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The American University in Cairo

School of Global Affairs and Public Policy

**"PROTECTION" OF BELIEFS OR BELIEVERS:
INCITEMENT TO RELIGIOUS HATRED REPLACING
BLASPHEMY AND DEFAMATION OF RELIGION**

A Thesis Submitted to the

Department of Law

**in partial fulfillment of the requirements for the degree of
Master of Arts in International Human Rights Law**

By

Mahmoud Farag

May 2011

DEDICATION

I am dedicating this thesis to my wife, *Samar Ali*, for her endless love and to our upcoming baby.

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I would like to thank God for His uncountable graces.

I am indebted to my mother, *Fatma Abdel Kareem*, and my uncle, *Sayed Abdel Kareem*, for their ongoing support and encouragement without which I would not have been able to finalize this thesis. I also wish my father, *Abdel Hakam Mahmoud*, was alive in order to witness this moment.

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The American University in Cairo
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"PROTECTION" OF BELIEFS OR BELIEVERS:
INCITEMENT TO RELIGIOUS HATRED REPLACING BLASPHEMY AND
DEFAMATION OF RELIGION

Mahmoud Farag

Supervised by Professor Gianluca Parolin

ABSTRACT

Incitement to religious hatred and restrictions on freedom of expression protect religious believers from unlawful expression. There is neither need to defamation of religion resolutions nor to blasphemy legislation. Islamic and several developing states have internationalized blasphemy law under the name of defamation of religion. Defamation of religion and blasphemy's protection of religion contradicts with the individual based nature of human rights. It does not also comply with the classic understanding of defamation law that has only protected individual's reputation. Defamation of religion requires the state to arbitrate amongst intangible competing religious truth. The lack of clear guidelines on what is and is not immune makes the enforcement of defamation of religion difficult. The ambiguity of defamation of religion, as a legal concept, opens the door further for state abuse.

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I. INTRODUCTION

Religion has proved to be one of the strongest human bonds throughout history. It has also been used by those in power to control their populations. Nevertheless, the degree of religious control in the public sphere has varied. Portraying themselves as God's representatives on earth, some rulers have exercised full control over religious institutions and thus over religion itself. This way, rulers have promoted religious views that have helped them maintain their positions in power. Offering contrary religious perspectives, considered blasphemy, was seen to be threatening and was harshly oppressed.

In addition to the political use of religion, some religious scholars have genuinely believed that orthodoxy is the only way to shield the original soul of religions. They were against religious reform seeing it as a shift from the true teachings of religion. Politicians and orthodox religious scholars have agreed on the necessity of guarding against blasphemy.

Pre the inception of human rights, oppression of blasphemers, being justified by political and religious interest, was seen as lawful. The development of human rights has drastically changed that position. Assuring dignity for all humans without distinctions is in fact one of the key guiding principles of human rights. Within this context, state abuse of humans is no longer accepted. The fact that human rights are offered as rights that every human should enjoy requires them to be general and neutral to extend protection to all individuals, regardless of their culture or religion. At the same time, human rights were developed to be interdependent. For example, civil and political rights are hardly achieved if individuals' social and economic rights are not fulfilled and vice versa. In order to maintain balance amongst different human rights, some limitations were introduced so that exercise of certain rights does not violate other individuals' rights. The existence of numerous cultures and religions across the globe has made conflicts amongst certain rights inevitable. Not only can human rights be domestically violated, but there can also be transnational violations. As human rights were introduced as an international legal framework, violations are not restricted to those domestically constructed.

The increasing interaction amongst cultures pushed by globalization has had implications for human rights. Despite the fact that human rights, as so named, are designed to protect humans only, there have been calls by some religious believers to

extend similar protection to religions. For instance, Islamic states in addition to several developing states have been rallying at the United Nations (UN) to promote protection of Islam in response to its wide spread correlation to terrorism and violence. The main focus of this research is to map out the development of blasphemy, as a domestic crime, and its move to the international stage under the name of defamation of religions. The research aims further at examining the legality of extending protection to religions and at analyzing the adequacy of protections afforded to religious believers within the current human rights context. It argues that religious believers are protected from defamatory speech under international law through incitement to religious hatred provisions and through restrictions to freedom of speech.

This research is divided into five sections. Section II introduces Christianity and Islam as case studies to trace the origins of blasphemy. At the outset, the scope and definition of the concept of religion are outlined. How blasphemy came to replace heresy and expanded its meaning in the Christian tradition is then clarified. It then describes how severe punishment was for blasphemers. Moving to Islam, the question whether blasphemy has explicit reference in Islamic religious sources is answered. In addition, what constitutes blasphemy in Islam is elucidated.

Section III represents a comparative study of blasphemy in the domestic laws of Western and Islamic states. Examining Western domestic jurisprudence, the legal status of blasphemy in the pre and post Enlightenment era is analyzed. Further, an overview of modern blasphemy cases is provided to clarify where blasphemy stands from a legal point of view. A correlation between the religious and oppressive nature of Islamic states on the one hand and blasphemy on the other is explored. Blasphemy cases in a number of Islamic states are also referred to show how blasphemy is being used on the domestic level.

Section IV starts with an analysis of the consequences of globalization on religion and blasphemy. Whether the increasing interface amongst cultures intensifies or minimizes blasphemy is examined. Subsequently, several transnational blasphemy cases explore how blasphemy fits the current interaction between Western and Islamic cultures. Providing a legal framework, the protection of religion under international human rights law is then presented.

Section V documents the shift from the domestic use of blasphemy to the international defamation of religions concept. A framework of the legal history of defamation is presented. An analysis of the Combating Defamation of Religion resolutions passed since 1999 at the UN bodies including the Commission on Human Rights (CHR), Human Rights Council (HRC) and the General Assembly (GA) is thus undertaken. The analysis of those resolutions is focused mainly on clarifying how years of resolutions have influenced the meaning of defamation of religion. Moreover, the rationale of states for supporting defamation of religion resolutions is included.

Section VI critiques the defamation of religion concept. The role of a state as an arbitrator among different religions and beliefs is scrutinized. The openness of defamation of religions to abuse by states is discussed. Moreover, the conflict between defamation of religions and a number of human rights is outlined. The section argues that there is no real need for defamation of religions, as a concept, taking into consideration the role of incitement to religious hatred and limitations on freedom of expression in protecting religious believers.

II. BLASPHEMY AND RELIGION: CHRISTIANITY AND ISLAM AS CASE STUDIES

Each society has its own dynamic set of social, cultural and behavioral structures. They highlight taboos that society members should not trespass. Still, the degree of tolerance differs from one taboo to another. Blasphemers are said to "cross societal tolerance lines."¹ In most religions, the sacred should be respected therefore disrespectful expression is not tolerated. As societal tolerance lines are not static, blasphemy is culturally relative being dependent on inconstant values.² What is seen disrespectful at one point in history might not be so at another. However elastic a culture is, challenging shared memories is sometimes difficult to be tolerated. This is often the case when it comes to "timeless truths that a society cherishes."³ These truths can differ from one society to another. Examples include "Holocaust denial, anti-Christian sentiment remarks or Islamophobia."⁴ Blasphemy embodies two long surviving characteristics: blasphemy has been forbidden in public places that are not used primarily for entertaining purposes; blasphemy has always triggered peoples' fear of God's punishment.⁵ In order to better understand the historical development of blasphemy, it is crucial to define religion.

A. Religion: Definition and Scope

Religion remains one of the significant pillars of human life. Nevertheless, allocating a uniform definition that encompasses the vast majority of religions around the globe has always been complicated. Oxford Dictionary defines religion as "the belief in and worship of a superhuman controlling power, esp. a personal God or gods."⁶ On the other hand, Encyclopedia Britannica defines religion as:

human beings' relation to that which they regard as holy, sacred, spiritual, or divine. Religion is commonly regarded as consisting of

¹ Leonard Williams Levy, *Blasphemy: verbal offense against the sacred, from Moses to Salman Rushdie* xi (University of N. Carolina Press 1995) (**hereinafter** *Verbal Offense*). The lessened tolerance of exposing the sacred is due to the fact that blasphemy "affronts the priestly class, the deep seated beliefs of worshippers and the basic values that a community shares." *Blasphemy*, *supra* note 7, at 3.

² David A. Lawton, *Blasphemy 4* (University of Pennsylvania Press, 1993) (*hereinafter* *Blasphemy*).

³ *Id.*, at 3.

⁴ John Witt and M. Christian Green, *Religious Freedom, Democracy and International Human Rights*, 23 *Emory Int. Law Rev.* 599, 583-608, 2009 (*hereinafter* *Religious Freedom*).

⁵ Alain Cabantous, *Blasphemy: Impious Speech in the West from the Seventeenth to the Nineteenth Century* (New York: Columbia University Press 2002) (*hereinafter* *Impious Speech*).

⁶ *Religion*, *The Oxford Pocket Dictionary of Current English* 2009, *available at* <http://www.encyclopedia.com/topic/religion.aspx#5-1G2:3045302232-full>

a person's relation to God or to gods or spirits. Worship is probably the most basic element of religion, but moral conduct, right belief, and participation in religious institutions are generally also constituent elements of the religious life as practiced by believers and worshipers and as commanded by religious sages and scriptures.⁷

This second definition broadens the scope of religion. Religion by definition is viewed as a life system that includes in addition to belief and worship, the common elements, morals and active engagement with other believers through institutions.

However broad the Encyclopedia Britannica's definition is, the Columbia Encyclopedia's definition of religion is even broader. It defines religion as "a system of thought, feeling, and action that is shared by a group and that gives the members an object of devotion; a code of behavior by which individuals may judge the personal and social consequences of their actions; and a frame of reference by which individuals may relate to their group and their universe."⁸ This definition despite including elements of worship and belief described as feeling and action, does not specify a supernatural power. It also identifies religion as a social system through which believers can come together and seek answers to issues related to the universe.

The lack of a uniform definition of religion reflects differences in religious believers' answers to "big questions of life concerning God, universe, and others."⁹ The lack of material evidence to support these questions regarding our existence has

⁷ *Religion*, Encyclopedia Britannica, available at <http://www.britannica.com.library.aucegypt.edu:2048/EBchecked/topic/497082/religion>

⁸ *Religion*, The Columbia Encyclopedia 2008, available at <http://www.encyclopedia.com/topic/religion.aspx#5-1G2:3045302232-full>. The Columbia Encyclopedia offers useful classifications for different religions: "In the comparative study of religions certain classifications are used. The most frequent are polytheism (as in popular Hinduism and ancient Greek religion), in which there are many gods; dualism (as in Zoroastrianism and certain Gnostic sects), which conceives of equally powerful deities of good and of evil; monotheism (as in Christianity, Judaism, and Islam), in which there is a single god; supratheism (as in Hindu Vedanta and certain Buddhist sects), in which the devotee participates in the religion through a mystical union with the godhead; and pantheism, in which the universe is identified with God. Another frequently used classification is based on the origins of the body of knowledge held by a certain religion: some religions are revealed, as in Judaism (where God revealed the Commandments to Moses), Christianity (where Christ, the Son of God, revealed the Word of the Father), and Islam (where the angel Gabriel revealed God's will to Muhammad). Some religions are non-revealed, or "natural," the result of human inquiry alone."

⁹ Rex Tauati Ahdar, *Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law*, 26 U. Queensland L.J. 301 (2007) (hereinafter *Religious Vilification*).

led to ongoing conflict amongst believers. Religious institutions and scholars play a role in helping believers find answers to existential questions. As an authoritative body, religious institutions often see that offering contrary views to theirs inflict negatively on religion.

B. Heresy v. Blasphemy in Christianity

Heresy and blasphemy in Christianity punish both offering challenging religious views to those of the Church and offending the sacred. The history of blasphemy goes back to the Ancient Greek era. The Greeks referred to blasphemy as impiety.¹⁰ Impiety was in fact defined, during that time, as "any act contemptuous of Gods or depraving holy matters."¹¹ This meant that disapproval of what Gods said or degrading the sacred was a crime. The seriousness of impiety, from the Ancient Greek perspective, was exemplified by how Socrates, the Ancient Greek philosopher, was sent to death when convicted for impiety.¹² Blasphemy was equally serious in Christianity but was called different names at different times. Heresy was the well known theological and legal term before the 13th century¹³ and blasphemy replaced it later.

As heresy was prominent in the Christian world, its definition depended upon the religious monopoly of the Church. To offer any competing religious interpretations to those offered by the Church was known for twelve centuries as heresy.¹⁴ In this context, the Church is the only recognized body to express religious views. Expressing views that do not conform to the Church's is heresy. From the Church's perspective, heresy is a religious error that collides with an authoritative truth put forward by the Church.¹⁵ In other words, heresy develops new interpretations or offers substitute interpretations to religious truths which lead to challenging the

¹⁰ Verbal Offense, *supra* note 1, at xi. Blasphemy, as a lingual term, is traced back to a Greek word that means 'speaking evil'. Riaz Hassan, *Expressions of Religiosity and Blasphemy in Modern Societies*, 35 Asian Journal of Social Science 114, 111-125, 2007(hereinafter *Expressions of Religiosity*).

¹¹ *Id.*

¹² Blasphemy, *supra* note 2, at 4.

¹³ Verbal Offense, *supra* note 1, at 50.

¹⁴ *Id.*, at 46.

¹⁵ Bernard Lewis, Some Observations on the Significance of Heresy in the History of Islam, 1 *Studia Islamica*, 43-63, 1953 (hereinafter *Significance of Heresy*).

Church's interpretations.¹⁶ Heretics are not only looked upon as opponents of the Church, but also enemies of God. According to Thomas Aquinas, heretics are "blasphemers against God."¹⁷ Heresy however would not have become enforceable by the Church without the support provided by the state.¹⁸

Heresy remained in place until the 13th century when a new term "blasphemy" was introduced to the Christian dictionary.¹⁹ Riaz Hassan provides an overview of blasphemy and highlights its focus on protecting the sacred:

In the Judeo-Christian tradition it refers to all acts of verbal offences against sacred values. In Catholic theology, it is defined as 'any word of malediction, reproach, of contumely renounced against God'. Blasphemy exists to prevent challenge to the notions of the sacred in organized religion. Its existence is a litmus test of the standards a society feels it must enforce to preserve its religious beliefs and morality and to prevent mockery of its gods. It constitutes an intolerable affront to the sacred, the priestly class, the deeply held beliefs of the believers and the basic values a community shares. Its commission invariably evoked severe punishment. In Judeo-Christian-Islamic traditions its commission is/was punishable by death. Denying the existence of God or reviling God is also recognized as an offence under common law.²⁰

Intellectually, blasphemy is regarded as a "by product of heresy."²¹ Although both heresy and blasphemy are concerned with different religious interpretations, blasphemy is in addition concerned with the sacred in general and God, being the supreme sacred, in particular.²² Blasphemy is defined as "a direct criticism of God and sacred objects."²³ Thus, "expressing disrespect to God by using profanity or

¹⁶ Gauri Viswanathan, *Blasphemy and Heresy: The Modernist Challenge*, 37 COMP STUD SOC HIST 399-412, 1995 (hereinafter *Blasphemy and Heresy*).

¹⁷ Verbal Offense, *supra* note 1, at 52.

¹⁸ *Id.*, at 46.

¹⁹ David Nash, *Blasphemy in the Christian World: A History* (Oxford University Press 2007) (hereinafter *Blasphemy in Christian World*).

²⁰ Expressions of Religiosity, *supra* note 10, at 114. The definition of blasphemy by U.S. Justice Felix Frankfurter as "challenging whatever the ruling authority of the moment established as orthodox religious doctrine" is the same as the one used to describe heresy. Robert C. Blitt, Should New Bills of Rights Address Emerging International Human Rights Norms? The Challenge of 'Defamation of Religion' 25 (University of Tennessee Legal Studies Research Paper No. 90, 2010) (hereinafter *Bills of Rights*).

²¹ Blasphemy, *supra* note 2, at 2.

²² This in fact challenge that notion that heresy and blasphemy have interchangeable definitions of being "a deviation from the faith as defined by the church." Verbal Offense, *supra* note 1, at 50

²³ Bills of Rights, *supra* note 20, at 13.

ridicule to discredit God's power" is blasphemous.²⁴ Blasphemy further entails "cursing God or Jesus, doubting Jesus's legitimacy or divinity."²⁵

The protection of the sacred afforded by the blasphemy doctrine widened the target group of blasphemers to include other believers in addition to Christians. For instance, Jews were considered blasphemers after the 13th century for "rejecting Jesus Christ as God."²⁶ The trial of Jesus however remains one of the most well known blasphemy trials in history.²⁷ Jesus' admitting a son-father relationship to God was considered blasphemous.²⁸ Similar to the Jews, blasphemy extended to followers of Christian religious sects. The division of the Catholic Church and the emergence of new religious sects led to counter blasphemous accusations across sects. The Anglican Church, for instance, did not tolerate Catholics and considered their religious teachings blasphemous.²⁹ Later on, categories of blasphemers included atheists because of their existential denial of God.³⁰ For some believers, blasphemous "insulting God or attributing devil's work to God"³¹ can be more serious leading to "attacking, wounding and damaging of religious belief."³² This explains the severe punishment attributed to blasphemy.

Punishing blasphemers was seen as one way to avoid God's punishment. "Corpus Julis Civilis in 529 of the Byzantine Empire stated that famine, earthquake and pestilence occurred because a failure to punish blasphemy provokes God's wrath."³³ Thus, blasphemers' punishment had the aim of "restoring honor to the sacred."³⁴ Although some religions regarded the sacred as powerful enough to punish, blasphemers were still punished as a sign of intolerance towards blasphemy.³⁵ The

²⁴ Blasphemy in Christian World, *supra* note 19.

²⁵ Blasphemy, *supra* note 2, at 2. The wider definition of blasphemy however, as "speaking evil of sacred matters", allows for its extendibility to all religions. Verbal Offense, *supra* note 1, at 3.

²⁶ Verbal Offense, *supra* note 1, at 53. What is ironic here is that Jews were criminalized for not believing in Jesus as God, something that Jesus himself was convicted of.

²⁷ *Id.*, at 15.

²⁸ *Id.*

²⁹ *Id.* Similarly, Catholics were seen as blasphemers by Protestants. *Id.*, at 61.

³⁰ *Id.*

³¹ Impious Speech, *supra* note 5. This is why the language used by blasphemers is described as "shocking, vile, and crude language or imagery." Blasphemy and Heresy, *supra* note 16, at 4.

³² Blasphemy in Christian World, *supra* note 19.

³³ Verbal Offense, *supra* note 1, at 50.

³⁴ *Id.*, at 3.

³⁵ *Id.*

sacred can use their super natural powers to punish blasphemers. However, punishing blasphemers was used to show respect to the sacred. Thomas Aquinas, for instance, noted that "blasphemy is not harmful to God but might be for believers."³⁶ Believers in that sense refer to the religious majority as there was actually no objective measurement of how blasphemous a statement might be. The degree to which a statement might be blasphemous was measured by how unpopular or incorrect the statement was from the religious majority's view.³⁷ This was justified to maintain social stability³⁸.

The severe punishment of blasphemy was done out of the association of blasphemy with "treason against God."³⁹ Not only were blasphemers regarded as enemies of God but as state enemies as well.⁴⁰ Persecution, torture and murder were the price that a blasphemer had to pay.⁴¹ The Church also resorted to discriminatory group identifications by enforcing blasphemers to "wear special marks."⁴² Punishment was only possible where there was a well established church backed by a strong state.⁴³ In addition to the church's official intolerant stand, blasphemers were also subject to attacks by lay Christians. For instance, Jews suffered from "boycotts, confiscation of properties, expulsion, and mass murders."⁴⁴ This extreme approach towards blasphemy however waned in post-Enlightenment era. By the 17th century, deists and free thinkers were tolerated.⁴⁵ This was, in fact, the starting point for placing blasphemy in a private and not a public context. As a result, blasphemy was

³⁶ *Id.*, at 52.

³⁷ Bills of Rights, *supra* note 20, at 5.

³⁸ Verbal Offense, *supra* note 1, at 3.

³⁹ *Id.*, at 31.

⁴⁰ *Id.*, at 47. The legal parameters of blasphemy have been framed through history around political aims including the need to protect the state. Bills of Rights, *supra* note 20. Under theocratic states, rulers were portrayed as God's agents on earth. This in fact was not achievable without fully control of religion. Therefore, blasphemy was abused as to suppress religious views that threatened King's divine authority. Verbal Offense, *supra* note 1, at 3. That way, blasphemy was used to control over populations under the name of religion. Impious Speech, *supra* note 5.

⁴¹ *Id.*, at 46 and 50.

⁴² *Id.*, at 53.

⁴³ This explains why blasphemy was not of a paramount issue at the British colonies in America whilst it was propagated very strongly by the Church in Europe. *Id.* On the other hand, the Spanish authorities was very much able to enforce blasphemy within their colonies in Mexico. For an overview on blasphemy in Mexico during the Spanish colonization, read Javier Villa-Lores, *Dangerous Speech: A Social History of Blasphemy in Colonial Mexico* (Tucson: University of Arizona Press 2006).

⁴⁴ *Id.*

⁴⁵ Blasphemy in Christian World, *supra* note 19.

viewed as a "personal sin rather than a public crime."⁴⁶ Whether Islam regards blasphemy as a public or private matter is an issue that also needs to be examined.

C. Heresy v. Blasphemy in Islam

Similar to Christianity, Heresy and blasphemy in Islam are concerned with the sacred. Islam is a holistic system where distinction between religious and worldly matters is very difficult.⁴⁷ In Islam "God is the sole source of both power and law, and the sovereign whilst Prophet Mohamed is His vicegerent on earth."⁴⁸ It is reasonable then that insulting God or his Prophet is a crime under Islamic Law.⁴⁹ But, the question therefore is whether this crime is termed "heresy" in Islam and whether its meaning is similar to that of Christian heresy.

To start with, there is a linguistic resemblance between heresy in Christianity and Islam. The term *hartaqa*, or heresy in English, is one of the very few Arabic words that have a European origin.⁵⁰ In addition to the lack of the actual word *hartaqa* in the Quran, the Muslims' holy book, it is also difficult to find a clear-cut concept for heresy in the Quran.⁵¹ This absence, however, does not eliminate heresy from being part of Islamic jurisprudence. This goes back to the fact that Islam, as a religion, has the Quran and the sunna of Prophet Mohamed as the two primary religious sources. Since Muslims have to adhere to what is written in the Quran and to the Prophet's deeds or sayings, any deviation from both religious sources is unacceptable and is considered heresy.⁵² Heresy in Islam is "exegesis of scripture and revelation."⁵³ In addition to *hartaqa*, Islamic scholars refer to heresy as *zandaqaa*.⁵⁴ *Zandaqaa* is a

⁴⁶ Impious Speech, *supra* note 5.

⁴⁷ Cherif Bassiouni, *Speech, Religious Discrimination, and Blasphemy*, American Society of International Law Proceedings, 83 ASILPROC 433 (1989) (hereinafter *Speech*).

⁴⁸ Significance of Heresy, *supra* note 15, at 62.

⁴⁹ Expressions of Religiosity, *supra* note 10, at 114.

⁵⁰ Significance of Heresy, *supra* note 15, at 51.

⁵¹ Mohammad Ali Amir-Moezzi, *Heresy*, Encyclopaedia of the Qurān, available at: http://www.brillonline.nl.library.aucegypt.edu:2048/subscriber/entry?entry=q3_SIM-00189 (hereinafter *Heresy*).

⁵² Robert Langer and Udo Simon, *The Dynamics of Orthodoxy and Heterodoxy. Dealing with Divergence in Muslim Discourses and Islamic Studies*, 48 *Welt des Islams* 273-288 (2008) (hereinafter *Orthodoxy and Heterodoxy*). The sunna refers to Prophet Mohamed's recorded sayings and deeds whether directly said and done by him or for those who were said or done by one of his companions and got approved by him.

⁵³ Heresy, *supra* note 51.

⁵⁴ Significance of Heresy, *supra* note 15, at 54.

broad term encompassing "all holders of unorthodox, unpopular and suspect beliefs, particularly those considered dangerous to the social order and the state. At the same time it was applied to loosely materialists, atheists, agnostics, and the like, and came to have the general meaning of free-thinker and libertine"⁵⁵ whether Muslim or non-Muslim.⁵⁶ Despite heresy's corresponding term in Islam, blasphemy does not seem to have any.

In the Quran the closest terms to blasphemy are *takdhīb* which means "giving the lie, denial" and *iftirāa* or invention.⁵⁷ Denial and invention, however, do not only imply insulting God by denying His existence. Blasphemous invention includes "a declaration of a false belief of one's own contrivance such as denouncing the claims that God engendered a son or doubting His divinity."⁵⁸ The blasphemous invention in fact resembles very much blasphemy in Christianity by not recognizing powers attached to the sacred. On the other hand, the most direct denial of the sacred is the "deliberate rejection of Allah/God and revelation" which is termed in Islam as *kufr* or infidelity.⁵⁹ Blasphemous denial can be "outright rejection of revealed religious truths, such as the revelations and warnings of God's messengers, announcements of the day of judgment and the meeting with God and refusal to recognize and acknowledge God's signs."⁶⁰ The rationale here is that denial of such fundamental Islamic beliefs is destructive to the whole religion and requires punishment.

For Muslims, heresy and blasphemy bring God's curse and are regarded a great sin.⁶¹ This however has not prevented several Islamic groups from going against the religious orthodox mainstream. Kharijites and Shiites are the two primary "heretical groups" that have appeared in Islamic history.⁶² Nevertheless, the first recorded persecution for blasphemy is that of Jaad ibn Dirham, a member of the Muatazila, another heretical group, who in 125/752, was "crucified under charge of

⁵⁵ *Id.*, at 55.

⁵⁶ Heresy, *supra* note 51.

⁵⁷ Devin J Stewart, *Blasphemy*, Encyclopaedia of the Qurān, available at: http://www.brillonline.nl.library.aucegypt.edu:2048/subscriber/entry?entry=q3_SIM-00052 (hereinafter *Blasphemy in Quran*).

⁵⁸ *Id.* It is said in the Quran that "Who does greater wrong than he who invents a lie against God?" (e.g. q 6:21).

⁵⁹ Expressions of Religiosity, *supra* note 10, at 114. Similarly, it is noted that 'ilhad" which is rejection of God and religion, nowadays known as atheism, can refer equally to blasphemous denial. *Id* and Significance of Heresy, *supra* note 15, at 56.

⁶⁰ *Blasphemy in Quran*, *supra* note 59.

⁶¹ *Id.*

⁶² Significance of Heresy, *supra* note 15, at 46-47.

zandaqaa."⁶³ During the 14th century, more heretical groups emerged including "qadariyya who support free will, *ibāḥiyya* the free-thinkers, *dahriyya* who compose mainly of philosophers and other supporters of the eternity of the universe, and *tanāsukhiyya* who believe in metempsychosis."⁶⁴ Punishment was the weapon used to counter these unorthodox groups.

The punishment of blasphemy is seen as protecting both Islam and the state from social instability. It is further contended that there is a correlation between orthodoxy and heresy.⁶⁵ Orthodoxy is established by an authority to make a distinction between right and wrong from a religious perspective.⁶⁶ The difficulty sorting out disagreements amongst religious scholars, has led to lack of clarity in defining heresy.⁶⁷ A uniform religious authority that has clear guidelines for all Muslims is absent.⁶⁸ This is not to say that orthodox beliefs do not change over time. Religious opinions have always been subject to reinterpretation by religious scholars. For instance, some religious views from the late 17th century were regarded heretical around a century earlier.⁶⁹ The importance of religion to a state has guaranteed the place of blasphemy as a crime for several centuries.⁷⁰

⁶³ *Id.*, at 55.

⁶⁴ Heresy, *supra* note 51.

⁶⁵ Heresy, *supra* note 51.

⁶⁶ Orthodoxy and Heterodoxy, *supra* note 52, at 277.

⁶⁷ Khaled El-Rouayheb, Heresy and Sufism in the Arabic-Islamic world, 1550-1750: Some preliminary observations, 73 *Bulletin of the School of Oriental & African Studies* 379, 357-380 (2010) (hereinafter *Heresy and Sufism*).

⁶⁸ Orthodoxy and Heterodoxy, *supra* note 52, at 273. It is claimed further that the absence of an orthodox religious authority for all Muslims defies the whole existence of heresy and blasphemy in Islam. "As Goldziher says : "The role of dogma in Islam cannot be com-with that which it in the life of the pared plays religious any Christian Churches. There are no Councils and Synods which, after lively controversy, lay down the formulae, which henceforth shall be deemed to embrace the whole of the true faith. There is no ecclesiastical institution, which serves as the measure of the orthodoxy; no single authorized interpretation holy on which the doctrine and of the Church scriptures, exegesis be built. The in all might Consensus, supreme authority of exercises an elastic, in a certain questions religious practice, sense barely definable jurisdiction, the very conception of which is moreover variously explained." Significance of Heresy, *supra* note 15, at 57. This statement however does not fit into the state-based system in which religious institutions within each state decide upon what to be orthodox. Having a supra-national institution to produce a single interpretation of religion is not feasible taking into consideration state sovereignty. Therefore, the absence of a sole religious entity in Islam, similar to the Church in Christianity, does not negate the existence of Islam but feeds its blurriness.

⁶⁹ Heresy and Sufism, *supra* note 67.

⁷⁰ Verbal Offense, *supra* note 1.

III. BLASPHEMY IN DOMESTIC LAWS

A. The Secularization of Blasphemy in Western Domestic Laws

As religion was secularized in Western states, blasphemy saw a similar secularization. The 1648 Westphalia Treaty that brought thirty years of religious war in Europe to an end paved the way for the development of the nation-state system. As the Church became less important to the survival of the state under the nation state system, blasphemy was secularized.⁷¹ The secularization of blasphemy reflected the diminishing authority of the Church in monopolizing interpretation of religion and thus decisions on what defines blasphemy. The United States (US) preceded the UK in secularizing blasphemy through the 1641 *Body of Liberties*, which represented the first code of laws to define what blasphemy is.⁷² The *Ordinance for the Punishing of Blasphemies and Heresies* was passed by the English Parliament in 1648 as to govern blasphemy.⁷³ This movement to secularize blasphemy does not ignore the fact that blasphemy was taken seriously by Western states during the 17th century. This was signified in 1675 by Lord Chief Justice Matthew Hall's view of religion as being an essential part of England's domestic laws.⁷⁴ At the same time, the French Revolution with its promotion of tolerance dissociated to a larger extent state and religion.⁷⁵ The diminishing control of the state over religion opened the door for religious reform and reinterpretation.

Freedom of expression in the post-Enlightenment era provided the space for people to "seek spiritual and artistic truth" without holding them liable of blasphemy.⁷⁶ The larger degrees of tolerance and freedom were reflected in the development of more liberal legislation. As a result, the number of prosecutions for blasphemy started to go down in the 18th century.⁷⁷

The secularization of blasphemy became much more evident in the 19th century. For instance, Justice Duke Coleridge stated in the *Footie case* that critical criticism of religion is not to be found liable given the honorable intent of the

⁷¹ Impious Speech, *supra* note 5.

⁷² *Id.*

⁷³ Verbal Offense, *supra* note 1.

⁷⁴ Blasphemy in Christian World, *supra* note 19, at 60.

⁷⁵ *Id.*

⁷⁶ *Id.*, at 71.

⁷⁷ Expressions of Religiosity, *supra* note 10, at 114.

author.⁷⁸ The introduction of mens rea to the equation of blasphemy was a historical turning point as it put an end to the automatic liability option. Not only did blasphemous content become determinant but the context did as well. This position was further reiterated by John Duke Cole-ridge "requiring a decency test in cases of alleged religious insult which had less to do with evaluating the approximation of content to accepted doctrine than with the acceptability of the form in which that content is expressed."⁷⁹ These developments were reasonable if looked at through an enlightened lens, as they were part of how society began to look more critically at issues of public interest including blasphemy. The liberal and secular Western society in the 18th century onwards has provided a space where societies and legal institutions have been able to challenge the rigid religious position towards blasphemy. Although in the first half of the 19th century, blasphemy was still viewed as peace disturbance,⁸⁰ it was no longer considered as a significant challenge to the state.⁸¹ This, in fact, led to shrinking numbers of blasphemy prosecutions. For instance, the last prosecution for blasphemy in Australia took place in 1871.⁸²

The secularization of blasphemy was not only restricted to Europe, but was also evident in the US as well. As religion became a private matter via the First Amendment of the US Constitution, blasphemy was no longer a crime.⁸³ This stand was solidified by the US Supreme Court's 1951 decision in the *Miracle* case noting that "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion."⁸⁴ The court made it clear how difficult, and even unacceptable under the US Constitution, it was to have a say on religious orthodoxy. The state, in this context, acted as a protector of its citizens' rights, rather than God's successor that theocratic rulers used to claim. The fact that blasphemy was secularized did not however mean the death of blasphemy.⁸⁵

⁷⁸ Blasphemy in Christian World, *supra* note 19, at 81.

⁷⁹ Blasphemy and Heresy, *supra* note 16, at 8.

⁸⁰ Verbal Offense, *supra* note 1, at 422.

⁸¹ Impious Speech, *supra* note 5.

⁸² Bills of Rights, *supra* note 20, at 13.

⁸³ Blasphemy in Christian World, *supra* note 19. The year 1967 further witnessed the termination of blasphemy being regarded a statutory crime. Verbal Offense, *supra* note 1.

⁸⁴ Verbal Offense, *supra* note 1.

⁸⁵ Long intervals between blasphemy prosecutions can gradually contribute to the elimination of blasphemy laws. For example, the Australian Law Reform Commission recommended the abolition of

Blasphemy laws are still in place in other Western countries. It is a crime under the Danish law to “expose to ridicule or insults the dogmas or worship of any lawfully existing religious community.”⁸⁶ Similarly, it is unlawful under the German law to “insult religion publicly.”⁸⁷ The *Gay News* case in 1971 is a proof that blasphemy is still alive in the UK despite the fact that the previous blasphemy case, *Gott*, was in 1921.⁸⁸

However, changed over time, blasphemy does not require intent to be prosecuted. It was stated by the Court in *R. v Lemon (Denis)* 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 only the intent to publish blasphemous material as sufficient.”⁸⁹ The lack of intent required for prosecution of blasphemy has not resulted in lenient enforcement. On the contrary, enforcement of blasphemy has been taken more seriously in Islamic countries than those of the West.⁹⁰

B. Blasphemy Survives the Religious Character of Islamic States

The religious nature of Islamic states has not made it feasible to secularize blasphemy. The diminishment of blasphemy in the West has not witnessed a similar movement within Islamic states.⁹¹ Islam seems to maintain the same holy status that it used to have centuries earlier. Not only is Islam safeguarded from offenses, whether major or minor, but blasphemy laws are also used in Islamic states to restrict the freedom of religion of both liberal and non-Muslims.⁹² Islamic states use blasphemy to restrict liberal and non-Muslims' deviations from orthodox religious interpretations. This explains why the religious character of Islamic states nevertheless does not guarantee free religious freedom for individuals.⁹³ The more religious a state is, the

blasphemy as an offence due to the lack of prosecutions in several Australian states for more than fifty years. Bills of Rights, *supra* note 20, at 13.

⁸⁶ Neil J. Foster, *Prophets, Cartoons, and Legal norms: rethinking the United Nations Defamation of Religion Provisions*, J. Cath. Leg. Stud 29 (2009) (hereinafter *Prophets*).

⁸⁷ Bills of Rights, *supra* note 20, at 7.

⁸⁸ Verbal Offense, *supra* note 1.

⁸⁹ *Id.*, at 6.

⁹⁰ Christopher Walker, *Saying the Unsayable*, 173 World Affairs 7, 75-84, Nov./Dec. 2010 (hereinafter *Saying the Unsayable*).

⁹¹ Bills of Rights, *supra* note 20, at 9.

⁹² *Id.*, at 11.

⁹³ Expressions of Religiosity, *supra* note 10, at 121.

less space is available for an individual to freely choose and adhere to a religion. Penalizing blasphemy is one way of imposing state's religious views and oppressing opposing ideas at the same time.⁹⁴ Blasphemers are not only seen as law violators but are also seen as God's traitors.⁹⁵ This was seen to be an "invitation to authoritarianism in the name of God" according to Mohamed Saied Al-Ashmawy, a *Sharia* and Islamic scholar.⁹⁶

In a recent study, it was found that Islamic states such as Malaysia, Pakistan, Indonesia, Egypt and others have "strong blasphemous attitudes."⁹⁷ Examining blasphemy legislation in several Islamic states sheds light on how blasphemy is domestically prosecuted. Despite the fact that Malaysia acquired a high score on the Human Development Index, it is characterized as being highly religious with strong blasphemous trends.⁹⁸ As stated in the Syariah Criminal Offences Act, it is an offense for:

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.⁹⁹

This broad range of criminalized actions makes it easy to find liable any form of expression that is not in conformity with the mainstream interpretation of Islam, including government's understanding. This is an indicator that blasphemy as a crime has different meanings within Islamic states' legislations. Pakistan is an Islamic state known for its blasphemy prosecutions.

Pakistan prioritizes Islam and the feelings of Muslims over the right to freedom of expression.¹⁰⁰ It is stated under Section 295-B of the Pakistani Penal Code

⁹⁴ Bills of Rights, *supra* note 20, at 9.

⁹⁵ Declan O'Sullivan, *Egyptian Cases of Blasphemy and Apostasy against Islam Takfir al-Muslim*, 7 *The International Journal of Human Rights* 98, 97-137, 2003 (hereinafter *Egyptian Cases*).

⁹⁶ *Id.*

⁹⁷ Expressions of Religiosity, *supra* note 10, at 119.

⁹⁸ *Id.*, at 120.

⁹⁹ Bills of Rights, *supra* note 20, at 10. It is worth noting however that the title of the act does not include the word blasphemy but rather is coded "Offences Relating to the Sanctity of the Religion of Islam and its Institution."

¹⁰⁰ Allison G. Belnap, *Defamation of Religions: A Vague and Overbroad Theory that Threatens Basic Human Rights*, B.Y.U. L. REV. 672, 2010 (hereinafter *A Vague and Overbroad Theory*). It is also

that " whoever willfully defiles, damages or desecrates a copy of the Holy Quran ... shall be punishable with imprisonment for life."¹⁰¹ In addition, Section 295-C notes that "use of derogatory remarks, etc., in respect of the Holy Prophet: whoever by words, either spoken or written, or by visible representations, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet (peace be upon him), shall be punished with death, or imprisonment for life, and shall also be liable to fine."¹⁰² The severity of the punishment, death sentence or life imprisonment, is indicative of how sanctified Islam is looked upon in Pakistan.¹⁰³ Despite being a lawful punishment, death sentence has not been invoked in blasphemy prosecutions in Pakistan.¹⁰⁴ This does not excuse the huge number of individuals 672, 537 who were convicted of being blasphemers between 1986 and 2003.¹⁰⁵ For instance, five Pakistani Ahmadis, four of them children, were convicted of blasphemy in 2009 for writing "Prophet Mohamed" on the walls of a mosque's bathroom.¹⁰⁶

Blasphemy under Indonesian law is crafted in a way that grants the government authoritative interpretation of religion. Although, according to the law, Islam, Catholicism, Protestantism, Buddhism, Hinduism and Confucianism are the only accorded religions in Indonesia, other religions are not forbidden.¹⁰⁷ The law,

noted that Pakistan did not extend similar protection to other religions but Islam and Muslims have always been of primary, and nearly the only, concern.

¹⁰¹ Rebecca J. Dobras. *Is the United Nations endorsing human rights violations?: an analysis of the United Nations' combating defamation of religious resolutions and Pakistan's blasphemy laws*. 37 Ga. J. Int'l & Comp. L. 348 (2009) (hereinafter *Human Rights Violations*).

¹⁰² Expressions of Religiosity, *supra* note 10, at 115.

¹⁰³ At the same time, this strong position opens questions on how fair can blasphemy trials in Pakistan be. Amnesty International's position is that blasphemy laws in Pakistan are frequently misused to oppress particular religious sects including Christians, Ahmadis and some Sunnis as well resulting in prosecuting hundreds of individuals. Expressions of Religiosity, *supra* note 10, at 116. Instead of shielding Islam, blasphemy laws have been misused to serve political aims through the targeting of certain religious groups.

¹⁰⁴ A Vague and Overbroad Theory, *supra* note 100, at 672.

¹⁰⁵ *Id.*

¹⁰⁶ *The limits of freedom and faith*, Economist, March 31, 2010, available at <http://www.economist.com/node/15833005> (hereinafter *Limits of Freedom and Faith*). In such a context, there are suspicions that they were prosecuted only because of their belonging to the Ahmadi religious sect than to writing what they did on the wall.

¹⁰⁷ Nicola Colbran, *Realities and challenges in realising freedom of religion or belief in Indonesia*, 14 International Journal of Human Rights 681, 678-704, 2010 (hereinafter *Freedom of Religion or belief in Indonesia*). Not only blasphemy is a dilemma for adherents of the six accorded religions in Indonesia, but adherents of local religions "are often accused of being members of splinter groups

through "prohibiting interpretations or activities that deviate from the main teachings of religions adhered to in Indonesia," opens the door for abuse.¹⁰⁸ The challenge is how to best determine the main teachings of each of these religions and to identify deviations that are blasphemous. In this way, the law restricts differences that are inherent in every religion. In such a legal context, it was observed by the US Department of State that the Indonesian law has been mostly invoked in blasphemy and heresy cases against Islam.¹⁰⁹ For instance, H.B. Jassin was accused of defaming Islam and given one year imprisonment for publishing a story in *Sastra* magazine, where he acted as Editor In-Chief, that allegedly depicted Prophet Mohamed along with angels.¹¹⁰ Blasphemy law was also used to convict Arswendo Atmowiloto, Editor of the *Monitor*, for publishing results of a survey of the most admired public figures in which Prophet Mohamed scored 11th.¹¹¹ Although, the first case might seem blasphemous since depiction of Prophet Mohamed and angels is prohibited in Islam, there is no clear reason why blasphemy can be applied to a public survey. There is no religious requirement that Prophet Mohamed be the foremost admired figure for all Muslims. Sunni Muslims believe that Mohamed is the Prophet, which cannot be interpreted as an obligation to admire him. Blasphemy prosecutions are controversial which can be in cases from other Islamic countries.

Blasphemy cases in Egypt, Afghanistan, Sudan and Saudi Arabia are indicative of its position in domestic legislations. In 2001, Salah Eldine Muhsin, an Egyptian, was found blasphemous for "describing the Quran as a book of holy ignorance and Prophet Mohamed to be the author of the Quran and that the Quran is full of contradictions."¹¹² The prosecutor contended that the terminology used by Muhsin "was derogatory and disrespectful of pious individuals."¹¹³ Thus, this case is not concerned with deviant religious interpretations but rather with blasphemous denial of Islam as a religion. In addition, one of the controversial blasphemy cases in Egypt arose when Haidar Haidar, a Syrian novelist, "described God as a failed artist

(agama sempalan) who must return to the established religion, or they are accused of disturbing public order, of defaming of religions.

¹⁰⁸ *Id.*

¹⁰⁹ Bills of Rights, *supra* note 20, at 11.

¹¹⁰ Freedom of Religion or belief in Indonesia, *supra* note 107, at 684.

¹¹¹ *Id.*, at 685.

¹¹² Egyptian Cases, *supra* note 95, at 99-100.

¹¹³ *Id.*, at 101.

and Prophet Mohamed as a womanizer in his novel *A Banquet of Seaweed*.¹¹⁴ The words were shocking for most Muslims. The novel was very controversial in Egypt when some parts were quoted in newspapers. An appointed committee to examine the alleged blasphemy claims found later that the novel "was misunderstood, misquoted, and taken out of context."¹¹⁵ This in fact signifies how crucial sometimes the context is when it comes to blasphemy.

Afghanistan is an Islamic state that takes a strict position against blasphemy.¹¹⁶ In one case, a university student was convicted of blasphemy for disrespecting Islam and the Quran after sharing an article claiming that women's rights were not accorded by Prophet Mohamed.¹¹⁷ Moreover, Saudi Arabia to a similar extent prioritizes protection of religious feelings of Muslims over the right to freedom of expression.¹¹⁸ From these cases, several individuals have been charged with blasphemy, but it is rare that anyone gets convicted as it is mostly used as "an instrument of political and social coercion" according to Ali Dayan Hasan, a researcher at Human Rights Watch.¹¹⁹

The political use of blasphemy cannot however eliminate its cultural implication. It is expected that every individual to an extent is aware of his own culture and religion which nevertheless cannot be expected from a foreigner. It is more difficult to prove intent to blaspheme by a foreigner, being unaware of the culture and religion in the first place. In Sudan, individuals can be easily convicted for blasphemy even if there is no intent.¹²⁰ A Sudanese case clarifies how foreigners' lack of knowledge of the culture and religion may lead to prosecution. A British teacher, Gillian Gibbons, was charged with blasphemy after she consented to let her primary class students call a bear Mohamed.¹²¹ Although the teacher might know that Mohamed is the Muslim Prophet, she is reasonably unexpected to know that Mohamed, in Sudan and probably in most Islamic countries, is a sacred name after which animals should not be named.

¹¹⁴ *Id.*, at 102-103.

¹¹⁵ *Id.*, at 104.

¹¹⁶ A Vague and Overbroad Theory, *supra* note 100, at 671.

¹¹⁷ *Id.*

¹¹⁸ *Id.*, at 673.

¹¹⁹ Limits of Freedom and Faith, *supra* note 106.

¹²⁰ *Id.*, at 674.

¹²¹ *Id.*

The impact of globalization on cultures is likely to affect blasphemy. Whether the mere interaction amongst cultures and religions can help people around the globe better understand and respect each other leads to more disharmony and blasphemy is an issue that needs to be considered.

IV. CULTURE AND HUMAN RIGHTS LAW: THE QUESTION OF BLASPHEMY

A. Blasphemy in Modern Western and Islamic Cultures

Cultures are dynamic and responsive to the global surrounding. Globalization has widened interaction amongst cultures. The fall of the Soviet Union in the early 1990s brought to an end the long standing ideological conflict between capitalism and communism. One of its outcomes was globalization, in which the whole world was seen as a small village. In this context, common values would be shaped and differences between lessened. There were however opposing intellectual views asserting the impossibility of a common culture. Samuel Huntington's notion of clash of civilizations is one such point of view.¹²²

The political context of the Third Millennium has in fact supported the anti-globalization thesis. The September 11th (9/11) attacks on the US in 2001 shed light on the extreme differences amongst cultures and religions. Islam was directly associated with 9/11 attacks in relationship between the terrorists and Al-Qaeda, an Islamic terrorist organization. The connection between Islam, as a religion, and terrorism and violence is a common association by many in the Western world.¹²³ Conversely cultural and religious differences have resulted in stronger nationalist feelings in some Western states home to major migrant communities including France, Belgium, and Germany.¹²⁴ The growing Muslim communities have led to tensions with the national populations in the Netherlands, Sweden and Denmark.¹²⁵ Limiting migration is seen as one way containing such tensions.

¹²² Samuel Huntington's notion of the inherent differences between both the Western and Islamic worlds aimed at highlighting how uneasy it would be for a cultural synthesis to come out via globalization. Detailed information can be found in Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* 93-96 (New York : Simon & Schuster) (1996).

¹²³ Maxim Grinberg, *Defamation of Religions v. Freedom of Expression: Finding the Balance in a Democratic Society*, 18 Sri Lanka J. Int'l L. 70 (2006) (hereinafter *Defamation vs. Expression*). According to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, "negative images of Muslims are sixteen times more prevalent than positive images, and approximately one in four Americans believe that the Muslim religion teaches violence and hatred." Human Rights Violations, *supra* note 101, at 364.

¹²⁴ Religious Freedom, *supra* note 4, at 586. There have been, for instance, a lot of tensions between the national and Muslim communities in countries such as Netherlands, Sweeden and Denmark due to enlarging.

¹²⁵ *Id.*, at 586.

At the same time, the powerful sense of nationalism has paved the way for pro-racism parties to come to power in some of these countries.¹²⁶ Several countries have recently passed "firm anti-proselytism laws, imposed cult registration requirements, tightened visa controls, and instituted various other discriminatory restrictions on new or newly-arrived religion."¹²⁷ Not only has migration been restricted based on threats presumed, but also for its racial and religious implications. One racist statement was made by Nobel Laureate in Medicine, James Watson: "persons of African descent are intellectually inferior, reviving historical stereotypes at the basis of anti-Black racism."¹²⁸ Further, religious oriented views are exemplified by the association of Islam and violence with facism, the belief in Judaism's close relationship to domination and power and the belonging of Christianity to Western supremacy.¹²⁹ Religion remains one of the critical issues within a multi-cultural environment.

Modernity has not created a world that is free from religion and religious differences. Religion continues to be one of the most influential elements in human life seen in the huge number of believers and also via the magnitude of its public influence.¹³⁰ "Orthodox, Hindu, Jewish, and indigenous groups around the world tie religious identity not to liberty of conscience and voluntary choice, but to birth and caste, blood and soil, language and ethnicity. This conflation of religion with race, ethnicity, nationality, and other markers of identity generally taken to be given rather than chosen, while common to these religions and cultures, has, as we shall see, become problematic."¹³¹ In addition to being looked upon as a belief system, religion is equated, by the above mentioned groups, with innate qualities. This line of thinking makes the right to have a personal choice with regards to religion very limited. In clear contrast, religion is viewed in Western secular countries as a personal and private matter.¹³² This is attributed to modernity in the Western world that recognizes religious pluralism and where one religion is not supreme over others.¹³³ Religious

¹²⁶ Human Rights Council, U.N. Doc A/HRC/9/12, at 8 (2008) (hereinafter *Doudou Diène*).

¹²⁷ Religious Freedom, *supra* note 4, at 587.

¹²⁸ Doudou Diène, *supra* note 126, at 6.

¹²⁹ *Id.*, at 6 & 9.

¹³⁰ Expressions of Religiosity, *supra* note 10, at 112.

¹³¹ Religious Freedom, *supra* note 4, at 597.

¹³² Expressions of Religiosity, *supra* note 10, at 111.

¹³³ *Id.*

conduct however remains the main obstacle to a pluralistic framework.¹³⁴ Religious conduct carries with it the risk of being blasphemed.

Throughout history, blasphemy has served as a means to gauge how religion is viewed and the degree to which it is used to control people.¹³⁵ Despite the secularization of blasphemy in the West, migrant communities' view of blasphemy highlights how interaction amongst cultures can bring classic views into life.¹³⁶ A statement that is not seen blasphemous by a certain religious sect of the national community can be found so by the same religious migrant sect. Differences of this sort might have cultural rather than religious grounds. Cultural differences also can alternate from one time to another. The present of the Islamic culture can be the past of the European culture.¹³⁷ Religion in the majority of Western states is a mere private issue. In many Islamic states, religion is still part of the public sphere. It is how blasphemy represents one clear threat by Islamic fundamentalism to the Western culture.¹³⁸ Revitalizing blasphemy can be viewed, from a Western perspective, as neglecting ages of development and modernity. Fundamental freedoms that Western societies are founded upon can be shaken by the revival of blasphemy.¹³⁹ Blasphemy legislation would function, in such a globalized context, as a protector against cultural differences instead of the classic religious orientation.¹⁴⁰ Thus, blasphemy can still be used to "defend religion and the legacies of its past."¹⁴¹

B. Blasphemy across Borders

Closer interaction amongst cultures has increased the possibility of blasphemy. The development of mass media communications in the second half of the 20th century have also contributed to the internationalization of blasphemy. One of the classic examples is the Salman Rushdie affair. The *Satanic Verses*, a novel by Salman Rushdie written in late 1980s, was regarded extremely blasphemous by Muslim's

¹³⁴ Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality toward Religion*, 39 DePaul L. Rev. 997 (1989-1990) (hereinafter *Neutrality toward Religion*).

¹³⁵ Blasphemy in Christian World, *supra* note 19.

¹³⁶ Blasphemy in Christian World, *supra* note 19, at 104.

¹³⁷ Blasphemy and Heresy, *supra* note 16, at 2.

¹³⁸ Verbal Offense, *supra* note 1.

¹³⁹ Blasphemy and Heresy, *supra* note 16.

¹⁴⁰ *Id.*, at 13.

¹⁴¹ *Id.*, at 244.

eyes.¹⁴² Protests erupted following its publication¹⁴³ and the Iranian Supreme Muslim Scholar Ayatollah Khomeini called for the death of Salman Rushdie.¹⁴⁴

Around a decade and half later, a more blasphemous event occurred in 2005. Twelve cartoons that depicted Prophet Mohammed appeared in the Jyllands-Posten, a Danish newspaper.¹⁴⁵ In spite of being viewed by Muslims around the world as offending their religious sensibilities, the one cartoon that portrayed Prophet Mohamed's turban in the shape of a bomb, was seen as blasphemous.¹⁴⁶ When the cartoons were first published they did not generate much controversy in comparison to months later when they were republished in several newspapers around Europe.¹⁴⁷ The controversy would probably not have been as heated without the re-appearance of the cartoons in other European newspapers in languages widely read by Muslims. Protests were set off by Muslims in reaction to the cartoons¹⁴⁸ and several Danish embassies throughout the Muslim world were attacked by outraged Muslims.¹⁴⁹ The fact that 100 people died during the protests, including Muslims who were crushed by protestors, sheds the light on how violent the protests were.¹⁵⁰ Similar over reacting violent protests by Muslims could possibly add to deepening hatred against Islam.¹⁵¹ Violent protesting asserts the Western association of Islam and violence.

The strong popular response resulted in similar powerful political and economic implications for Denmark including "boycott of Danish goods, the removal of diplomats, and a rebuke from the E.U."¹⁵² The cartoons' controversy was of significance in the Islamic world to the extent that Osama Bin Laden, Chief of Al-

¹⁴² Human Rights Violations, *supra* note 101, at 364.

¹⁴³ *Id.*

¹⁴⁴ 1989: Ayatollah sentences author to death, December 29, 2008, available at http://news.bbc.co.uk/onthisday/hi/dates/stories/february/14/newsid_2541000/2541149.stm

¹⁴⁵ Peter G Danchin, *Who is the Human in Human Rights - The Claims of Culture and Religion*, 24 Md. J. Int'l L. 101 (2009) (hereinafter *Culture and Religion*).

¹⁴⁶ Prophets, *supra* note 87, at 21.

¹⁴⁷ *Id.*, at 26. It seems that Danish newspapers, being in Danish which is an uncommon language, were not widely read by Muslims.

¹⁴⁸ A Vague and Overbroad Theory, *supra* note 100, at 639-640.

¹⁴⁹ Jeremy Rabkin, *Islam and Free Speech*, American Spectator, March 2009, available at <http://vlex.com/vid/islam-and-free-speech-66318645> (hereinafter *Islam and Free Speech*).

¹⁵⁰ Prophets, *supra* note 87, at 23.

¹⁵¹ L. Bennett Graham, *Defamation of Religions: the End of Pluralism?*, 23 Emory Int'l L. Rev. 74 (2009) (hereinafter *End of Pluralism*).

¹⁵² Prophets, *supra* note 87, at 27.

Qaeda militant organization, labeled it as "a rallying cry for Muslim extremists."¹⁵³ Although, several moderate Muslims would disagree with what Bin Laden said. It is indicative how Muslims are still very sensitive towards religion in general and blasphemy in particular. The issue was of such importance to the European Union (EU) that it published a report titled "*Muslims in the European Union: Discrimination and Islamophobia*" highlighting "the pivotal importance of intercultural respect" and acknowledging that "freedom of expression is part of the principles and values that the EU was founded upon" but also affirmed "certain limits...to protect other fundamental rights."¹⁵⁴ Despite regional concerns, it was decided by the Danish public prosecutor that publishing the cartoons was not criminal in accordance with Danish legislation as the issue outlined in the cartoons is of public interest.¹⁵⁵ This reflects how different cultures and legislation can determine whether an issue is blasphemous.

One of Pope Benedict XVI's statements erupted a huge controversy as seen blasphemous by Muslims. The Pope actually started one of his speeches in 2006 by:

recounting a conversation on the truths of Christianity and Islam that took place between a 14th-century Byzantine Christian emperor, Manuel II Paleologus, and a Persian scholar. The emperor comes to speak about the issue of jihad, holy war, the Pope said. He said, I quote, Show me just what Muhammad brought that was new, and there you will find things only evil and inhuman, such as his command to spread by the sword the faith he preached, the Pope said.¹⁵⁶

Muslims around the world were upset with the Pope's speech and asked him to apologize. This represented the first serious crisis faced by the Pope.¹⁵⁷ Embodying the popular unhappiness amongst Muslims concerning the Pope's speech, the Organization of Islamic Conference (OIC) stated that it "regrets the quotations cited

¹⁵³ *Id.*

¹⁵⁴ Islam and Free Speech, *supra* note 148, at 4.

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¹⁵⁶ Ian Fisher, Some Muslim Leaders Want Pope to Apologize, N.Y. Times, September 16, 2006, available at http://www.nytimes.com/2006/09/16/world/europe/16pope.html?_r=1&fta=y (hereinafter *Pope to Apologize*).

¹⁵⁷ *Id.* The Pope's speech came after his accusation in 2005, a year before, "Muslim leaders in Germany of failing to steer their youth from what he described as the darkness of a new barbarism." *Id.*

by the pope on the Life of the Honorable Prophet Mohammed, and what he referred to as 'spreading' Islam 'by the sword.'¹⁵⁸

The formal position in some Islamic countries was of a higher pitch. The Palestinian Prime Minister in Gaza, Ismail Haneya, considered the Pope's speech as "not true and defamed the essence of this holy religion and it defamed the history of the Islam."¹⁵⁹ Defamation mentioned here signifies how blasphemy has transformed from its traditional domestic form into a more internationalized one under the banner of defamation of religion. On a similar note, the Muslim Brotherhood, one of the prominent Islamic groups, took a stronger stand than that of the OIC. According to the Chairman of the Muslim Brotherhood, Mohamed Mahdi Akef, "the pope's statements come to add fuel to fire and trigger anger within the Muslim world and show that the West with its politicians and clerics are hostile to Islam."¹⁶⁰ As a result of both formal and informal responses coming from Muslims, the Pope's Chief Spokesperson noted that hurting the feelings of Muslims was not the intent of the speech.¹⁶¹ This position was repeatedly stated as an indirect apology to Muslims and to calm them down. For instance, Walter Kasper, a high ranking German cardinal, clarified that the Pope did not want, through the speech, to hold an anti-Islam position.¹⁶² Another debate, but a minor one, included the production of movie titled "Fitna" in 2008 in which verses from the Quran were portrayed in conjunction with terrorist attacks.¹⁶³

Although the major focus of blasphemy debates have taken place in the Islamic parts of the world, blasphemy remains of relevance to some Christians in Western countries. A well known instance was the anger of Western Christians over the *Opera* by Jerry Springer and their desire to be protected from similar religious offenses.¹⁶⁴ In addition to a high degree of profanity, the *Opera* was regarded as contemptible to Judeo-Christian beliefs.¹⁶⁵ This anger was viewed by David Nash as a revival of the classic "conception of damage to the community through damage to the

¹⁵⁸ *Pope's Islam comments condemned*, CNN, September 15, 2006, available at <http://www.cnn.com/2006/WORLD/europe/09/15/pope.islam/index.html> (hereinafter *Pope's Islam comments*).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Pope to Apologize, *supra* note 156.

¹⁶² *Id.*

¹⁶³ Doudou Diène, *supra* note 126, at 11.

¹⁶⁴ Blasphemy in Christian World, *supra* note 19.

¹⁶⁵ *Id.*

honor of God."¹⁶⁶ Controversy became stronger with *Submission*, a Dutch movie, by Theo Van Gogh.¹⁶⁷

Australia has not been immune to blasphemy controversies. The Supreme Court of Victoria in the *Piss Christ* case did not find Andres Serrano, an artist, liable for a painting, on a petition that was filled in by Catholic Archdiocese of Melbourne.¹⁶⁸ In its reasoning, the Court found “no evidence of any unrest of any kind following or likely to follow the showing of the photograph in question.”¹⁶⁹ According to the Court, the lack of unrest meant that the painting, from a lay Christian person's point of view, was not blasphemous. The fact that blasphemy is still litigated in Western countries simply means that it is not dead in modern Western culture.¹⁷⁰ The huge number of laws and constitutional articles on religious related rights, counting more than 200, passed in less than forty years signifies how religion is principal in human life.¹⁷¹

C. Is Religion Protected under Human Rights Law?

The recurrence of blasphemy on the international stage makes it important to examine whether religion is accorded particular protection under international human rights law. Although blasphemy lacks explicit appearance in human rights conventions, it intersects with other rights such as freedom of religion and also contradicts with freedom of expression. Blasphemy does not fit into the traditional individual-based human rights regime.¹⁷² Blasphemy is mainly concerned with the religion itself whilst freedom of religion focuses more on the freedom of individuals to exercise their religion. According to article 18 of the Universal Declaration of

¹⁶⁶ *Id.*, at 247.

¹⁶⁷ End of Pluralism, *supra* note 151, at 70.

¹⁶⁸ Bills of Rights, *supra* note 20, at 8.

¹⁶⁹ *Id.*

¹⁷⁰ Blasphemy and Heresy, *supra* note 16, at 3.

¹⁷¹ Religious Freedom, *supra* note 4, at 585.

¹⁷² RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED FORMS OF INTOLERANCE, FOLLOW-UP AND IMPLEMENTATION OF THE DURBAN DECLARATION AND PROGRAMME OF ACTION, UN Doc. A/HRC/10/NGO/69 (2009) (hereinafter *Freedom House and Becket Fund*). Although the traditional view of human rights is individually based, some of the core human rights are group based such as self determination and rights of ethnic, religious and linguistic minorities. Peter G Danchin, *Who is the Human in Human Rights - The Claims of Culture and Religion*, 24 Md. J. Int'l L. 111 (2009) (hereinafter *Culture and Religion*). Still, collective human rights are concerned with rights of groups of individuals rather than rights of entities which is the case with defamation of religion. In, Bills of Rights, *supra* note 20, at 14, it is reinforced that human rights law should always concern itself with individuals rather than ideas.

Human Rights, "everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."¹⁷³ The right to change religion is not enforceable if an individual is barred from being given the opportunity to choose which religion to believe in upon having access to competing religious views.¹⁷⁴

The right to freedom of religion is further manifested in the International Covenant on Civil and Political Rights (ICCPR).¹⁷⁵ It is stated under article 18 of the ICCPR that:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.¹⁷⁶

Freedom of religion as codified under this article focuses solely on individuals rather than ideas. However, a limitation is added to freedom of religion under article 18(3) of the ICCPR stating that "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."¹⁷⁷ Despite limiting freedom of religion to an extent, protection of religion is not explicitly noted as one of the legitimate reasons for such limitation. It is however made clear by the Human Rights Committee, a UN monitoring body with invested authority to interpret the ICCPR, that:

¹⁷³ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) (hereinafter *UDHR*).

¹⁷⁴ Neil J. Foster, *Defamation and Vilification: Rights to Reputation, Free Speech and Freedom of Religion at Common Law and under Human Rights laws 6* (Cultural and Religious Freedom Under a Bill of Rights Conference 2009), available at: http://works.bepress.com/neil_foster/18 (hereinafter *Defamation and Vilification*).

¹⁷⁵ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 (hereinafter *ICCPR*).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

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.¹⁷⁸

In other words, claiming blasphemy as one of the grounds under which freedom of religion can be restricted is not legitimate.

Reference to religion is also found in other human rights conventions. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) requires states to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof."¹⁷⁹ This article prohibits discriminatory practices by states with regards to the exercise of freedom of religion. Therefore, an idea, whether blasphemous or not, can generically fall under this article only if it is intended to incite hatred against members of another group. This explains why religious based discrimination without a hatred component does not fit the context of the ICERD.¹⁸⁰ This is emphasized by the Committee on the Elimination of Racial Discrimination, responsible for interpreting the ICERD recognizing the intersectionality between racial and religious elements as being significant in adjudicating discrimination cases.¹⁸¹ In order to codify developments coming from non-state actors or individuals, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief added that "No one

¹⁷⁸ Bills of Rights, *supra* note 20, at 16.

¹⁷⁹ International Convention on the Elimination of All Forms of Racial Discrimination, article 4(a), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969 (hereinafter *ICERD*).

¹⁸⁰ Human Rights Council, UN Doc. A/HRC/9/25 (2008) at 8 (hereinafter *Human Rights Commissioner Study*).

¹⁸¹ *Id.* Connections between race and religion were also part of the debate that came up in the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance that was held in Durban, South Africa in 2001. World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Programme of Action, Agenda item 9, adopted on September 8, 2001 in Durban South Africa, U.N. Doc. A/CONF.189/5 (2001).

shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief."¹⁸²

Although international human rights instruments are general with no specific reference to blasphemy, the 1981 Universal Islamic Declaration of Human Rights (Universal Islamic Declaration) is more specific. According to article XII (e) Right to Freedom of Belief, Thought and Speech, "No one shall hold in contempt or ridicule the religious beliefs of others or incite public hostility against them; respect for the religious feelings of others is obligatory on all Muslims."¹⁸³ Building upon the hatred speech, this article outlines a far wider prohibition on scorning religious beliefs with no clarification on how and when religious beliefs are to be ridiculed. In 1990, the Cairo Declaration on Human Rights elaborated on the Universal Islamic Declaration but surprisingly the prohibition on ridiculing religious beliefs was not there.¹⁸⁴ The Cairo Declaration mostly followed the ICERD model of banning discrimination based on "race, colour, language, sex, religious belief, political affiliation, [and] social status."¹⁸⁵ In the context of a growing international focus on controversial issues including proselytism, conversion and blasphemy,¹⁸⁶ some countries have sought the internationalizing of blasphemy to protect religions under the banner of defamation of religions.

¹⁸² Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, article 2(1), G.A. res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/684 (1981) (hereinafter *Declaration of Religion and Belief*).

¹⁸³ Universal Islamic Declaration of Human Rights, adopted by the *Islamic Council of Europe* on 19 September 1981/21 *Dhul Qaidah 1401* (hereinafter *Universal Islamic Declaration*). Similar freedom of religion clauses also appear under regional human rights instruments such as article 8 of the African Charter on Human and Peoples' Rights, article 9 of the European Convention of Human Rights and article 12 of the American Convention on Human Rights.

¹⁸⁴ Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993) (hereinafter *Cairo Declaration*).

¹⁸⁵ *Id.*

¹⁸⁶ Religious Freedom, *supra* note 4, at 595.

V. DEFAMATION OF RELIGIONS IN THE UN

A. Defamation: A Newly Introduced Term Shaping an Old Concept

Defamation of religion, whilst new as a term, corresponds to the long lasting concept of blasphemy. Defamation in itself is a well known term but its combination with religion was revolutionary. The first appearance of defamation in Common Law goes back to 1222.¹⁸⁷ It was regarded as being a "spiritual offence being concerned mostly with lies."¹⁸⁸ Oral defamation is termed "slander" while written defamation is coined "libel."¹⁸⁹ In order for slander to take place, there has to be incidence of damage and specific meaning.¹⁹⁰ Therefore, slander cannot be claimed unless it results some sort of damage. Disgrace and dishonor are two other defining elements of slander.¹⁹¹ The seriousness of slander is manifested in its punishment in the 10th century: the cutting of the tongue.¹⁹²

On the other hand, libel is defined as "any writing, picture, or sign tending without lawful excuse to injure the character of an individual."¹⁹³ The varieties of libel aim at limiting the space that can be used to damage one's character. Libel can as well be framed by an intent "to blacken the memory of the one who is dead, or to impeach the honesty, integrity, virtue or reputation, or to publish the natural defects of one who is living and thereby expose him to the public hatred, contempt or ridicule."¹⁹⁴ Libel affects both the living and the dead. In the context of defamation, damaging an individual's character means "harming the reputation of an individual if a false statement is communicated to a third person/s."¹⁹⁵ In other words, accurate information cannot be defamatory even if it harms an individual's reputation.

¹⁸⁷ David Rolph, *Reputation, Celebrity and Defamation Law*, 39 (Ashgate: Aldershot and Burlington 2008) (hereinafter *Reputation*). For an overview on the development of defamation under Common Law, please refer to 39-40.

¹⁸⁸ *Id.*, at 41.

¹⁸⁹ GEORGE WINGROVE COOKE, *A treatise on the law of defamation: with forms of pleadings*, 1 (Philadelphia : T. & J.W Johnson, 1846) (hereinafter *Treatise on Defamation*).

¹⁹⁰ *Id.*

¹⁹¹ Van Vechten Veeder, *The History and Theory of the Law of Defamation. I*, 3 COLUMBIA LAW REV, 549, 546-573, 1903) (hereinafter *History and Theory I*).

¹⁹² *Id.*

¹⁹³ *Treatise on Defamation*, *supra* note 189, at 2.

¹⁹⁴ Van Vechten Veeder, *The History and Theory of the Law of Defamation. II*, 4 COLUMBIA LAW REV, 41, 33-56, 1904 (hereinafter *History and Theory II*).

¹⁹⁵ Bills of Rights, *supra* note 20, at 14. A similar definition with a similar focus on reputation can be found in Albert E. Harum, *Remolding the Common Law of Defamation*, 49 ABAJ. 149, 1963 (hereinafter *Remolding*).

In addition to damaging a reputation, libel can result in "exposing an individual to hatred, contempt or ridicule."¹⁹⁶ The significance of reputation to defamation requires a thorough analysis of what the term means.

Applicability of defamation law would not be possible without a clear understanding of reputation.¹⁹⁷ Defamation law aims at protecting a reputation rather than character.¹⁹⁸ Reputation is concerned with what the individual is thought of by others, while character is what the individual is in reality.¹⁹⁹ However close in meaning, reputation and character can be sometimes contradictory in the event an individual has good character with a bad reputation or vice versa.²⁰⁰ How one's character is seen by others constitutes reputation. This explains how reputation is mostly based upon "recognition by others"²⁰¹ and comes out of social interaction between individuals.²⁰² Reputation is reasonably acquired via communication amongst individuals, without which it would be difficult for someone to have a reputation. On the one hand, reputation can be considered as an outcome of one's social effort and thus a personal possession.²⁰³ For instance, reputation for an individual who is doing his/her best to interact with others in a positive manner might feel like it is something that he owns. On the other hand, it is argued that reputation falls more into the public rather than the private space.²⁰⁴ This view considers reputation as an outcome of what people already think and therefore it would not be reasonable to claim title to people's thoughts. Whether private or public, reputation is crucial to humans.

¹⁹⁶ Robert C Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 Cal. L. Rev., 717, 691-742, 1986 (hereinafter *Social Foundations*). A similar definition was developed by the Court in *Random House Australia Pty Ltd v Abbott* [1999] as "a publication, without justification or lawful excuse, exposing a person to hatred, contempt or ridicule, calculated to injure that person's reputation, is a libel." Defamation and Vilification, *supra* note 174, at 10. In *Macgregor v. Thwaites*, the Court has also quoted a similar definition. Treatise on Defamation, *supra* note 189, at 2.

¹⁹⁷ Reputation, *supra* note 187, at 3.

¹⁹⁸ History and Theory II, *supra* note 194, at 33.

¹⁹⁹ *Id.* In *Plato Films Ltd v. Speidel*, the Court had similar understanding to reputation. Reputation, *supra* note 187, at 5.

²⁰⁰ *Id.*

²⁰¹ Reputation, *supra* note 187, at 3.

²⁰² *Social Foundations*, *supra* note 196, at 694-695.

²⁰³ History and Theory II, *supra* note 194, at 33.

²⁰⁴ Reputation, *supra* note 187, at 23.

According to Sir Edward Coke, reputation is even more valuable than life itself.²⁰⁵ This is relevant in a society where a bad reputation could lead to exclusion or negligence. Therefore, the right to reputation, as argued, should be regarded as absolute as the right to security both of which cannot be restricted under whatever circumstances.²⁰⁶ The rationale behind this position is that reputation is interconnected with dignity, the essence of human rights.²⁰⁷ The UDHR, in its preamble, recognizes human dignity as the "foundation of freedom, justice and peace in the world."²⁰⁸ The self worthiness of an individual can thus be attributed to one's reputation and how the society looks upon him or her.²⁰⁹ The importance of reputation has thus made it inevitable that legislations be developed to govern defamation of reputation. This has become even more timely due to the preponderance of multi-media and internet making reputation more vulnerable and restoration of rights more difficult.²¹⁰

Defamation law has always been framed contextually and not deliberately.²¹¹ This has in fact resulted in defamation law becoming one of the most controversial and critiqued branches of law for "its doubts and open difficulties, its meaningless and grotesque anomalies."²¹² The intangibility of reputation, being a thought, assuredly complicates the outlining of defamation. However crucial defamation is, it has always been dealt with as a statute and not as a crime.²¹³ The lesser punishment for defamation being a statute originates from complications in adjudication of defamation. This is also supported by the very low numbers of individuals convicted under defamation law.²¹⁴ Indicative of this is how countries, mostly in the Western

²⁰⁵ *Id.*, at 6. Sir Frederick Pollock takes it further saying that reputation can be of more importance than life itself. *Id.*, at 6. This seems a metaphor to manifest how important reputation is. It is further asserted by the Court in *Hill v. Church of Scientology* that it cannot be argued how reputation is important to the majority of people.

²⁰⁶ History and Theory II, *supra* note 194, at 34.

²⁰⁷ Reputation, *supra* note 187, at xxi.

²⁰⁸ UDHR, *supra* note 173. Article 1 of the UDHR also asserts that "All human beings are born free and equal in dignity and rights." Human dignity is defined broadly as "the notion that there is something inherent in the individual human being that mandates, as a matter of principle that certain things should be done for her and certain things should not." Prophets, *supra* note 87, at 21.

²⁰⁹ Reputation, *supra* note 187, at 30.

²¹⁰ *Id.*, at xxi.

²¹¹ History and Theory I, *supra* note 191, at 546.

²¹² *Id.*

²¹³ A Vague and Overbroad Theory, *supra* note 100, at 644.

²¹⁴ *Id.*

hemisphere, have worked at building "an atmosphere of civility and respect"²¹⁵ and are less inclined to restrict the right to freedom of expression. For instance, liability for defamation in the US has a high threshold requiring "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting to at least negligence on the part of the publisher; and (d) either actionability on the statement irrespective of special harm or the existence of special harm caused by the publication."²¹⁶ In addition to being public, defamatory publication requires carelessness on the part of the defamer and harm caused by publication. The Court in *Milkovich v. Lorain Journal Co.* found that an individual's opinion meets liability criteria if there is prior information on the defamer's part on the falseness of the opinion.²¹⁷ Whenever it is unclear that a publication is defamatory, proof of damages becomes paramount.²¹⁸

The fact that defamation is concerned with individuals, and possibly groups in some cases, but not ideas or systems of beliefs has made the work of developing a definition for defamation of religions thorny.²¹⁹ As Christianity is part of English Law, communications can be found defamatory if ridiculing Christianity.²²⁰ This is rather the exception than the rule as in several countries religion does not form an integral part of the law. It is already challenging to determine defamation of individuals, and extending defamation to ideas or beliefs is even more challenging. This highlights why a definition of defamation of religions after more than ten years on the international stage has still not been achieved.²²¹

B. Combating Defamation of Religions Resolutions

1. UN Commission on Human Rights

Defamation of religions, as a term, was coined through resolutions at the CHR, which was superseded by the HRC. This is recognized by Susan Bunn Livingstone, a former U.S. State Department expert on human rights, as a movement

²¹⁵ *Id.*, at 646.

²¹⁶ *Id.*, at 644-645.

²¹⁷ Bills of Rights, *supra* note 20, at 14. Increasing the space for freedom of expression and limiting immunity for public officials, they are exempted from claiming damages unless "a communication was made with 'actual malice'-that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Social Foundations, *supra* note 196, at 721-722.

²¹⁸ History and Theory II, *supra* note 194, at 34.

²¹⁹ Bills of Rights, *supra* note 20, at 14.

²²⁰ Treatise on Defamation, *supra* note 189, at 69.

²²¹ Bills of Rights, *supra* note 20, at 15.

towards internationalization of blasphemy.²²² The legal internationalization of blasphemy reflects primarily the clashes between the Western and Islamic cultures. Due to the lack of concise meaning of the term defamation of religions, "resolutions had provided only an amorphous list of words with very little decisive meaning."²²³ Although focused on Islam at first, the resolutions were expanded to include religion in general.

On behalf of the OIC, Pakistan in 1999 proposed a draft of the first resolution under the title "Defamation of Islam."²²⁴ The Islamic specificity of the draft was opposed by Western governments who called for a more comprehensive approach.²²⁵ Pakistan however was of the view that removal of Islam specifically would undermine the overall objective and purpose of the resolution in highlighting the "defamatory attacks against Islam."²²⁶ The resolution was finally passed under the name of "Defamation of Religion" singling out Islam.²²⁷ The resolution, in its introduction, refers to the UN Charter's position against discrimination based on race, sex, language or religion with regards to enjoyment of human rights and the negative effects of discrimination based on religion or belief on human dignity.²²⁸ In guiding states on how to combat defamation of religion, the resolution recommends that states "within their national legal framework, in conformity with international human rights instruments to take all appropriate measures to combat hatred, discrimination, intolerance and acts of violence, intimidation and coercion motivated by religious intolerance."²²⁹ While seen as a problematic statement for calling upon states to restrict freedom of speech,²³⁰ the requirement that limitations should comply with human rights law is a safeguard against abuse. In the resolution, defamation of religion was also viewed to exist within a context of discrimination and hatred. Whether and how defamation interacts with these elements is an issue that was not

²²² Luiza Savage, *Stifling Free Speech Globally*, Maclean's, July 23, 2008, available at http://www.macleans.ca/world/global/article.jsp?content=20080723_27859_27859 (hereinafter *Stifling Free Speech*).

²²³ A Vague and Overbroad Theory, *supra* note 100, at 655.

²²⁴ End of Pluralism, *supra* note 151, at 70.

²²⁵ Bills of Rights, *supra* note 20, at 13.

²²⁶ *Id.*

²²⁷ *Stifling Free Speech*, *supra* note 222, at 1.

²²⁸ Commission on Human Rights, U.N. Doc 1999/82, at 2 (1999) (hereinafter *1999/82*).

²²⁹ *1999/82*, *supra* note 228, at 2.

²³⁰ A Vague and Overbroad Theory, *supra* note 100, at 654.

touched on by the resolution. Reducing the inclusion of Islamic specificity, the resolution mentioned the term religion numerous times whilst mentioning Islam only two times throughout the resolution.²³¹ This was not appealing to some countries.²³² For instance, India was not happy with singling out Islam as, from their point of view, "defamation and stereotyping were not exclusive to any one religion."²³³ Germany and Japan held similar line of thinking in viewing the resolution as too specific and in need of being more general.²³⁴ In order to limit the legality of the resolution, Germany said that on behalf of the EU "they did not attach any legal meaning to the term 'defamation' as used in the title."²³⁵

The internationalization efforts of defamation continued throughout the first decade of the Third Millennium. In 2000, a similar "Defamation of Religions" resolution was passed at the CHR without a vote²³⁶ and the same concerns that were raised by countries about the previous resolution persisted.²³⁷

The 2001 resolution appeared under the name "Combating Defamation of Religions as a Means to Promote Human Rights, Social Harmony and Religious and Cultural Diversity."²³⁸ In contrast to the two previous resolutions that referred only to defamation of religions in their titles, this resolution's title promotes the idea that combating defamation of religions is not an end in itself. Combating defamation of religions is a means for achieving peaceful coexistence. This was done by limiting the explicit mentioning of Islam to one reference only²³⁹ and by increasing emphasis on

²³¹ A Vague and Overbroad Theory, *supra* note 100, at 653-654. The two references to Islam under the resolution were expressions of "deep concern that Islam is frequently and wrongly associated with human rights violations and with terrorism" and alarming how "print, audio-visual or electronic media or any other means is used to incite acts of violence, xenophobia or related intolerance and discrimination towards Islam and any other religion." *Id.*, at 1.

²³² For the complete records of the discussions by delegates at the Commission on Human Rights, refer to Commission on Human Rights, U.N. Doc. E/CN.4/1999/SR.62 (1999) (hereinafter U.N. Doc. E/CN.4/1999/SR.62).

²³³ Press Release, Commission on Human Rights, Commission on Human Rights Establishes Intersessional Working Group to Review and Enhance Its Mechanisms, U.N. Doc. HR/CN/99/64 (Apr. 29, 1999) in Human Rights Violations, *supra* note 101, at 351.

²³⁴ *Id.*

²³⁵ U.N. Doc. E/CN.4/1999/SR.62, *supra* note 232, at 3.

²³⁶ Commission on Human Rights, Defamation of Religions, U.N. Doc. E/CN.4/2000/167 (2000).

²³⁷ The records of the sessions in which the draft resolution was discussed can be found at Commission on Human Rights, U.N. Doc. E/CN.4/2000/SR.67 (2000).

²³⁸ Commission on Human Rights, Defamation of Religions, U.N. Doc E/CN.4/2001/167 (2001) (hereinafter *U.N. Doc E/CN.4/2001/167*).

²³⁹ *Id.*, at 48.

inclusion of all religions.²⁴⁰ At the same time, the resolution saw increasing reference to racism and xenophobia.²⁴¹ There is no clear reason why racism and xenophobia are highlighted in this resolution unless defamation of religions is seen as overlapping with racial discrimination. Not only, is this the first resolution to include explicitly the term "defamation of religions" in its text, it also regarded it as "among the causes of social disharmony and leads (ing) to violations of the human rights of their adherents."²⁴² This was the ground upon which a call for states to "provide adequate protection against all human rights violations resulting from defamation of religions" was made.²⁴³ The resolution was the first to be voted upon and to be adopted by majority vote, 28 in favor versus 15 against and 9 abstentions.²⁴⁴ The fact that supporters of the resolution are mostly developing countries; whilst opponents are mainly developed brings a cultural element to the equation. Cultural tensions can lead countries to protect their own cultures via international restriction on defamatory freedom of expression.

The 2002 CHR resolution's peculiarity is rooted in its being voted on post 9/11 events. Under the name of "Combating Defamation of Religions," the resolution reflected "negative projection of Islam, Muslim values and traditions by the media, as well as at the introduction and enforcement of laws that specifically discriminate against and target Muslims" that took place after 9/11.²⁴⁵ Compared to the earlier resolution that limited the explicit reference to Islam in order to generalize defamation of religions, the 2002 resolution was mostly concerned with Islam. The Islamic

²⁴⁰ A Vague and Overbroad Theory, *supra* note 100, at 655.

²⁴¹ The resolution at several positions noted racism and xenophobia including: " Considering the outcome of the four regional preparatory meetings for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, to be held in Durban, South Africa, in September 2001"; "Welcomes the resolve expressed in the United Nations Millennium Declaration to take measures to eliminate the increasing acts of racism and xenophobia in many societies and to promote greater harmony and tolerance in all societies, and looks forward to its effective implementation at all levels." U.N. Doc E/CN.4/2001/167, *supra* note 238, at 48.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ A Vague and Overbroad Theory, *supra* note 100, at 639. In favor countries included were: Algeria, Argentina, Brazil, Cameroon, China, Colombia, Costa Rica, Cuba, Ecuador, Indonesia, Kenya, Libyan Arab Jamahiriya, Madagascar, Malaysia, Mauritius, Mexico, Niger, Pakistan, Peru, Qatar, Russian Federation, Saudi Arabia, Senegal, Syrian Arab Republic, Thailand, Uruguay, Venezuela, Viet Nam. Against countries were: Belgium, Canada, Czech Republic, France, Germany, Italy, Japan, Latvia, Norway, Poland, Portugal, Romania, Spain, United Kingdom of Great Britain and Northern Ireland, United States of America. *Id.*

²⁴⁵ Commission on Human Rights, Combating Defamation of Religions, U.N. Doc. E/CN.4/2002/200, at 57 (2002 (hereinafter *U.N. Doc. E/CN.4/2002/200*)).

specificity surfaced once more as the 9/11 impact had a major effect on Muslims and Islam. According to the resolution, the defamation of religion campaign on Islam was strengthened after 9/11.²⁴⁶ This emphasis on Islam reflected in three references to Islam and seven references to Muslim.²⁴⁷ As 9/11 was as an example of cultural tension between the West and Islam, the resolution also highlighted how it is paramount to "promote tolerance, understanding among different cultures and mutual appreciation of cultural and religious values."²⁴⁸ Endorsement of tolerance would not be possible without the work of all states to combat discrimination and religious hatred. The resolution ended with a revolutionary request of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance "to examine the situation of Muslim and Arab peoples in various parts of the world with special reference to physical assaults and attacks against their places of worship, cultural centres, businesses and properties in the aftermath of the events of 11 September 2001."²⁴⁹ The resolution was finally passed with a majority of 30 votes to 15 with 8 abstentions.²⁵⁰ The intense focus on Islam was one of the main reasons why some countries voted against or abstained from voting on the resolution.²⁵¹

The 2003 resolution was similar to the 2002 one except for minor additions. Passed with the same name "Combating Defamation of Religions", the resolution's primary contribution was its recommendation to states to ensure non-discrimination by governmental employees.²⁵² The resolution encouraged:

all States to ensure that all public officials, including members of law enforcement bodies, the military, civil servants and educators, in the course of their official duties respect different religions and beliefs and do not discriminate on the grounds of religion or belief, and that necessary and appropriate education or training is provided.²⁵³

²⁴⁶ U.N. Doc. E/CN.4/2002/200, *supra* note 245, at 58.

²⁴⁷ A Vague and Overbroad Theory, *supra* note 100, at 656.

²⁴⁸ U.N. Doc. E/CN.4/2002/200, *supra* note 245, at 57.

²⁴⁹ *Id.*, at 59. The full report can be accessed through Commission on Human Rights, U.N. Doc.E/CN.4/2003/23 (2003).

²⁵⁰ *Id.*

²⁵¹ Speaking on behalf of the EU Mr. PEREZ-VILLANUEVA y TOVAR (Spain) noted that the resolution "did not stress the rights of individuals, irrespective of their religion or belief, and continued to give pre-eminence to one religion and to certain communities defined by their religion." Similar notes were also made by the Indian and Canadian delegates and were grounded as reasons for their abstention. Commission on Human Rights, U.N. Doc. E/CN.4/2002/SR.39, at 6-8 (2002) (hereinafter U.N. Doc. E/CN.4/2002/SR.39).

²⁵² Commission on Human Rights, Combating Defamation of Religions, U.N. Doc. E/CN.4/2003/135, at 36 (2003) (hereinafter U.N. Doc. E/CN.4/2003/135).

²⁵³ *Id.*

The resolution also included the second request to the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance to produce another report on the situation of Arabs and Muslims in the world.²⁵⁴ It was interesting that the resolution passed with a higher majority of 32 votes in comparison to 14 votes against and 7 abstentions.²⁵⁵ Discussing the resolution, the Pakistani delegate pointed out that explicit reference to Islam and Muslims in the text of the resolution "should not be construed as a demonstration of insensitivity to the sanctity of other religions. The defamation of religions and religiously-motivated violence by anyone, anywhere, was condemned."²⁵⁶ On the other hand, the US and EU delegates opposed the resolution for not focusing on all religions rather than on Islam.²⁵⁷

Similar to the 2003 resolution, the 2004 Combating Defamation of Religions resolution singled out Islam and Muslims which were mentioned three and five times respectively.²⁵⁸ In addition, two clauses on equal access to education were newly introduced in this resolution. Under these clauses, it is recommended that states:

ensure equal access to education for all in law and in practice and commit themselves to ensuring access to education, including access to free primary education for all children, both girls and boys, and access for adults to lifelong learning and education, based on respect for human rights, diversity and tolerance, without discrimination of any kind.²⁵⁹

Education in fact fits within the general framework of the resolution in fostering an environment of tolerance and peaceful coexistence. The results of voting for this resolution are worth noting here. Although the resolution passed by a majority of 29 votes, the majority was less by 3 votes if compared to the 2003 resolution.²⁶⁰ At the same time, votes against numbered 16, two votes more than those in 2003. The

²⁵⁴ *Id.* at 37.

²⁵⁵ *Id.* at 37.

²⁵⁶ Commission on Human Rights, U.N. Doc. E/CN.4/2003/SR.47, at 19 (2003) (hereinafter *U.N. Doc. E/CN.4/2003/SR.47*).

²⁵⁷ *Id.*, at 20.

²⁵⁸ Commission on Human Rights, Combating Defamation of Religions, U.N. Doc. E/CN.4/2004/127 (2004) (hereinafter *U.N. Doc. E/CN.4/2004/127*).

²⁵⁹ *Id.*, at 2.

²⁶⁰ *Id.*, at 4.

principle ground for opposing the resolution continued to be the traditional emphasis on Islam.²⁶¹ The US was also of the view that the resolution should include a call for amendments to remove religious hatred elements from certain educational systems and to sound the concern of state owned media involvement in inciting religious hatred.²⁶²

The 2005 resolution continued to hold a relatively high Islamic focus exemplified in five references to the word "Islam" and six references to the word "Muslim/s."²⁶³ The resolution goes further by highlighting the attacks that Islam and Muslims suffer from within human rights bodies²⁶⁴ and calls for fighting these defamatory attacks.²⁶⁵ One of the striking additions to this resolution was its recognition of how defamation of religions becomes an "aggravating factor that contributes to the denial of fundamental rights and freedoms of target groups, as well as their economic and social exclusion" in light of the war on terror, led by the US.²⁶⁶ Although the resolution does not correlate the war on terror with Islamic extremism, it was implicit that defamation of religions within such a context is defamation of Islam. This can be seen if we take into consideration that the war on terror was mainly against religious fundamentalism in Islamic countries, including Afghanistan and Iraq. On another note, the resolution was supported by a higher majority of 31 votes than that of 2004; the opposing votes remained constant. This was in fact the last Combating Defamation of Religion resolution at the CHR before it was replaced by the HRC.

2. UN Human Rights Council (HRC)

The first Combating Defamation of Religions resolution was passed under the umbrella of the HRC in March 2007. The resolution is characterized by fewer references to Islam and Muslim/s, three and two respectively.²⁶⁷ One of these references however expressed concern at the "laws or administrative measures that

²⁶¹ Commission on Human Rights, U.N. Doc. E/CN.4/2004/SR.45, at 19-20 (2004) (hereinafter *U.N. Doc. E/CN.4/2004/SR.45*). This was referred to by delegates of Ireland (on behalf of EU), US, Dominican Republic, Costa Rica, and Guatemala.

²⁶² *Id.*, at 20.

²⁶³ Commission on Human Rights, Combating Defamation of Religions, U.N. Doc. E/CN.4/2005/L.10/Add.6, at 4 (2005) (hereinafter *U.N. Doc. E/CN.4/2005/L.10/Add.6*).

²⁶⁴ *Id.*, at 2.

²⁶⁵ *Id.*, at 3.

²⁶⁶ *Id.*

²⁶⁷ Human Rights Council, Combating Defamation of Religions, U.N. Doc. A/HRC/4/123 (2007) (hereinafter *U.N. Doc. A/HRC/4/123*).

have been specifically designed to “control” and “monitor” Muslim and Arab minorities, thereby stigmatizing them further and legitimating the discrimination that they experience.”²⁶⁸ Although, these measures do not represent defamation of religions themselves, they were seen as making discrimination more likely. Discrimination was seen as one of the elements that contributes to defamation. Moreover, the mentioning of Muslims and Arabs reflects, in fact, how religion and race sometimes overlap. It was also the first time that a defamation of religion resolution touched on freedom of expression in relation to defamation of religion.²⁶⁹ In spite of it is not clear from the resolution's language how the relationship between freedom of expression and defamation of religion should be governed. Despite the fact that individual reputation and respect for religions were mentioned as restrictions on freedom of expression, it was not clarified how reputation and respect interact with defamation. The resolution did not identify to what degree defamation of religion would affect the reputation of adherents. At the same time, the issue whether disrespect of religion constitutes defamation of religion is one that was kept open ended. The results of the voting were astonishing. For the first time, the resolution was passed with a much less majority, 24 votes in favor, and a higher number of votes against, 14, than earlier resolutions.²⁷⁰

The lower number of majority votes in favor of the earlier resolution might be interpreted as a need for a more generalized resolution with less Islamic specificity. This however was not the case with the 2008 Combating of Defamation Resolution. The resolution in fact included five references to Islam and three to Muslim.²⁷¹ The resolution was further identified with Islam through a number of references to the OIC.²⁷² The resolution noted the “deliberate stereotyping of religions, their adherents and sacred persons.”²⁷³ However general, the reference to sacred persons was an indirect condemnation of the Danish cartoons that depicted the Prophet Mohamed.²⁷⁴

²⁶⁸ *Id.*, at 20.

²⁶⁹ *Id.*, at 21. The resolution “emphasizes 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 others, protection of national security or of public order, public health or morals and respect for religions and beliefs.”

²⁷⁰ *Id.*

²⁷¹ Human Rights Council, Combating Defamation of Religions, U.N. Doc. A/HRC/7/78, at 55 (2008) (hereinafter *U.N. Doc. A/HRC/7/78*).

²⁷² *Id.*

²⁷³ *Id.*, at 56.

²⁷⁴ Culture and Religion, *supra* note 145.

This added to the Islamic specificity of the resolution. Support to the resolution decreased further by having only 21 votes in favor and 10 votes against.²⁷⁵ The number of abstaining votes went up to 14 in comparison to 9 in the 2007 resolution.²⁷⁶

The 2009 Combating Defamation of Religions resolution carried with it only two references to Islam.²⁷⁷ The resolution guides states that terrorism cannot be used to defame religions as per the United Nations Global Counter-Terrorism Strategy.²⁷⁸ In addition, the resolution holds its stand that freedom of expression can be restricted under particular conditions. The resolution provides justification for the legality of constraining freedom of expression in accordance with General Comment No. 15 of the Committee on the Elimination of Racial Discrimination, in which the Committee stipulated that the "prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with freedom of opinion and expression, is equally applicable to the question of incitement to religious hatred."²⁷⁹ The attachment of incitement of religious hatred to defamation of religions throughout the resolution aims at proving how freedom of expression does not entail defaming religions. Along with defamation of religions, incitement to religious hatred was regarded as contributing factors to "social disharmony and violations of human rights."²⁸⁰ In addition, "acts of hatred, discrimination, intimidation and coercion" are outcomes of both defamation of religions and incitement to religious hatred.²⁸¹ The resolution also signified a campaign on "defamation of religion in particular and incitement to religious hatred in general."²⁸² Finally, the resolution recommends combating defamation of religions and incitement to religious hatred. The equation of both defamation of religions and incitement to religious hatred suggests a strong correlation between both elements. According to the resolution, defamation of religions opens the door to incitement of religious hatred. Although the supporting

²⁷⁵ U.N. Doc. A/HRC/7/78, *supra* note 271, at 58.

²⁷⁶ *Id.*

²⁷⁷ Human Rights Council, Combating Defamation of Religions, U.N. Doc. A/64/53 (2009) (hereinafter *U.N. Doc. A/64/53*).

²⁷⁸ *Id.*, at 77.

²⁷⁹ *Id.*

²⁸⁰ *Id.*, at 75.

²⁸¹ *Id.*, at 77.

²⁸² *Id.*, at 76.

votes increased to 21 votes, two more votes than those in 2008, this cannot be compared to the higher number in earlier years.²⁸³

The latest Combating Defamation of Religions resolution in 2010 was passed with two minimum references to Islam.²⁸⁴ Acknowledging that defamation is applicable to all religions rather than only Islam, anti-Semitism and Christianophobia were mentioned along with Islamophobia as instances of intolerance.²⁸⁵ The resolution however gave special regard to Islamophobic practices providing the "ban on the construction of minarets of mosques" as an example.²⁸⁶ Similar to the 2009 resolution, this resolution highlighted the relationship between defamation and incitement to religious hatred. Defamation of religions and incitement to religious hatred were allocated together in four spots in the resolution. Building upon that, the resolution noted the "report of the United Nations High Commissioner for Human Rights on the possible correlation between defamation of religions and the upsurge in incitement, intolerance and hatred in many parts of the world."²⁸⁷ Despite the lower level of Islamic specificity and the movement towards correlating defamation of religions and incitement to religious hatred, the resolution was passed with the smallest majority to date, 20 votes in favor, and the highest number of votes against, 17.²⁸⁸ This in fact indicates that defamation of religions is losing its long standing support at the HRC. It then seems crucial to examine the degree of support to defamation of religions resolutions at the UN General Assembly (GA).

3. UN General Assembly (GA)

Defamation of religions was further internationalized through a number of GA resolutions. The first resolution passed in 2005 in the GA was titled Combating Defamation of Religions.²⁸⁹ In addition to holding the same name, the text of the resolution was almost identical to the 2005 CHR Combating Defamation of Religions

²⁸³ *Id.*, at 75. The resolution states that "defamation of religions is a serious affront to human dignity leading to a restriction on the freedom of religion of their adherents and incitement to religious hatred and violence."

²⁸⁴ Human Rights Council, Combating Defamation of Religions, U.N. Doc. A/HRC/RES/13/16 (2010) (hereinafter *U.N. Doc. A/HRC/RES/13/16*).

²⁸⁵ *Id.*, at 2.

²⁸⁶ *Id.*, at 3.

²⁸⁷ *Id.*

²⁸⁸ *Id.*, at 5.

²⁸⁹ Combating Defamation of Religions, G.A. res. 60/150, U.N. Doc. A/RES/60/150 (2006) (hereinafter *U.N. Doc. A/RES/60/150*).

resolution. The resolution was in fact very much Islamic specific with five references to each of the words Islam and Muslims.²⁹⁰ The resolution recalled the UN efforts in establishing dialogue among civilization and in fighting intolerance through the Millennium Declaration, Durban Declaration and Programme of Action, and Global Agenda for Dialogue among Civilizations.²⁹¹ Condemning negative stereotyping of religions, the resolution gave particular consideration to the "the frequent association of Islam to human rights violations and terrorism."²⁹² Providing a road map to states on how to combat defamation of religions, states are also urged in the resolution to start "strategizing and harmonizing actions at the local, national, regional and international levels through education and awareness-raising."²⁹³ The resolution further requested the Secretary General (SG) to report on "the implementation of the resolution" at the next session.²⁹⁴

The resolution was passed by a majority vote of 101 to 50 with 20 abstentions.²⁹⁵ Despite the high majority, criticism was directed towards the resolution for its attention to Islam and Muslims. The resolution was supported by several votes from the whole Middle East, except Israel, and several Latin American, African and Asian states.²⁹⁶ This division resembles the one experienced at the CHR and HRC when the combating defamation of religion resolutions were voted on. While voting in favor of the resolution, the Guatemalan delegate noted that the resolution is in need of being more inclusive as to avoid signifying one religion over other religions.²⁹⁷ On the other hand, the US delegate noted that the "draft resolution was incomplete, however, as it failed to address the situation of all religions. More inclusive language would have furthered the objective of promoting religious freedom. Furthermore, any resolution on the topic must include mention of the need to change educational systems which promote hatred of particular religions or state-sponsored media which

²⁹⁰ *Id.*, at 1-4.

²⁹¹ *Id.*, at 1.

²⁹² *Id.*, at 2.

²⁹³ *Id.*, at 3.

²⁹⁴ *Id.*, at 4.

²⁹⁵ General Assembly, 64th plenary meeting, Reports of the Third Committee, U.N. Doc. A/60/PV.64 (2006) (hereinafter *U.N. Doc. A/60/PV.64*).

²⁹⁶ Liaquat Ali Khan, Combating Defamation of Religions, *The American Muslim (TAM)*, Jan. 2007, 1-2, available at: http://www.theamericanmuslim.org/tam.php/features/articles/combating_defamation_of_religions/ (hereinafter *Combating Defamation*).

²⁹⁷ *Id.*, at 18.

negatively target any one religion or people of a certain faith."²⁹⁸ It seems therefore that there was concern amongst some supporting and opposing votes over the resolution's Islamic specificity.

The 2006 GA Combating Defamation of Religions resolution kept its relatively Islamic specificity with the same number of references to Islam and Muslims, five references each.²⁹⁹ The resolution's condemnation of "use of the print, audio-visual and electronic media, including the Internet, and any other means to incite acts of violence, xenophobia or related intolerance and discrimination against Islam or any other religion"³⁰⁰ was very timely due to the Danish cartoons crisis.³⁰¹ The resolution was very similar to the earlier resolution except with a call for the HRC to "address instances of intolerance, discrimination and incitement of hatred against any community or adherents of any religion."³⁰² This was in fact the first reference to incitement of hatred in all combating defamation of religion resolutions. This is significant taking into consideration how incitement of religious hatred was later closely attached to defamation of religions. The resolution, despite being Islamic specific, was adopted by 111 votes to 54 with 18 abstentions.³⁰³

The 2007 GA Combating Defamation of Religions resolution continues to hold an Islamic specificity with four references each to Islam and Muslims.³⁰⁴ It was however apparent that the correlation between defamation of religions and incitement to religious hatred is becoming clearer. This was in fact exemplified by increasing the number of references to incitement to religious hatred throughout the document to six.³⁰⁵ It was further striking that in five of the six references, defamation of religions

²⁹⁸ U.N. GA, 60th Sess., 3d Comm., 45th mtg. 39, U.N. Doc. A/C.3/60/SR.45 (Nov. 21, 2005), in A Vague and Overbroad Theory, *supra* note 100, at 640. I have tried to have access to this document via the UN website but unfortunately the document online was not functioning. Thus, I rely solely on the citation provided by Vague and Overbroad Theory, *supra* note 100.

²⁹⁹ Combating Defamation of Religions, G.A. res. 60/164, U.N. Doc. A/RES/61/164 (2006) (hereinafter *U.N. Doc. A/RES/61/164*).

³⁰⁰ *Id.*, at 3.

³⁰¹ General Assembly, 81st plenary meeting, U.N. Doc. GA/10562 (2006), available at: <http://www.un.org/News/Press/docs/2006/ga10562.doc.htm>

³⁰² *Id.*, at 4.

³⁰³ General Assembly, 81st plenary meeting, Reports of the Third Committee, U.N. Doc. A/61/PV.81, at 18 (2006).

³⁰⁴ Combating Defamation of Religions, G.A. res. 62/154, U.N. Doc. A /RES/62/154 (2007) (hereinafter *U.N. Doc. A /RES/62/154*).

³⁰⁵ *Id.*, at 3-4.

is coupled with incitement to religious hatred. For instance, the resolution expressed "deep concern about programs and agendas pursued by extremist organizations and groups aimed at the defamation of religions and incitement to religious hatred, in particular when condoned by Governments."³⁰⁶ This line of thinking reflects how defamation of religions and incitement to religious hatred can be closely associated. This also explains why the Secretary General was requested, at the end of the resolution, to "submit a report on the implementation of the present resolution, including on the possible correlation between defamation of religions and the upsurge in incitement, intolerance and hatred in many parts of the world."³⁰⁷ The resolution continued to enjoy widely support being adopted by 108 votes to 51 with 25 abstentions.³⁰⁸

In response to the long standing call for the resolutions to become more inclusive and less focused on Islam, the 2008 GA resolution included only one and two references to Islam and Muslims respectively.³⁰⁹ This was outstanding in the resolution being the least Islamic specific until 2008. The resolution was considered the "most moderate after having been the subject of criticism and modification for nearly a decade."³¹⁰ In addition, the resolution was a pioneer in highlighting the relationship between defamation of religions and incitement to religious hatred. According to the resolution, "defamation of religions is a serious affront to human dignity leading to the illicit restriction of the freedom of religion of their adherents and incitement to religious hatred."³¹¹ Defamation of religions is seen as more serious for opening the door to incitement to religious hatred. At the same time, the resolution's view that defamation of religions restricts freedom of religion was justified throughout the resolution by calling states to abide by international

³⁰⁶ *Id.*, at 3.

³⁰⁷ *Id.*, at 4.

³⁰⁸ General Assembly, 76th plenary meeting, Reports of the Third Committee, U.N. Doc. A/62/PV.76, at 20 (2007).

³⁰⁹ Combating Defamation of Religions, G.A. res. 63/171, U.N. Doc. A/RES/63/171 (2008) (hereinafter *U.N. Doc. A/RES/63/171*). It is worth noting that this resolution is the longest Defamation of Religion resolution up to the date of its adoption.

³¹⁰ Religious Freedom, *supra* note 4, at 602. According to Uganda, the sponsor of the resolution, the current resolution's "text incorporated the concerns of many delegations that all religions be covered by the text and not just Islam, because although Islam was usually at the core of such acts, it did not preclude the possibility that other religions could be targeted later." ³¹⁰ General Assembly, 70th & 71st plenary meetings, U.N. Doc. GA/SHC/3941 (2008) (hereinafter U.N. Doc. GA/SHC/3941, available at <http://www.un.org/News/Press/docs/2008/ga10801.doc.htm>

³¹¹ *Id.*, at 2.

conventions on elimination of religious discrimination.³¹² This was also underlined by the resolution's note that "all human rights are universal, indivisible, interdependent and interrelated."³¹³ This statement aimed at highlighting to states that all human rights, including freedom of religion, stand on one footing and any restrictions to freedom of exercise of these rights should not be tolerated. As a result, states were required to extend protection and respect to "religious places, sites, shrines and symbols" according to domestic legislations that comply with relevant international human rights norms.³¹⁴

It was remarkable that despite the modifications to the resolutions, it enjoyed a lesser majority of 86 votes and 53 opposing votes.³¹⁵ From the meeting records, some of the states expressed the view that the issue of defamation is better dealt with within the frame of incitement to religious hatred.³¹⁶ The rationale behind this view is to "leave individuals freer to exercise freedom of speech with respect to religious beliefs."³¹⁷ On the other hand, the US maintained its traditional position that the resolution despite its amendments and fewer mentions of Islam and Muslim needs was seen as focusing on one religion.³¹⁸ Singapore however justified its voting in favor of the resolution as understanding that the resolution was applicable to all religions.³¹⁹ Thus, there were disparities in how states interpreted the explicit reference to Islam and Muslims in the text of the resolution. Although some states read that as giving unacceptable attention to Islam, others thought this was reasonable out of emerging discrimination against Muslims. In sum, these differences have affected states' willingness to support the resolution.

The 2009 GA Combating Defamation of Religions resolution was not in fact luckier.³²⁰ Although, the resolution was similar to the earlier 2008 resolution in

³¹² *Id.* at 1.

³¹³ *Id.*

³¹⁴ *Id.*, at 6.

³¹⁵ General Assembly, 70th plenary meeting, Reports of the Third Committee, U.N. Doc. A/63/PV.70 (2008). This lesser majority was in line with lessening the majority for Combating Defamation of Religions resolution at the HRC in the same year.

³¹⁶ U.N. Doc. GA/SHC/3941, *supra* note 310.

³¹⁷ *Id.* Chile and Japan were of the view that

³¹⁸ General Assembly, 49th & 50th meetings, U.N. Doc. GA/SHC/3909 (2008), available at <http://www.un.org/News/Press/docs/2007/gaschc3909.doc.htm> (hereinafter *U.N. Doc. GA/SHC/3909*). Similarly, India maintained its classical stand of abstention out of the resolution's focus on Islam.

³¹⁹ *Id.*

³²⁰ Combating Defamation of Religions, G.A. res. 64/156, U.N. Doc. A /RES/64/156 (2009).

having similar limited references to Islam and Muslims, the resolution passed with a lower majority of 80 votes to 61 with 42 abstentions.³²¹ The voters against the resolution maintained their opposition with a slightly different rationale than the one in earlier resolutions. For instance, the US and EU voiced the concern that curbing freedom of speech is not the best way to protect religions.³²² Conversely, the US believes that "free and open dialogue" can help solve the problem far better than "by imposing governmental laws regarding who could say what, when."³²³ Brazil and Columbia, who abstained, made similar comments on how the resolution was framed in a way that could open the door to restricting other rights including freedom of expression; thus was something that they were not in line with.³²⁴ The voting on this resolution also saw the transformation of some classic abstainers to vote against the resolution. India had expressed its ongoing concerns with the resolution's emphasis on Islam and the unclear relationship between religion and race.³²⁵ The blurred language of the resolution on how religion interacts with race was one of the reasons why some delegates, including the Albanian, chose to abstain.³²⁶

The most recent GA Combating Defamation of Religions resolution was adopted in 2010.³²⁷ One of the notable features of this resolution is its shift towards use of the word "vilification" rather than "defamation." The resolution in fact contained nine references to "vilification of religions" with only two references to defamation of religions.³²⁸ This was put forward as "a sign of compromise and consensus to avoid any pretext and encourage all to reach an objective consensus."³²⁹ The heated debate over the issue of defamation of religions and the reduced support for the resolutions in earlier sessions was to be overcome by the use of vilification rather than defamation. Aimed at becoming an umbrella under which all religions fall, the resolution extended its reference to Judeophobia and

³²¹ General Assembly, 41st & 42nd meetings, U.N. Doc. A/64/PV.65 (2009).

³²² General Assembly, 41st & 42nd meetings, U.N. Doc. GA/SHC/3966 (2009), available at <http://www.un.org/News/Press/docs/2009/gashc3966.doc.htm>

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ Combating Defamation of Religions, G.A. res. 65/224, U.N. Doc. A /RES/65/224 (2010) (hereinafter *U.N. Doc. A /RES/65/224*).

³²⁸ *Id.*, at 2-6.

³²⁹ General Assembly, 51st & 52nd meetings, U.N. Doc. GA/SHC/4001 (2010) available at <http://www.un.org/News/Press/docs/2010/gashc4001.doc.htm>, hereinafter (*U.N. Doc. GA/SHC/4001*),

Christianophobia in addition to Islam.³³⁰ This amendment was viewed as resolving some states's concern on the lack of inclusiveness of the resolution with its sole focus on Islam. The dilemma is that the resolution retains one reference to Islam and a similar reference to Muslims.³³¹ These amendments nevertheless did not meet states' expectations and resulted in the smallest majority of "76 in favour to 64 against, with 42 abstentions."³³² Replacing vilification with defamation did not bring significant change to the meaning. According to the EU, neither vilification nor defamation complies with human rights norms as it is only humans, rather than religions, that should be protected.³³³ On a similar note, the US expressed gratitude for the amendments but was "disappointed to see that the text failed to bridge differences."³³⁴

C. Rationale behind Combating Defamation of Religion Resolutions

States have been voting in favor of the combating defamation of religions resolutions at the HRC and GA for more than a decade. Although the resolutions have been losing support in recent years, it is worth analyzing why a significant number of states still support the resolutions. It is the resolutions themselves that shed light on the reasons why states advocate for combating defamation of religions or not. One of the primary reasons is that defamation of religions and similarly its abuse can result in "social disharmony and violations of human rights."³³⁵ On the one hand, "psychological and physical violence and assaults, and incitement thereto, against persons on the basis of their religion or belief, and such acts directed against their businesses, properties, cultural centers and places of worship, as well as the targeting and desecration of holy books, holy sites and religious symbols of all religion"³³⁶ can be viewed as examples of social disharmony. On the other hand, the view of

³³⁰ U.N. Doc. A/RES/65/224, *supra* note 327, at 2. U.N. Doc. This is a replication of what was mentioned in the HRC Combating Defamation of Religions resolution earlier 2010. A/HRC/RES/13/16, *supra* note 284. The UK delegate was not happy with resorting to the term Judeophobia as "it marked a deviate from anti-semitism." U.N. Doc. GA/SHC/4001, *supra* note 330.

³³¹ *Id.*, at 4 & 2.

³³² U.N. Doc. GA/SHC/4001, *supra* note 330.

³³³ *Id.*

³³⁴ *Id.*

³³⁵ U.N. Doc. A/RES/65/224, *supra* note 327, at 2. This is asserted similarly in the resolution expressing that "in the context of the fight against terrorism, vilification of religions, and incitement to religious hatred in general, become aggravating factors that contribute to the denial of fundamental rights and freedoms of members of target groups, as well as to their economic and social exclusion." U.N. Doc. A/RES/65/224, *supra* note 327, at 4. I will mainly resort to the latest Combating Defamation of Religions resolution at the GA being very comprehensive of what is included in most GA and HRC resolutions around the same issue.

³³⁶ *Id.*, at 4.

defamation of religions as the source of human rights violations adds a level of seriousness to the discussion. It then depends on how dependent these violations on defamation of religions are. It is stated in the resolution that discriminatory policies by some states against particular ethnic and religious groups curb them from fully exercising their rights.³³⁷

These discriminatory measures can thus lead to violation of article 27 of the ICCPR: group members' inability "to observe, practice and manifest their religion freely and without fear of coercion, violence or reprisal."³³⁸ Two of the recent cases that reflect possible human rights violations are the French ban on wearing face veils in public and the Swiss prohibition on building minarets on mosques.³³⁹ Moreover, the European Court of Human Rights contended that religious adherents can cease, either totally or partially, to manifest or practice their religious freedom in cases of strong opposition or denial of their religion.³⁴⁰ Thus, knowing that manifestation of a certain religious practice is unwelcome, religious adherents may choose to abandon their right to manifest their religion. However indirect the effect, this scenario is crucial and highlights how defamation of religions correlates to human rights violations.

Resolution supporters contend that defamation of religions fulfills the limitations criteria on freedom of speech. Various combating defamation of religions resolutions clarify that freedom of speech is not absolute as the "exercise of which

³³⁷ *Id.*, at 2. Indonesia is one of the states that support the view of negative implications of defamation of religions on individuals' ability to exercise their rights. Freedom of Religion or belief in Indonesia, *supra* note 107, at 686. See Human Rights Council, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Githu Muigai, on the manifestations of defamation of religions, and in particular on the ongoing serious implications of Islamophobia, for the enjoyment of all rights by their followers, U.N. Doc. A/HRC/15/53 (2010) for more details on how defamation of religions can restrict full enjoyment of rights.

³³⁸ U.N. Doc. A/RES/65/224, *supra* note 327, at 2. According to article 27 of the ICCPR, "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." ICCPR, *supra* note, 175.

³³⁹ For more information on banning veil in France, refer to *Parliament approves ban on full veil in public*, September 15 2010, available at <http://www.france24.com/en/20100914-french-parliament-approves-ban-full-veil-public-senate-law-fine-sarkozy-islam>. Information on prohibiting minarets in Switzerland can be found at NICK CUMMING-BRUCE AND STEVEN ERLANGER, *Swiss Ban Building of Minarets on Mosques*, November 29, 2009, available at <http://www.nytimes.com/2009/11/30/world/europe/30swiss.html>

³⁴⁰ Religious Vilification, *supra* note 9, at 296.

carries with it special duties and responsibilities and may therefore be subject to limitations as provided for by law and are necessary for respect of the rights or reputations of others, protection of national security or of public order, public health or morals."³⁴¹ In other words, defamation of religions infringing on the rights and reputations of religious adherents should not be tolerated. One of the legal precedents that the pro-resolutions states refer to is *Otto Preminger Institute v. Austria* in which the Court argued that religious feelings should not be affronted through exercise of freedom of expression.³⁴² Nevertheless, the Court drew a balance between being insulted and the obligation upon religious believers to "tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith."³⁴³ Other precedents by the European Court of Human Rights uphold a British decision banning a movie that was found blasphemous to Christians and declaring that the Turkish criminal statute is in conformity with article 10 of the European Convention on Human Rights.³⁴⁴

Cultural relativism is also an underlying factor for some states to combat defamation of religions resolutions. Although this issue was not part of the formal debate among states during deliberations at the UN,³⁴⁵ it can be traced back to classic positions of supporter states. Several states vary in their degrees of willingness to ratify human rights conventions.³⁴⁶ For instance, some Islamic countries including Pakistan, Egypt and Saudi Arabia oppose certain articles of the UDHR relating to marriage and family.³⁴⁷ This is even clearer when examining different reservations states have made to human rights documents.³⁴⁸ As a result, religion and human rights conventions do not always share an identical position on issues.³⁴⁹ States differ on

³⁴¹ U.N. Doc. A /RES/65/224, *supra* note 327, at 5.

³⁴² A Vague and Overbroad Theory, *supra* note 100, at 669.

³⁴³ *Id.*

³⁴⁴ *Id.*, at 670.

³⁴⁵ The resolutions made it clear that "Charter of the United Nations, to promote and encourage universal respect for and observance of all human rights and fundamental freedoms without distinction as to race, sex, language or religion." ³⁴⁵ U.N. Doc. A /RES/65/224, *supra* note 327, at 1.

³⁴⁶ Prophets, *supra* note 87, at 38.

³⁴⁷ Religious Freedom, *supra* note 4, at 587.

³⁴⁸ For example, The Pakistani reservation to articles 3,6,7 and 18 of the ICCPR reads "'[The] Islamic Republic of Pakistan declares that the provisions of Articles 3, 6, 7, 18 and 19 shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the Sharia laws'. Reference to Islamic Law is frequent in Islamic states' reservations or declarations to human rights documents. For a deep review of the status of ratifications, reservations and declarations, refer to <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>

³⁴⁹ Religious Freedom, *supra* note 4, at 584.

their level of adherence to what religion entails or to human rights norms. This in fact is reflected in the more compelling views against combating defamation of religions resolutions.

VI. INCITEMENT TO RELIGIOUS HATRED SURPASSES DEFAMATION OF RELIGIONS

A. Critique of Defamation of Religions Doctrine

There are three main reasons why defamation of religions, as a doctrine, has been subject to severe criticism.

First, domestic enforcement of defamation of religions requires that states arbitrate amongst different religions and belief systems. This is contrary to the character of religion as a non-innate human characteristic to which individuals have the freedom to choose.³⁵⁰ What complicates the issue further is the wide range of religions and belief systems that have divergent points of view that mostly lack material proof.³⁵¹ Each religion has its own world view and some of them entail belief in supernatural powers that fall outside our material senses. There are also internal divisions within the same religion. For instance, Orthodox, Protestants and Catholics are all Christians, regardless of the variations in their faiths. Similarly, Sunni and Shia are all Muslim sects that have, even within themselves, differing religious views.

The lack of clear identification of which religious aspects should be immune to debate and which ones are open for it makes the realization of defamation of religions difficult to achieve. As a result, it is not uncommon for individuals to fall unintentionally into the defamation of religions trap.³⁵² Due to the absence of clear guidelines of what is and is not defamatory, individuals would be easily convicted of defamation of religions. Individuals would have to know all religions very well to avoid having their views be defamatory. For example, the South African Council of Muslim Theologian argued that putting pictures of flags of Saudi Arabia, Iran and Iraq on balls is offensive for Muslims as these flags include sacred statements.³⁵³ Putting defamation of religions into practice would in fact mean that those who put images of these flags on the balls would likely be found as defamers of Islam whereas it was not their intention to even talk about Islam.

³⁵⁰ Freedom House and Becket Fund, *supra* note 172, at 4. See also ICCPR, *supra* note 175, at article 18.

³⁵¹ Bills of Rights, *supra* note 20, at 13.

³⁵² A Vague and Overbroad Theory, *supra* note 100, at 681.

³⁵³ *Id.*

This illuminates why "it would be difficult and potentially dangerous to define in abstract what constitutes a 'defamation of religions' as well as to find an impartial, independent and non-arbitrary body for adjudicating such cases."³⁵⁴ To reach a decision of what is defamatory from the perspective of a particular religion, a state would monopolize the truth in the event it took the side of a certain religion or sect over another. In order for a judge to reach a fair decision and not to be perceived as biased, the judge must be aware of the totality of religions within the state boundaries which is nearly impossible.³⁵⁵ To start with, a judge does not fully acquire religious knowledge nor is he trained as a religious scholar. This highlights why having the US, for example, to determine whether the Danish cartoons fall within defamation of religions borders or not is an extremely complex task.³⁵⁶

On the other hand, religious views, similar to cultural and political ones, should not be curbed since they all fall within the sphere of public debate.³⁵⁷ At the same time, state interference within public debates is seen as harmful rather than valuable. The "free market of ideas concept presupposes that there is an intrinsic value in individuals being exposed to a broad range of ideas."³⁵⁸ This exposure helps individuals to make better informed decisions on what general direction to move in and which religion to follow in particular. Some religions have even supported the creation of such open space for sharing ideas. In the Quran, for instance, humans are divided "into nations and tribes, so that you might come to know one another."³⁵⁹ Christianity alike requires that believers interact with others and "preach the Gospel."³⁶⁰ Undertaking a religious duty, some Christians are required to proselytize with no regard as to whether what is in the Gospel might be seen as defamatory by other religions or not. This is asserted in *Otto-Preminger-Institut v. Austria* in which the Court notes that "those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a

³⁵⁴ Human Rights Commissioner Study, *supra* note 180, at 9.

³⁵⁵ End of Pluralism, *supra* note 151, at 76.

³⁵⁶ Prophets, *supra* note 87, at 56.

³⁵⁷ Human Rights Violations, *supra* note 101, at 367.

³⁵⁸ Prophets, *supra* note 87, at 44.

³⁵⁹ Quran 49:13 in Religious Freedom, *supra* note 4, at 593.

³⁶⁰ Religious Vilification, *supra* note 9, at 294.

minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith."³⁶¹ Tolerance and peaceful coexistence should guide individuals while exercising their freedom of religion.

Secondly, the vagueness of the concept of defamation of religions makes it open to abuse by states.³⁶² Despite the large number of defamation of religions resolutions at the UN, consensus has not yet been reached on a definition. This is rooted, as noted, in the lack of conformity with the classic individual definition of defamation and in equalizing race, an innate trait, to religion, a non-innate one.³⁶³ These complexities in fact have made the term open to abuse. Defamation of religions can be used by some states to maintain stability through oppression of dissenting religious voices rather than to shield human dignity and personal reputation.³⁶⁴ In accordance with the defamation of religions doctrine, states are granted full control of religion.³⁶⁵ This, on the other hand, would have been more difficult if defamation of religions was a well-defined legal term.

There is a rational fear of state abuse of defamation of religions doctrine by their imposing a dominant religion over less dominant ones in violation of the right to freedom of religion.³⁶⁶ The risk of defamation of religions being abused is double in countries that have official religions.³⁶⁷ As expressed in a Joint Statement by three UN Special Rapporteurs, defamation of religions on both the international and national levels:

³⁶¹ Human Rights Commissioner Study, *supra* note 180, at 13.

³⁶² Human Rights Violations, *supra* note 101, at 367.

³⁶³ Freedom House and Becket Fund, *supra* note 172, at 2.

³⁶⁴ A Vague and Overbroad Theory, *supra* note 100, at 644.

³⁶⁵ Combating Defamation, *supra* note 296, at 5.

³⁶⁶ Neutrality toward Religion, *supra* note 134, at 997. For instance, article 156a of the Indonesian Criminal Law talks about "what is religion, who owns a religion, and if a religion can be insulted, who has the right to feel insulted." Freedom of Religion or belief in Indonesia, *supra* note 107, at 686. Under this article, it is the government that decides arbitrarily what constitutes an insult to certain religions' adherents. Abusing this article, adherents of a certain religion can be convicted of insulting feelings of adherents of the majority's religion.

³⁶⁷ A Vague and Overbroad Theory, *supra* note 100, at 680. Constitutions of several Islamic and Arab countries, for example, state that Islam is the official religion.

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.³⁶⁸

The statement highlights the fact that defamation of religions can be used to restrict different religious opinions amongst sects of the same religion and across religions as well. In such context, the only tolerated religious view is the state's and the sole legitimate religion is the official religion.

There are examples of actual abuse of domestic blasphemy laws in both Western and Islamic states. In Western legislation, Christianity has always been favored over other religions and thus Christians were the only ones allowed to bring claims under blasphemy laws.³⁶⁹ As noted in *Wingrove v. United Kingdom* by the European Court of Human Rights, the English blasphemy law extends protection to only followers of the Anglican Church of England.³⁷⁰ This reflects how discriminatory the English law is in not affording protection to other religions. As a result, the English blasphemy law is considered by some scholars to be unconstitutional.³⁷¹

On the other hand, observations on how blasphemy laws are applied within Islamic states prove that defamation of religions can be easily abused. For Pakistan, Egypt and Saudi Arabia, defamation of religions is synonymous with domestic blasphemy laws by which any "dissent from the official reading of Islam" is

³⁶⁸ 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, 22 April 2009, 1, http://www2.ohchr.org/english/issues/racism/rapporteur/docs/Joint_Statement_SRs.pdf (hereinafter *Joint Statement*) in Bills of Rights, *supra* note 20, at 20. Similar views also raise concerns about making use of Combating Defamation of Religion resolutions as a cover for discriminatory national blasphemy laws. Stifling Free Speech, *supra* note 222, at 2.

³⁶⁹ Bills of Rights, *supra* note 20, at 8-9.

³⁷⁰ Human Rights Commissioner Study, *supra* note 180, at 14.

³⁷¹ Verbal Offense, *supra* note 1, at 573-575.

criminalized.³⁷² Under the Islamic reading of defamation of religions, offering different religious interpretations or understandings to the one tolerated by the state is outlawed. According to the 2006 Report on International Religious Freedom, that is published yearly by the US, "anti-blasphemy laws are often used to intimidate reform-minded Muslims, sectarian opponents, and religious minorities, or to settle personal scores."³⁷³ Not only are blasphemy laws used to prosecute Muslim reformers, they are also used against non-Muslim minorities. For example, Bahaai Iranians and Unorthodox Shiite Iranians have been convicted under blasphemy laws.³⁷⁴ Whilst in Indonesia, members of the Ahmadi religious sect are commonly prosecuted for "being deviant, defaming mainstream religion and causing public unrest and disturbance."³⁷⁵ Ahmadis in Indonesia are considered defamers of Islam just for following a different Islamic doctrine from that that put forward by the ruling government. These instances show how defamation of religions, if applied domestically, can be easily used against adherents of a particular belief that does not conform to the official religion.

Thirdly, the Defamation of Religions doctrine collides with the founding human rights principles. On the one hand, defamation of religions takes the concept of defamation out of its traditional individualized context. Defamation law, as outlined above, aims at protecting an individual's reputation.³⁷⁶ Since religion is not an individual, it should not enjoy protection extended by defamation law to individuals. On the other hand, defamation of religions, as a concept, does not fit the human rights framework which is only designed to protect individuals. This was the position of the European Union as expressed by the Delegate of Portugal in the GA saying that human rights law protects only human freedom of religion and not religion itself as "religion does not enjoy legal personality in most states."³⁷⁷ Defamation of religions would have been in line with human rights law if it afforded protection to individual believers, but the fact that it protects the feelings of believers or religions from

³⁷² *The meaning of freedom*, Economist, April 2, 2009, at 1 available at <http://www.economist.com/node/13413974> (hereinafter *the meaning of freedom*).

³⁷³ Stifling Free Speech, *supra* note 222, at 2.

³⁷⁴ Saying the Unsayable, *supra* note 90, at 77-78.

³⁷⁵ Freedom of Religion or belief in Indonesia, *supra* note 107, at 687.

³⁷⁶ Bills of Rights, *supra* note 20, at 14.

³⁷⁷ U.N. Doc. GA/SHC/3909, *supra* note 318.

different interpretations makes it contrary to human rights.³⁷⁸ This means that in order for defamation of religions to be in conformity with human rights, it should focus solely on believers rather than beliefs.

At the same time, defamation of religions touches upon the conflict between freedom of religion and freedom of expression.³⁷⁹ This in fact represents one of the controversies surrounding defamation of religion, namely, how to maintain balance between the freedom of individuals to express their opinions and practice their religions when these are offensive to other believers. To reach that balance, freedom of expression cannot be restricted solely on grounds of protection of freedom of religion.³⁸⁰ Human rights are interdependent and freedom of religion cannot be favored over freedom of expression. This highlights how protection of religions cannot be protected without infringement on other human rights³⁸¹ in general and freedom of expression in particular.³⁸² Although, there is an inherent tension between freedom of expression and freedom of religion,³⁸³ *FCC v. Pacifica* found that offended feelings experienced by individuals out of others' exercise of the right to freedom of expression cannot excuse suppression of the latter.³⁸⁴ This ruling mirrors the restrictions on the exercise of freedom of expression outlined in human rights law.

According to article 19(3) of the ICCPR, freedom of expression can be restricted "(a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order, or of public health or morals."³⁸⁵ Since defamation of religions doctrine is concerned mainly with religions, rather than individuals, freedom of expression cannot be restricted under the claim of protecting the reputations of others. In addition, the fact that the line between acceptable speech and offensive speech that curbs other individuals' rights to exercise religious freedom

³⁷⁸ Stifling Free Speech, *supra* note 222, at 2.

³⁷⁹ A Vague and Overbroad Theory, *supra* note 100, at 649.

³⁸⁰ *Id.*, at 647.

³⁸¹ The meaning of freedom, *supra* note 372.

³⁸² Freedom House and Becket Fund, *supra* note 172, at 2.

³⁸³ A Vague and Overbroad Theory, *supra* note 100, at 649.

³⁸⁴ Prophets, *supra* note 87, at 44.

³⁸⁵ ICCPR, *supra* note 175, at article 19.

is determined by states suggests a large degree of subjectivity.³⁸⁶ In the absence of objective measures by which offensive religious speech can be identified, a restriction of freedom of expression under the claim of respect of freedom of religion of other believers is nearly impossible. This position is supported by the UN Human Rights Commissioner who stated that "defamation of religions may offend people and hurt their religious feelings but it does not necessarily or at least directly result in a violation of their rights, including their right to freedom of religion."³⁸⁷ Furthermore, it is hard to imagine how offended religious feelings have an implication on national security or public order. This does not exclude the possibility that defamation of religions can be a risk to the public security or public order at a later stage in the event it incites religious hatred.

B. No Need to Defamation of Religions: Incitement to Religious Hatred as a Protector of Believers

Incitement to hatred is one of the basic concerns that human rights law has dealt with since its inception. History has shown that "the world's great atrocities are preceded by words of hate including Rwanda, Yugoslavia, and Nazi Germany."³⁸⁸ As a result, the need to protect human rights in general and human life in particular requires that hate speech be banned. Incitement to religious hatred has thus been included in international and regional human rights conventions. According to the ICCPR, "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."³⁸⁹ Religious hatred itself cannot be criminalized unless done in a way that incites discrimination, hostility or violence.

In addition to the ICCPR, the ICERD requires states to:

declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as

³⁸⁶ A Vague and Overbroad Theory, *supra* note 100, at 674.

³⁸⁷ Human Rights Commissioner Study, *supra* note 180, at 10. For similar arguments, refer to Bills of Rights, *supra* note 20, at 15 and by Asma Jahangir, Former Special Rapporteur on Religious Freedom, in Freedom House and Becket Fund, *supra* note 172, at 3

³⁸⁸ Steve Edwards, *The Trouble with Religious Hatred Laws*, 24 Policy 41, September 15, 2008. (hereinafter *Religious Hatred Laws*).

³⁸⁹ ICCPR, *supra* note, 175, at article 20(2).

well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.³⁹⁰

Although this article is concerned with racial hatred, the notion of incitement to hatred is included. In addition, the Committee on the Elimination of Racial Discrimination examining double racial and religious discrimination reveals how they both intersect.³⁹¹ This is reasonable in the context of both religious and racial hatred in the ICCPR and the view of interdependence of human rights.

Particular importance of the concept of incitement comes within article 3c of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) classifying "direct and public incitement to commit genocide" amongst punishable parameters.³⁹² Thorough examination of how incitement works in the context of Genocide can be helpful in understanding the parameters of incitement within the framework of hatred. The only regional human rights document that explicitly mentions incitement to religious hatred is article 13(5) of the American Convention on Human Rights (ACHR) that declares as unlawful "any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin."³⁹³ In addition to conventions, incitement to religious hatred had a recent appearance at the Human Rights Council. In a resolution titled Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence against, Persons Based on Religion or Belief, "advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, whether it involves the use of print, audio-visual or electronic media or any other means" was condemned.³⁹⁴

³⁹⁰ ICERD, *supra* note 179, at article 4.

³⁹¹ Human Rights Commissioner Study, *supra* note 180, at 8.

³⁹² Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, *entered into force* Jan. 12, 1951 (hereinafter *Genocide Convention*).

³⁹³ American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143 (hereinafter *ACHR*).

³⁹⁴ Human Rights Council, U.N. Doc A/HRC/RES/16/18, at 2 (2011) (hereinafter U.N. Doc A/HRC/RES/16/18).

Incitement to religious hatred has been identified during the last few years as an alternative to the notion of defamation of religions. That is why the majority of defamation of religions resolutions passed at the UN have coupled defamation of religions and the necessity of combating hatred.³⁹⁵ This suggests a correlation between defamation of religions and incitement to hatred. It is nearly impossible to have a mechanism through which religious intolerance can be contained.³⁹⁶ Human rights are founded upon the concept of equality as stated in article 2 of the UDHR: "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."³⁹⁷ Therefore, a state should not only promote equality but also should fight against intolerance and hatred. This however should be done in a legal manner that protects differences amongst individuals "against the brutal affronts of verbal abuse."³⁹⁸ This reflects the essence of human rights in protecting individuals rather than ideas or religion.

Since 2008, both the GA and HRC defamation of religions resolutions have tended towards protection of believers through incitement to religious hatred rather than the classical protection of beliefs under defamation of religions.³⁹⁹ This shift is indicative of how incitement to religious hatred entails a more legalized character than defamation of religions. This movement has been echoed in a similar movement by the UN Special Rapporteurs away from the sociological concept of defamation of religions to the more legally oriented approach of incitement to religious hatred.⁴⁰⁰ In a report presented to the UNGA, the Special Rapporteur on Freedom of Religion or Belief noted that defamation of religions or its domestic term blasphemy can be better alternated with "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."⁴⁰¹ The Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance also supported this shift based on the level of conformity incitement of

³⁹⁵ Human Rights Commissioner Study, *supra* note 180, at 4.

³⁹⁶ Religious Vilification, *supra* note 9, at 294.

³⁹⁷ UDHR, *supra* note 173, at article 2.

³⁹⁸ Blasphemy and Heresy, *supra* note 16, at 10.

³⁹⁹ Both the GA and HRC resolutions were respectively referred to earlier at U.N. Doc. A/64/53, *supra* note 272. U.N. Doc. A/RES/63/171, *supra* note 309.

⁴⁰⁰ Bills of Rights, *supra* note 20, at 20.

⁴⁰¹ Human Rights Commissioner Study, *supra* note 180, at 10.

religious hatred is with human rights law.⁴⁰² The legal connotation of incitement to religious hatred goes back to how it fits within the international human rights law context. According to the Special Rapporteur on the Right to Freedom of Opinion and Expression, incitement to religious hatred constitutes one of the lawful restrictions on freedom of expression.⁴⁰³ The legality of the incitement to religious hatred claim evades one of the strongest claims against defamation of religion, namely conflict with freedom of speech and freedom of religion. Moreover, the concept in itself is characterized by broad interpretation. In other words, incitement to religious hatred encompasses different categories "including stereotyping, ridicule, derogatory comments and insults."⁴⁰⁴ These expressions have however to be explored in accordance with human rights law principles. This signifies the need for a careful examination of how incitement to religious hatred is applicable within a context of overlapping rights.

Incitement to religious hatred, being a widely considered alternative to defamation of religions, requires deep insight on its applicability within the current human rights context. What is peculiar about incitement to religious hatred provisions that appear in international conventions is their functioning in a way that restricts other rights namely freedom of expression and freedom of religion.⁴⁰⁵ This can be traced back to the inherent conflict between freedom of expression entailing the eliminating of restrictions and religious tolerance that cannot survive without those restrictions.⁴⁰⁶ In other words, the provisions reflect necessary restrictions on both freedoms of expression and religion. This position is compatible with the Human Rights Committee's General Comment no. 11 stating that the "required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities."⁴⁰⁷ This highlights how the restriction on freedom of expression is vital to ensure enjoyment of

⁴⁰² *Id.*

⁴⁰³ Stifling Free Speech, *supra* note 222, at 3.

⁴⁰⁴ Human Rights Council, Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, Xenophobia and related intolerance, Doudou Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance, U.N. Doc. A/HRC/2/3, at 8 (2006) (hereinafter *U.N. Doc. A/HRC/2/3*).

⁴⁰⁵ Human Rights Commissioner Study, *supra* note 180, at 7. A similar position is expressed by the Special Rapporteurs in A/HRC/2/3, *supra* note 397, at 11.

⁴⁰⁶ Religious Vilification, *supra* note 9, at 294.

⁴⁰⁷ Hun Rigmahts Commissioner Study, *supra* note 180, at 7

other rights. Restriction of freedom of expression is also based upon a human life protection argument that:

suppressing speech which proximately encourages violence is a justifiable restriction in a democratic society, since the protection of life is a higher normative and social value which momentarily trumps free expression—but only to the extent strictly necessary to prevent the greater harm. Human rights law does not permit one person to exercise their rights to destroy the rights of another, but any restriction on freedom of expression must not jeopardize the right itself.⁴⁰⁸

The Human Rights Committee, in its comment no. 22, considers article 20(2) of the ICCPR as significant in providing a space for individuals and minorities to enjoy their right to religious freedom outlined in article 18 and 27 of the ICCPR.⁴⁰⁹ Although the need to restrict freedom of expression is undisputed, incitement to religious hatred doctrine lacks consensus from states on its applicability leading to a variable practice.⁴¹⁰ For instance, there is a thin line between lawful and unlawful exercise of freedom of religion and expression. Expression was divided by the Special Rapporteurs to "criminalized speech under international law, criminalized speech under civil law and controversial speech implicating elements of tolerance, civility and respect of religions or beliefs of others."⁴¹¹

The unclear guidelines on when to curb freedom of speech in relation to incitement to religious hatred is a dilemma. This is even seen as a challenge by the UK House of Lords Select Committee who noted that there are difficulties identifying the narrow gap between freedom of expression and incitement to religious hatred.⁴¹² In spite of the difficulties, there are still some clues that can be used to overcome this dilemma. As stated by Helen Skoze, Commissioner of Victorian Equal Opportunity and Human Rights Commission, freedom of expression should not be restricted if

⁴⁰⁸ Bills of Rights, *supra* note 20, at 77.

⁴⁰⁹ *Id.*, at 6.

⁴¹⁰ Human Rights Council, Incitement to racial and religious hatred and the promotion of tolerance: report of the High Commissioner for Human Rights, UN Doc. A/HRC/2/6 (2006) at 4 (hereinafter *UN Doc. A/HRC/2/6*).

⁴¹¹ A/HRC/2/3, *supra* note 404, at 11.

⁴¹² Religious Vilification, *supra* note 9, at 300.

exercised for artistic and intellectual reasons.⁴¹³ A similar position is articulated in the Australian Anti-Discrimination Act of 1991: "a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including public discussion or debate about, and expositions of, any act or matter" should not constitute incitement to religious hatred.⁴¹⁴ In addition to art and the intellect, the Act includes scientific and research expression done with no intent to incite hatred. This reading however does not comply with the text of article 20(2) of the ICCPR that restricts freedom of expression whenever it constitutes advocacy to hatred without reference to art or intellect as exceptions. It is argued that the Danish cartoons can be found unlawful in that they constitute incitement to religious hatred,⁴¹⁵ whether produced for artistic reasons or not.

Eliminating vagueness around the terms "incitement" and "hatred" is crucial for getting states to consider incitement to religious hatred as an alternative to defamation of religions. Incitement is seen to be very close in meaning to "public provocation"⁴¹⁶ as in most cases it includes mobilization of a group of individuals towards taking a particular action. The public character of incitement is also rooted in the necessity of a public receiver of the incitement.⁴¹⁷ This does not mean that incitement is restricted to physical public spaces. The public character refers to the presence of external receivers of incitement.

Incitement can also result in three distinctive acts: (a) incitement to an illegal act that takes place (e.g. genocide, violence, discrimination); (b) incitement to an illegal act that does not take place but creates in the mind of the recipient the requisite desire to commit an illegal act; and (c) creating a certain state of mind – racial hatred, racism – without a link to any particular illegal act."⁴¹⁸ The three acts in fact reflect the various objectives of incitement and the degree to which it succeeds in inflictions

⁴¹³ Religious Hatred Laws, *supra* note 388, at 41. Furthermore, it is stated under Irish Law that "that a reasonable person would find genuine literary, artistic, political, scientific, or academic value in the matter to which the offence relates." Bills of Rights, *supra* note 20, at 24.

⁴¹⁴ Defamation and Vilification, *supra* note 174, at 2.

⁴¹⁵ A Vague and Overbroad Theory, *supra* note 100, at 651.

⁴¹⁶ Human Rights Council, Expert seminar on the links between articles 19 and 20 of the International Covenant on Civil and Political Rights: "Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence", UN Doc. A/HRC/10/31/Add.3 (2009) at 12 (hereinafter *UN Doc. A/HRC/10/31/Add.3*).

⁴¹⁷ Religious Vilification, *supra* note 9, at 308.

⁴¹⁸ A/HRC/2/6, *supra* note 410, at 11.

upon the target group. The most obvious type is incitement towards an illegal action that comes into reality. In this case, it is easy to correlate incitement to the illegal action taking place. The second type is different in that an illegal action is not committed; however the target group is provoked and ready to commit the illegal action. Finally, the third type is to fuel the intolerance of a group towards a minority for instance. Both the second and third types are more difficult to prove due to the absence of an illegal outcome to incitement. Some states have followed a narrowly drawn path with regards to incitement. The US, for example, gives primacy to freedom of speech; incitement is only criminalized if directed towards committing unlawful actions that are likely to happen.⁴¹⁹ Under the US doctrine of incitement, it is important that there is a nexus between incitement and illegal actions in addition to a probability that the illegal action will take place.

The meaning of the term "hatred" has also been controversial. What complicates the issue is the lack of a clear definition on hatred in human rights instruments or developed by international human rights bodies.⁴²⁰ Hatred is regarded as being more than "dislike but rather a high degree of opprobrium."⁴²¹ The fact that hatred is an intangible feeling makes it difficult to assess. When religion is introduced to the equation of incitement, the UK Racial and Religious Hatred Act of 2006 defines hatred as directed "against a group of persons defined by reference to religious belief or lack of religious belief."⁴²² Although under religious hatred, the group against which incitement is directed is labeled by their religious affiliation or lack thereof, hatred remains unclear. This is why proving whether hatred is an outcome of incitement is almost impossible.⁴²³ Criminal proceedings require proof that a certain form of expression includes a threat in addition to the availability of intent to produce

⁴¹⁹ A Vague and Overbroad Theory, *supra* note 100, at 650.

⁴²⁰ A/HRC/2/6, *supra* note 410, at 16. One of the available definitions for hate speech though is the Council of Europe's stating that "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin." A/HRC/2/6, *supra* note 410, at 11.

⁴²¹ A/HRC/10/31/Add.3, *supra* note 416, at 12. According to Oxford Dictionary, opprobrium refers to "harsh criticism or censure." Opprobrium, available at:

<http://www.oxforddictionaries.com/definition/opprobrium?view=uk>

⁴²² Defamation and Vilification, *supra* note 174, at 5.

⁴²³ A/HRC/2/6, *supra* note 410, at 16.

religious hatred.⁴²⁴ The easier task will be identifying whether a speech has a threatening element, but the difficult one will remain assessing religious hatred. Examining whether there is intent to religious hatred becomes much easier if the term "religious hatred" is clarified. The ruling of the European Court of Human Rights in *Wingrove v. United Kingdom* states that restriction of speech is mainly reliant on the protection of other individuals' rights.⁴²⁵ It seems that the classical restrictions of freedom of expression as outlined in the ICCPR and regional human rights documents works well in protecting rights of other individuals.

The fuzziness of hatred, as a term, limits the degree to which unlawful speech against religious believers can be criminalized. Except in clear cut cases where unlawful actions such as violence or discrimination are committed and correlated to incitement to hatred against religious believers, incitement to religious hatred is difficult to find. In such contexts, the core issue is not a thorough examination of what hatred means, rather how incitement resulted in unlawful actions. In order for incitement to religious hatred to become applicable in cases where unlawful actions cannot be correlated to incitement or where the outcome of incitement is only negative feelings that cannot be assessed, more efforts have to be directed towards reaching an agreed upon definition of hatred. This task could fall within the mandates of the Human Rights Committee or the Committee on the Elimination of Racial Discrimination, being authoritative bodies in interpreting the ICCPR and the ICERD. This should not be interpreted to mean that defamation of religions or domestic blasphemy legislation are needed as it is clear that religions or beliefs should not be subject to protection under human rights law that is concerned mainly with individuals including religious believers. Meanwhile, protection of religious believers is available through restrictions on freedom of expression when jeopardizing the reputations or rights of others or when seen as risking national security, public order, public health or morals.⁴²⁶ In extreme cases, incitement to religious hatred can be resorted to whenever there are unlawful actions as an outcome of incitement.

⁴²⁴ Kay Goodall, *Incitement to Religious Hatred: All Talk and No Substance?*, 70(1) MLR 90, 89-113 (2007) (hereinafter *All Talk and No Substance*).

⁴²⁵ Human Rights Commissioner Study, *supra* note 180, at 14.

⁴²⁶ ICCPR, *supra* note 175, at article 19 (3 a&b).

VII. CONCLUSION

Heresy and blasphemy have had religious and political functions. In Christianity, heresy is challenging the Church's religious interpretations. Blasphemy, which replaced heresy in the 13th century, has extended its meaning to include criticism and disrespect of the sacred. Islam, on the other hand, neither has explicit reference to heresy nor to blasphemy. The closest Islamic terms to heresy and blasphemy are *takdhīb* or denial and *iftirāa* or invention. Blasphemous denial includes rejection of God; while blasphemous invention refers to unrecognizing sacred powers. Rulers in some Western and Islamic countries have used heresy and blasphemy to maintain control over their populations. Rulers have thus oppressed the opposition and minorities under the name of religion. The political abuse of blasphemy has mostly come to an end in Western states but has not yet in the Islamic world.

There is disparity between blasphemy legislation in Western and Islamic states. The secularization of religion in Western states has resulted in secularizing blasphemy. Islamic states however have not seen a similar movement. Although there is blasphemy legislation in some Western states, enforcement of blasphemy law has diminished in the 20th century. On the other hand, the religious character of Islamic states has impeded secularizing blasphemy. Thus, Islamic states continue to convict liberal and non-Muslims for deviations from orthodox religious interpretations. Religion which has become mostly a private matter in most Western states is still a public issue in several Islamic states.

Globalization has been seen as an umbrella under which Western and Islamic cultures can more interact. However, the more interaction between Western and Islamic cultures has increased the possibilities of blasphemy. The development of mass media communications has taken blasphemy across borders. The *Sanatic Verses*, the Danish cartoons and the 2006 Pope's statement clarify how blasphemy has become an international issue. Islamic states have also contributed to internationalizing blasphemy through the UN defamation of religion resolutions.

Islamic and several developing states have sponsored defamation of religion resolutions at the CHR, HRC and the GA for more than a decade. Supporting states of those resolutions have contended that defamation of religion lead to social tensions and human rights violations. Defamation of religion results in discriminatory policies that restrict individuals from full exercise of freedom of religion. Further, defamation

of religion should be prohibited as it fulfills the limitations criteria on freedom of expression.

On the other hand, most of the developed states have severely criticized defamation of religion. Domestic enforcement of defamation of religion requires states to arbitrate amongst different religions. The lack of material evidence to support religious beliefs and the absence of clear guidelines on what is and is not immune from defamation makes arbitration difficult. Further, the vagueness of defamation of religion, as a legal term, opens the door to abuse by states. There are several examples of actual abuse of domestic blasphemy laws in both Western and Islamic states. Moreover, defamation of religion does not conform with human rights principles. Consensus has not yet been reached on objective measures through which defamatory religious speech could be curbed. Defamation of religion contradicts with the individual based nature of human rights because it calls for the protection of religions rather than religious believers. Incitement to religious hatred has been considered an alternative to defamation of religions.

Incitement to religious hatred and restrictions on freedom of expression provide adequate protection to religious believers from unlawful expression. Ideally, incitement to religious hatred is enforced whenever correlated to discrimination or violence. Clarifying the meaning of 'incitement' and 'hatred' can expand the protection accorded to religious believers. In conjunction, restrictions on freedom of expression protect religious believers from expression that jeopardizes their reputations or their rights or risks national security, public order, public health or morals.