

Freedom of Speech and Criticism of Religion: What are the Limits?¹

Ben Clarke

A INTRODUCTION

This paper examines the challenges that confront the international community in seeking to harmonize fundamentally different world views. It explores antinomies that arise when freedom of expression and freedom of religion collide. A number of relevant controversies are noted. These include those surrounding: Salman Rushdie's book *The Satanic Verses*; the Danish cartoons; the Dutch film *Submission Part I*; and the banning of head scarves in public institutions in some European States⁵ but not others.⁶ An expansive literature on these topics has already emerged.⁷ Simultaneously, a number of 'atheist manifestos' have been published. Many of these books directly criticize world religions.⁸ Some single

¹ Ben Clarke, Senior Lecturer in Law, University of Notre Dame Australia. The views expressed in this article are those of the author. Email: bclarke@nd.edu.au This article is based upon a conference paper delivered at the Talifa Technical University International Conference on *Human Development and Security in a Changing World*, 10-12 July 2007, Jordan.

⁵ For a recent survey of European State practice on the headscarf issue see: Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (2006); and Steiner, Alston and Goodman, 622-633.

⁶ See Steiner, Alston and Goodman, *ibid*, 622-633. In Western Australia, where Muslims represent around 1% of the population the *hijab* is an optional part of the police uniform, as is the Sikh turban. In 2005 Australia's federal Education Minister Brendan Nelson stated "we defend the rights of all Australian children to be able to go to schools which their parents think best meet the needs of their own children and, in doing so, to wear the symbols of their own religious conviction and affiliation, so long as they are consistent with broader school's uniform policies": 'Nelson rejects school headscarf ban' 28 August 2005 available at www.abc.net.au/news

⁷ See Alain Cabantous' *Blasphemy: Impious Speech in the West from the Seventeenth to the Nineteenth Century* (2002), David Lawton, *Blasphemy* (1993), Leonard Levy *Blasphemy: Verbal Offence against the Sacred, from Moses to Salman Rushdie* (1993); Alan Hunt *Governing Morals: A Social History of Moral Regulation* (1999); Marci Hamilton *God vs the Gavel: Religion & the Rule of Law* (2004). See also George Nokes, *A History of the Crime of Blasphemy* (1928).

⁸ Samuel Harris, *The End of Faith* (2005); Daniel Darret, *Breaking the Spell: Religion as a Natural Phenomenon* (2006); Richard Dawkins, *The God Delusion* (2006); Christopher Hitchens, *God is Not Good: How Religion Poisons Everything* (2007); Tamas Pataki, *Against Religion* (2007); James Herveij Johnson, *The Case Against Religion* (1949); Michel Onfray, *Atheist Manifesto: The Case Against Christianity, Judaism, and Islam* (2007); Ayaan Hirsi Ali *Infidel: My Journey to Enlightenment* (2007); Bawer, *While Europe Slept: How Radical Islam Is Destroying the West from Within* (2006); Ibn Warraq *Why I am Not a Muslim* (1996); Ibn Warraq *Leaving Islam: Apostates Speak Out*, (ed.) (2003); Ibn Warraq, *Which Koran?: Variants, Manuscripts, and the Influence of Pre-Islamic Poetry* (2007); Brigitte Gabriel, *Because They Hate: A Survivor of Islamic Terror Warns America* (2006).

out religion as the primary cause of sectarian hatred and violence.⁹ Somewhat surprisingly, many recent books of this kind have not triggered the level of protest that has followed earlier criticisms of monotheistic faiths. Nonetheless they feed into the growing debate over the role of religion in contemporary societies,¹⁰ and whether freedom of expression must be exercised with sensitivity and respect for the religious beliefs of others. The core question to be explored here is:

Does freedom of speech include the right to publicly ridicule the religious beliefs of others?

This question is addressed by reference to the *International Covenant on Civil and Political Rights* (1966) (hereinafter 'the Covenant'), General Comments of the Human Rights Committee, jurisprudence of international and domestic courts, and the writings of legal commentators.

The paper concludes with observations about the phenomena of extremism and religious violence. It highlights the role democracy and human rights can play in building ideologies that encourage religious moderation, tolerance, human security and protection of minority rights. These observations are made with the knowledge that *the Islamic world has always belonged to the human rights movement*. This is evident from the adoption by Muslim States of both the *Universal Declaration of Human Rights* (UDHR) (1948) and the Covenant. Significantly, no country has ever voted against the UDHR. Moreover, almost all States (including the vast majority of Muslim States) have now ratified the Covenant.¹¹

B GLOBALIZATION, RELIGIOUS SENSIBILITIES AND HUMAN RIGHTS

Human rights norms may be interpreted and applied in different ways at a local, national and international level. Even at a local level, there can be profound differences of opinion on the nature and scope of basic human rights. A group of students from the same community may for example disagree on how human rights are to be applied in a given context. For example, one student's literary masterpiece may be another's blasphemy. How are such diametrically opposed views to be harmonized? Is this an achievable goal? Or is it overly ambitious to hope for universal agreement on the manner in which basic human rights may be exercised? In this context it is acknowledged that some religious sects contain inherent constraints on the exercise of Covenant rights and freedoms, including

⁹ See Dawkins and Hitchens, note 7 above.

¹⁰ Bruce Irshad Manji *The Trouble with Islam Today: A Muslim's Call for Reform in Her Faith* (2004); Mohammed Arkoun, *Islam: To Reform or to Subvert?* (2006); Dr. Abdulaziz Othman Altwaijri, *Enlightenment as an Islamic concept* (2007); DeLong-Bas, *Wahhabi Islam: From Revival and Reform to Global Jihad* (2004) (Oxford University Press); Bawer, *While Europe Slept: How Radical Islam Is Destroying the West from Within* (2006); Ibn Warraq *Why I am Not a Muslim* (1996); Ibn Warraq *Leaving Islam: Apostates Speak Out*, (ed.) (2003); Ibn Warraq, *Which Koran?: Variants, Manuscripts, and the Influence of Pre-Islamic Poetry* (2007); Brigitte Gabriel, *Because They Hate: A Survivor of Islamic Terror Warns America* (2006).

¹¹ See Annexure I: States Party to the Covenant (ICCPR) at 19 April 2007.

freedom of religion and expression.¹² The mere raising of certain questions can carry implications in some societies. In some States certain topics are not open for public discussion. Advocacy of gay and lesbians rights, or criticism of the behaviour of the Prophet Mohammed, are two examples. Public debate about such matters is not acceptable in some Muslim countries. This article explores some of the practical and normative difficulties posed by these issues in an age of pluralism and democracy where competing rights must be balanced. A range of questions are considered: Should the 'protected knowledge' of one faith be forbidden territory for comedians, philosophers, and critics who hold a different world view? Can a balance be struck between (a) respect for religious beliefs and (b) traditions of artistic license and freedom of expression? Or is there an irreconcilable difference of opinion on this issue? Is this a *bona fide* 'clash of civilizations'?¹³ Will an international consensus emerge on the need to curb freedom of expression, so insults upon religious belief may be limited? Is policing of critical expression compatible with democracy, pluralism, and human rights?

C DOES FREEDOM OF CONSCIENCE INCLUDE THE RIGHT TO CRITICIZE RELIGIONS?

Freedom to criticize religious ideas has long been a foundational principle in western democratic societies.¹⁴ Two important justifications for this position are noted here. Firstly, without this freedom, those who found religions for financial gain (i.e. in order to exploit the religious vulnerability of others) would be legally shielded from public criticism of their 'religious' practices. Secondly, belief systems which advocate physical violence may also be legally protected. Denunciation of dangerous religious sects has played an important role in human security and development in many States, including Japan and the US. However with this freedom comes the right to challenge orthodox religious ideas. This is precisely what a number of the greatest 'enlightenment scholars' of 18 and 19th century Europe did. A number attracted the ire of the establishment. Some paid with their careers and even their lives. For enlightenment philosophers, reason, science, and rational thought replaced the theological constraints that had often held back their predecessors. Superstition and ignorance were challenged.¹⁵ Liberalism and secularism flourish. The separation of religion and State became the norm. The burning of 'witches' ceased. The persecution of religious heretics and apostates ended. Freedom of speech and religion became the cornerstones of democratic polity. Scholars were free to critically analyze sacred texts of all

¹² In the case of Islam, denigration of Mohammed or fundamental tenants of the faith are strictly prohibited.

¹³ See [Samuel P. Huntington](#), *The Clash of Civilizations and the Remaking of World Order* (1996); and Bernard Lewis 'The Roots of Muslim Rage' *The Atlantic Monthly*, Sept. 1990.

¹⁴ The writings of Mark Twain offer some much celebrated examples of 19th century critical thought on religion: See *Adventures of Huckleberry Finn* (1884); *A Pen Warmed-Up in Hell: Mark Twain in Protest* (1972), ed. Frederick Anderson.

¹⁵ See Jacob, Margaret, *Enlightenment: A Brief History with Documents* (2000); Louis Dupre, *The Enlightenment & the Intellectual Foundations of Modern Culture* (2004);

faiths, and question long held assumptions about the universe.¹⁶ While this intellectual renaissance did not prevent war, it did spark innovation in 18th and 19th century European States, and contributed to developments in a range of fields including: political science, economics, philosophy and the natural sciences.

The unbridled freedom to criticize religion is not been recognized in all States. Where a religion forms part of the national ideology, it may be shielded from criticism.¹⁷ To publicly challenge the prevailing religious ideology is, in some States, a crime that may be visited with punishment. While freedom of religion and freedom of expression is often protected in the constitution, these rights are sometimes curbed by express or implied laws that protect the State religion.¹⁸ In such cases these rights are usually available to citizens 'within the limits of the law' and 'subject to public policy or morality.'

While such limitations are permissible *per se* under the Covenant, the manner of enforcement of these limitations by some States often leads to the arbitrary restrictions being placed on the enjoyment of these rights. Indeed these two rights are sometimes limited not by any specific law, but at the discretion of police or security officials. Whether a religious opinion or political idea voiced in public is 'legal' may ultimately depend upon the subjective assessments of a security official acting on his or her interpretation of 'morality' or 'public order'. Such arbitrary exercise of discretionary powers can and does result in the punishment of critics of the State religion in circumstances where their conduct would not attract official attention if it were directed at a *different* religion. In some cases States encourage criticism of certain religions *but not others*. Such State practices cannot be reconciled with either the letter or spirit of the Covenant which prohibits such discrimination. Rules of this kind can lead to oppression of political dissidents, and manipulation of religious rules by state actors for political purposes.¹⁹

¹⁶ See Jonathan Hill, *Faith in the Age of Reason* (2004)

¹⁷ Iran and Saudi Arabia are quintessential examples. In both States Islam is the official religion, religious courts exercise jurisdiction in all areas of jurisprudence, and [religious police](#) have broad powers to enforce compliance with religious laws.

¹⁸ See for example: *Constitution of Iran* (1979) Article 24; *Constitution of the Hashemite Kingdom of Jordan* (1952) Articles 14 & 15; *Constitution of Syria* (1973) Article 35; *Constitution of Kuwait* (1962) Constitution, Article 35; *Saudi Constitution* (1992), Article 39.

¹⁹ Two examples are offered here. In northern Nigeria, the politicization of religion has meant that criticism of government is labeled as criticism of Islam: See "'Political Shari'a'?" Human Rights and Islamic Law in Northern Nigeria' *Human Rights Watch*, Vol. 16, No.9(A) September 2004. Available at www.hrw.org

In Saudi Arabia, a journalist who reported on certain practices by sheikhs was arrested and interrogated about his commitment to Islam: See "Saudi Arabia: Al-Qa'ida Critic Arrested for 'Destructive Thoughts': Secret Police Ensnare Liberal Journalist" (12 April 2006). Available at www.hrw.org

D. BALANCING COMPETING RIGHTS IN AN AGE OF TERRORISM: THE STRUGGLE TO CURB RELIGIOUS VIOLENCE WITHOUT DENYING FREEDOM OF EXPRESSION, CONSCIENCE AND RELIGION

Since 11 September 2001, there has been much debate over the extent to which fundamental rights and freedoms of the individual should be curtailed in order to provide law enforcement and security agencies with the powers they need to infiltrate and disrupt terrorist cells. The core question is this: 'how is balance to be achieved between (a) respect for the right of individuals to go about their daily lives without interference from the State, and (b) the protection of the community from attacks by terrorist organizations? Can fundamental norms of a democratic society be preserved while at the same time taking necessary measures to guarantee the right to life and security of the person?

The recent control order fiasco in the UK has renewed debate on this issue.²⁰ A number of British citizens were placed on control orders after being suspected of involvement in terrorism. They could not be deported as they are British citizens. They could not be detained as there was not sufficient evidence to charge or hold them. Lord Carlisle, who was appointed by the UK government to review terrorism legislation, claimed that there was 'solid intelligence' that some of the escapees may have fled to Iraq to target US and UK soldiers. This raises questions about whether further erosion of civil liberties is needed to protect the British public from terror suspects.

Religious violence - particularly suicide bombing - is a new and bewildering phenomenon for present generations in many secular democracies. It raises a host of legal questions. Should people be detained for merely espousing extreme beliefs, such as support for militant groups that engage in religious or political violence? Is such an approach compatible with the UK's obligations under international human rights law? The British parliament must now wrestle with these questions, as they decide whether or not to adopt laws that involve a clear departure from their obligation under the *European Convention on Human Rights*. Alternatively they may declare a State of emergency in order to justify suspension of certain basic rights. While both options are undesirable and perhaps unlikely, if the threat level increases such measures will become more likely.

1. You cannot please everybody!

²⁰Under UK law, control orders may be issued where people are considered a threat to national security but there is insufficient to prosecute them. Control orders were introduced because indefinite detention without charge or trial is illegal under UK law. The shortcomings of the control order system raises a number of questions: 1) If these orders do not work should UK parliament sanction indefinite detention of terror suspects? 2) Should it grant police the power to search anyone any time without having a reasonable suspicion that they have committed an offence? 3) Are such measures justified in the face of a growing terror threat in the UK? 4) What other measures could reasonably be taken to thwart terror attacks by extremists whose ideological commitment to political or religious violence is uncovered, but who are yet to commit a crime?

It is the sovereign right of States to determine which laws they adopt and which rights they protect. They are free to determine for themselves how best to balance competing rights in the context of their specific development and security concerns. However States parties to the Covenant have given a solemn undertaking to guarantee *all* of the rights and freedoms contained in that instrument. While some of these rights may be suspended during a state of emergency, freedom of religion is not one of those rights. (See Article 4 of the Covenant.)

In balancing competing human rights it is not possible to please everybody. This is evident from decisions of the *European Court of Human Rights*, as it struggles to uphold democratic norms and human rights in cases that involve religious sensitivity.²¹ The issues are rarely black and white. They are more often a shade of grey. Great wisdom must be exercised by those entrusted with the responsibility of balancing competing human rights. The following case study illustrates these points.

E. FREEDOM OF RELIGION, DEMOCRACY AND SECULAR POLITY: THE TURKISH EXPERIENCE

Turkish polity is of importance to the present study. This medium sized nation of 71 million people has managed to harmonize the Islamic beliefs of most of its citizens with its obligations under the Covenant and the *European Convention of Human Rights*. Article 2 of the *Constitution of the Republic of Turkey* provides a platform for striking this balance:

‘The Republic of Turkey is a democratic, secular and social State governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble.’

An ignorant tourist could be excused for thinking that Atatürk - the founder of the Turkish republic, who died in 1938 - still rules Turkey. His portrait is displayed prominently in many public and private spaces across the country. However such images do not always have much serious political or even secularist content and are perhaps more symbols of nationalism than anything else. Most Islamists have learned to live with them.²² However huge attendance at pro-secularist rallies in recent months confirms that Atatürk’s legacy is deep rooted, at least among the urban and middle-class elites that still actively support secularism. Those attending voiced their concern about the possible erosion of the

²¹ See *Leyla Şahin v. Turkey* Decision of 29 June 2004, Application Number 44774/98 *European Court of Human Rights*

²² I am indebted to Taner Edis for these observations. Email correspondence from Taner Enis to Ben Clarke 4 July 2007 (copy of file).

separation of religion and State in Turkey. Such a development would offend, *inter alia*, Article 4 of the Turkish Constitution. It bars any amendment of the Constitution. While questionable from a democratic perspective, Article 4 reflects the sentiments expressed in the preamble:

‘as required by the principle of secularism, there shall be no interference whatsoever by sacred religious feelings in state affairs and politics.’

Another curious feature of the Turkish legal order is the prohibition on criticism of ‘Turkishness.’²³ Such laws are common in autocracies but frowned upon in democracies. Can this law be reconciled with freedom of speech? Is it consistent with the human rights guarantees provided by Turkey in its bid to join the EU? It remains to be seen whether Turkey will provide a model for negotiating issues of religious criticism and free speech. Turkey’s practice of prosecuting those who acknowledge and document the Armenian Genocide suggest that there is room for improvement.²⁴ Such limitations on freedom of expression are clearly inconsistent with basic rights guaranteed under the Covenant, the UDHR and the European Convention on Human Rights.

One of the most interesting cases decided in the *European Court of Human Rights* (ECHR) in recent years goes to the very heart of Turkey’s constitutional order and the debate about how to balance competing rights in a democratic State. In the *Refah Case*, the ECHR had to grapple with the following question: ‘can democracy be guaranteed when religious parties that espouse anti-democratic rhetoric contest elections?’ This raises other profound questions.²⁵ The most striking one is:

If the majority of people want to move away from pluralism and democracy and establish a non-democratic Islamic State, should judges in Brussels deny them their wish?

1. Case Study: *Refah Partisi (The Welfare Party) and Others v. Turkey*²⁶

²³ See sections 301 and 305 *Turkish Penal Code*. The latter renders criminal the expression of opinions which degrade “Turkishness, the Republic, institutions and organs of the state”. This has been interpreted to include denigration of Kemal Atatürk.

²⁴ [Article 301](#) of the Turkish Penal Code has been invoked by public prosecutors to silence Turkish intellectuals who have condemned the Armenian genocide. See Steiner, Alston and Goodman, pp4-5.

²⁵ Does Islam permit the separation of religion and State? Is this a question of interpretation? In Muslim States that do not recognize separation of religion and State or democracy is there scope for reform? Does *ijtihad* offer a vehicle for reform? Or are arguments that Islam does not permit democracy just an excuse for autocratic regimes to cling to power? On the compatibility of Islam and Democracy, see [David Smock](#), ‘Islam and Democracy’ *United States Institute of Peace*, Special Report No. 93, September 2002. Available at: www.usip.org accessed 8 October 2007; Ali Khan, “[A Theory of Universal Democracy](#),” (1997)16 *Wisconsin International Law Journal* 61 (1997).

²⁶ *Refah Partisi (The Welfare Party) and Others v. Turkey*, Judgment of the Grand Chamber, European Court of Human Rights, Strasbourg, February 13, 2003, affirming the judgment of the first Chamber delivered on 31 July 2001.

The *Refah* case is of significance for Muslim States that are exploring democratic and human rights based approaches to governance. It concerned the banning of religious parties. At issue was whether the creed of certain Islamist parties offended the democratic and secular Constitution of Turkey. At the heart of the matter is the fear that religious parties may win elections and then set about dismantling democratic institutions. (So called 'one man, one vote, one time' elections.)

a. *The Facts*

In May 1997, the Principal State Counsel of Turkey applied to the Constitutional Court of Turkey to have a political party, *Refah Partisi* ("Refah") dissolved. It was argued that the activities of Refah were contrary to principles of secularism that are entrenched in the Turkish Constitution. Refah had become the largest political party in the Turkish parliament following elections of 1995 with 158 seats in the Grand National Assembly. The applicant cited speeches by Refah politicians calling for the elimination of secularism and for its replacement with *Sharia*. The Applicant drew the court's attention to speeches by Refah party members who indicated that force may be used to achieve Refah's objectives. The Constitutional Court authorized the disbanding of Refah. It stated that secularism was "the instrument of the transition to democracy" and that "[w]ithin a secular State religious feelings simply cannot be associated with politics, public affairs and legislative provisions." The following year, high-ranking members of Refah commenced proceedings in the European Court of Human Rights. They argued that the dissolution of Refah and the suspension of the right of some of Refah's members to participate in politics breached: Article 9 of the *European Convention of Human Rights* (which protects freedom of thought), Article 10 (which guarantees freedom of expression), and Article 11 (freedom of assembly and association). They contended that the banning of their party and associated acts were not necessary to protect Turkish democracy. In particular they highlighted the fact that Refah had been in power from 1996-1997 and not attempted to bring about transform Turkey into a theocracy²⁷ or place the country under Islamic law. Moreover, Refah members had no tried to use force to fulfill their ideological objectives.

b. *The Decision of the European Court of Human Rights*

In a unanimously decision, the European Court of Human Rights opined that "compromise between the requirements of defending democratic society and individual rights is inherent in the Convention system." It declared that the State "may decide to impose on its serving or future civil servants, who will be required to wield a portion of its sovereign power, the duty to refrain from taking part in the Islamic fundamentalist movement." Moreover, it found that the Applicants had

²⁷ A range of critical views on theocratic Islamic rule see: Charles Kurzman (Ed.), *Liberal Islam: A Source-Book* (Oxford University Press, 1998)

not presented sufficient evidence that the dissolution of Refah was carried out other than for the reasons set out in the decision of the Constitutional Court of Turkey. Furthermore, these reasons (the protection: of secularism; national security; and public safety) were legitimate under Article 11(2) of the *European Convention of Human Rights*. Consequently Turkey was not in violation of Articles 9, 10 or 11 as these rights “cannot deprive the authorities of a State in which an association, through its activities, jeopardizes that State’s institutions, of the right to protect those institutions.”

c. Analysis

The case is interesting for a range of reasons. Firstly it suggests that religious parties whose policies are at odds with democratic institutions and secular norms have no place in the democratic political landscape. Secondly it implies that enforcement of *Sharia* is inconsistent with basic rights and freedoms guaranteed under the *European Convention of Human Rights*. Nonetheless, where Islamist parties enjoy popular support they are likely to emerge and re-emerge over time in Muslim societies. This happened in Turkey. Prime Minister Erdoğan and Foreign Minister Gül of the current ruling party in Turkey (the AK Party [‘Justice and Development Party’]), were, at different times, both members of banned religious parties - Refah and Fazilet Partisi (FP, "the Virtue Party").²⁸ AK espouses a commitment to democracy and says its policies reflect the diversity of modern Turkey. It denies any extremist religious agenda. Nonetheless, as has been noted, the issue triggered mass protests, with both supporters and opponents of the AK taking to the streets. The former claim that they are defending Turkey’s secular constitution and that religion should be a private matter.²⁹

F. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Almost all States have now given solemn undertakings to protect freedom of expression, freedom of religion and freedom of assembly. There are now 160 State Parties to the Covenant - including most Muslim countries.³⁰ Afghanistan, Iraq, Lebanon, Yemen, Egypt, Iran, Libya, Kuwait, Djibouti, Indonesia, India, Bangladesh, Tunisia, Mali, Morocco, Bahrain, Jordan, Syria, Sudan, Chad, Somalia, Turkey, Cameroon, Thailand and Algeria are all parties to the Covenant. (Saudi Arabia, Pakistan and UAE are the major Muslim States yet to accede to the Covenant.)

The Covenant is a descendent of the *Universal Declaration of Human Rights* (UDHR), adopted by the UN General Assembly in 1948. It has been repeatedly reaffirmed ever since by the General Assembly. Its articles are now widely

²⁸ FP succeeded Refah Partisi.

²⁹ For both sides of the debate see: ‘Turkey political crisis: Readers' views’ 2 May 2007 http://news.bbc.co.uk/2/hi/talking_point/6614965.stm

³⁰ See Annexure I (List of States Party to the *International Covenant of Civil and Political Rights*.)

acknowledged as reflecting binding norms of international legal obligation. As long ago as 1980, the U.S. Court of Appeals stated "several commentators have concluded that the Universal Declaration has become, *in toto*, a part of binding customary international law."³¹ Given that more than three quarters of the UN's members States are now bound by the Covenant under treaty law, it is arguable that all nations may be bound by this instrument under customary international law.³²

1. 'General Comments' of the United Nations Human Rights Committee

In order to assist States Parties to the Covenant in ensuring that their law and practice complies with their obligations under the Covenant, the United Nations Human Rights Committee ('the Committee') has issued a series of General Comments on articles contained in the Covenant. The General Comments on freedom of religion and freedom of expression are examined here, together with those relating to implementation of the Covenant by States.

2. *Implementation of the Covenant*

General Comment (3)³³ deals with implementation of Covenant rights at the national level. It recognises that States parties have the discretion to choose their method of implementation - within the framework set out in the relevant article(s).³⁴ The Committee stresses that 'implementation does not depend solely on constitutional or legislative enactments'. They are 'often not per se sufficient.' Moreover 'States parties have ... to ensure the enjoyment of these rights to *all* individuals under their jurisdiction.'³⁵ (Not merely their own citizens or followers of the State religion.)

3. *Freedom of Expression*

Article 19 of the Covenant states:

1. Everyone shall have the right to hold opinions without interference.
2. 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.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

³¹ *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cr. 1980)

³² See Annexure 1.

³³ General Comment No. 03: Implementation at the national level (Art. 2): 29/07/1981.

³⁴ See Article 2 of the Covenant.

³⁵ General Comment No. 03: Implementation at the national level (Art. 2):

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

The UN Human Rights Committee has emphasized that the "right to hold opinions without interference" is a right for which the Covenant permits no exception or restriction.³⁶ This is significant in context of the debate about whether free speech extends to the right to criticize the beliefs of others. There is no requirement under the Covenant that individuals must censure their opinions on the religious beliefs or ideologies of others. Indeed it is hard to imagine how freedom of speech could be rationally limited in such a manner without engaging in the kind of repression that the Covenant seeks to prevent.

Consider the following hypothetical example. 'Dietism' is a religion that prohibits its members from consuming foods that contain certain vitamins that are an essential part of a healthy diet. Should non-members of the religion be prohibited from criticizing this tenant of the Dietism faith? How else can followers of Dietism be warned of the danger that this belief poses to their health?³⁷

The Committee goes on to note that 'Paragraph 2 (Article 19) requires protection of the right to freedom of expression, which includes not only freedom to "impart information and ideas of all kinds", but also freedom to "seek" and "receive" them "regardless of frontiers" and in whatever medium, "either orally, in writing or in print, in the form of art, or through any other media of his choice". Consequently efforts by States to block public access to satellite TV networks, mobile phone communication or the internet offend the right to freedom of expression. So do efforts by State officials to monitor private communications for the purposes of enforcing oppressive and discriminatory laws.

It also notes that any restrictions on freedom of expression must be "provided by law" and only imposed for one of the purposes set out in subparagraphs (a) and (b) of paragraph 3. The restrictions must be "necessary" for that State party for one of those purposes set out in (a) or (b). If they are not, such laws offend the Covenant. Blasphemy laws would therefore only be valid if it could be demonstrated that they were necessary for one of these purposes. The real legal challenge arises where States have to decide whether certain publications may incite violence. Where certain parts of the population have previously responded violently to perceived criticism of their faith there will be a genuine threat of riots and violence. In the context of Islam we know that certain critical expressions can be guaranteed to produce violence.³⁸ Should Muslim majority States therefore not permit any such criticism? A perusal of public libraries in

³⁶ General Comment No. 10: Freedom of expression (Art. 19) 29/06/83. (1983)

³⁷ After devising this 'hypothetical' I was surprised to discover that there is a religious movement (of sorts) in the US called Dietism.

³⁸ A recent example is violent protests over Danish cartoons which many Muslims considered an insult to their religion. More than 100 people died across the world in 2005 and 2006 during this saga. The most serious incidents occurred in Nigeria, Afghanistan, Syria, Iraq and Pakistan.

some Muslim States reveals that this is not the universal practice. Any number of books that could be construed as being critical of Islam can be found in libraries in some Muslim countries. If they are not banned, then why are high-profile works such as *The Satanic Verses* banned? Is the degree of adverse publicity the work has attracted the barometer? Or is there a 'scale of ridicule' to be applied here? If the work has literary merit and is a genuine work of academic scholarship rather than mere scuttlebutt should it be published? These are questions for each State to determine. Under the Covenant it would seem that this assessment must be made on a case by case basis.

4. *Freedom of thought, conscience and religion*

Article 18 states:

1. 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.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
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.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

General Comment No. 22 addresses the rights to freedom of thought, conscience and religion.³⁹ It emphasizes that these rights encompass the freedom to hold beliefs. This is particularly important in societies where atheism is the State ideology.

The Committee notes that freedom of thought, conscience and religion is: far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.

³⁹ICCPR/C/21/Rev.1/Add.4, General Comment No. 22. : 30/07/93.

The Committee underscores the fact that 'the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief.' It also notes that:

The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4.2 of the Covenant.

(i) *The protection against discrimination on the basis of religion*

Importantly in the context of this presentation, the Committee notes that:

Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.

A review of the annual reports of Human Rights Watch, Amnesty International and other non-governmental human rights organisations reveals that discrimination on the basis of religion is alive and well in a number of States. In some instances such discrimination is carried out by governmental officials at the behest of the State.⁴⁰

Attention now turns to two cases studies which tease out some of the issues and principles discussed above.

Case Study (1): The Jedi Knights – Religion or Popular Culture?

As has been noted, the UN Human Rights Committee has stated that new and emerging religions are covered by the Covenant. While some emerging religions and sects are a source of concern (due to their extremist beliefs and advocacy or practice of violence), others reflect orthodox notions of religion involving worship, devotion to God and acts of charity. A third variety are emerging religious cults that are more 'cultural trends' or 'passing fads' than serious religions. One example is the recent international campaign for 'Jedi Knights' to be recognized

⁴⁰ I explore this issue further in a forthcoming monograph: *Terrorism, Causes and Cures: Legal, Political and Philosophical Perspectives*, T. Brian Mooney, Rob Imre and Ben Clarke. (Ashgate Press, UK. Projected publication September, 2007.)

⁴² One example is Manichaeism, a dualistic religion which emerged in Babylon in the 3rd century CE. It was seen as a threat to Christianity, Zoroastrianism, and later, Islam. Manichaeans were persecuted by followers of three of these religions. In 382 Roman Emperor Theodosius I issued a decree of death for Manichaeans. See: Runciman, Steven *The Medieval Manichee: A Study of the Christian Dualist Heresy* (1982).

as a religion. It seems that some people have embraced Yoda, Luke Skywalker and the other Jedi heroes from the Star Wars films as spiritual role models. Whether disillusioned by religious violence and division, or simply having fun, hundreds of thousands of people have indicated in national census forms that they are 'Jedi Knights'. In Canada, New Zealand, the UK and Australia there were sizable internet campaigns to have 'Jedi Knight' listed as a religion on national census forms. While widely regarded as a 'massive practical joke', the Australian Bureau of Statistics did not see the humour in this campaign. In 2001 it threatened persons who wrote 'Jedi Knight' as their religion with a \$1,000 fine for stating false information on their census form. This threat back fired. It triggered an avalanche of internet support for 'the Jedi cause.' Through sheer weight of numbers, census officials in these countries had little option but to include 'Jedi Knight' on the census form. Indeed 'Jedi Knights' have often far outnumbered followers of many well recognized minority religions in census records. In a recent New Zealand census 53,000 people listed themselves as Jedi. 70,000 Australians did so in their 2001 census, while in the Canadian census of 2001 some 20,000 people reported their religion as Jedi. However the global centre of the Jedi faith appears to be England and Wales, where a staggering 390,000 people recently indicated their allegiance to the Jedi Knights.

What is to be done about the Jedis? Should they be acknowledged, ignored, or repressed? A glance at history reveals that repression of religious sects often fuels their growth. One need look no further than Christianity, Islam and the Baha'i faiths. In each case there have been attempts to repress these religious movements. All have survived and thrived. Christianity, which was suppressed in Soviet bloc countries, and in China, is now stronger in those places than it is in Western Europe. The same is true of Islam in a number of places where Muslims have been oppressed. The Bahai's of Iran face continuing persecution and discrimination at home, yet their religion continues to thrive, due in large measure to the growing Persian Diaspora.

Short of wiping out all members of a religion, which has occurred,⁴² repression does not work. Nor is it compatible with basic human rights. Whether the Jedi Knights emerge as a viable religion, or peter out when the next fashion takes hold, is not the issue. The issue is that in an age of universal human rights, people are free to believe whatever they like. However their religious practices must not harm others and their religious speech must not incite violence or hatred.⁴³

Case Study (2): Monty Python and Adel Imam

Monty Python's *The Life of Brian* (1979) is one the most cherished movies in British film history. It is a comic work of genius. Some British politicians have suggested that such films may, in the present age, not be able to be made, due

⁴³ For a useful discussion of hate speech see: Steiner, Alston and Goodman, pp 639-650.

to the restrictive impact of racial and religious hatred laws.⁴⁴ *The Life of Brian* is a satirical comedy set during the time of Jesus. The star of the film is *not* Jesus but a fictional character named Brian. The essence of the film is that some local people mistake Brian for 'The Messiah.' Many comic scenes flow from this premise. In one scene Brian's mother calls out from the crowd 'He's not the Messiah. He's a very naughty boy.' At another point, *The Gospel according to Matthew* is misquoted by those at the back of the crowd, who hear 'Blessed are the cheese makers' rather than 'Blessed are the peace makers.' These phrases have now entered into common usage in the English language. The first phrase is regarded by some film critics as the best catchphrase in film history. There are also sexual innuendos and some rude language in the film. If you ask a British adult about the *Life of Brian*, many will be able to recite a line or two from the film. It is like asking an Arab whether they have heard of Adel Imam. You can't help but think of the happy chaos that seems to follow Imam through almost every film he makes. The question is 'should the *Life of Brian* be banned because it takes a satirical look at Biblical times and has risqué content?'⁴⁵ 'Should *al-Irhab wa-l-Kebab (Terrorism and Kebab)* (1992) be banned because of its subtle observations about religion and sex?' Or more broadly, 'should Adel Imam's films be banned because of his occasional immodest behaviour on film, his liberal views, or the offence his films may cause to religious conservatives?' I doubt that Adel Imam's films would be banned in Arab States without a huge public outcry. It would be the same if the *Life of Brian* were banned in Britain. Why? In a nutshell, the rights of people to choose what they watch and listen to are time honoured universal rights. People can choose *not* to watch films or music video clips that may offend their religious sensibilities. Their right to make this choice is at the core of what it means to live in a free and democratic society. It is also fundamental to the Covenant.

G. FREEDOM OF SPEECH AND INCITEMENT OF RELIGIOUS HATRED

In 2006 the *Racial and Religious Hatred Act 2006* was enacted in the UK. It created new offences that prohibits conduct which stirs up hatred against persons on religious grounds. Religious hatred is defined as hatred against a group of persons defined by reference to religious belief or lack of religious belief. The legislation states:

A person who uses *threatening words or behaviour*, or displays any written material which is threatening, is guilty of an offence *if he intends thereby to stir up religious hatred*. (italics added)⁴⁶

⁴⁴ See *House of Commons Hansard Debates*, 11 July 2005, accessible at:

<http://www.publications.parliament.uk/pa/cm200506/cmhansrd/vo050711/debtext/50711-28.htm>

⁴⁵ *The Life of Brian* was banned for a number of years in some Western countries - including the Republic of Ireland, Norway, Italy and parts of the U.S. - for its alleged blasphemous comment. However this merely fuelled publicity and added to the film's popularity. It was marketed in Sweden as 'The film that is so funny that it was banned in Norway.'

⁴⁶ The new offences apply to the use of words or behaviour or display of written material (new section 29B), publishing or distributing written material (new section 29C), the public performance of a play (new section 29D), distributing, showing or playing a recording (new section 29E), broadcasting or including a programme in a programme service (new section 29F) and the possession of written materials or recordings with a view to display, publication, distribution

Under this law criticism of a certain religion or its prophets would not constitute an offence *per se*. Instead it must be proved that such criticisms are made by means of threatening words or behaviour AND with the intention of stirring up religious hatred. Such conduct would be punishable.

This legislation is likely to withstand a legal challenge to the *European Convention of Human Rights*. Why? In this writer's opinion the banning of the conduct specified in the Act is demonstrably necessary in a democratic society, and therefore would not contravene the Convention right to freedom of opinion and expression. Threatening words and behaviour uttered with the intent to stir up religious hatred are incompatible with a pluralistic society. They clearly undermine the freedom of others to hold their own beliefs free from intimidation.

H. CRITICISM OF RELIGION AND THE PRINCIPLE OF NON-DISCRIMINATION

As noted above, the mere criticism of certain beliefs (i.e. without threats or intimidation) is protected under the freedom of expression. Whether the target of criticism is a religion, ideology, prophet or political leader, the right to criticize is guaranteed under the Covenant. If it were otherwise, all manner of political and religious speech would have to be banned, as the principle of non-discrimination requires that such bans be applied uniformly. Let us take the example of religion. To ban criticism of religion *per se* is to declare that freedom of speech is fettered in this respect. Public criticism of established religious beliefs and doctrines would be prohibited. A number of problems arise here. As noted above, any ban on criticism of religion would need to be applied to *all* religions due to the Covenant requirement of non-discrimination. Now let's imagine trying to apply this ban in practice. Intractable problems would arise. Consider the following questions: What is to be done about sacred texts that are critical of other religions or religious groups? Should they no longer be publicly recited or taught in religious schools? Where is the line to be drawn between religion, philosophy and ideology? Should there be a minimum number of followers for a religion to be recognized? Would all sects be covered - including those that are more cultural associations than religions? When does a religion cease to be such? What about 'dead' religions such as the worship of Ba'al?⁴⁷ (Should it be acceptable to criticize 'dead' religions as opposed to 'living' ones?) Who would answer these questions? The UN Human Rights Council? Or individual States party to the Covenant?

These questions highlight an important fact. In an age of pluralism and Covenant values, the notion of protected religious knowledge (i.e. religious concepts and beliefs which, according to a religion, are not open to criticism) becomes all but impossible to enforce without offending: (a) the principle of non-discrimination,

or inclusion in a programme service (new section 29G). For each offence the words, behaviour, written material, recordings or programmes *must be threatening and intended to stir up religious hatred*.

⁴⁷ 2 Kings 10: 26-28

and (b) the rights to freedom of expression, conscience and religion. The remainder of this article explores this issue in greater depth...

I. THE PROBLEM OF DIRECT CRITICISM OF ISLAM

One of the most sensitive issues concerning freedom of speech is direct criticism of the pillars of the Islamic faith. Few contemporary writers are willing to do so unless these use a pseudonym.⁴⁸ A rare exception is Ayaan Hirsi Ali. Born in Somalia, and raised as a devout Muslim, Ali stopped practicing Islam for a range of reasons outlined in her book, and eventually became an atheist. In 2004, together with Dutch filmmaker Theo Van Gogh, she made a 10 minute film called *Submission Part I*. It was greeted instant condemnation (for its criticism of Islam) and praise (for highlighting the problem of domestic violence and marginalization of women).⁴⁹ The film depicts a Muslim woman in prayer who tells God that she may not be able to submit any longer. The woman narrates a story of domestic violence and pregnancy as a result of being raped by an uncle. She is semi-naked and has verses of Koran written on her body. In making such a provocative film, Ali alienated her Muslim audience and missed an opportunity to make a powerful statement about domestic violence and the cultures from which it springs. Instead the film degenerates into an exercise in ridicule of the Islamic faith itself. This approach was counter-productive and unnecessary. If a 'scale of ridicule' were applied, (as mooted on page 19 above) this film would score near, or at, the top end of the scale.

While extremely provocative and offensive to many Muslims, *Submission Part I* does not breach the Covenant. This is clear from the General Comment discussed above. It is therefore a legitimate, albeit distasteful, exercise of freedom of conscience and expression. The fact that many Muslims would disagree with this analysis highlights the difficulties inherent in harmonizing some aspects of international human rights law and Islamic law. Nonetheless, Muslim States retain the right to prohibit the showing of the film in the exercise of their sovereignty. The effectiveness of such a ban is questionable in an era of global technology. The film is freely available on internet websites including 'U Tube', a site that receives well over 2 million 'hits' per month. After the director of the film was murdered, Ali went into hiding and eventually moved to the US. Her autobiography, *Infidel: My Journey to Enlightenment (2007)*, made the New York Times bestsellers list. It was also the number one selling book in Europe for a time.⁵⁰

⁴⁸ Ibn Warraq is arguably the most prominent academic critic of Islam. This US based ex-Muslim writer, born to Indian-Muslim parents, is known only by his pen-name. His books include: *Why I am Not a Muslim* (1996); *Leaving Islam: Apostates Speak Out*, (ed.) (2003); and *Which Koran?: Variants, Manuscripts, and the Influence of Pre-Islamic Poetry* (2007).

⁴⁹ Van Gogh was murdered by Dutch citizen Mohammed Bouyeri two months after the film was aired on Dutch TV.

⁵⁰For a critique of Islam from a liberal feminist Muslim see: Irshad Manji *The Trouble with Islam Today: A Muslim's Call for Reform in Her Faith* (2004).

1. *Criticism of Religion as permissible Freedom of Speech: A Secular Narrative*

For proponents of secularism, these controversies are an attempt to repress or discourage the free flow of ideas and opinions, and are inconsistent with freedom of conscience and expression. Efforts to suppress religious or political expression are also counter-productive, as they frequently draw attention to the issue that the authorities are seeking to suppress. In a global age, repression of ideas and opinions is increasingly ineffective. Book and effigy burning, and calls for punishment or death of those deemed to have offended a religion attract widespread international media coverage. So does the murder of critics of religion. Such occurrences have led many people to regard certain religious communities as intolerant. Insensitive criticism of sensitive religious beliefs, and violent responses to such criticism, are *both* unfortunate. They undermine efforts to promote religious tolerance, inter-faith unity, peace and moderation.

Most religious violence to 'defend religion' is not authorized by States, although it is sometimes tolerated or condoned by State officials. Self-authorized religious violence is not only anti-democratic and contrary to fundamental human rights guaranteed under the Covenant, it also damages the reputation of the religion being 'defended' and may distort its public image. Violence against opponents of a religion breeds secular 'martyrs' (Van Gogh), while the threat of violence breeds secular 'heroes' (Ayaan Hirsi Ali). This is no more evident than in the case of Ayaan Hirsi Ali, who like Salman Rushdie, has been flooded with awards from States, NGOs and political parties across Europe since being targeted by radical Islamists. Rather than recant her views, Ali is now writing a new book - presumably in the company of her bodyguards. This work of fiction follows the Prophet Mohammed around the New York Library, where he peruses the shelves and embarks on a journey of knowledge and enlightenment.⁵¹

2. *Criticism of Islam as punishable conduct: An Islamist Narrative*

The question 'what is an appropriate response to criticism of Islam', is, from an Islamic perspective, a multilayered one. A range of issues must be addressed: How is the Quran and Hadith to be interpreted? Which school of Islamic jurisprudence, if any, applies? Is the enforcement of *Shariah* obligatory? Are individuals entitled to directly enforce *Shariah*, or must the matter be left to legal authorities? Must the religion be physically 'defended' by religious authorities, or can judgment be left to God?

⁵¹ For contrasting views on Islam and enlightenment see: Abdelwahab Meddeb, 'Islam and the Enlightenment: Between Ebb and Flow' (2006) 5 *Logos journal of modern society & culture*, accessible at www.logosjournal.com; Mohammed Arkoun, *The Unthought in Contemporary Islamic Thought*, (2002); Mohammed Arkoun, *Islam: To Reform or to Subvert* (2006) Dr. Abdulaziz Othman Altwaijri, *Enlightenment as an Islamic concept* (2007) accessible at www.isesco.org.ma/pub/Eng/enligh/Chap6.htm (The European concept of enlightenment 'does not belong to our Islamic culture and civilization.')

Basic concepts of Islamic law that will be relevant including notions of defamation in Islam, including *sabb allah* (reviling God) and *sabb al-rasul* (reviling the prophet/blasphemy). Others such as *irtadda* (to renounce Islam) may also be relevant. For some Muslims living in secular societies, criticism of Islam is regarded as irresponsible free speech that deserves verbal condemnation but nothing more. For others, such as Mohammed Bouyeri (Van Gogh's assassin) an attack upon the faith is a personal attack which requires immediate punishment.⁵² The public showing of *Submission Part I* would be likely to attract the attention of prosecutorial authorities in some Muslim States but not others, reflecting differences in law and tradition. Adding to this diverse array of factors are the treaty obligations of States. Importantly, no Muslim State entered a reservation with respect to the right to freedom of expression, conscience and belief when ratifying the Covenant. For this reason, punishment of apostasy, heresy, or defamation of religion are inconsistent with their obligations under the Covenant.⁵³ Indeed conservative Muslims scholars who regard punishment of apostasy as a religious obligation are under increasing pressure to review their position in light of the Covenant.⁵⁴ While opinion among Muslim scholars' remains divided on this issue⁵⁵ a growing number of influential Muslim thinkers are embracing freedom of faith and rejecting the doctrine of earthly punishment of apostasy.⁵⁶ In this writer's view, Muslim States can take much of the heat out of this debate by simply ratifying the 2nd Protocol to the Covenant (which bans the death penalty), and implementing this instrument at the national level. If this approach is adopted, then in the event of antimony between *Shariah* and human rights obligations under 2nd Protocol, the latter will prevail. This conclusion flows from, *inter alia*, the Law of Treaties,⁵⁷ and principles of State responsibility.⁵⁸

3. Responding to Criticism of Islam

How, from a human rights perspective, should Muslims respond (if at all) to criticism of their faith? The first thing to recognize is the direct conflict between the strict application of *Shariah* punishment and international human rights standards. *Shariah* punishment of *ridda* (repudiation of protected knowledge of

⁵²Mohammed Bouyeri 'Jihad Manifesto' -A call to destroy America and all "unbelievers" (November 5, 2004) <<http://www.militantislammonitor.org/article/id/312>>

⁵³See comments by Judge Higgins of the International Court of Justice: Rosalyn Higgins, *Problems & Process, International Law and How We Use It* (1994), 98.

⁵⁴ See Abdullah Saeed and Hassan Saeed, (2004) *Freedom of Religion, Apostasy and Islam* (Burlington, Vt.: Ashgate).

⁵⁵ Abdullah Saeed and Hassan Saeed, (2004) *Freedom of Religion, Apostasy and Islam* (Burlington, Vt.: Ashgate) 14; See also M. J. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights*, (1987); K. J. Partsch, 'Freedom of Conscience and Expression, and Political Freedoms', in L. Henkin (ed.), *The International Bill of Rights The Covenant on Civil and Political Rights*; Sultan Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights* (1970), 70.

⁵⁶ See Saeed and Saeed, *ibid.* See also Dr. Mohammad Omar Farooq 'On Apostasy and Islam: 100+ Notable Islamic Voices affirming the Freedom of Faith' April 2, 2007 <<http://apostasyyandislam.blogspot.com/>> accessed 20 June 2007.

⁵⁷ See *Vienna Convention on the Law of Treaties* (1969), Articles 26 & 27.

⁵⁸ See *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its Fifty-third Session*, UN GAOR, 56th Sess, Supp No 10, p 43, UN Doc A/56/10 (2001), Articles 1 & 2.

Islam), whether committed by *murtaddun* (apostates) or not, cannot be reconciled with the UDHR or the Covenant. Consequently a violent response to criticism of Islam violates international human rights law. This is so irrespective of whether the violence is judicially sanctioned or extra-judicial in character. It is also unnecessary under Islamic law, according to a growing number of scholars.⁵⁹ All States party to the Covenant have a treaty obligation to suppress violence against those who exercise freedom of speech. They are required to reign in those who issue *fatwas* calling for the death of critics of Islam. This is easier said than done in States where criticism of Islam is regarded by the majority of the population as a criminal act that must be punished. In promoting change in thinking on this issue a number of strategies can be adopted. One is to highlight the longstanding view of Arab and Muslim States and organizations that violence is not the answer to social problems. Here the universal values of tolerance, mercy and peace can be emphasized together with UN principles on peaceful dispute resolution. Another approach is to note that criticism of religion can be viewed as an opportunity to correct misunderstandings. In the Islamic context, there are some famous cases where such dialogues have resulted in *da'wah* (invitation) and even *al-ikrah* (conversion without coercion or manipulation) of former critics of Islam or particular Islamic sects. Of course under the Covenant, freedom of religion includes freedom to proselytize.⁶⁰ However this cuts both ways. In other words, if the principle of non-discrimination is to be honoured, then the right to proselytize must be universally respected, and therefore be available to *all* religious groups in *all* States that are party to the Covenant.

This approach raises difficulties in States where *Sharia* is followed. The concept of *ikhtilaf*⁶¹ renders the central tenants of Islam 'protected knowledge', which are off limits for criticism. An alternative approach is to say that as Islam encourages the quest for knowledge, Muslims should engage in reasoned debate on any subject.⁶² Moreover, as much of the criticism of Islam is a product of ignorance of the contemporary practices of the majority Muslims throughout the world, debate offers a chance to dispel misunderstandings and impart knowledge. The importance of such discussion is widely held by western Muslims, perhaps out of necessity. They are living in societies where people are free to question everything – including religious beliefs and practices. Since 911 there is unprecedented public interest in Islam. Whether it be the *hijab*, *jihad*, radical

⁵⁹ See for example: Abdullahi Ahmed An-Na'im, 'Human Rights in the Muslim World' (1990) 3 *Harvard Human Rights Journal* 13, cited in Steiner, Alston and Goodman, 531-539, at 537-538.

⁶⁰ See generally: Human Rights Committee, *General Comment 22, Article 18* (Forty-eighth session, 1993). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994).

⁶¹ See Ali Khan, 'Islam as Intellectual Property' (2000-2001) 31 *Cumb Law Review* 631, at 642. ('*Ikhtilaf* or disagreement is prohibited when the text of the Quran is clear.')

⁶² M. A. Muqtedar Khan contends that:

Muslims must go back and read Ibn Rushd (*Fasl al-Maqaal*, The Decisive Treatise), and learn how he bridged science and religion, in order to understand that Islam has nothing to fear from reason and so to open their hearts and minds to rational thought. This is the goal that Ibn Khaldun, the great 14th century Arab historian and philosopher, would have called the "engine of civilization." M. A. Muqtedar Khan "Two Theories of Ijtihad" *The Washington Times* [03.22.06]

Islam, Islamist terror organisations such as *Al Qaeda*, or the meaning of Islamic verses invoked by jihadists, Muslims living in the West can expect to be asked about these things in the work place, on the bus, at in other daily interactions with non-Muslims. For many western Muslims, discussion and debate about even the most sensitive of religious issues has become part of their ordinary lives.

4. *Reasoned Debated as a Path to Knowledge, Understanding and Peaceful Resolution of Antimony*

In concluding, we return to the question posed at the outset: *Does freedom of speech include the right to publicly ridicule the religious beliefs of others?* For States parties to the Covenant, the question must be answered in the affirmative. While nations retain the sovereign right to prohibit whatever conduct they please, laws which arbitrarily curb basic human rights (e.g. by banning criticism of the State religion but not others) breach the Covenant, unless it can be demonstrated that there are valid public order reasons for a specific law. Moreover discriminatory laws of this kind, particularly those which provide for harsh punishment of literary criticism of religion, will continue to generate adverse international media attention. Furthermore, it is arguable that the international community has an obligation *erga omnes* to protect people against such punishment, because fundamental human rights have been recognized by some legal scholars as *jus cogens*.⁶³

Should freedom of speech include the right to ridicule the religious beliefs of others? This question may be answered from numerous perspectives. A moral argument may be made that such behaviour is provocative, insensitive, rude and 'uncivilized'. On the other hand, it can be beneficial. The exposure of charlatans and extremists, who use religion to exploit others, or pursue destructive goals, is in the public interest. Criticism of their religious beliefs and practices may be an essential part of this process. However the distinction between responsible refutation and irresponsible ridicule may be a fine one. Another dimension to the topic is refutation of religious doctrines through scientific advances. In some cases, this may be the inevitable outcome of scientific research, inquiry and debate, which may render certain religious ideas untenable.

In this writer's view, opportunities for rational and reasoned debate among people of different religious backgrounds, or none at all, need to be grasped. They offer a path to knowledge, understanding of each other, mutual respect, education and exposure to new ideas. Such debate can pave the way towards greater respect for the freedoms of expression and religion, and a greater willingness by all sides to exercise them in a responsible manner. At this juncture, it is interesting to note that Shi'ite cleric Seyyed Hossein Khomeini, the

⁶³ See *The Responsibility to Protect* (Report of the International Commission on Intervention and State Sovereignty) December 2001 <http://www.iciss.ca/Report2-En.Asp>
General Assembly World Summit Outcome Document (2005) paragraphs 138 and 139 www.un.org/summit2005/documents.html
Security Council [Resolution 1674](#) (2006), paragraph 8

grandson of Ayatollah Khomeini, has recently stated that he is open to the idea of meeting Salman Rushdie, and believed that he might benefit from Rushdie's knowledge about religion, particularly Indian religions. He also claimed that he would never have issued a *fatwa* calling for the death of Salman Rushdie.⁶⁵ In his view, decision-making authority involving death in apostasy cases was only accorded to the prophets of Islam - not to ordinary people.

J. CONCLUSION

In the 21st century, many people from diverse cultures, religions and nationalities live side by side in pluralistic societies. This growing trend is shaped by a range of factors including globalization. In this environment, there is a growing awareness of the importance of respect for the religious sensibilities of others. At the same time, radical Islamist ideologies and associated religious violence by extremists, has emerged as a serious security concern for many States – including western liberal democracies. Islam is therefore at the centre of public debate about the limits of basic freedoms, including the freedom to criticize religion. Anger at Islamist violence has sparked unprecedented public criticism of Islam. Such criticism has, on occasion, sparked significant protest and occasional violence from some Muslims. This in turn has fortified the resolve of some defenders of free speech to exercise this right - even where it is likely to trigger religious violence. In this environment, the limits of freedom of speech are likely to remain a matter of controversy. So too is the question of permissible responses to criticism of sacred beliefs.

Yet if current trends in globalization and pluralism continue, radical Islamist ideologies are likely to recede over time. If so, the earthly punishment of both apostasy and defamation of Islam may recede with it. Some Muslim States have already scrapped apostasy and religious defamation laws, while a number of others have simply ceased to enforce them.⁶⁶ These patterns are unsurprising - most States are now multi-faith societies. In such societies some people will inevitably marry outside their faith tradition and/or change religion. In both cases, their right to do so is protected under international human rights law. Religious extremists are trying to halt the spread of such norms in a number of States. Some are willing to engage in terrorism in order to promote their religio-political ideology. However such methods are not supported by the majority of the

⁶⁵ 'Ayatollah Khomeini's Grandson tells VOA Rushdie Fatwa was Wrong' Interview *Voice of America* 27 April 2004, Washington, D.C. available at: <http://www.pavvand.com/news/04/apr/1198.html> Note: In 1998 the Iranian government distanced itself from the *fatwa* by formally guaranteeing that it would not attempt to enforce it. However it declared itself unable to withdraw the edict, which many others have declared should be carried out.

⁶⁶ See Saeed & Saeed, pp9-19

Muslims.⁶⁷ Moreover, Muslim leaders across the world have repeatedly urged moderation, and emphasised Islamic principles of mercy, love, tolerance, and peace⁶⁸ in the resolution of disputes. In Muslim countries where basic civil and political rights are not yet fully protected, these Islamic principles should define the response to criticisms of Islam. However all States Parties to the Covenant are obliged to guarantee freedoms of expression, conscience and religion within their territory, and to implement the Covenant. Consequently, the peaceful exercise of these rights should *never* be visited with punishment - even when the exercise of these basic rights offends local norms - whether they be religious, tribal or ideological in origin.

Annexure I: States Party to the Covenant (ICCPR) at 19 April 2007

Afghanistan	.	24 Jan 1983 a
Albania	.	4 Oct 1991 a
Algeria	10 Dec 1968	12 Sep 1989
Andorra	5 Aug 2002	22 Sep 2006
Angola	.	10 Jan 1992 a
Argentina	19 Feb 1968	8 Aug 1986
Armenia	.	23 Jun 1993 a
Australia	18 Dec 1972	13 Aug 1980
Austria	10 Dec 1973	10 Sep 1978
Azerbaijan	.	13 Aug 1992 a
Bahrain	.	20 Sep 2006 a
Bangladesh	.	6 Sep 2000 a
Barbados	.	5 Jan 1973 a
Belarus	19 Mar 1968	12 Nov 1973
Belgium	10 Dec 1968	21 Apr 1983
Belize	.	10 Jun 1996 a
Benin	.	12 Mar 1992 a
Bolivia	.	12 Aug 1982 a

⁶⁷ See for example: 'A Rising Tide Lifts Mood in the Developing World: Support for Suicide Bombing Drops Sharply in Muslim Countries', *47-Nation Pew Global Attitudes Survey*, 24 July 2007 Available at: www.pewresearch.org accessed 9 October 2007.

⁶⁸ See for example *The Amman Message*, and the 'Grand list of endorsements of the Amman Message' Both are available at www.ammanmessage.com

Bosnia and Herzegovina	.	1 Sep 1993 d
Botswana	8 Sep 2000	8 Sep 2000
Brazil	.	24 Jan 1992 a
Bulgaria	8 Oct 1968	21 Sep 1970
Burkina Faso	.	4 Jan 1999 a
Burundi	.	9 May 1990 a
Cambodia	17 Oct 1980	26 May 1992 a
Cameroon	.	27 Jun 1984 a
Canada	.	19 May 1976 a
Cape Verde	.	6 Aug 1993 a
Central African Republic	.	8 May 1981 a
Chad	.	9 Jun 1995 a
Chile	16 Sep 1969	10 Feb 1972
China	5 Oct 1998	.
Colombia	21 Dec 1966	29 Oct 1969
Congo	.	5 Oct 1983 a
Costa Rica	19 Dec 1966	29 Nov 1968
Côte d'Ivoire	.	26 Mar 1992 a
Croatia	.	12 Oct 1992 d
Cyprus	19 Dec 1966	2 Apr 1969
Czech Republic	.	22 Feb 1993 d
Democratic People's Republic of Korea	.	14 Sep 1981 a
Democratic Republic of the Congo	.	1 Nov 1976 a
Denmark	20 Mar 1968	6 Jan 1972
Djibouti	.	5 Nov 2002 a
Dominica	.	17 Jun 1993 a
Dominican Republic	.	4 Jan 1978 a
Ecuador	4 Apr 1968	6 Mar 1969
Egypt	4 Aug 1967	14 Jan 1982
El Salvador	21 Sep 1967	30 Nov 1979
Equatorial Guinea	.	25 Sep 1987 a

Eritrea	.	22 Jan 2002 a
Estonia	.	21 Oct 1991 a
Ethiopia	.	11 Jun 1993 a
Finland	11 Oct 1967	19 Aug 1975
France	.	4 Nov 1980 a
Gabon	.	21 Jan 1983 a
Gambia	.	22 Mar 1979 a
Georgia	.	3 May 1994 a
Germany	9 Oct 1968	17 Dec 1973
Ghana	7 Sep 2000	7 Sep 2000
Greece	.	5 May 1997 a
Grenada	.	6 Sep 1991 a
Guatemala	.	5 May 1992 a
Guinea	28 Feb 1967	24 Jan 1978
Guinea-Bissau	12 Sep 2000	.
Guyana	22 Aug 1968	15 Feb 1977
Haiti	.	6 Feb 1991 a
Honduras	19 Dec 1966	25 Aug 1997
Hungary	25 Mar 1969	17 Jan 1974
Iceland	30 Dec 1968	22 Aug 1979
India	.	10 Apr 1979 a
Indonesia	.	23 Feb 2006 a
Iran (Islamic Republic of)	4 Apr 1968	24 Jun 1975
Iraq	18 Feb 1969	25 Jan 1971
Ireland	1 Oct 1973	8 Dec 1989
Israel	19 Dec 1966	3 Oct 1991
Italy	18 Jan 1967	15 Sep 1978
Jamaica	19 Dec 1966	3 Oct 1975
Japan	30 May 1978	21 Jun 1979
Jordan	30 Jun 1972	28 May 1975
Kazakhstan	2 Dec 2003	24 Jan 2006

Kenya	.	1 May 1972 a
Kuwait	.	21 May 1996 a
Kyrgyzstan	.	7 Oct 1994 a
Lao People's Democratic Republic	7 Dec 2000	.
Latvia	.	14 Apr 1992 a
Lebanon	.	3 Nov 1972 a
Lesotho	.	9 Sep 1992 a
Liberia	18 Apr 1967	22 Sep 2004
Libyan Arab Jamahiriya	.	15 May 1970 a
Liechtenstein	.	10 Dec 1998 a
Lithuania	.	20 Nov 1991 a
Luxembourg	26 Nov 1974	18 Aug 1983
Madagascar	17 Sep 1969	21 Jun 1971
Malawi	.	22 Dec 1993 a
Maldives	.	19 Sep 2006 a
Mali	.	16 Jul 1974 a
Malta	.	13 Sep 1990 a
Mauritania	.	17 Nov 2004 a
Mauritius	.	12 Dec 1973 a
Mexico	.	23 Mar 1981 a
Monaco	26 Jun 1997	28 Aug 1997
Mongolia	5 Jun 1968	18 Nov 1974
Montenegro	.	23 Oct 2006 d
Morocco	19 Jan 1977	3 May 1979
Mozambique	.	21 Jul 1993 a
Namibia	.	28 Nov 1994 a
Nauru	12 Nov 2001	.
Nepal	.	14 May 1991 a
Netherlands	25 Jun 1969	11 Dec 1978
New Zealand	12 Nov 1968	28 Dec 1978
Nicaragua	.	12 Mar 1980 a

Niger	.	7 Mar 1986 a
Nigeria	.	29 Jul 1993 a
Norway	20 Mar 1968	13 Sep 1972
Panama	27 Jul 1976	8 Mar 1977
Paraguay	.	10 Jun 1992 a
Peru	11 Aug 1977	28 Apr 1978
Philippines	19 Dec 1966	23 Oct 1986
Poland	2 Mar 1967	18 Mar 1977
Portugal	7 Oct 1976	15 Jun 1978
Republic of Korea	.	10 Apr 1990 a
Republic of Moldova	.	26 Jan 1993 a
Romania	27 Jun 1968	9 Dec 1974
Russian Federation	18 Mar 1968	16 Oct 1973
Rwanda	.	16 Apr 1975 a
Saint Vincent and the Grenadines	.	9 Nov 1981 a
San Marino	.	18 Oct 1985 a
Sao Tome and Principe	31 Oct 1995	.
Senegal	6 Jul 1970	13 Feb 1978
Serbia and Montenegro	.	12 Mar 2001 d
Seychelles	.	5 May 1992 a
Sierra Leone	.	23 Aug 1996 a
Slovakia	.	28 May 1993 d
Slovenia	.	6 Jul 1992 d
Somalia	.	24 Jan 1990 a
South Africa	3 Oct 1994	10 Dec 1998
Spain	28 Sep 1976	27 Apr 1977
Sri Lanka	.	11 Jun 1980 a
Sudan	.	18 Mar 1986 a
Suriname	.	28 Dec 1976 a
Swaziland	.	26 Mar 2004 a
Sweden	29 Sep 1967	6 Dec 1971

Switzerland	.	18 Jun 1992 a
Syrian Arab Republic	.	21 Apr 1969 a
Tajikistan	.	4 Jan 1999 a
Thailand	.	29 Oct 1996 a
The Former Yugoslav Republic of Macedonia	.	18 Jan 1994 d
Timor-Leste	.	18 Sep 2003 a
Togo	.	24 May 1984 a
Trinidad and Tobago	.	21 Dec 1978 a
Tunisia	30 Apr 1968	18 Mar 1969
Turkey	15 Aug 2000	23 Sep 2003
Turkmenistan	.	1 May 1997 a
Uganda	.	21 Jun 1995 a
Ukraine	20 Mar 1968	12 Nov 1973
United Kingdom of Great Britain and Northern Ireland	16 Sep 1968	20 May 1976
United Republic of Tanzania	.	11 Jun 1976 a
United States of America	5 Oct 1977	8 Jun 1992
Uruguay	21 Feb 1967	1 Apr 1970
Uzbekistan	.	28 Sep 1995 a
Venezuela (Bolivarian Republic of)	24 Jun 1969	10 May 1978
Viet Nam	.	24 Sep 1982 a
Yemen	.	9 Feb 1987 a
Zambia	.	10 Apr 1984 a
Zimbabwe	.	13 May 1991 a

Source: Office of the United Nations High Commissioner for Human Rights

<<http://www.ohchr.org/english/law/ccpr.htm>> accessed 1 June 2007.