

DEFAMATION OF RELIGIONS: THE END OF PLURALISM?

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The movement to combat the “defamation of religions” has not only challenged the international framework for freedom of expression. It has also strategically employed language to confound traditional legal understandings of race, religion, and hate speech. For the past decade, the United Nations Organisation of the Islamic Conference (OIC), which is made up of 57 Muslim countries from around the world, has sought to codify a right for religions, especially Islam, not to be offended.¹ But who has ever heard of the right not to be offended? And since when do ideas, religions, and philosophies have rights of their own?

In the following presentation, I will first provide some historical context to show how this resolution has evolved at the United Nations. Then I will take a step back to address which core issues this resolution is seeking to address in the world today. I will show why the solution of a resolution against the “defamation of religions” is problematic for the protection of fundamental freedoms. Finally, I will outline how the debate is shifting and what I think the international community can do to provide an effective and appropriate solution.

I. HISTORY OF A U.N. RESOLUTION

In 1999—before Al-Qaeda’s attacks on September 11, 2001, before the Danish Cartoon Crisis of 2005, and before the murder of Dutch filmmaker Theo Van Gogh—Pakistan proposed a draft resolution entitled Defamation of Islam to the United Nations Commission on Human Rights on behalf of the OIC.² Despite the sponsor’s appeal for protection against rising “Islamophobia,” other members expressed concern about the sole focus on

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¹ Ken Levine & Robert Leikind, Op-Ed., *Keeping the Commitment to Dignity for All*, BOSTON GLOBE, Dec. 9, 2008, at A15.

² U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, Pakistan, Draft Res., *Racism, Racial Discrimination, Xenophobia and all Forms of Discrimination*, U.N. Doc. E/CN.4/1999/L.40 (Apr. 20, 1999).

Islam.³ The resolution that emerged was entitled Defamation of Religions.⁴ The U.N. Commission on Human Rights adopted similar resolutions on Defamation of Religions each year from 1999 through 2005.⁵ The first two years this resolution was proposed, it was adopted without a vote.⁶

In the wake of September 11, 2001, concern about the treatment of Islam increased around the world as Islam became the scapegoat of all acts of terrorism, not just those involving Muslim extremists.⁷ With the rising concern came greater attention to the term “Islamophobia” and the treatment of Muslims in the public square.⁸ Nonetheless, the media focus on Islam polarized participants in the debate, as some sought to place more of the blame on Islam, while others fought for the civil rights of Muslims to interact in the public square like any other citizens.⁹ It was in 2001 that a vote was first called on the Defamations of Religions resolution at the U.N. Commission on Human Rights. The resolution passed with an overwhelming majority.¹⁰

In 2004, Theo Van Gogh, a Dutch artist, added fuel to the debate with his short film, *Submission*, which portrayed Islam in a negative light and included the collaboration of former Muslim Ayaan Hirsi Ali, who has since moved away from the Netherlands for her safety.¹¹

³ ECOSOC, Comm’n on Human Rights [CHR], *Summary Record of the 61st Meeting*, ¶¶ 3, 6, U.N. Doc. E/CN.4/1999/SR.61 (Apr. 29, 1999) (German and Japanese representatives expressing concern about the draft resolution’s narrow focus on Islam).

⁴ CHR Res. 1999/82, at 280, U.N. ESCOR, 55th Sess., Supp. No. 3, U.N. Doc. E/CN.4/1999/167 (Apr. 30, 1999).

⁵ CHR Res. 2005/3, at 21, U.N. ESCOR, 61st Sess., Supp. No. 3, U.N. Doc. E/CN.4/2005/135 (Apr. 12, 2005); CHR Res. 2004/6, at 28, U.N. ESCOR, 60th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2004/127 (Apr. 13, 2004); CHR Res. 2003/4, at 34, U.N. ESCOR, 59th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2003/135 (Apr. 14, 2003); CHR Res. 2002/9, at 56, U.N. ESCOR, 58th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2002/200 (Apr. 15, 2002); CHR Res. 2001/4, at 47, U.N. ESCOR, 57th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2001/167 (Apr. 18, 2001); CHR Res. 2000/84, at 336, U.N. ESCOR, 56th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2000/167 (Apr. 26, 2000); CHR Res. 1999/82, *supra* note 4.

⁶ *See* CHR Res. 2000/84, *supra* note 5, at 338; CHR Res. 1999/82, *supra* note 4, at 281.

⁷ *See* Human Rights Council [HRC] Res. 4/9, at 19, U.N. Doc. A/HRC/4/123 (Mar. 30 2007); Ali S. Asani, “So That You May Know One Another”: A Muslim American Reflects on Pluralism and Islam, *ANNALS AM. ACAD. POL. & SOC. SCI.*, July 2003, at 40, 40, 49–51.

⁸ *See* Asani, *supra* note 7, at 49–51.

⁹ *See id.*

¹⁰ *See* CHR Res. 2001/4, *supra* note 5, at 49. The Resolution was adopted by a 28 to 15 vote with 9 abstentions. *Id.*

¹¹ Rebecca Leung, *Slaughter and ‘Submission’: Creator of Dutch Film Vows Sequel Despite Muslim Death Threats*, CBS NEWS, Aug. 20, 2006, <http://www.cbsnews.com/stories/2005/03/11/60minutes/main679609.shtml>.

In 2005, the debate over religious sensitivity erupted on the world stage with the publication of cartoons depicting Muhammad in derogatory ways (for example, with a bomb nestled in his turban) in the Danish newspaper *Jyllands-Posten*.¹² Riots broke out in Europe and throughout the Muslim world when the Danish government failed to apologize for publishing images that many Muslims consider blasphemous.¹³ Danish embassies were attacked, European products were boycotted, and formal diplomatic relations between Denmark and a number of Muslim countries were threatened.¹⁴ Tensions were exacerbated as newspapers in Europe and North America reprinted the cartoons in an act of free speech solidarity, which showed little regard to the sensitivity of the Muslim population around the world.¹⁵

In the United Nations, the debate over defamation of religions took on new life, centered on the supposed choice between free speech and religious sensitivity. In 2005, a version of the defamation of religions resolution was debated in the General Assembly for the first time.¹⁶ Nonetheless, the General Assembly vote was a landslide; the resolution passed easily.¹⁷ The General Assembly has adopted resolutions on defamation of religions in 2006, 2007, 2008.¹⁸

The United States had consistently opposed the resolution.¹⁹ But in 2006, it became more apparent that the resolution was not going to disappear and could threaten American legal interests by challenging First Amendment jurisprudence and lowering the threshold for acceptable public speech. The

¹² Anthony Browne, *Denmark Faces International Boycott over Muslim Cartoons*, TIMES (London), Jan. 31, 2006, at 29.

¹³ *Id.*

¹⁴ *Muslim Cartoon Fury Claims Lives*, BBC NEWS, Feb. 6, 2006, http://news.bbc.co.uk/2/hi/south_asia/4684652.stm (discussing embassy attacks and threats to diplomatic relations); Browne, *supra* note 12 (discussing boycott of Danish goods).

¹⁵ *Muhammad Cartoon Row Intensifies*, BBC NEWS, Feb. 1, 2006, <http://news.bbc.co.uk/2/hi/europe/4670370.stm>.

¹⁶ G.A., 60th Sess., 3d Comm., *Yemen: Draft Resolution: Combating Defamation of Religions*, U.N. Doc. A/C.3/60/L.29 (Oct. 31, 2005).

¹⁷ G.A. Res. 60/150, U.N. Doc. A/RES/60/150 (Dec. 16, 2005). Resolution 60/150 was adopted by 101 to 53 votes with 20 abstentions. U.N. GAOR, 60th Sess., 64th plen. mtg. at 11, U.N. Doc. A/60/PV.64 (Dec. 16, 2005).

¹⁸ G.A. Res. 61/164, U.N. Doc. A/RES/61/164 (Dec. 19, 2006); G.A. Res. 62/154, U.N. Doc. A/RES/62/154 (Dec. 18, 2007); G.A. Res. 63/171, U.N. Doc. A/RES/63/171 (Dec. 18, 2008).

¹⁹ *See, e.g.*, U.N. GAOR, 60th Sess., 3d Comm., 45th mtg., ¶ 39, U.N. Doc. A/C.3/60/SR.45 (Nov. 21, 2005); *see also* Martin Sieff, *U.N. Religious Hate Vote Alarms Liberty Groups*, UNITED PRESS INT'L, Dec. 18, 2008, http://www.upi.com/news/issueoftheday/2008/12/19/Critics_slam_UN_religious_hate_vote/UPI-29281229711881/ (discussing continued U.S. opposition in 2008).

United States thus began engaging the issue more seriously through diplomatic negotiations and bilateral conversations. These discussions (as well as efforts by other organizations and nations) brought about the first significant challenge to the resolution on defamation of religions at the U.N. Human Rights Council (formerly the UN Commission on Human rights) in 2006.

As the parsing of words and negotiations has evolved over the past decade, delegations have gradually become more educated on the concept of defamation of religions and its danger to the human rights structure.²⁰ This education campaign significantly hurt support for the resolution. The Human Rights Council and the General Assembly have continued to pass the resolution,²¹ but in 2008, both resolutions, one in the Human Rights Council and the other in the General Assembly, passed only by plurality.²² For the first time, there were more “no” votes and abstentions than there were “yes” votes.

However, this issue is not likely to disappear any time soon, despite the recent turn of events. The OIC will likely propose a similar resolution again in March 2009 at the Human Rights Council, and the issue has already begun to take a central role in the preparations for the Durban Review Conference.²³

²⁰ See U.N. Office at Geneva [UNOG], Human Rights Council Discusses Reports on Freedom of Religion and Belief, and Human Rights and International Solidarity (Sep. 13, 2007), available at [http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear_en\)/BFFD4B2D3B32BDCAC1257355003CA0D6?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/BFFD4B2D3B32BDCAC1257355003CA0D6?OpenDocument).

²¹ HRC Res. 7/19, at 54, U.N. Doc. A/HRC/4/123 (Mar. 27, 2008); HRC Res. 4/9, *supra* note 7; G.A. Res. 63/171, *supra* note 18; G.A. Res. 62/154, *supra* note 18; G.A. Res. 61/164, *supra* note 18.

²² The 2008 Human Rights Council resolution passed with a vote of 21 in favor, 10 in opposition, and 14 in abstention. HRC Res. 7/19, *supra* note 21, at 58. The 2008 General Assembly resolution passed with 86 in favor, 53 against, and 42 abstentions. U.N. GAOR, 63rd Sess., 70th plen. mtg. at 17–18, U.N. Doc. A/63/PV.70 (Dec. 18, 2008).

²³ Barbara Sowell, *Durban II: More U.N. Efforts to Squelch Free Speech?*, DIGITAL J., Mar. 11, 2009, <http://www.digitaljournal.com/article/269015>. The Durban Review Conference will take place in April in Geneva, Switzerland. It is a follow-up conference to one that took place in 2001 in Durban, South Africa, on the topic of racism and other forms of intolerance. The 2001 conference was meant to address gaps in the international framework for protection against racism and other forms of intolerance. Unfortunately, instead of upholding principles of respect and tolerance, the first Durban conference became an international platform for racism, anti-Semitism, and other forms of intolerance. A number of countries have already indicated reservations about attending or an intention to boycott. Simon Tisdall, *West Fears Muslim Countries Will Hijack Racism Conference*, GUARDIAN (London), Apr. 17, 2009, at 24.

II. THE BURNING COALS OF THE DEBATE

A. *The Clash of Civilizations*

Throughout academia, the Huntington thesis concerning the “clash of civilizations” is considered a lightning rod of pessimism and millennialism.²⁴ However, the defamation of religions issue has fulfilled the late social scientist’s prophecy. Indeed, the most challenging aspect of the Huntington thesis is the fear that the West and the Muslim world will not find a solution to reconcile their different worldviews.²⁵ And unfortunately, neither party is innocent. In the past decade, there has been an abundance of closed-door meetings on the issue of defamation of religions. The OIC has only recently begun to engage Western governments in a more transparent manner.²⁶ Meanwhile, even though most Western governments have put protections in place against the discrimination of Muslims, the full body pat down of any Middle Eastern man at the airport is still the most stereotypical portrayal of Western treatment of Muslims.

B. *Religious Discrimination*

It is important for all parties to recognize that there is a serious problem of discrimination against people of all religions. In the modern world, the discrimination against Muslims is particularly apparent due to the prevalence of a form of terrorism that has sought to hijack the name of Islam. The term “Islamophobia” is misleading because it frames the problem as an issue of fear rather than hate. And yet, it is important for international bodies like the United Nations to address the very real problem of unreasonable hatred based on religion. The solution, however, must not inhibit intellectual disagreement with particular worldviews, for the world is full of truth claims that will always conflict with one another. It is important to protect the individuals who wish to express those truth claims in a peaceful manner, without undue burden or censorship.

²⁴ See generally John H. Knox, *The Case of the Missing Paradigm*, 32 TEX. INT’L L. J. 355 (1997).

²⁵ See *id.* at 357.

²⁶ In 2007, the OIC hardly held any informal discussions on the defamation of religions resolution in the General Assembly. In 2008, the OIC, led by Uganda, held a number of informal discussions in an effort to address concerns from many of the Western delegations. *New York Update, General Assembly, 63rd Session, Oct. 21–Dec. 18, 2008*, N.Y. MONITOR (Int’l Serv. for Human Rights, New York, N.Y.), 2008, at 16, available at http://www.ishr.ch/index.php?option=com_docman&task=doc_download&Itemid=&gid=252.

C. *Free Speech vs. Freedom of Religion?*

As mentioned earlier, the Danish cartoon crisis was the crucible for the debate over religious sensitivity protection. Indeed, the way that the events surrounding the publication of the cartoons unfolded was unfortunate. The lack of respect shown by a few editors and cartoonists was interpreted as the intent of a continent.²⁷ Meanwhile, the response from many of those who were offended by the cartoons was so violent and destructive that it only fostered a greater cycle of hatred.²⁸ Out of this chaotic confusion emerged the claim of a dichotomy between free speech and freedom of religion—two principles that actually go hand in hand and will be discussed below in depth.

D. *Politics at Play*

The political climate following the Danish cartoon crisis and the death of Theo Van Gogh took on a polemical spirit—inciting xenophobic nationalist political parties like the National Front and the Northern League in Europe.²⁹ In 2008, Dutch parliamentarian Geert Wilders released the fearmongering film *Fitna*, which means “strife” in Arabic.³⁰ Simultaneously, wars in Iraq and Afghanistan, rising tensions in the Middle East, and negotiations regarding Turkey joining the European Union have continued to play into the geopolitical framework for the debate over the defamation of religions issue.

E. *Muslim-Jewish Tensions*

Finally, Muslim-Jewish tensions have also played an important role in the debate over religious sensitivity. Much of the debate harkens back to post-World War II era policies that first created the state of Israel but also enacted strict anti-Semitism and Holocaust denial laws throughout Europe. The Israel-Palestine conflict continues today with no foreseeable end in sight. The European anti-Semitism laws, which were appropriate to address a very real threat to a people in the post-war era, are now cited by Muslims who desire similar protection against speech critical of Islam (hence the movement to combat the defamation of Islam). Much of this aspect of the debate is wrapped

²⁷ See Thomas Olesen, *Contentious Cartoons: Elite and Media-Driven Mobilization*, 12 MOBILIZATION 37 (2007).

²⁸ Hassan M. Fattah, *At Mecca Meeting, Cartoon Outrage Crystallized*, N.Y. TIMES, Feb. 9, 2006, at A1.

²⁹ See, e.g., RAY TARAS, EUROPE OLD AND NEW: TRANSNATIONALISM, BELONGING, XENOPHOPIA 102–04 (2008).

³⁰ *Id.* at 104; Gregory Crouch, *Dutch Film Against Islam Is Released on Internet*, N.Y. TIMES, March 28, 2008, at A8.

up in the definitions of race and religion, another topic that will be examined in depth below.

III. DEFAMATION OF RELIGIONS: A PROBLEMATIC SOLUTION TO A REAL PROBLEM

A. *What Are Traditional Defamation Laws Meant to Accomplish?*

With a better sense of the problem and the contributing factors, it is now possible to assess the role of a U.N. resolution meant to combat the defamation of religions. A traditional defamation law is meant to protect an individual from false truth claims that are harmful to his livelihood.³¹ The Roger Clemens case is a current, well-known example of a defamation case. Clemens, a famous Cy Young Award-winning baseball pitcher, was made infamous when his former trainer accused him of taking performance-enhancing drugs.³² Clemens was forced to testify before the U.S. Congress.³³ He retired from baseball and was left with a reputation so tarnished that no company would choose him to endorse its product in a Super Bowl commercial. His livelihood was significantly affected by the accusation, which Clemens has maintained to be false.³⁴ Thus, Clemens brought a defamation suit against his former trainer.³⁵ If the trainer's accusation is found to be credible, the trainer will face no punishment or fine; however, if the trainer is not able to prove his accusation, he will face legal consequences for tarnishing and defaming Roger Clemens. Such is the nature of a traditional defamation suit.

In order to enforce a defamation of religion suit in the same manner, a judge would first have to recognize that an idea, philosophy, or religion can be defamed in the same way that an individual can be defamed. Human rights law has always intended the protection of individual rights, just as traditional defamation laws have always intended to protect individuals from false claims

³¹ Elyn Tracy Marcus, *Group Defamation and Individual Actions: A New Look at an Old Rule*, 71 CAL. L. REV. 1532, 1532 (1983).

³² Mary Flood & David Barron, *Fighting Back—Clemens Winds Up, Lets Denials Fly—Lawsuit*, HOUSTON CHRON., Jan. 7, 2008, at A1.

³³ *Id.*; Amy Shipley & Barry Svrluga, *On Capitol Hill, Clemens Denies Steroid Use*, WASH. POST, Feb. 14, 2008, at A1.

³⁴ Flood & Barron, *supra* note 32; Dave Sheinin, *Clemens: Allegations 'Totally False,'* WASH. POST, Jan. 7, 2008, at E3.

³⁵ Flood & Barron, *supra* note 32.

that cause an undue burden on an individual's livelihood or reputation.³⁶ Second, if a judge were able to accept the initial premise and continued with the case, he would also be forced to make a subjective decision. In order to decide a defamation case, a judge or jury must determine what is true in the case.³⁷ Thus, if a Muslim were to make the statement that Jesus was only a prophet, would that statement be considered defamatory to Christianity, which claims the Jesus was the Son of God? In order to rule in that case, the judge would be forced to take sides in a theological debate. When it comes to religion, a judge cannot objectively determine what is true unless the state is willing to make the audacious claim that it has a monopoly on eternal truth. Finally, it is also important to note that defamation laws are not meant to protect individuals from offensive statements that are peaceful in nature.³⁸ Determining what is and is not offensive also requires a subjective opinion. And as uncomfortable as it may be, there is no such thing as the right not to be offended.

B. Existing Legal Instruments

Proponents of the defamation of religions resolution are quick to respond by asking what defense we have against occasions when words have the power to incite people to violence and hatred. But international law provides for occasions of incitement to violence and recognizes that it is necessary to censor certain types of speech.³⁹ In the same way that yelling "fire" in a

³⁶ Defamation is a communication that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559 (1977).

³⁷ Proving that an alleged defamation was actually true serves as an absolute defense to the defamation claim. Noonan v. Staples, 556 F.3d 20, 26 (1st Cir. 2009) ("Since a given statement, even if libelous, must also be false to give rise to a cause of action, the defendant may assert the statement's truth as an absolute defense to a libel claim.").

³⁸ "It is proposed that in [unintentional defamation] cases that, if the defendant takes all reasonable steps to clear the reputation of the injured person by a prompt correction and apology and payment of reasonable costs involved, then, while the plaintiff is not debarred from proceeding with his action (unless he accepts the correction and apology), if it is found that there was no intention to defame and no lack of reasonable care in publishing the statements complained of, the apology and correction will constitute a good defense." G.W. Reed, *The Law of Defamation*, 8 U. TORONTO L.J. 95, 96 (1949).

³⁹ For example, the Rome Statute of the International Criminal Court criminalizes inciting others to commit genocide. Rome Statute of the International Criminal Court art. 25(3)(e), July 17, 1998, 2187 U.N.T.S. 3. Additionally,

[i]n May 2005, the Council of Europe adopted a new *Convention on the Prevention of Terrorism* which requires State parties to criminalize 'public provocation to commit a terrorist offense'. 'Public provocation' means 'the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct,

crowded theater is a punishable offense for inciting a riot, there is recognition that certain types of speech impede the safety, health, and morals of others.⁴⁰ Language amounting to hate speech or incitement to violence is considered dangerous to the wellbeing of society and is therefore restricted. But there is a very high threshold for what amounts to censorable speech.⁴¹ Such domestic laws already exist around the world and are substantiated by similar international laws.⁴²

whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed’.

Ben Saul, *Speaking of Terror: Criminalising Incitement to Violence*, 28 U. NEW S. WALES L.J. 868, 869 (2005) (internal citation omitted), available at <http://www.austlii.edu.au/au/journals/UNSWLJ/2005/53.html>.

⁴⁰ “In international law, it is recognised that freedom of expression ‘carries with it special duties and responsibilities’ and may be limited by law if necessary to secure ‘respect of the rights or reputations of others’ or to protect ‘national security . . . public order . . . public health or morals.’” *Id.* at 882 (quoting International Covenant on Civil and Political Rights art. 19(3), Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]).

⁴¹ The exception must not swallow the right:

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 jeopardise the right itself.

Id.

⁴² The Supreme Court of the United States has endeavored to find the balance between positive and negative rights of free expression as exemplified in the following two decisions. In *Roth v. United States*, 354 U.S. 476, 484 (1957), Justice Brennan provided an example of the positive rights of free expression: “All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties.” In *Gitlow v. New York*, 268 U.S. 652 (1925), Justice Stanford provided an example of the negative rights of free expression:

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question.

And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press, said Story (*supra*) does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. It does not

C. *Race vs. Religion*

The misunderstanding of the differences between race and religion has been one of the most significant hindrances to the progress of any discussion on this issue. While there is often a relationship between these characteristics, the conflation of these concepts has confused the legal protections for each of them. Race, an immutable characteristic, is treated by the law differently than is religion. Article 18 of the Universal Declaration of Human Rights (UDHR) guarantees the right to change one's religion.⁴³ This fundamental component of the freedom of conscience is, at its core, the recognition that there is such thing as a conscience that allows for an individual's beliefs and ideas to evolve and change. Unfortunately, international mechanisms for the protection of human rights have gradually weakened the direct mention of this fundamental right.⁴⁴ If race and religion continue to be conflated, this right will continue to be undermined as religion becomes defined as an immutable trait.

In a case in Malaysia with which the Becket Fund was involved, a young woman by the name of Azlina Jailani converted to Catholicism after being born as an ethnic Malay in a Muslim household.⁴⁵ However, when she went to

protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the State. And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. In short this freedom does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied.

Id. at 666–68 (citations omitted).

⁴³ Universal Declaration of Human Rights art. 18, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (“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.”).

⁴⁴ Although the UDHR includes the right to change one's religion, the ICCPR, *supra* note 40, does not directly recognize this right, instead articulating it as the right to adopt a religion:

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.

Id. art. 18(1) (emphasis added). The change in diction from “change” to “adopt” does not fully capture this particular component of religious freedom and has unfortunately become standard in international agreements. In many interpretations of Islam, apostasy is banned, thus prompting the complications with the right to change one's religion.

⁴⁵ For news reports of the case, see Ian MacKinnon, *Malaysia Rejects Bid for Christian Convert to Remove Islam ID Tag*, GUARDIAN.CO.UK, May 31, 2007, <http://www.guardian.co.uk/world/2007/may/31/>

receive a marriage certificate from the state to confirm her marriage to a Catholic man, the court refused on account of her name, which indicated that she was an ethnic Malay. In the Malaysian constitution, an ethnic Malay is defined as a Muslim, and therefore, she was not permitted to marry a non-Muslim. The court told her she would have to change her name, so she did so. However, as she was changing her name to Lina Joy, the government passed a law requiring identity cards to indicate a religious affiliation. When Ms. Joy's identity card came back indicating her as a Muslim, she returned again to the court to contest. This time, however, the civil court told Ms. Joy that changing her religious affiliation was out of their jurisdiction. She would have to go to the Shariah court to be declared an apostate before she could marry her Catholic husband. At this point in history, the Malaysian Shari'ah court had only declared one person an apostate and that was posthumously. More often than not, applications for apostasy were met with mandatory "re-education" in Islam. Thus, Lina Joy refused to submit herself to the Shari'ah court, because she claimed that, as a non-Muslim, she did not fall under their jurisdiction. Her case was ultimately appealed all the way to the Superior Court of Malaysia, where she lost two to one and was forced into hiding. This case further illustrates the problems created by a conflation of mutable and immutable characteristics. Had Malaysian law treated ethnicity or race differently than religion, the confusion suffered by Lina Joy might not have been so contentious.

The conflation of race and religion has become a major flashpoint in anticipation of the Durban Review Conference, which takes place in April 2009.⁴⁶ While the conference is meant to focus on issues of racism and other forms of intolerance, religion has consistently been referred to as a substitute for or corollary to race.⁴⁷ Recognizing a relationship between racism and

religion.islam; Jane Perlez, *Once Muslim, Now Christian and Caught in the Courts*, N.Y. TIMES, Aug. 24, 2006 at A4.

⁴⁶ The Durban Review Conference

will evaluate progress towards the goals set by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban, South Africa, in 2001.

The Review Conference will serve as a catalyst to fulfilling the promises of the Durban Declaration and Programme of Action agreed at the 2001 World Conference through reinvigorated actions, initiatives and practical solutions, illuminating the way toward equality for every individual and group in all regions and countries of the world.

The Durban Review Conference, <http://www.un.org/durbanreview2009/> (last visited Mar. 27, 2009).

⁴⁷ The Belgium representative, in discussing the Durban Review Conference at the High Level Segment of the U.N. Human Rights Council on March 3, 2009, said, "We must see racism as a problem for all

religious discrimination is very different from creating laws that treat the two characteristics as one and same. Hopefully, the upcoming review conference will address the very real issues of racism and intolerance in the world without seeking to conflate race with religion.

D. Domestic Implementation

Perhaps a more important question concerning defamation of religion laws might be how such a resolution would be implemented at the domestic level. There are few references, if any, in domestic courts to the U.N. resolutions on defamation of religions that have already been passed. Nonetheless, such resolutions set legal precedent and contribute to customary law, one of the basic components of international law.

Although there are few specific references to the resolutions themselves, there are a number of cases in which a law combating the defamation of religions was at issue. The best example of such a law is found in the Pakistan Penal Code Section 295, which makes blasphemy a crime punishable by fine, prison, or even death.⁴⁸ U.N. resolutions on the defamation of religions provide cover for such domestic laws that have been in place for a long time. Interestingly enough, the Pakistan anti-blasphemy law is probably used more often against Muslims than against minority religions.⁴⁹ Because the blasphemy standard is vague and the burden of proof is on the accused to demonstrate his innocence, the anti-blasphemy law in Pakistan is often used to settle personal scores and to drive away business competition.⁵⁰ Such laws are also used to suppress reformist dissent or minority sects of Islam.⁵¹ Such cases show how anti-blasphemy laws are used to establish theocratic regimes.

countries. The problem of defamation of religion undermines this process of the international system for protecting human rights. Human rights must protect individuals, and freedoms of individuals, and not religions as such." *Dutch FM Verhagen 'Deeply Distrubed' by Durban II*, UN WATCH, Mar. 3, 2009, <http://blog.unwatch.org/?p=265>.

⁴⁸ Pakistan currently enforces Pakistan Penal Code 295, which imposes capital punishment for blasphemy, including defamation of Islam. Pak. Pen. Code § 295 (1860).

⁴⁹ U.S. Dep't of State, Pakistan, 2008 Report on International Religious Freedom, *available at* <http://www.state.gov/g/drl/rls/irf/2008/index.htm>.

⁵⁰ *Id.*

⁵¹ The Pakistani Anti-Blasphemy laws are often used to persecute believers of the Ahmadiyya faith, a minority religion, whom the government of Pakistan does not recognize as true Muslims. Isambard Wilkinson, *Islamic Splinter Group Targeted by Pakistan's Blasphemy Laws*, DAILY TELEGRAPH (LONDON), Dec. 26, 2007, at 21. The anti-blasphemy laws of Pakistan "mandate three years' imprisonment for Ahmadis who dare to call themselves Muslim." *Id.*

Another recent episode involving an anti-blasphemy law took place in a Sudanese elementary school. Gillian Gibbons, a British citizen who was an elementary school teacher in Sudan, asked the class what they would like to name the class teddy bear. She complied with the wish of her students to name the bear Muhammad only to find herself behind bars for defaming the Prophet Muhammad.⁵² It was only after the British government intervened that Gibbons was freed and deported from Sudan.⁵³

However, anti-defamation of religion laws are not only being used to “protect” Islam; they are also used by Christians, Buddhists, Hindus, and others. In Russia, there were two recent cases in which a group of Christians sued the television networks for the defamatory nature of the popular show *South Park*.⁵⁴ In India, state anti-conversion laws define coercion by force to include “the threat of divine displeasure.”⁵⁵ Thus, if a Muslim were to tell a Hindu that polytheism was wrong and that it angers Allah, the Muslim could be found guilty of forcibly trying to convert the Hindu. Such laws are used to intimidate and create a hostile environment for religious minorities.⁵⁶ In the fall of 2008, the environment of hostility that followed an anti-conversion law became violent as Hindu extremists took to the streets, killed over 50 Christians, and displaced tens of thousands of Christians from their homes.⁵⁷ Similar legislation has been proposed in Sri Lanka, where Buddhists, the majority religious group, are seeking to establish a religious monopoly.⁵⁸ The proliferation of the abuse of defamation of religion laws proves that this concept is a tool of oppression without religious or national borders.

⁵² Kevin Sullivan, *Sudan Convicts Teacher in Naming of Teddy Bear*, WASH. POST, Nov. 30, 2007, at A18.

⁵³ *Teddy Row Teacher Leaves Sudan*, CNN, Dec. 3, 2007, <http://www.cnn.com/2007/WORLD/africa/12/03/sudan.teacher/index.html>.

⁵⁴ Nico Hines, *Russian Prosecutors in Bid to Ban South Park*, TIMESONLINE, Sept. 8, 2008, <http://www.timesonline.co.uk/tol/news/world/europe/article4704089.ece>.

⁵⁵ E.g., Orissa Freedom of Religion Act, No. 21, art. 3 (1967) (India).

⁵⁶ See Charles Haviland, *Fears for India's Secularism*, BBC NEWS, June 6, 2003, http://news.bbc.co.uk/2/hi/south_asia/2967196.stm.

⁵⁷ See CHRISTIAN SOLIDARITY WORLDWIDE, BRIEFING, INDIA: RELIGIOUSLY-MOTIVATED VIOLENCE & DISCRIMINATION AGAINST CHRISTIANS 4 (2009), available at <http://dynamic.csw.org.uk/article.asp?t=report&id=106> (follow “Download full report” hyperlink); *India: “Anti-Conversion” Law Considered in Karnataka*, COMPASS DIRECT NEWS, Mar. 2, 2009, <http://www.compassdirect.org/en/display.php?page=news&lang=en&length=long&idelement=5829>; Hari Kumar & Heather Timmons, *Violence in India Is Fueled by Religious and Economic Divide*, N.Y. TIMES, Sept. 3, 2008, at A6.

⁵⁸ See Melani Manel Perera, *Anti-Conversion Bill: Minorities Fear Restrictions on Religious Freedom*, ASIANews, Jan. 20, 2009, <http://www.asianews.it/index.php?l=en&art=14360>.

E. Where Is the Conversation Moving?

Following the backlash against the resolutions on defamation of religions in 2008, the OIC is beginning to address the issue from a different approach—focusing more on incitement to violence, discrimination, or hatred, rather than defamation of religions.⁵⁹ From a legal standpoint, the conversation is moving away from Articles 18 and 19 of the ICCPR, guaranteeing freedom of religion and expression, and toward Article 20, prohibiting incitement to discrimination and violence.⁶⁰ However, there are a number of risks involved in bringing the discussion into the context of Article 20. First and foremost, Article 20 presupposes the freedom of expression found in Articles 18 and 19. Without freedom of expression, there is no need for a strict set of parameters on circumstances in which a government may restrict that freedom. When the United States ratified the ICCPR, it issued a reservation regarding Article 20 because of a contradiction with the First Amendment.⁶¹ European nations, meanwhile, have more hate speech legislation already on the books and will be questioned about the equal treatment of all groups. There has been some discussion of re-opening Article 20 to a Human Rights Committee general comment—an in-depth expert analysis of the provision, which is then accepted or denied by the General Assembly. However, such a re-opening could be very dangerous, as it might lead to a lowering of the high threshold for the extreme circumstances in which fundamental rights may be restricted. In the near future, another resolution on defamation of religions is expected in March 2009 at the Human Rights Council, and the issue will most likely remain a high agenda item at the Durban Review Conference.

F. So What Is the Solution?

While most of the legal solutions that have been put forward by the OIC are already dangerous for the stability of human rights law, it is important for countries to be thinking creatively about how to address problems of religious discrimination and hatred. Most of these solutions are actually found in the political, rather than legal, arena. In many situations, a government can

⁵⁹ See UNOG, *supra*, note 20 (Marghoob Saleem Butt of Pakistan speaking on behalf of the OIC about “incidents of religious intolerance and xenophobia in the west”).

⁶⁰ Article 20(2) provides: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” ICCPR, *supra* note 40, art. 20(2).

⁶¹ See S. COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 102-23 (1992), *reprinted in* 31 I.L.M. 645 (1992) (“That article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.”).

condemn particular viewpoints without taking legal action. Additionally, much of the hatred that is expressed toward particular religious groups today results from ignorance, which can be countered by more thorough education. If the “other” is not understood, why should he be accepted or respected? In a modern, pluralistic society, the melting pot sometimes needs stirring, and the best way of doing that is through education. Finally, a state has the duty to protect the public square to ensure that all religious traditions may interact freely without threat of suppression, by state or non-state actors. If a state is able to ensure a space for the free marketplace of ideas, truth claims will work themselves out in an educational manner, and the fundamental right to choose and assert truth claims in a peaceful manner will be maintained.

Since the delivery of this presentation, a number of developments have occurred. First, as predicted, the U.N. Human Rights Council once again passed a resolution on the defamation of religions in March 2009.⁶² The vote remained a plurality, and informal discussions reflected concern about the use of the word “defamation.”

Second, the Durban Review Conference in April 2009 did address the issue of defamation of religions, but after heavy lobbying by a number of countries that were concerned about throwing off the entire purpose of the conference, which was meant to address racism, the outcome document deleted any reference to defamation of religions.⁶³ This development was a landmark in the debate and may foreshadow a shift away from the term “defamation of religions” toward the debate over incitement to violence, discrimination, hostility, and hatred (Article 20 of the ICCPR).

Finally, three U.N. Special Rapporteurs on Freedom of Religion or Belief, Freedom of Expression, and Racism delivered a statement in April at the Durban Review Conference to express concern about the defamation of religions issue.⁶⁴ They warned countries not to criminalize peaceful

⁶² HRC Res. 10/22, at 78, U.N. Doc. A/HRC/10/L.11 (Mar. 26, 2009).

⁶³ U.N. Durban Review Conference, Outcome Document of the Durban Review Conference, *available at* http://www.un.org/durbanreview2009/pdf/Durban_Review_outcome_document_En.pdf (last visited July 10, 2009).

⁶⁴ Githu Muigai, Asma Jahangir & Frank La Rue, Freedom of Expression and Incitement to Racial or Religious Hatred, Statement at OHCHR Side Event During the Durban Review Conference (Apr. 22, 2009), *available at* <http://www2.ohchr.org/english/issues/opinion/docs/SRJointstatement22April09New.pdf>.

expressions of religion and even cautioned against watering down existing understandings of incitement to violence, discrimination, hostility, and hatred.⁶⁵

⁶⁵ *Id.*