

Human Rights First Working Paper on Incitement Laws and Religious Defamation Laws¹

Human Rights First has prepared this working paper on Articles 18, 19, and 20 of the International Covenant on Civil and Political Rights to inform the debate on the protection of freedom of expression, incitement and the defamation of religion.

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According to a study commissioned by Human Rights First, there is a high risk that Incitement Laws and Religious Defamation Laws will unnecessarily trample upon the right to freedom of expression. To avoid this, States should be guided by the following five considerations:

- (a) The fundamental right to freedom of expression should only be restricted in certain narrowly defined circumstances, prescribed by ICCPR Articles 19 and 20.
- (b) The fundamental right to freedom of thought, conscience and religion should only be restricted in certain narrowly defined circumstances, prescribed by ICCPR Article 18.
- (c) The fundamental rights of freedom of expression and religion can only be protected if States ensure that the elements of Incitement

¹ See, e.g., U.N. Resolution 60/150, *Combating defamation of religions*, January 20, 2006, U.N. Doc. A/RES/60/150 and subsequent U.N. Resolutions on the same topic (Resolution 61/164, February 21, 2007; Resolution 62/154, March 6, 2008).

and Religious Defamation Laws: (i) are defined precisely; (ii) are applied and enforced equally and not selectively; (iii) provide for punishment that is proportionate to the alleged offense; and (iv) provide adequate safeguards to prevent abuse of powers in the Laws' enforcement.

- (d) The need to protect religious freedom should not be conflated with the need to prevent racial hatred. Thus, States should not place undue emphasis on Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination (*CERD*), at the expense of the right to freedom of expression and religion.
- (e) Any incursion on the rights to freedom of expression and religion, in favor of greater regulation of speech, other than those limited incursions permitted by the ICCPR, may well exacerbate, rather than ameliorate, the problem of hate speech aimed at religion.

2. In general, it is necessary that all Incitement Laws meet the criteria of ICCPR Article 19(3). Thus, such laws must be (a) duly enacted by the appropriate State body, and (b) necessary for (c) “respect of the rights or reputations of others” or for “the protection of national security or of public order (*ordre public*), or of public health or morals.” In addition, Incitement Laws need to be drafted in such a way to meet the criteria of ICCPR Article 20(2). Thus, such Laws should prohibit only “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.” Insofar as Incitement Laws impact on the right to freedom of thought, conscience and religion, these laws must also meet the criteria of ICCPR Article 18(3). That is, the laws must be necessary to “protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”

3. In relation to Religious Defamation Laws: these laws are unlikely to meet the high thresholds set forth in ICCPR Articles 18(3), 19(3) and 20(2) unless these laws link religious defamation to incitement to discrimination, hostility or violence.

I. THE FUNDAMENTAL RIGHT OF FREEDOM OF EXPRESSION, PROTECTED BY ICCPR ARTICLES 19 AND 20

A. The Right To Freedom Of Expression And Permitted Restrictions On This Right

4. The international law norm of freedom of expression is enshrined in a number of international human rights instruments. For example, ICCPR Article 19(2) states:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

5. Analogous guarantees of the right to freedom of expression can be found in the Universal Declaration of Human Rights (the *UDHR*),² the American Convention on Human Rights (the *American Convention*),³ the European Convention on Human Rights (the *European Convention*),⁴ and the African Charter on Human and Peoples' Rights (the *African Charter*).⁵ Across the board, these instruments recognize a broad right to freedom of expression, applying:

*not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society."*⁶

6. However, the right to freedom of expression is not absolute, and may be restricted in certain narrowly defined circumstances. ICCPR Article 19(3) permits restrictions subject to a three-part test: the restriction must be (a) "provided by law," and (b) "necessary" for (c) "respect of the rights or reputations of others" or for "the protection of national security or of public order (*ordre public*), or of public health or morals." Similar restrictions on the right to freedom of expression are envisaged in the UDHR,⁷ the American Convention,⁸ the European Convention,⁹ and the Declaration of Principles on Freedom of Expression in Africa.¹⁰

7. Pursuant to the ICCPR, however, any restriction imposed by States on the right to freedom of expression must comply with the criteria set forth in Article 19(3). As explained by the Human Rights Committee:

² UDHR, Article 19.

³ American Convention, Article 13(1).

⁴ European Convention, Article 10(1).

⁵ African Charter, Article 9.

⁶ *Handyside v. United Kingdom*, ECHR No. 5493/72, December 7, 1976, § 49.

⁷ UDHR, Article 29(2) ("In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.").

⁸ American Convention, Article 13(2) (similar to ICCPR Article 19(2)).

⁹ European Convention, Article 10(2) ("The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.").

¹⁰ Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa (2002) (Res. 62(XXXII)02), Principle II(2) ("Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.").

*[W]hen a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Paragraph 3 [of ICCPR Article 19] lays down conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be “provided by law”; they may only be imposed for one of the purposes set out in subparagraphs (a) and (b) of paragraph 3; and they must be justified as being “necessary” for that State party for one of those purposes.*¹¹

8. The same approach has been adopted by the European Court of Human Rights (the *ECHR*). In particular, the ECHR has confirmed the primacy of the right to freedom of expression in the European Convention, noting that, when assessing a particular restriction, the ECHR is not faced “with a choice between two conflicting principles” but rather is faced “with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.”¹² As the ECHR has further explained:

*The test of whether the interference complained of was “necessary in a democratic society” requires the Court to determine whether it corresponded to a “pressing social need”, whether it was proportionate to the legitimate aim pursued (the potential impact of the medium of expression concerned is an important factor in the consideration of the proportionality of an interference), and whether the reasons given by the national authorities to justify it are relevant and sufficient.*¹³

9. The requirement that the restriction be “necessary” limits States’ discretion in enacting laws in this area, and “[t]he necessity for any restriction [on the right to freedom of expression] must be convincingly established.”¹⁴

B. Incitement Laws Should Be Narrowly Drafted To Avoid Impact On The Fundamental Right Of Freedom Of Expression

10. One of the few permitted restrictions on the right to freedom of expression is where the exercise of that right results, or will likely result in, violence stemming from incitement of religious hatred. This restriction is expressly set out in Article 20(2) of the ICCPR, which states that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”¹⁵

¹¹ Human Rights Committee (*HRC*), General Comment 10, Article 19, U.N. Doc. HRI/GEN/1/Rev.1 at 11 (1994), ¶ 4.

¹² *The Sunday Times v. United Kingdom*, 1 EHRR 737, April 26, 1976, § 65.

¹³ *Klein v. Slovakia*, ECHR No. 72208/01, January 31, 2007, § 47.

¹⁴ *Case of Otto-Preminger-Institut v. Austria*, ECHR No. 13470/87, September 20, 1994, § 49; see also HRC, General Comment 11, Article 20, U.N. Doc. HRI/GEN/1/Rev.1 at 12 (1994), ¶ 1 (States should adopt only “necessary legislative measures” that prohibit the actions in Article 20(2)).

¹⁵ ICCPR, Article 20(2); see also American Convention, Article 13(5) (“Any propaganda for ... religious hatred that constitute[s] incitements to lawless violence or to any other similar action against

11. In order to avoid the possibility that the legislation required pursuant to Article 20(2) unduly trammels the right to freedom of expression, such legislation should be drafted narrowly. Thus, pursuant to Article 20(2), a State law may prohibit “advocacy” of “religious hatred” only when such advocacy “constitutes incitement to discrimination, hostility or violence.” ICCPR Article 20 does not provide an independent basis for regulation on the right to freedom of expression that is inconsistent with Article 19. In other words, a restriction enacted under ICCPR Article 20(2) must also meet the three-part test elucidated by ICCPR Article 19(3).

12. This interpretation of the interplay between Articles 19 and 20 of the ICCPR is confirmed in ECHR jurisprudence, which holds that any restriction on the right to freedom of expression in the context of religious opinions and beliefs will be closely scrutinized. The ECHR will only permit restrictions on expressions “that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.”¹⁶ The ECHR will protect the freedom of expression of historians or journalists disseminating views which contribute to “a wide-ranging and ongoing debate,” where such views do not appear to be “gratuitous or detached from the reality of contemporary thought.”¹⁷

13. As explained by the U.N. Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the U.N. Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related tolerance, Doudou Diène:

*The threshold of the acts that are referred to in [ICCPR] article 20 is relatively high because they have to constitute advocacy of national, racial or religious hatred. Accordingly, the Special Rapporteur is of the opinion that expressions should only be prohibited under article 20 if they constitute incitement to imminent acts of violence or discrimination against a specific individual or group.*¹⁸

14. Under ICCPR Articles 19 and 20, legitimate public discourse on religion is protected as part of the right of freedom of expression, with limited restrictions on such discourse to prohibit advocacy of religious hatred for incitement of violence. Requiring violence to be imminent is consistent with the purpose of ICCPR Article 20(2), which is to protect individuals from violence, not to protect the religion from criticism. Incitement Laws, if sufficiently narrowly drafted, may pass the tests of ICCPR Articles 19 and 20, but most

any person or group of persons on any grounds including those of ... religion ... shall be considered as offenses punishable by law.”).

¹⁶ *Case of Otto-Preminger-Institut v. Austria*, ECHR No. 13470/87, September 20, 1994, § 49.

¹⁷ *Giniewski v. France*, ECHR No. 64016/00, April 31, 2006, § 50.

¹⁸ Report of the Special Rapporteur on freedom of religion or belief, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, U.N. Doc. A/HRC/2/3 (September 20, 2006) (*Special Rapporteurs 2006 Report*), ¶ 47 (emphasis added).

Religious Defamation Laws will not pass these tests. As noted by the Special Rapporteur on Freedom of Religion or Belief:

[G]roups of atheists and non-theists have recently voiced their deep concerns about the present exercise to combat “defamation of religions” at the international level. These atheist and non-theist groups argue that the very concept of “defamation of religions” is flawed, since it is individuals – both believers and non-believers alike – who have rights, not religions.¹⁹

15. The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance made similar observations in the first substantive session of the Preparatory Committee for the Durban Review Conference on April 22, 2008:

[T]he focus of the debate on racism and religion should be shifted away from defamation of religions to incitement to racial and religious hatred. ... [W]hile defamation of religions is a sociological concept, incitement to racial and religious hatred is a legal concept that can be dealt with under international instruments; in the framework of human rights, incitement to racial and religious hatred is prohibited by the ICCPR, ICERD and the Durban Declaration and Programme of Action, and by many national constitutions.²⁰

II. RELIGIOUS DEFAMATION LAWS ARE DIFFICULT TO RECONCILE WITH THE FUNDAMENTAL RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION, PROTECTED BY ICCPR ARTICLE 18

16. A number of international instruments confirm the right to freedom of thought, conscience and religion, which includes the freedom for an individual to maintain, change or reject theism as and when they so choose. For example, Article 18(1) of the ICCPR states:

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.

¹⁹ Interim Report of the Special Rapporteur on freedom of religion or belief, U.N. Doc. A/62/280 (August 20, 2007) (*Special Rapporteur 2007 Interim Report*), ¶ 71.

²⁰ Study of U.N. High Commissioner for Human Rights (*UNHCHR*) compiling existing legislations and jurisprudence concerning defamation of and contempt for religions, U.N. Doc. A/HRC/9/25 (September 5, 2008), ¶ 39.

17. Similar guarantees are found in the UDHR,²¹ the European Convention,²² the American Convention²³ and the African Charter.²⁴ The Human Rights Committee has emphasized the importance of choice in the exercise of freedom of religion:

*The Committee observes that the freedom to “have or to adopt” a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one’s current religion or belief with another or to adopt atheistic views, as well as the right to retain one’s religion or belief.*²⁵

18. Like the right to freedom of expression, the right to freedom of thought, conscience and religion may be restricted, but only in certain narrowly-defined circumstances, similar (but not identical) to the restrictions permitted in ICCPR Article 19(3). The restrictions on the right to freedom of thought, conscience and religion are set forth in ICCPR Article 18(3):

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.

19. Because the right to freedom of religion is grounded upon the right of an individual to choose his or her own religion, Article 18 of the ICCPR makes clear that it must be accompanied by a full and free discourse as to the advantages and disadvantages of individual religions. Religious Defamation Laws are likely to be inconsistent with such a full and free discourse and, therefore, are unlikely to fall within the narrow exception set forth in Article 18(3). As the Special Rapporteurs have noted:

[T]he right to freedom of religion or belief, as enshrined in relevant international legal standards, does not include the right to have a religion or belief that is free from criticism or ridicule....

Defamation of religions may offend people and hurt their feelings but it does not necessarily or at least directly result in a violation of their rights, including their right to freedom of religion. Freedom of religion primarily confers a right to act in accordance with one’s religion but

²¹ UDHR, Article 18.

²² European Convention, Article 9(1).

²³ American Convention, Article 12(1).

²⁴ African Charter, Article 8.

²⁵ HRC, General Comment 22, Article 18, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994) (*General Comment 22*), ¶ 5; see also Report of Special Rapporteur on freedom of religion or belief, U.N. Doc. A/HRC/6/5 (July 20, 2007) (*Special Rapporteur 2007 Report*), ¶ 7.

*does not bestow a right for believers to have their religion itself protected from all adverse comment.*²⁶

20. Religious Defamation Laws are also inconsistent with the right to freedom of thought, conscience or religion, insofar as such laws favor religion (by shielding it from defamation and criticism) at the expense of agnostic or atheistic views.²⁷

III. DRAFTING APPROPRIATE INCITEMENT LAWS AND RELIGIOUS DEFAMATION LAWS

21. It is clear from the foregoing that, in order to craft Incitement Laws and Religious Defamation Laws that are consistent with the right to freedom of expression and religion, States must ensure that: (a) the elements of such laws are defined with sufficient precision; (b) the Laws are equally applied and enforced; (c) adequate safeguards are in place to prevent abuse of powers in the enforcement of laws; and (d) the punishment provided in such laws is proportionate to the offense.

22. The absence of precise definitions of the elements of Incitement Laws and Religious Defamation Laws has already been recognized to be a problem. The UN High Commissioner for Human Rights conducted a survey of States on this area, and concluded that there is no common understanding as to the meaning of the term “defamation of religion,” and that the various State laws apply to conduct as varied as contempt, ridicule, outrage and disrespect, which could certainly intrude on freedom of expression.²⁸ In addition, in many common law systems, truth is a defense to a claim of defamation, with defamation laws being intended to prevent the dissemination of false statements to harm another person. Determining the “truth” or “falsity” of a statement made in relation to a particular religion is problematic, because religions often promote belief in a divine authority whose teachings constitute the absolute and whole “truth.” If the decision-maker - a judge, jury or administrative tribunal, and in almost all cases an organ of the State - rules on the veracity of the alleged defamatory statement, such a ruling may infringe a national requirement of separation of church and state, and may also suppress opposing views and stifle debate.²⁹ In some States, it may be difficult to find an impartial and independent body to make such a determination on religious truth.³⁰

²⁶ Special Rapporteurs 2006 Report, *supra* note 18, ¶¶ 36-37.

²⁷ International Humanist and Ethical Union, *Statement: Combating Defamation of Religion - unnecessary, flawed and morally wrong*, available at <http://www.ihcu.org/node/2751> (accessed September 30, 2008); see also General Comment 22, *supra* note 25, ¶ 2 (ICCPR “Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or beliefs.”).

²⁸ Report of UNHCHR on the Implementation of Human Rights Council Resolution 7/19 Entitled “Combating Defamation of Religions,” U.N. Doc. A/HRC/9/7 (September 12, 2008), ¶ 67.

²⁹ *Combating Defamation of Religions*, submitted by the Becket Fund for Religious Liberty to UNHCHR, June 2, 2008, pp. 5-6.

³⁰ Special Rapporteur 2007 Interim Report, *supra* note 19, ¶ 77; *Blasphemous Matter: Blasphemy, defamation of religion and Human Rights*, Magenta Foundation Publication, September 2008, p. 25.

23. As noted above, it is also clear that, in order for Incitement and Defamation Laws to be consistent with the right to freedom of thought and expression, such laws must be equally, and not selectively enforced, to protect individuals practicing all religions, not just religions condoned by the State. Selective application of the Law on the basis of the relevant religion would itself be discriminatory.³¹ The Special Rapporteur on freedom of religion or belief has noted many examples of persecution of religious minorities as a result of legislation on religious offences, and overzealous application of laws that are neutrally cast.³² We are aware of reports that some States have enacted Defamation Laws that are selectively enforced towards religious minorities for alleged violations, analogous to “anti-blaspemy” laws, and by States that have enacted Laws punishing such violations with death.³³

24. The improper expression of religious ideas or beliefs must also be subject to appropriate punishment, proportionate to the alleged offense.³⁴ In implementing Incitement Laws and Religious Defamation Laws, States must also ensure that there are adequate safeguards, in the form of internal checks and balances and mechanisms for complaints, on the exercise of executive and judicial power.

IV. RESTRICTIONS ON THE RIGHT TO FREEDOM OF EXPRESSION MAY EXACERBATE THE PROBLEM OF HATE SPEECH AIMED AT RELIGION

25. There is evidence that shifting the delicate balance away from the right to freedom of expression and in favor of greater regulation of speech may exacerbate, rather than ameliorate, the problem of hate speech aimed at religion. As the Special Rapporteur on freedom of religion or belief concluded:

*At the global level, any attempt to lower the threshold of article 20 of the Covenant would not only shrink the frontiers of free expression, but also limit freedom of religion or belief itself. Such an attempt could be counterproductive and may promote an atmosphere of religious intolerance.*³⁵

³¹ Ben Clarke, *Freedom of Speech and Criticism of Religion: What are the Limits?*, 14(2) Murdoch University E Law Journal 94, 97 (2007).

³² Special Rapporteur 2007 Interim Report, *supra* note 19, ¶ 29.

³³ *Combating Defamation of Religions*, European Centre for Law and Justice, Submission to UNHCHR, June 2008; *Defamation of Religions*, Issues Brief for UNHCHR, Becket Fund for Religious Liberty, June 2, 2008, p. 1. Pakistan, which first introduced the “defamation of religions” issue to the Commission of Human Rights in 1999, currently enforces Penal Code No. 295 of 1986, which imposes capital punishment for blasphemy, including defamation of Islam.

³⁴ *Gündüz v. Turkey*, ECHR No. 35071/97, June 14, 2004, § 40.

³⁵ *Id.*, ¶ 50; see also Special Rapporteur 2007 Report, *supra* note 25, ¶ 39.