the UN Special Rapporteur on racism, Indonesia’s ambassador alleged “defamation of our religion Islam and blasphemy against its Holy Book Qur’an.” Rene Wadlow and David Littman, *Blasphemy at the United Nations?*, IV MIDDLE EAST QUARTERLY 4, 85-86 (1997), available at <http://www.meforum.org/379/blasphemy-at-the-united-nations>. The UNCHR responded by adopting a consensus decision—supported by the United States and several other Western countries, which expressed “indignation and protest at the content of such an offensive reference to Islam and the Holy Qur’an . . . [a]ffirmed that that offensive reference should have been excluded from the report . . . [and] [r]equested . . . the Special Rapporteur to take corrective action in response.” Commission on Human Rights Res. 1997/125, Reps. of Commission on Human Rights, 53d Sess., U.N. Doc E/CN.4/DEC/1997/125 (Apr. 18, 1997).

⁸⁴ Commission on Human Rights, *Summary Record of the 61st Meeting*, ¶ 1 U.N. Doc. E/CN.4/1999/SR.61 (Oct. 19, 1999) (quoting Ambassador Zamir Akram of Pakistan).

⁸⁵ *Id.* ¶¶ 1-2.

⁸⁶ Commission on Human Rights, *Draft Resolution 1999/ . . . Defamation of Islam*, at 2, UN Doc. E/CN.4/1999/L.40 (Apr. 20, 1999). The Draft Resolution was submitted by Pakistan on behalf of members of the OIC.

religious intolerance to “continue to devote attention to attacks against Islam and attempts to defame it.”⁸⁷

¶26 In response to Pakistan’s draft, Western governments proposed amendments to de-specify Islam and approach the challenge of discrimination from a more general perspective inclusive of all religions.⁸⁸ Subsequent Pakistani sub-amendments sought to preserve specificity relating to “defamatory attacks against [Islam]”⁸⁹ and stressed that removing the resolution’s focus on Islam “would defeat the purpose of the text, which was to bring a problem relating specifically to that religion to the attention of the international community.”⁹⁰ Following additional negotiations, a compromise resolution emerged expressing concern over the stereotyping of all religions rather than Islam alone, and which retained the term “defamation” in the resolution title only.⁹¹ The representative from Pakistan hailed the OIC member states’ “considerable flexibility” in agreeing to a compromise resolution.⁹² At the same time, Germany’s representative, speaking on behalf of the European Union (EU), stressed the EU’s collective “wish to make it clear that they did not attach any legal meaning to the term ‘defamation’ as used in the title.”⁹³

¶27 This seemingly insignificant resolution served as defamation’s proverbial foot in the door at the UN for two reasons: first, it tasked two UN special rapporteurs with taking into account provisions of the resolution in future reports to the UNCHR; and second, it expressed the UNCHR’s intent “to remain seized of the matter.”⁹⁴ Consequently, the effort to install a prohibition on defamation of religion became systematized and integrated not only into the UNCHR agenda, but also into the mandates of the Special Rapporteur on religious intolerance and the Special Rapporteur on racism, racial discrimination, xenophobia and related intolerance.

¶28 Over the relatively short time span of 10 years, the UNCHR, its successor the Human Rights Council (HRC), and even the UN General Assembly (U.N.G.A.) proceeded to pass regular resolutions dedicated to combating “Defamation of Religion.” A review of these resolutions demonstrates that invocation of the term “defamation” skyrocketed, from a solitary reference in 1999, to 23 references in 2009. Furthermore, placement of the term defamation within the resolution also shifted dramatically, from no references within the body of the resolution, up to eight preambulatory references coupled with eight additional operative references most recently in 2009.⁹⁵ The repeated

⁸⁷ *Id.*

⁸⁸ Commission on Human Rights, *Draft Resolution 1999/ . . . Amendment to draft resolution E/CN.4/1999/L.40*, ¶ 8, UN Doc. E/CN.4/1999/L.90 (Apr. 22, 1999). The amendments were put forward by Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, Netherlands, Portugal, Spain, Sweden, United Kingdom of Great Britain and Northern Ireland (joined by the Czech Republic, Latvia, Norway and Poland).

⁸⁹ Commission on Human Rights, *Proposed sub-amendments to the amendments to draft resolution E/CN.4/1999/L.40 contained in document E/CN.4/1999/L.90*, ¶ 1, UN Doc. E/CN.4/1999/L.104 (April 28, 1999).

⁹⁰ Summary Record, *supra* note 84, ¶ 8.

⁹¹ U.N. Comm’n on Human Rights, Res. 1999/82, *Defamation of Religions*, UN Doc. E/CN.4/RES/1999/82 (Apr. 30, 1999). (Adopted without a vote).

⁹² U.N. Comm’n on Human Rights, *Summary Record of the 62nd Meeting*, [1999] para. 1, U.N. Doc. E/CN.4/1999/SR.62 (Nov. 17, 1999).

⁹³ *Id.*, at ¶ 9.

⁹⁴ UNHCR, Res. 1999/82, *supra* note 91, at ¶ 6.

⁹⁵ Operative paragraphs of UN resolutions are typically action-oriented statements intended to create or advance policy. In contrast, preambulatory text is explanatory in purpose, and provides justifications for

use of defamation in the operative clauses of these resolutions necessarily gives its meaning new significance. To understand this significance, it is helpful to start with the legal definition of defamation and explore the implications of efforts to graft this concept onto protection of religion within the framework of international law.

B. Defining Defamation of Religion: Challenges to Existing Principles of Defamation Law and International Human Rights Law

1. Understanding Defamation Law

¶29

Although specifics vary from state to state, defamation is classically defined as the “act of harming the reputation of another by making a false statement to a third person,”⁹⁶ or as an intentional false communication that injures another person’s reputation.⁹⁷ From this, several important elements are obvious: first, the offense must be directed at individuals (or in certain potential instances, at groups⁹⁸) rather than at an idea, concept, or set of beliefs; and second, if the statement is merely an opinion, rather than an assertion of fact, a claim for defamation typically cannot be supported. In addition to the existing common law defense of fair comment,⁹⁹ under Australia’s unified defamation law, a statutory defense to alleged defamation arises, *inter alia*, where the defendant proves that:

- (a) the matter was an expression of opinion of the defendant rather than a statement of fact, and
- (b) the opinion related to a matter of public interest, and
- (c) the opinion is based on proper material.¹⁰⁰

¶30

The United States Supreme Court has ruled that the distinction between fact and opinion remains relevant in establishing whether a defamation claim is actionable. In *Milkovich v. Lorain Journal Co.*,¹⁰¹ the Court held communication in the form of an opinion may be considered defamatory, but only if the statement of the opinion implies that the speaker has knowledge of provably false (i.e. defamatory) but undisclosed facts.¹⁰² In other words, the opinion may be defamatory only if it is premised on some

action undertaken in the resolution’s operative part. Data on file with the author. For a more detailed treatment of how defamation of religion arrived at the U.N., see Blitt, *supra* note 80.

⁹⁶ BLACK’S LAW DICTIONARY (8th ed. 2004).

⁹⁷ Special Rapporteur on Civil and Political Rights, Including the Question of Freedom of Expression, *The Right to Freedom of Opinion and Expression*, Economic and Social Council, U.N. Doc. E/CN.4/2006/55 (Dec. 30, 2005). This applies to individuals and corporations alike.

⁹⁸ In *Beauharnais v. Illinois*, 343 U.S. 250, 258 (1952), a majority of the U.S. Supreme Court seemed to endorse the notion of group libel claims. However, the Ninth Circuit U.S. Court of Appeals has observed that “cases decided since *Beauharnais*...have substantially undercut this support. To the extent that *Beauharnais* can be read as endorsing group libel claims, it has been so weakened by subsequent cases such as *New York Times* that the Seventh Circuit has stated that these cases ‘had so washed away the foundations of *Beauharnais* that it cannot be considered authoritative’...We agree with the Seventh Circuit that the permissibility of group libel claims is highly questionable at best.” *Dworkin v. Hustler Magazine Inc.* 867 F.2d 1188, 1200 (9th Cir. App. 1989).

⁹⁹ David Rolph, *A Critique of the National, Uniform Defamation Laws* 16.3 TORTS L.J. 207, 237 (2008).

¹⁰⁰ Defamation Act, 2005, § 31.1 (N.S.W.).

¹⁰¹ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

¹⁰² See Restatement (Second) of Torts § 566 (1977).

precursory and provably false statement of fact. However, the plaintiff must still show that the false implications of the communication were made with some level of fault to support recovery. As this practice indicates, a showing of intent may be required in certain instances.

¶31 Although the decision in *Milkovich* represented a more nuanced elaboration on the U.S. Supreme Court's decision in *Gertz v. Robert Welch*, it preserved the core principle that "there is no such thing as a false idea" under the First Amendment of the U.S. Constitution.¹⁰³ Moreover, *Milkovich* reaffirmed that statements which could not "reasonably [be] interpreted as stating actual facts" about an individual would fail to satisfy the test for defamation.¹⁰⁴ In the majority's view, this protection served as "assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation."¹⁰⁵

2. Enforcing a Prohibition on Defamation of Religion: Definitional and Legal Impediments

¶32 With this overview in mind, the problem of relying on defamation as a legal framework for protecting religion becomes evident. First, enforcement of and limitations on defamation vary from jurisdiction to jurisdiction, making it virtually impossible to extract clear, consistent rules regarding its application to individuals. Beyond this, applying defamation to various systems of belief that come with their own sets of unique but improvable truth claims further complicates the effort. These claims often may be directly at odds with the competing claims of another religious group. Indeed, the latter group may even consider such rival views "defamatory." However, because these scenarios do not deal in provable statements of fact, defamation law cannot effectively address them. The problem of providing a workable definition of "defamation of religion" is so apparent that after ten years of passing resolutions, neither the HRC nor the U.N.G.A. has ventured to undertake the task.¹⁰⁶

¶33 The conceptual challenge of defamation of religion is exacerbated further when considering the nature and purpose of international human rights law. To begin, international human rights law, and specifically the right to freedom of religion or belief, "does not include the right to have a religion or belief that is free from criticism or ridicule."¹⁰⁷ This same body of law also recognizes individuals' right to freedom of expression; and while that right may be limited in certain narrowly tailored contexts, hurt feelings alone do not rise to the level of a violation of rights that would justify such a limitation.¹⁰⁸ Recognizing such a limitation under international human rights law would

¹⁰³ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

¹⁰⁴ *Milkovich*, *supra* note 101, at 2706.

¹⁰⁵ *Id.* at 2697.

¹⁰⁶ Instead, there is a new emphasis on blurring the boundary between defamation and the concept of incitement. *See* Part III(B)(3).

¹⁰⁷ Special Rapporteurs on Freedom of Religion or Belief and on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, UN Doc. A/HRC/2/3 (20 Sept. 2006) (by Asma Jahangir & Doudou Diène). [hereinafter *Jahangir & Diène*].

¹⁰⁸ International Covenant on Civil and Political Rights, Art. 19.3, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) ("Restrictions must be provided by law, and be necessary: (a) For respect of the rights or reputations of others; [and] (b) For the protection of national security or of public order (ordre

entail nothing less than a reordering of rights resulting in the censoring of free expression by limiting “scholarship on religious issues and...[by] asphyxiat[ing] honest debate or research.”¹⁰⁹

¶34

This reordering would also undermine freedom of religion, the very right supporters of outlawing defamation argue requires greater protection. The history associated with protecting religious freedom is intimately tied to the protection of minority rights.¹¹⁰ However, blasphemy charges typically are used to stifle the freedom of religion or belief of minority groups disfavored by the dominant faith. Granting the charge of defamation an international imprimatur allows it to be used not as a shield, but rather as a sword to silence those deemed to have religious or political beliefs at odds with the faith supported by the ruling party. Perhaps in response to this risk, the UN Human Rights Committee, the body of independent experts tasked with interpreting the provisions of the International Covenant on Civil and Political Rights (ICCPR) and monitoring its implementation,¹¹¹ concluded almost twenty years ago that:

If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 [freedom of thought, conscience and religion] or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.¹¹²

Further, establishing defamation of religion as a legitimate basis for suppressing speech would essentially ascribe greater priority to the protection of a set of ideas rather than to individuals, an outcome antithetical to the very impetus for international *human* rights law.¹¹³

¶35

Despite these red flags – and in contradiction to the recommendations of at least one UN special rapporteur at the time – the HRC and the U.N.G.A. in 2007 proceeded with efforts to modify the longstanding consensus surrounding human rights norms. In similar resolutions, both UN bodies asserted

... that everyone has the right to freedom of expression, which should be exercised with responsibility and may therefore be subject to limitations as provided by law and necessary for respect of the rights or reputations of

public), or of public health or morals.”).

¹⁰⁹ Jahangir & Diène, *supra* note 107, at ¶ 42.

¹¹⁰ See, e.g., Little Treaty of Versailles, June 28, 1919 (the 1919 treaty between Poland and the League of Nations addressing minority rights in the newly created Polish state).

¹¹¹ Office of the United Nations High Commissioner for Human Rights (OHCHR), Human Rights Committee: Monitoring Civil and Political Rights, <http://www2.ohchr.org/english/bodies/hrc/index.htm> (last visited Oct. 12, 2010).

¹¹² OHCHR, General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion. Art. 18, ¶ 10 (July 30, 1993).

¹¹³ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (“Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.”).

others, protection of national security or of public order, public health or morals and *respect for religions and beliefs*.¹¹⁴

¶36 This language signals surreptitious efforts by the U.N.G.A. and the HRC—the body “responsible for strengthening the promotion and protection of human rights around the globe”¹¹⁵—to amend the longstanding legal consensus enshrined under the ICCPR. Using the limitations agreed upon in ICCPR article 19 as a jumping-off point, both resolutions unilaterally *add* a limitation on the right of freedom of expression, namely “respect for religions and beliefs.” In other words, in the minds of the voting majorities within the U.N.G.A. and HRC, speech labeled defamatory (or blasphemous) of religion is no longer worthy of protection, regardless of contrary views expressed by the Special Rapporteur on freedom of religion or belief or in the ICCPR text.

¶37 The steady effort on the part of OIC member states to entrench defamation of religion as an international norm again bore fruit in 2008, when the U.N.G.A. passed a similar resolution, calling, *inter alia*, for increased restrictions on freedom of expression.¹¹⁶ During voting in the Third Committee on the draft resolution submitted by Pakistan (again acting on behalf of OIC member states),¹¹⁷ the European Union maintained its position that “[it] did not see the concept of defamation of religions as valid in a human rights discourse; international human rights law protected primarily individuals, rather than religions as such, and religions or beliefs in most States did not enjoy legal personality.”¹¹⁸

3. Which Way Forward: Defamation of Religion as Customary International Law or as a Form of Incitement?

¶38 Although some states continue to claim that “defamation of religion” is an unworkable chimera, consistent majorities in the HRC and U.N.G.A. beg to differ. And yet, despite this majority, U.N.G.A. resolutions are arguably only a representation of that body’s opinion and therefore not legally binding. In accordance with the UN Charter, the U.N.G.A. is not intended to serve as a legislative body:

¹¹⁴ See G.A. Res. 61/164, ¶ 9, U.N. Doc. A/RES/61/164 (Feb. 21, 2007); see also Human Rights Council Res. 4/9, U.N. Doc. A/HRC/Res/4/9/ (30 March 2007). (The vote in the General Assembly was 111 votes to 54, with 18 abstentions. In the Council, the recorded vote was 24 to 14 with nine abstentions).

¹¹⁵ OHCHR: The Human Rights Council, <http://www2.ohchr.org/english/bodies/hrcouncil/> (last visited Oct. 12, 2010).

¹¹⁶ G.A. Res. 62/154, ¶ 10, U.N. Doc. A/RES/62/154 (Mar. 6, 2008) (The resolution passed with a recorded vote of 108 to 51, with 25 abstentions). See also G.A. Res. 10678 (X), U.N. Doc. GA/10678 (Dec. 18, 2007).

¹¹⁷ Pakistan, “Combating Defamation of Religions” (draft resolution), UN Doc. A/C.3/62/L.35, Nov. 2, 2007. Subsequently, Belarus and Venezuela joined in sponsoring the draft resolution. Report of the Third Committee, “Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms,” UN Doc. A/62/439/Add.2. The Third Committee endorsed the draft by a vote of 95 in favor to 52 against, with 30 abstentions. For the voting record, see Annex III, UN Department of Public Information, *Third Committee Approves Three Country-Specific Texts On Human Rights: Despite Opposition Led By Developing Countries*, UN Doc. GA/SHC/3909, Nov. 20, 2007.

¹¹⁸ U.N. Doc. GA/SHC/3909, *supra* note 117.

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and ... *may make recommendations* to the Members of the United Nations or to the Security Council or to both on any such questions or matters.¹¹⁹

However, it is also generally recognized that over time, U.N.G.A. resolutions may come to reflect and have the binding force of customary international law. The classic example of such practice is embodied in U.N.G.A. Resolution 217A (1948), more commonly known as the Universal Declaration on Human Rights (UDHR).¹²⁰ Over time, this landmark Declaration has come to be acknowledged by a variety of authorities as reflective of customary international law norms.¹²¹

¶39 Most recently at the end of 2009, the U.N.G.A. again endorsed a resolution on combating defamation of religion.¹²² The resolution received a record sixty-one “no” votes¹²³ at the Assembly’s 64th session.¹²⁴ Although the endorsement of a limitation on freedom of expression based on “*respect for religions and beliefs*” was conspicuously missing from the text,¹²⁵ the resolution continued to express “deep concern” over “the intensification of the overall campaign of the defamation of religions” despite offering nothing to substantiate the finding.¹²⁶

¶40 At this point, a growing rift between the Special Rapporteur on freedom of expression, the Special Rapporteur on freedom of religion or belief and possibly the

¹¹⁹ U.N. Charter art. 10.

¹²⁰ Universal Declaration of Human Rights, *supra* note 113.

¹²¹ *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d. Cir. App. 1980) (the prohibition against torture “has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights...”); *see also* Hurst Hannum, *The UDHR In National and International Law*, vol. 3 no. 2 HEALTH AND HUMAN RIGHTS 145, 145 (Many of the Universal Declaration’s provisions also have become incorporated into customary international law, which is binding on all states”). This evolution occurred despite the fact that the UDHR’s drafters plainly intended it to have no legally binding effect on states. In the words of Eleanor Roosevelt, chairperson of the UN Commission on Human Rights tasked with drafting the document, the UDHR “was not a treaty or international agreement and did not impose legal obligations; it was rather a statement of basic principles of inalienable human rights setting up a common standard of achievement for all peoples and all nations.” 1948 U.N.Y.B. 527, U.N. Sales No. 1950.I.II.

¹²² G.A. Res. 64/156, U.N. Doc. A/RES/64/156 (Mar. 8, 2010). The “Combating defamation of religions” resolution as passed in the Third Committee is referenced as UN Doc. A/64/439/Add.2 (Part II).

¹²³ UN Department of Public Information, “General Assembly Adopts 56 Resolutions, 9 Decisions Recommended by Third Committee on Broad Range of Human Rights, Social, Cultural Issues,” UN Doc. GA/10905 (Dec. 18, 2009), .

¹²⁴ The resolution (UN Doc. A/64/439/Add.2, part II) was adopted by a recorded vote of 80 in favor to 61 against, with 42 abstentions. Voting in favor were OIC states, the Russian Federation, and China, together with numerous African, Latin American, and Asian states. Australia, the United States, EU member states, and others voted against the text. *See* Annex VIII, UN Doc. GA/10905, *supra* note 123. One could make the case that the vote actually reflected a plurality rather than a majority since over 100 states either voted against or abstained.

¹²⁵ The provision is stricken from the paragraph addressing freedom of expression. It was also absent in 2008. *See* Para. 10, UN Doc. A/64/439/Add.2 (Part II), *supra* note 122, and ¶ 10, UN General Assembly Resolution, “Defamation of Religions,” UN Doc. A/RES/63/171, 24 March 2009 (emphasis added). Human Rights Council, “Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind,” UN Doc. A/HRC/RES/12/21, 12 October 2009. At the same time, the HRC passed an equally ominous new resolution entitled “Promoting human rights and fundamental freedom through a better understanding of traditional values of humankind.” Though some of the problems raised by this resolution are related, they fall outside the immediate scope of this article.

¹²⁶ UN Doc. A/64/439/Add.2 (Part II), *supra* note 122.

Office of the High Commissioner on Human Rights on the one hand, and certain U.N. member states on the other, has become evident.¹²⁷ Most of the early reports prepared by Doudou Diène, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, signal strident support for prohibiting defamation of religion. For example, Diène urged “the Commission to invite the Special Rapporteur to submit a regular report on all manifestations of defamation of religion, stressing the strength and seriousness of Islamophobia at the present time.”¹²⁸ In contrast, Diène’s predecessor Abdelfattah Amor stressed early on that “very frequently, prohibitions against acts of defamation or blasphemy are misused for the purposes of outright censorship of the right to criticism and discussion of religion and related questions,” and that in “many cases, defamation becomes the tool of extremists in censoring and maintaining or propagating obscurantism.”¹²⁹

¶41 Despite these sharp disagreements, a survey of the reporting by the U.N. special rapporteurs and the OHCHR over ten years indicates a recent about-face away from the defamation concept and in favor of addressing issues of concern through the offense of incitement. This sea change in attitude is particularly evident in 2008, even in Diène’s reporting. Although non-existent as a concern over nearly ten years, Diène suddenly argues that “[w]ith a view to promoting this change of paradigm, translating religious defamation from a sociological notion into a legal human rights concept, namely incitement to racial and religious hatred,” will show “that combating incitement to hatred is not a North-South ideological question but a reality present in a large majority of national legislations in all regions.”¹³⁰

¶42 This concerted effort to redirect the defamation debate away from its sociological overtones in favor of a protection regime grounded in the more palatable – and arguably legally definable – notion of incitement finds dramatic expression in a joint statement released by three special rapporteurs during the 2009 Durban Review Conference. Oddly, however, this important document lacks an official U.N. Document number and is virtually buried on the UN’s website.¹³¹ According to the special

¹²⁷ The U.S. described the voting over the most recent defamation resolution as evidencing an “increasingly splintered view” within the General Assembly. UN Department of Public Information, “Third Committee Approves Resolution Aimed at ‘Combating Defamation of Religions’, One of 16 Draft Texts Recommended to General Assembly,” UN Doc. GA/SHC/3966 (Nov. 12, 2009).

¹²⁸ Report by Mr. Doudou Diène, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, ¶ 37, UN Doc. E/CN.4/2006/17 (Feb. 13, 2006).

¹²⁹ Interim report by the Special Rapporteur of the Commission on Human Rights on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, ¶ 97, UN Doc. A/55/280 (Sept. 8, 2000). Still Amor also maintained that the issue of defamation reflected one of his “major concerns...because it is an intrinsic violation of the freedom of religion or belief.” Report submitted by Mr. Abdelfattah Amor, Special Rapporteur on Freedom of Religion or Belief, ¶ 137, UN Doc. E/CN.4/2004/63 (Jan. 16, 2004).

¹³⁰ Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance: Follow-up to and Implementation of the Durban Declaration and Program of Action, ¶ 45, UN Doc. A/HRC/9/12 (Sept. 2, 2008).

¹³¹ Joint statement by Mr. Githu Muigai, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance; Ms. Asma Jahangir, Special Rapporteur on Freedom of Religion or Belief; and Mr. Frank La Rue, Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Freedom of Expression and Incitement to Racial or Religious Hatred*, OHCHR side event during the Durban Review Conference, Geneva, 1 (April 22, 2009), http://www2.ohchr.org/english/issues/racism/rappporteur/docs/Joint_Statement_SRs.pdf. Searching for “Joint statement of three special rapporteurs on incitement to racial or religious hatred” returns only two results from <http://search.ohchr.org> and <http://www.google.com> alike. Searching for “Freedom of

rapporteurs who endorsed this statement, the concept of defamation of religion suffers from significant underlying problems:

[T]he difficulties in providing an objective definition of the term “defamation of religions” at the international level make the whole concept open to abuse. At the national level, domestic blasphemy laws can prove counter-productive, since this could result in the de facto censure of all inter-religious and intra-religious criticism. Many of these laws afford different levels of protection to different religions and have often proved to be applied in a discriminatory manner. There are numerous examples of persecution of religious minorities or dissenters, but also of atheists and non-theists, as a result of legislation on religious offences or overzealous application of laws that are fairly neutral.¹³²

¶43 Even as certain individual and institutional voices have begun endorsing this position, it remains likely that the debate will continue to spill over to future U.N.G.A. sessions. The reality remains that a majority of states at the UN continue to favor promulgating a new norm prohibiting defamation of religion, even if means fitting it in under a more consensual rubric of incitement. As Masood Khan, Pakistan’s UN ambassador, reminded the HRC in 2008, the ultimate objective of OIC member states is nothing less than a “new instrument or convention” addressing defamation.¹³³ The OIC already considers defamation a legitimate and existing norm: “The succession of U.N.G.A. and UNHRC [UN Human Rights Council] resolutions on the defamation of religions *makes it a standalone concept with international legitimacy.*”¹³⁴

¶44 In light of these views, the paradigm shift advocated by the special rapporteurs remains uncertain at best. Even if the U.N.G.A. and the HRC drop the effort to entrench a norm built around the specific language of defamation, there is little indication that a compromise based on “incitement to religious hatred” would function any differently in practice. In other words, OIC member states and other governments may still invoke the incitement model to establish a justification under international law for outlawing speech, religious practice, and other actions deemed blasphemous. It is worthwhile to recall here that support for a defamation of religion norm transcends OIC member states. Countries such as Russia and China continue to be strong proponents of the norm. For example, the former Russian Orthodox Church Patriarch, Alexy II, latched onto the concept of defamation of religion as a basis for building Christian-Muslim cooperation: “In the framework of international organizations, it seems useful to create mechanisms that make it possible to be more sensitive to the spiritual and cultural traditions of various peoples.”¹³⁵

Expression and Incitement to Racial or Religious Hatred” returns eight hits, four of which are UN-based websites. The document can also be accessed from <http://www2.ohchr.org/english/issues/religion/index.htm>.

¹³² Freedom of Expression and Incitement to Racial or Religious Hatred, *supra* note 131, at ¶ 2.

¹³³ Steven Edwards, *UN anti-blasphemy measures have sinister goals, observers say*, CANWEST NEWS SERVICE, Nov. 24, 2008, <http://www2.canada.com/theprovince/news/story.html?id=9b8e3a6d-795d-440f-a5de-6ff6e78c78d5>.

¹³⁴ 2nd OIC Observatory Report on Islamophobia, June 2008 to April 2009, issued at the 36th council of foreign ministers, Damascus, Syrian Arab Republic, May 23-25, 2009, 4 (emphasis added).

¹³⁵ “Response from His Holiness Patriarchy Alexy II of Moscow and all Russia [to the open letter of 138

IV. DEFAMATION OF RELIGION AND DRAFTING AUSTRALIA'S BILL OF RIGHTS

¶45 In the immediate context of ongoing efforts to better protect and promote human rights in Australia, through the development of a bill of rights,¹³⁶ the issue of defamation of religion merits consideration for a number of reasons. First, accounting for current international human rights debates in any final instrument may better position that document to meet potential future challenges. For example, by exploring the issue of defamation, drafters of a bill of rights can address the scope and priority to be assigned to freedom of expression and freedom of religion or belief, including what limitations may be applicable and when. Such a step can be a useful part of the process of determining where Australia wants to situate itself and its citizens vis à vis emerging human rights norms. This approach is also in sync with the Australian Human Rights Consultation Committee's finding that "newly emerging rights in international law – such as the right to a clean and sustainable environment – are constantly in the Australian public's gaze."¹³⁷ In other words, Australians favor an open-minded and exploratory approach that enables consideration of unsettled questions related to rights. Such an approach should necessarily consider *lex lata*, but also *lex ferenda* and other sources of potential norms that offer a more expansive interpretation of emerging human rights principles.

¶46 Second, a robust upfront discussion on defamation of religion can help resolve potential inconsistencies between Australian foreign policy and national law. This is particularly important given Australia's ambivalent position regarding the protection of religion under defamation-based offenses. Although Australia's international voting record at the UN reveals a national distaste for defamation of religion resolutions, domestic legislative initiatives indicate the possibility of allowing prosecution of such offenses in the name of fostering tolerance. For example, Victoria's controversial Racial and Religious Tolerance Act ("the Act") specifically prohibits "conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule" of persons "on the ground of religious belief or activity."¹³⁸ The Act also provides various exceptions, including where conduct of the accused is deemed to have occurred reasonably and in good faith:

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for –
 - (i) any genuine academic, artistic, religious¹³⁹ or scientific purpose; or
 - (ii) any purpose that is in the public interest; or
- (c) in making or publishing a fair and accurate report of any event or matter of public interest.¹⁴⁰

Muslim Theologians],” April 18, 2008, <http://acommonword.com/en/a-common-word/6-christian-responses/202-response-from-his-holiness-patriarchy-alexy-ii-of-moscow-and-all-russia.html>.

¹³⁶ This is in fact one of the objectives of Australia's National Human Rights Consultation process. See http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Terms_of_Reference.

¹³⁷ NATIONAL HUMAN RIGHTS CONSULTATION REPORT, *supra* note 11, at 346.

¹³⁸ Art. 8, Racial and Religious Tolerance Act 2001, No. 47 of 2001 (Version No. 006), incorporating amendments as at 1 October 2009.

¹³⁹ An amendment added in 2006 provides that “a religious purpose includes, but is not limited to, conveying or teaching a religion or proselytizing.” *Id.* Art. 11(2).

¶47 Disturbingly, the Act renders motive irrelevant in determining whether an offense has occurred¹⁴¹ and boasts an extra-territorial effect covering conduct that may have transpired outside of Victoria proper.¹⁴² Nevertheless, it would appear that the law does not afford protection to religious beliefs *per se*, but rather only to adherents as individuals or as a class of persons. In *Fletcher v. Salvation Army Australia*, the administrative tribunal found that the Act:

is not concerned with the vilification of a religious belief or activity as such. Rather it is concerned with the vilification of a person, or a class of persons, on the ground of the religious belief or activity of the person or class ... The law does not stop a person from engaging in conduct that involves contempt for, or severe ridicule of, a religious belief or activity, provided this does not incite hatred against, serious contempt for, or revulsion or severe ridicule of another person or a class of persons on the ground of such belief or activity. The law recognises that you can hate the idea without hating the person.¹⁴³

¶48 Beyond this, other constituencies in Australia have expressed support for a prohibition on defamation of religion. During a government-sponsored inquiry into revising the existing law on blasphemy in NSW,¹⁴⁴ the New South Wales Council of Churches (NSWCC) offered detailed submissions in favor of a new codification of the offense of blasphemy. As part of this re-codification effort, the NSWCC expressed support for retaining the offense but replacing the term “blasphemy” with either “religious vilification” or “religious defamation,” labels the NSWCC argued would avoid any misunderstanding or misconstruing of the offense while preserving its essence (namely, the prohibition of criticism of religious beliefs and symbols).¹⁴⁵ Drafters of any bill of rights should be cognizant of such domestic expressions of support for retaining a blasphemy offense for two reasons: first, they mirror efforts on the international level to package an old offense in new, less “offensive” terms; and second, because such supporters still deserve a thoughtful explanation as to why reviving blasphemy may be at odds with other rights and values contemplated as worthy of protection under any future rights instrument.

¶49 Therefore, the importance of having drafters clarify Australia’s position cannot be overstated. This becomes particularly evident when considering the emerging law in Ireland. Like Australia, Ireland has consistently voted against defamation of religion resolutions at the UN. Following the December 2008 vote on “Combating Defamation of Religion,” Ireland’s Minister for Foreign Affairs, Micheál Martin, explained:

¹⁴⁰ *Id.* at Art. 11(1). Article 12 addresses exceptions for private conduct, “in circumstances that may reasonably be taken to indicate that the parties to the conduct desire it to be heard or seen only by themselves.”

¹⁴¹ *Id.* Art. 9(1).

¹⁴² *Id.* Art. 8(2)(b).

¹⁴³ *Fletcher v Salvation Army Australia* (Anti Discrimination) [2005] VCAT 1523, ¶ 7 (1 August 2005).

¹⁴⁴ For a discussion of the Commission’s findings, see Part II(a) above.

¹⁴⁵ *NSW Blasphemy Report*, *supra* note 33, ¶ 4.40.

We believe that the concept of defamation of religion is not consistent with the promotion and protection of human rights. It can be used to justify arbitrary limitations on, or the denial of, freedom of expression. Indeed, Ireland considers that freedom of expression is a key and inherent element in the manifestation of freedom of thought and conscience and as such is complementary to freedom of religion or belief.¹⁴⁶

¶50 However, Ireland's constitution has long provided that the "publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law."¹⁴⁷ To this end, a 2009 law enacted by the Oireachtas¹⁴⁸ has made it a fineable offense for anyone to publish or utter "blasphemous matter."¹⁴⁹ Under the new law, in force since January 2010, a blasphemous communication "is grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion."¹⁵⁰

¶51 Unlike Victoria's Racial and Religious Tolerance Act, the Irish law establishes a *mens rea* threshold: prosecutors must demonstrate the accused intended "by the publication or utterance of the matter concerned, to cause such outrage."¹⁵¹ The law also affords a defense to the charges if the defendant can prove "that a reasonable person would find genuine literary, artistic, political, scientific, or academic value in the matter to which the offence relates."¹⁵² However, these grounds are arguably narrower than Victoria's since no reference is made to the legitimacy of religious or public interest purposes. More problematic still, Ireland's law explicitly protects "matters held sacred by any religion." It therefore appears to track more closely with the push to outlaw defamation of religion at the UN, giving rise to an apparent inconsistency – if not outright conflict – between the law itself and statements of Foreign Affairs Minister Martin. As it stands, Ireland's Defamation Act potentially may run afoul of that country's obligations under international law and the European Convention on Human Rights. Indeed, at least one group has already taken steps to challenge the legality of the Irish law's provisions

¹⁴⁶ *New Blasphemy Laws—Free Speech is Not Up For Discussion*, IRISH EXAMINER, May 1, 2009, <http://www.examiner.ie/opinion/editorial/new-blasphemy-laws--free-speech-is-not-up-for-discussion-90664>.

¹⁴⁷ Ir. CONST., 1937, art. 40.

¹⁴⁸ A strict time limit, known as a guillotine, was imposed on the debate in the Dáil. Following the lower house vote, Ireland's Seanad passed the bill in a nail-biting 23-22 vote, with the Green Party voting in favor. *Libel law revisions pass the Dáil*, July 8, 2009, <http://www.rte.ie/news/2009/0708/libel.html>. Stephen Collins, *Defamation Bill stumbles through Seanad after lost vote*, IRISH TIMES, Jul. 10, 2009, <http://www.irishtimes.com/newspaper/frontpage/2009/0710/1224250388598.html>.

¹⁴⁹ Art. 36(1), Defamation Bill 2006. A fine may run up to €25,000. Prior drafts of the law originally called for a maximum €100,000 fine for the offense.

¹⁵⁰ *Id.* Art. 36(2)(a).

¹⁵¹ *Id.* Art. 36(2)(b).

¹⁵² *Id.* Art. 36(3).

on “blasphemous matter,”¹⁵³ and there is some speculation that the government will hold a public referendum to address the issue.¹⁵⁴

¶152

By encouraging the drafters of Australia’s bill of rights to confront questions related to religious defamation and vilification directly, potential inconsistencies in law and foreign policy similar to those arising in Ireland may be avoided. There is already some guidance on this issue emerging from the Australian judiciary, including expression of a narrow definition of incitement,¹⁵⁵ as well as a directive to avoid conflating hatred of a given belief and hatred of adherents of that belief in the legal context. In *Catch the Fire Ministries v. Islamic Council of Victoria*, the Victoria Court of Appeal found that the lower tribunal failed to consider that distinction, and held that the Racial and Religious Tolerance Act does not “purport to mandate religious tolerance.”¹⁵⁶ According to the Court, the Act “goes no further in restricting freedom to criticise the religious beliefs of others than to prohibit criticism so extreme as to incite hatred or other relevant emotion of or towards those others. It is essential to keep the distinction between the hatred of beliefs and the hatred of their adherents steadily in view.”¹⁵⁷

¶153

Finally, even if the drafters of an Australian bill of rights reject the defamation norm currently espoused by a majority of UN member states, the process of reaching this decision will help establish the legal justifications for such a position. Within the context of a comprehensive evaluation of the proposed norm, this would position the bill of rights to address, either head-on or implicitly, any possible future gaps or inconsistencies between international human rights law and Australia’s domestic implementation of rights. Similarly, in the event defamation of religion is confirmed as a customary international law norm, Australia will be able to point to its internal bill of rights debate as evidence of its status as a persistent objector opposed to such a norm. In short, drafters can enshrine a more long-term vision of which rights are germane to Australia and how these rights will operate by evaluating not only norms expressed in the relevant treaty law, but also the emerging and potential norms on or just beyond the horizon. This process would also have the benefit of strengthening Australia’s prestige on the international level by “limit[ing] future criticism for non-compliance [and] bolster[ing] Australia’s credibility when [it comments] on human rights abuses in other jurisdictions.”¹⁵⁸

¹⁵³ For example, an Irish atheist group published a series of “blasphemous” quotations by personalities including Jesus Christ, Mohammed, Mark Twain, Salman Rushdie and Bjork in an effort to challenge the law in court. CNN, *Irish Atheists Use Bjork, Mark Twain to Challenge Blasphemy Law*, <http://www.cnn.com/2010/WORLD/europe/01/02/ireland.blasphemy.law/index.html>.

¹⁵⁴ Compare Michael O’Regan, *Now Not the Time For Referendum on Blasphemy, Says Ahern*, THE IRISH TIMES, Mar. 26, 2010, <http://www.irishtimes.com/newspaper/ireland/2010/0326/1224267097750.html>, with Henry McDonald, *Ireland to Hold Referendum on Blasphemy Law*, THE GUARDIAN (UK), Mar. 15, 2010, <http://www.guardian.co.uk/world/2010/mar/15/ireland-referendum-blasphemy-law>.

¹⁵⁵ For example, in *Fletcher v Salvation Army Australia*, the tribunal focused on the meaning of “incite” under the Racial and Religious Tolerance Act: “In its context, this does not mean ‘causes.’ Rather it carries the connotation of ‘inflamm[e]’ or ‘set alight’.” The section is not concerned with conduct that provokes thought.” *Fletcher v. Salvation Army*, *supra* note 143, at ¶ 5.

¹⁵⁶ *Catch the Fire Ministries v. Islamic Council of Victoria* [2006] VSCA 284, ¶ 34.

¹⁵⁷ *Id.*

¹⁵⁸ Australia’s National Human Rights Consultation Report has observed that passage of a Human Rights Act would result in improved international standing for Australia. NATIONAL HUMAN RIGHTS CONSULTATION REPORT, *supra* note 11, at xxv.

V. CONCLUSION

¶54 This article has argued that there is much value and benefit to opening the drafting process surrounding a bill of rights to outside ideas and comparative data. Beyond increasing awareness and challenging preconceptions, such an approach provides a more robust and grounded domestic debate, and can facilitate an outcome that provides reasons and justifications for decisions. Taken together, these measures ultimately can help establish the foundation for fewer surprises down the road.

¶55 As the last Western democracy without some form of a bill of rights, Australia finds itself in an awkward, but potentially enviable, position. On the one hand, its citizens lack a clear understanding and expression of their rights and freedoms,¹⁵⁹ and the country itself risks being isolated from developments in similar legal systems and may suffer diminished stature during human rights discussions within international fora.¹⁶⁰ On the other hand, standing at the threshold of a decision to draft a genuinely Australian human rights instrument holds significant promise: to empower citizens through a participatory drafting model, meaningfully engage with a body of international law that has advanced dramatically in the short span of sixty years, and create a document that not only adopts existing minimum standards, but also contemplates and accounts for emerging human rights norms. Based on Australia's long history of support for international human rights and the findings of the National Human Rights Commission, it is evident that Australians will not settle for an instrument that merely reflects the floor without consideration of the ceiling as well.

¶56 In the context of defamation of religion, it is clear that a majority of UN member states support greater protection of religious symbols and beliefs, even if it comes at the expense of freedom of expression and freedom of thought, conscience, and religion or belief. This emerging norm – regardless of whether it is labeled “defamation of religion” or “incitement to religious hatred” – is part of an ongoing debate over the substance of international human rights. Therefore, it should figure in any future deliberations over the content and scope of rights in Australia. By recognizing this issue and accounting for it during the drafting process, Australians can measure their vision of domestic rights against the one emerging on the international level and, if disparities arise, provide the necessary justifications in advance rather than post facto.

¶57 To be certain, the concept of defamation of religion is fraught with difficulties. However, navigating through these difficulties will ensure an open and participatory process, shine greater light on Australia's national values and identity, and result in a more durable final instrument capable of addressing future challenges. Undertaking this exercise has the added benefits of helping to flesh out and test more general positions relating to issues including balancing of rights and limitations, and of clarifying potential inconsistencies in Australia's domestic law and foreign policy. Importantly, these advantages should be reproducible regarding assessments of other similarly emerging norms drafters may choose to investigate in the future.

¹⁵⁹ The National Human Rights Consultation Committee “found a lack of understanding among Australians of what human rights are.” *Id.*, at xvii.

¹⁶⁰ *Id.*, at xxv.