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**Freedom of religion, freedom of expression and the United Nations:
recognizing values and rights
in the “defamation of religions” discourse * ****

SOMMARIO: 1. Limits to free speech, incitement to hatred and a “third case” - 2. UN Resolutions on *Defamation of Religions* (1999 – 2010). The role of the Organization of Islamic Cooperation - 3. Recognizing values and rights in the *defamation of religions* discourse - 4. The interplay between racial and religious offences and its effect on limitations to free speech - 5. Balancing freedom of expression and freedom of religion in the work of the UN Human Rights Committee - 6. Concluding Remarks.

1 - Limits to free speech, incitement to hatred and a “third case”

Interactions and conflicts between freedom of conscience and religion and freedom of expression appear to be at the core of the international philosophical and legal debate about human rights. Episodes like the Danish cartoons affair¹ seem to radicalize opposing views about which

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¹ Report of the Special Rapporteur on Freedom of Expression, UN doc. E/CN.4/2006/17, 13 Février 2006, *Situation des populations musulmanes et arabes dans diverses régions du monde*; see also UN doc. A/HRC/4/27, 2 January 2007. *Int. al.*, L. Christoffersen (ed.), *Images of God: Freedom of Expression and Religion in a Globalized World*, Tiderne Skifter, Copenhagen, 2006; L. Christoffersen, H. Raun Iversen et al., (eds.), *Religion in the 21st Century*, Ashgate, Farnham, 2010; Z. COMBALÍA SOLÍS, *Libertad de expresión y difamación de las religiones: el debate en Naciones Unidas a propósito del conflicto de las caricaturas de Mahoma*, *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*,



value deserves the greater protection in a democratic society. Among the main issues at stake is the need to ban the advocacy to religious hatred which constitutes incitement to discrimination and violence. The concept of incitement to hatred, however, is not easy to define and drawing the line between offensive but legitimate speech and hate speech can prove to be a complicated though unavoidable task, since freedom of opinion and expression, which stands at the core of the international legal standards on human rights², is widely considered one of the basic conditions for a democratic and pluralistic society, so that any measure aimed at curtailing its exercise must come under close scrutiny about its necessity and proportionality. As the European Court of Human Rights has pointed out, pluralism and tolerance require that not only information or ideas “that are favourably received or regarded as inoffensive or as a matter of indifference” shall be protected by the State, but also speech that offends, shocks or disturbs the State or any sector of the population³.

One of the most controversial issues, therefore, is when an offensive speech constitutes incitement to discrimination and when it does not⁴. At

19, 2009 (www.iustel.com); **A. SARI**, *The Danish Cartoons Row : Re - Drawing the Limits of the Right to Freedom of Expression?*, *Finnish Yearbook of International Law*, XVI, 2005, pp. 365 - 398.

² Universal Declaration on Human Rights, U.N. doc. A/810 at 71 (1948) article 19; International Covenant on Civil and Political Rights, U.N. Doc. A/6316 (1966) article 19; Convention on the Rights of the Child, U.N. doc. A/44/49 (1989) article 13; *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, UN doc. E/CN. 4/1996/39 (1996); European Convention on Human Rights, article 10, (Council of Europe, 1950); Charter of Fundamental Rights of the European Union, 2000/C, 364/1 art. 11; Arab Charter on Human Rights (League of Arab States), 2004, art. 32; African Charter on Human and People’s Rights, OAU Doc. CAB/LEG/67/3 (Organization of African Unity), 1982, art. 9; American Convention on Human Rights (Organization of American States), 1969, art. 13.

³ European Court of Human Rights, *Handyside v. The United Kingdom*, appl. n. 5493/72, 7 December 1976 (par. 49). See also Council of Europe, Parliamentary Assembly, Resolution 1510 (2006), *Freedom of expression and respect for religious beliefs*; Id., Recommendation 1805 (2007), *Blasphemy, religious insults and hate speech against persons on grounds of their religion*; Id., Resolution 1577 (2007), *Towards decriminalisation of defamation*. **J. MARTÍNEZ-TORRÓN**, *Conflictos entre libertad de expresión y libertad religiosa en la jurisprudencia de Estrasburgo*, in A. Montoya Melgar (a cura di), *Cuestiones actuales de la jurisdicción en España*, Real Academia de jurisprudencia y legislación, Madrid, 2010, I; **ID.**, *Limitations on Religious Freedom in the Case Law of the European Court of Human Rights*, *Emory Int’l L. Rev.*, 19, 2005, pp. 587-636; **P.M. TAYLOR**, *Freedom of Religion. UN and European Human Rights Law and Practice*, CUP, Cambridge, 2005, p. 77 ss.

⁴ **N. LERNER**, *Incitement to hate crimes and religious hatred*, United Nations, Expert Seminar on Freedom of expression and advocacy of group hatred, 2008.



the international and regional level, provisions allowing the States to sanction any form of incitement to hatred and to limit the free exercise of expression suitably deal with both the possible cases of infringement of the rights and freedoms of others; the legal prohibition of hate speech, though, still remains a complex and disputable issue.

The aim of this paper, however, will be to focus on a “third case” of conflict, related to the issue of balancing religious sensibility and the legitimate exercise of freedom of expression.

In a series of Resolutions voted by the Human Rights Commission, the Human Rights Council (which replaced the former Commission in 2006) and the Assembly General, the United Nations have been dealing with the matter of the so-called “defamation of religions”.

I will attempt to draw attention to the arguments used in the UN documents, since they prove the intention to create what we should call a “third case” of offence, the victim of which are religions and beliefs *per se*⁵.

2 - UN Resolutions on *Defamation of Religions* (1999 – 2010). The role of the Organization of Islamic Cooperation

International legal human rights standards prohibit any form of incitement to hatred on, among others, religious grounds. Among the most important references are article 4 of the International Convention on the Elimination of all Forms of Racial Discrimination (1965), which prohibits any form of incitement to racial discrimination⁶ and article 20 of

⁵ The terms “religion” and “expression” will be used with the meaning they have in the Universal Declaration of Human Rights (articles 18 and 19) and in the International Covenant on Civil and Political Rights (articles 18 and 19).

⁶ Article 4: «States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia: (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by



the International Covenant on Civil and Political Rights, which states that 1) any propaganda for war shall be prohibited by law and 2) any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law⁷. As has been pointed out, although the Convention on Racial Discrimination does not refer to religion, “it seems reasonable to apply, by analogy, relevant provisions to religion-related discrimination or intolerance”⁸.

Besides, almost every international or regional treaty on human rights which recognizes freedom of expression encompasses some grounds for limitation which must be provided by law, such as national security, public order or the rights and freedoms of others⁹. Any restriction must be proportional to the aim pursued and not able to jeopardize freedom of expression.

Therefore, although widely perceived as a cornerstone of a democratic society, freedom of expression is not conceived as an absolute right. Different aims can be the sources of different degrees of limitation so that, for instance, since freedom of civil and political debate is a necessary requirement of a healthy democracy, any restrictive measure on this must

law; (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination», International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), U.N. Doc. A/6014 (1966). See also the Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1951), article 3c) and the Declaration on Race and Racial Prejudice, E/CN.4/Sub.2/1982/2/Add.1, annex V (1982).

⁷ International Covenant on Civil and Political Rights, cit. The Human Rights Committee has pointed out that the provisions of article 20 are fully compatible with freedom of expression, see General Comment n. 11, Article 20 (1983), U.N. Doc. HRI/GEN/1/Rev.1 at 12 (1994). For a comparison between article 4 CERD and article 20 ICCPR, **N. GHANEA**, *Nature and means of effective remedies*, in *Prohibition of Incitement to National, Racial or Religious Hatred in Accordance with International Human Rights Law*, UN Expert Seminar for the European Region, 2011; **A. CALLAMARD**, *Thresholds for the prohibition of incitement to discrimination, hostility or violence under article 20 of the ICCPR*, United Nations Office of the High Commissioner for Human Rights, Regional Expert Meeting on article 20 ICCPR, Vienna, 2010; **K.J. PARTSCH**, *Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination*, in S. Coliver (ed.), *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination*, Article 19 and University of Essex, London, 1992, pp. 27-28.

⁸ **N. LERNER**, *Incitement to hate crimes and religious hatred*, cit., **ID.**, *Group Rights and Discrimination in International Law*, Kluwer Law, London, 2nd ed., 2003. The Author recalls that several articles of the UN Declaration against any forms of religious discrimination, as well as the definition of the terms *intolerance* and *discrimination*, are largely influenced by the Convention on Racial Discrimination.

⁹ See *supra*, note 2.



be subjected to strict scrutiny, whereas respect for the right to freedom of religion and religious feelings deserves to be taken in due account, allowing a wider restriction on free speech¹⁰. As the European Court of Human Rights has stated, whoever exercises the freedom of expression¹¹ undertakes duties and responsibilities which, in the context of religious opinions and beliefs, entail

“an obligation to avoid as far as possible 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”¹².

With the defamation of religions discourse, the Organization of Islamic Cooperation (hereinafter, OIC) brought a new type of violation of religious freedom into the United Nations’ debate¹³. The OIC proposed the adoption of the Resolutions and had them approved thanks to the votes of its member States.

A very brief overview of the anti-blasphemy laws which are still in force in many Countries of the OIC could probably help in understanding the political and legal framework of the matter.

For instance, Algerian Constitution asserts that Islam is the religion

¹⁰ Assembly General Resolution, UN doc. A/RES/61/164, 19 December 2006; Id., UN doc. A/RES/62/154, 18 December 2007.

¹¹ As enshrined in article 10 ECHR, which states: 1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 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.

¹² European Court of Human Rights, *Otto-Preminger Institut v. Austria*, appl. n. 13470/87, 20 September 1994 (par. 49). For an overview of this issue in the European context, N. DOE, *Law and Religion in Europe. A Comparative Introduction*, OUP, Oxford, 2011.

¹³ The Organization of Islamic Cooperation is an intergovernmental institution born in 1969 with the aim of providing assistance to Muslim people across the world; it currently gathers 57 States and has its own Observatory on Islamophobia (<http://www.oic-oci.org/>).



of the State and Arabic is the national and official language¹⁴. Art. 36 states that “Freedom of creed and opinion is inviolable”, while art. 41 states that “Freedom of expression, association and meeting are guaranteed to the citizen”. The Algerian Penal Code prohibits insults against Islam or the prophet Muhammad¹⁵. Reportedly, blasphemy cases are brought under this provision, usually against non practicing Muslims or those failing to adhere to the state-sanctioned interpretation of Islam¹⁶. The Information Code of 1990, governing the media, also prohibits blasphemy and publications that are “contrary to Islamic morals, national values, human rights”; it also bans insults against Islam and the other “heavenly religions,” namely Christianity and Judaism¹⁷.

In Malaysia, where Islam is the official religion of the Federation, blasphemy and religious insults are prohibited in both the state-level Shari’a statutes and in federal law. At the federal level, the Malaysian Penal Code (revised in 2006¹⁸) prohibits injuring or defiling a place of worship with intent to insult the religion of any class¹⁹,

“uttering words, with deliberate intent to wound the religious feeling of any person”²⁰ and “causing disharmony, disunity, or feelings of enmity, hatred or ill-will, or prejudicing the maintenance of harmony or unity, on grounds of religion”²¹.

Blasphemy laws can be found in the Pakistan Penal Code²². They address a number of offenses, including defiling a place of worship, defiling or damaging the Quran, insulting the prophet Muhammad and apostasy. Perpetrators face possible fines, short-term or life imprisonment,

¹⁴ Constitution of the People’s Democratic Republic of Algeria, 1989 (amended by the constitutional revision of 1996), Chapter I, articles 2-3 (http://confinder.richmond.edu/admin/docs/local_algeria.pdf).

¹⁵ Algerian Penal Code, 1979 (amended in 2001), art. 144 bis 2, cited in Freedom House Special Report, *Policing Belief. The impact of blasphemy laws on human rights*, October 2010 (http://freedomhouse.org/uploads/special_report/95.pdf).

¹⁶ *Policing Belief*, cit.; European Centre for Law and Justice, *Religious Freedom in Algeria*, UPR Submission, May – June 2012.

¹⁷ Art. 77; cited in *Policing Belief*, cit. Cfr. Special Rapporteur on Freedom of Opinion and Expression, UN doc. E/CN.4/2004/62/Add.2 (Mission to the Islamic Republic of Iran).

¹⁸ Malaysian Penal Code, Act 574 (revised in 2006) Chapter XV (<http://www.agc.gov.my/Akta/Vol.%2012/Act%20574.pdf>).

¹⁹ *Ibidem*, par. 295.

²⁰ *Ibidem*, par. 298.

²¹ *Ibidem*, par. 298 a.

²² Chapter XV, art. 295–298, Pakistan Penal Code (<http://www.pakistani.org>).



and even the death penalty in the case of defiling the sacred name of the Prophet. The Pakistan Constitution provides freedom of speech and expression

“subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, commission of or incitement to an offence”²³.

The matters of concern arising from national blasphemy and religious insult laws are at least two: firstly, the lack of clarity in their formulation and their vague terminology, which open the door to forms of abuses; secondly, their discriminative nature, since in many cases they protect only specific religions (namely Islam) and are often used to stem theological dissent and intimidate non believers or believers of other creeds. NGO's have reported numerous cases in which blasphemy laws have been used to exact revenge in personal disputes, like land disputes or business affairs²⁴.

At the international level, the Islamic Conference has repeatedly expressed its deep concern for the discriminations and profiling suffered by Muslims in Western countries, particularly after the terrorist attacks of 9 / 11, which led to numerous cases of intolerance and wrongful associations between Islam and terrorism. During their 2010 Annual Meeting of Ministers of Foreign Affairs, on *Countering Islamophobia*, the OIC member states expressed their deep concern at the “growing trend of intolerance and hatred towards Muslims”, affirming that defamation of Islam “insults the deep-seated religious feelings, undermines the dignity and violates the fundamental human rights of Muslims”. While supporting and promoting dialogue and toleration among civilizations, they state:

“(We) call for a global awareness on the dangerous implications of the rise of Islamophobia on world peace and security and call on the leaders of the international community to demonstrate their collective political will to address the issue with all urgency. We emphasize the need to develop, at the UN, including the HRC, a legally binding institutional instrument to promote respect for all religions and

²³ The Constitution of the Islamic Republic of Pakistan (<http://www.pakistani.org/pakistan/constitution/>).

²⁴ *Int. al.*, Open Doors UK, *Briefing Paper on Religious Liberties in Algeria* 1 (2011) (<http://www.opendoorsuk.org>).



cultural values and prevent intolerance, discrimination and the instigation of hatred against any group or followers of any religion”²⁵.

Following this line of reasoning, some States, on behalf of the Organization, began to put pressure on the UN Human Rights institutions to officially ban any kind of defamation of Islam, later accepting to extend the prohibition in favour of religions and beliefs in general.

The Human Rights Commission from 1999 to 2005 and, subsequently, the Human Rights Council until 2010, annually voted a Resolution on the Defamation of religions, followed by the Assembly General, in which they express their deep concern about the instances of intolerance, discrimination and acts of violence against the followers of certain faiths which take place in many parts of the world and for the negative stereotyping of certain religions, especially in the media. They affirm that defamation of religions constitutes a serious affront to human dignity, leading to restrictions on the exercise of freedom of religion and aggravating social disharmony (which is rather different from the international legal concept of public order) and economic exclusion²⁶. According to the Assembly General, defamation of religions is among the causes for social disharmony and violations of human rights²⁷; therefore, it shall be perfectly justifiable to impose further limitations on the exercise of freedom of expression, in order to avoid religious, racial or ethnic tensions among different groups.

The Resolutions invite governments to effectively combat defamation of religions and incitement to hatred in general and against

²⁵ Declaration by the Annual Coordination Meeting of Ministers of Foreign Affairs of OIC Member States on Countering Islamophobia, UN Headquarters, New York, 24 September 2010, OIC/ACM2010/ISLAMOPHOBIE-DEC. Cfr. **B. CHELINI – PONT**, *La mobilisation de l'Organisation de la Conférence Islamique mondiale contre la diffamation de l'Islam (1999 - 2009) et ses conséquences en Europe*, in *Annuaire Droit et Religions*, 4, 2009-2010, pp. 525-552.

²⁶ Commission on Human Rights, Resolutions: 1999/82, 20 April 1999; 2000/84, 26 April 2000; 2001/4, 18 April 2001; 2002/9, 15 April 2002; 2003/4, 14 April 2003; 2004/6, 13 April 2004; 2005/3, 12 April 2005; Human Rights Council, Resolutions: UN doc. A/HRC/RES/4/9, 30 March 2007; UN doc. A/HRC/RES/7/19, 27 March 2008; UN doc. A/HRC/ 10/22, 26 March 2009; UN doc. A/HRC/RES/13/16, 25 March 2010. See also UN doc. A/HRC/RES/6/37, 14 December, 2007, *Elimination of all forms of intolerance and of discrimination based on religion or belief*.

²⁷ Assembly General, Resolutions: UN doc. A/RES/60/150, 16 December 2005; UN doc. A/RES/61/164, 19 December 2006; UN doc. A/RES/61/161, 19 December 2006; UN doc. A/RES/62/154, 18 December 2007; UN doc. A/RES/63/171, 18 December 2008; UN doc. A/RES/64/156; 8 March 2010; UN doc. A/RES/65/224, 21 December 2010.



Islam and Muslims in particular, condemning any form of stereotyping or offensive speech.

The 2010 Human Rights Council Resolution added another assumption to the usual statements, which is worth noting:

“(The HRC) Strongly condemns in this regard the ban on the construction of minarets of mosques and other recent discriminatory measures, which are manifestations of Islamophobia which stand in sharp contradiction to international human rights obligations concerning freedoms of religion, belief, conscience and expression, and stresses that such discriminatory measures would fuel discrimination, extremism and misperception leading to polarization and fragmentation with dangerous unintended and unforeseen consequences”²⁸.

The Resolutions urge States to take every possible measure to grant adequate protection from acts of discrimination, intimidation and coercion resulting from defamation of religions and incitement to hatred, at the same time promoting tolerance and respect for all religions and beliefs, fostering mutual understanding and dialogue through education and legislation.

3 - Recognizing values and rights in the *defamation of religions* discourse.

It is worth highlighting a particular goal that emerges from the documents mentioned above: providing protection not only to the adherents of a certain faith but also to religions and beliefs *per se*, to some extent justifying limitations to freedom of expression beyond those already provided by international law²⁹. The core argument to legitimize this aim

²⁸ UN doc. A/HRC/R/13/16, 25 March 2010.

²⁹ «(...) everyone has the right to freedom of expression, which should be exercised with responsibility and may therefore be subject to limitations as provided by law and necessary for respect of the rights and reputations of others, protection of national security or of public order, public health or morals *and respect for religions and beliefs*», UN doc. A/HRC/RES/4/9, 20 March 2007. See also Assembly General, UN doc. A/RES/61/164, 19 December 2006; Id., UN doc. A/RES/62/154, 18 December 2007. The reference to the respect for religions and beliefs has been later dropped out, see UN doc. A/RES/63/171, 18 December 2008; UN doc. A/RES/64/81, 7 December 2009. See also UNESCO, 174/EX/Decisions, 46, *Respect for freedom of expression and respect for sacred beliefs and values and religious symbols*, 2006.



relies upon the valuable contribution that all religions have given to modern civilizations and to a common understanding of values³⁰. Although being it a matter of great concern, nonetheless, careful consideration should be given to any proposal of applying anti-defamation penal laws. First of all, religions, beliefs, symbols and systems of values are not, as such, protected by the international human rights norms, which are designed to protect human rights held by individuals or identifiable groups or communities³¹. Although, obviously, defiling a religion or belief means, in practice, offending the religious feelings of the faithful, promoting the implementation of anti-defamation laws and blasphemy laws can turn out to be quite dangerous³². International legal standards of protection are not aimed at safeguarding religious feelings as such but only the exercise of the right to religious freedom. Here a shift from values to rights seems to take place: if respect for religious sensibilities is a value which plays a major role in a democratic and pluralistic society, religions and beliefs *per se* could hardly be perceived as being the holders of an autonomous human right.

Among the worst consequences of anti-defamatory legislations is the possibility for political institutions and religious majorities to use them with a view to stemming the activities of religious minorities. This is what happens in most of the States where anti-defamatory legislation is still in force: taking into account how hard it is both to identify the victims and to demonstrate one's innocence, national blasphemy laws can be strong

³⁰ UN doc. A/RES/61/164 cit. See also UN doc. A/RES/60/288, 20 September 2006, *The United Nations Global Counter-Terrorism Strategy*.

³¹ See Reports of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN doc. A/HRC/7/14, 28 February 2008; UN doc. A/HRC/11/4, 30 April 2009; Joint Declaration on Defamation of Religions, Anti-Terrorism and Anti-Extremism Legislation, Athens, 9 December 2008; NGO's Reports, UN doc. A/HRC/9/7, 12 September 2008. *Libel and Insult laws: what more can be done to decriminalise libel and repeal insult laws?*, OSCE Conference, Paris 2003.

³² Cfr., *int. al.*, **N. FOSTER**, *Defamation and Vilification: Rights to Reputation, Free Speech and Freedom of Religion at Common Law and under Human Rights Law*, in P. Babie, N. Rochow (eds.), *Freedom of Religion under Bills of Rights*, University of Adelaide Press, Adelaide, 2012; **J. TEMPERMAN**, *Protection Against Religious Hatred under the United Nations ICCPR and the European Convention System*, in S. Ferrari, R. Cristofori (eds.), *Law and Religion in the 21st Century*, Ashgate, 2010, pp. 215-223; **ID.**, *The emerging counter-defamation of religion discourse: a critical analysis*, in *Annuaire Droit et Religions*, 4, 2009 - 2010, pp. 553-559; **S. PARMAR**, *The Challenge of "Defamation of Religions" to Freedom of Expression and the International Human Rights System*, in *European Human Rights Law Review*, 3, 2009, pp. 353-375; **S. ANGELETTI**, *Defamation of religions in UN documents: some critical observations*, in *Conscience and Liberty*, 2010, pp. 40-63.



political devices used to prevent religious dissent, thus limiting the religious expression of minorities³³. In addition, the UN documents define defamation of religion as just an *indirect* means for more severe human rights violations³⁴, making it necessary to prove the linkage between the expression used and the act of violation, which is an essential prerequisite of any penal sanction but hard to demonstrate in this case. In this context, also the vagueness of the term “defamation” should not be underestimated. Neither international norms and documents, nor national legislations provide us with a common understanding of what defamation means, thus allowing abuses and misinterpretations³⁵.

More broadly, the above mentioned documents tend to highlight the conflicts between rights rather than the positive interplays between them. The UN Special Rapporteurs, however, putting the different rights in context, have repeatedly asserted that free expression is “the first condition of liberty, (...) giving succour and protection to other liberties”³⁶; they state that the exercise of freedom of religion requires an effective right to freedom of expression and freedom of association³⁷ and that “There is no contradiction between the principles of freedom of religion and freedom of expression. They are mutually reinforcing and enhance the human and spiritual basis of societies and populations.”³⁸ Along the same lines, the Human Rights Council has pointed out that freedom of expression and freedom of religion are closely connected and

³³ Cfr. Joint Statement, *Freedom of Expression and Incitement to Racial or Religious Hatred*, Durban Review Conference, 2009; UN Special Rapporteur on Freedom of Religion or Belief, UN doc. A/HRC/10/8, 6 January 2009; Id., UN doc. A/62/280, 20 August 2007; High Commissioner for Human Rights, UN doc. A/HRC/2/6, 20 September 2006; International Religious Liberty Association, 2010, «Statement of concern about proposals regarding defamation of religions (3 September 2009)», *Conscience and Liberty*, pp. 115–118; Becket Fund for Religious Liberty, UN doc. A/HRC/9/7, 12 September 2008.

³⁴ UN doc. A/RES/ 61/164, cit.; UN doc. A/RES/63/171, cit.; UN doc. A/HRC/RES/7/19, cit.; UN doc. A/HRC/RES/ 10/22, cit.

³⁵ See Joint Declaration of the Special Rapporteurs on freedom of expression (UN, OSCE, OAS, ACHPR), UN doc. A/HRC/4/27, Annex, 2 January 2007; European Commission for Democracy through law (Venice Commission), *Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred*, CDL-AD (2008); European Commission for Democracy through Law, *Blasphemy, insult and hatred. Finding answers in a democratic society*, Council of Europe, 2010.

³⁶ UN doc. E/CN.4/1995/32, 14 December 1994. See also Durban Review Conference, *Outcome document*, Geneva, April 2009.

³⁷ UN doc. A/HRC/2/3, 20 September 2006 (par. 41).

³⁸ UN doc. A/HRC/4/27, 2 January 2007.



affect each other³⁹.

We should state, then, that applying penal anti-defamation laws might not be the best way to deal with the potential conflict between a legitimate exercise of freedom of expression and the respect due to those who manifest religious feelings.

Along this lines, many States (the United States and European Countries in particular), civil actors and international institutions reached the conclusion that the concept of defamation of religions should be rejected by the United Nations, at the same time highlighting the importance of applying legislation condemning incitement to hatred and hate speech. The Joint Declarations given by the Special Rapporteurs on Freedom of Expression from the main international institutions, as well as the report presented in 2008 by the European Commission for Democracy through law, strongly supported this position⁴⁰.

4 - The interplay between racial and religious offences and its effect on limitations to free speech

The more recent trends show a shift toward what seems to be probably a more suitable accommodation of the interests at stake. In March 2011 the Human Rights Council adopted by consensus a Resolution, proposed by the Secretary General of the OIC, entitled *Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief*⁴¹ which seems to have marked a turning point. Firstly, the Resolution never mentions the expression “defamation of religions” while focusing on the manifestations of violence, discriminations and intolerance suffered by people because of their religious convictions and beliefs. It takes into account stereotyping and profiling against individuals and not against religions or beliefs. Moreover, the Resolution does not mention the contribution given by

³⁹ Human Rights Council, UN doc. A/HRC/RES/7/36, 28 March 2008; UN Special Rapporteur on freedom of religion or belief, UN doc. A/HRC/2/3, 20 September 2006; Id., UN doc. E/CN. 4/2005/61, 20 December 2004; Assembly General, UN doc. A/RES/63/181, 18 December 2008.

⁴⁰ Joint Declaration, UN doc. A/HRC/4/27, Annex, cit.; Joint Declaration on *Defamation of Religions, Anti-Terrorism and Anti-Extremism Legislation*, Athens, 9 December 2008; European Commission for Democracy through law, cit.

⁴¹ A/HRC/RES/16/18, 24 March 2011. After this paper was delivered, followed another Resolution adopted by the Human Rights Council, which is, to all intents and purposes, very similar: UN doc. A/HRC/RES/19/25, 23 March 2012.



religions to the development of human culture and the need to foster a dialogue among religions and cultures in order to promote peace. It refers, instead, to the contribution given by individuals of different faiths and to the dialogue among religious and cultural groups and communities. It also highlights that individuals are the subjects of the protection provided by international and national institutions, therefore recognizing the need for a balancing test between competing individual rights, like freedom of expression and freedom of religion. This changing paradigm is quite evident from the references made by the Resolution to article 20 ICCPR. The Human Rights Council pointed out that article 20 and other international provisions already provide effective remedies against forms of hate speech, hostility or violence. Consequently, the Assembly General adopted a corresponding Resolution⁴² in which it

“strongly deplores all acts of violence against persons on the basis of their religion or belief, as well as all attacks on and in religious places and shrines in violation of international law and condemns any advocacy of religious hatred that constituted incitement to discrimination, hostility or violence”.

The OIC Countries, as well as other countries who supported the anti-defamation Resolutions up until now, have apparently abandoned this path and, with a view to effectively combating Islamophobia and discrimination, have shifted their attention toward focusing on the links between racial and religious discrimination. It is commonly perceived that some minorities tend to identify themselves as racial groups and religious communities at the same time; therefore, discriminations affecting these groups can be regarded as aggravated since multiple identities are involved⁴³: “(...) racial and religious intolerance are not mutually exclusive practices; in many cases prejudices dovetail and overlap”⁴⁴. When dealing with the issue of race and religion, we must never forget how hard it is to draw a line between the concepts of religious minorities, racial minorities or linguistic minorities in order to identify and suitably

⁴² Assembly General Resolution, *Combating intolerance, negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons, based on religion or belief*, A/RES/66/167, Draft Res. XVII, 19 December 2011.

⁴³ UN doc. E/CN. 4/2003/66, 15 January 2003; UN doc. A/RES/63/242, 24 December 2008; UN doc. A/RES/61/149, 19 December 2006.

⁴⁴ **E. DARIAN-SMITH**, *Religion, Race, Rights. Landmarks in the history of modern anglo-american law*, Hart, Oxford, 2010, p.15.



protect them⁴⁵. As has been pointed out, more than the specific nature of the group, it is relevant to protect its self-perception and the right of its members not to be discriminated for group's reasons⁴⁶.

The UN Special Rapporteur on Racial Discrimination has repeatedly affirmed that islamophobia is an aggravated discrimination, which mixes the religious dimension with the political and ideological one⁴⁷. As he puts it, in order to combat new forms of racism, we need promotion and protection of ethnic, cultural and religious pluralism, dialogue among cultures and religions and respect for religious and cultural diversity:

"It is a question of establishing a close link, through reflection and action, between efforts to combat racism, discrimination, xenophobia and intolerance and the urgent promotion of dialogue between cultures, civilizations and religions"⁴⁸.

Also the OIC Secretary General recently pointed out that islamophobia is a contemporary form of racial discrimination⁴⁹.

The interactions between race and religion were discussed at great length during the Conferences against racial discrimination, held in Durban in 2001 and 2009⁵⁰, where the delegates expressed their concern about acts of violence against religious communities and forms of incitement to religious and racial hatred, affirming that public policies against racism must take into due account the linkage between race and religion in addressing acts of racial intolerance, in order to protect religious and racial groups. Following the First World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, the

⁴⁵ See Council of Europe, Resolution 1605 (2008), *European Muslim Communities confronted with extremism*; ECRI General Policy, Recommendation n. 5 on *Combating Intolerance and Discrimination against Muslims*, 16 March 2000; ECRI General Policy, Recommendation n. 9 on *The Fight against Antisemitism*, 25 June 2004; ECRI General Policy, Recommendation n. 7 on *National Legislation to Combat Racism and Racial Discrimination*, 13 December 2002.

⁴⁶ N. LERNER, *Incitement to hate crimes and religious hatred*, cit.

⁴⁷ UN doc. E/CN. 4/2006/17, cit. ; see also UN doc. E/CN. 4/2004/18, 21 January 2004; UN doc. E/CN. 4/2005/18, 13 December 2004; UN doc. E/CN. 4/2003/24, 30 January 2003; UN doc. E/CN. 4/2002/24, 13 February 2002.

⁴⁸ UN doc. E/CN. 4/2003/24, cit.

⁴⁹ OIC-CS-OBS-REP-FINAL, 31 May 2008.

⁵⁰ UN doc. A/CONF. 189/12, 2001, *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban*; Durban Review Conference, *Outcome Document*, cit.



Human Rights Council established an *Ad Hoc Committee on the Elaboration of Complementary Standards* with the mandate to elaborate an Optional Protocol or an additional Convention to the International Convention on the elimination of all forms of racial discrimination⁵¹. The aim of the Committee, strongly supported by most of the OIC Countries, is to set new standards to combat contemporary forms of racism, including incitement to racial and religious hatred. Up until now, the Ad Hoc Committee has been working, among others, on the issue of xenophobia and on the adoption of legal instruments against racial discrimination at a national level. Apparently, there is no consensus among the delegates, neither over the definition of xenophobia nor over the definition of incitement to religious and ethnic hatred. Most of the delegates from Islamic Countries express a favourable position towards the adoption of complementary standards which clearly recognize a link between racial and religious forms of vilification, discrimination and incitement to hatred, while many other countries, namely the United States and European states, consider the issue of racial and ethnic discrimination already addressed by the CERD and regard religious hatred as a separate issue⁵². Although it is hard to foresee where this discussion will lead to, it is nonetheless worth considering very carefully any wish to extend the sanctions against racial speech to incitement to religious hatred, if the latter is designed to protect from religious defamation not only individuals and groups but also religions and systems of values⁵³.

5 - Balancing freedom of expression and freedom of religion in the work of the UN Human Rights Committee

In the common search for a correct balancing between freedom of expression and freedom of religion, the work of the Human Rights Committee could very well provide a useful pattern for other UN institutions to follow. On July 2011, the Human Rights Committee

⁵¹ Human Rights Council Decision 3/103, 8 December 2006; Id., Resolution 6/21, 28 September 2007.

⁵² UN doc. A/HRC/10/88, 24 February 2009.

⁵³ Cfr. N. GHANEA, *Nature and means of effective remedies*, cit. The Author warns us about the «need to be as open as possible with regards to critical expressions of diverging ideas related to religious or other beliefs. However, critical expressions of racial superiority do not enable the enjoyment of any human right. In fact they inhibit the enjoyment of an environment free of the racial hatred» (pp. 12-13).



approved a General Comment⁵⁴ on article 19 of the ICCPR, which replaces the former from 1983⁵⁵. Article 19 ICCPR protects the right to hold opinion and the right to freedom of expression; the second paragraph states that the exercise of the right to freedom of expression carries with it duties and responsibilities and may therefore be subject to certain restrictions, as long as they are provided for by law and necessary for the respect of the rights or reputations of others, or for the protection of general interests, like national security, public order, public health or morals⁵⁶. The aim of the norm was, on the one hand, to protect the right to hold opinions without interference from the State, with a view to avoiding the restrictions on the expression of political opinions coming from non democratic states and, on the other, to safeguard the right to freedom of expression, seen as inherent in the dignity of the human beings and essential to the full development of their personality⁵⁷. To this end, the smallest number of restrictions were included; as the Committee has pointed out: “restrictions must be provided by law” and they shall not “be enshrined in traditional, religious or other such customary law”⁵⁸. The Committee also recalls that the principle of proportionality applies and it has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities when applying the law⁵⁹. One of the possible restrictions to freedom of expression encompassed in article 19 is that of the “respect for the rights or reputations of others”, which refers to human rights as recognized in the Covenant and more generally in international human rights law. Leaving no space whatsoever for any form of direct protection of beliefs, ideologies or creeds, the Committee clearly states that:

«The term “others” relates to other persons individually or as members of a community. Thus, it may, for instance, refer to

⁵⁴ UN Human Rights Committee, General Comment n. 34 on Article 19, UN doc. CCPR/C/GC/CRP.2 (2011).

⁵⁵ UN Human Rights Committee, General Comment n. 10 on Article 19, UN doc. HRI/GEN/1/Rev.1 at 11 (1994).

⁵⁶ See **M. BOSSUYT**, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, M. Nijhoff, The Netherlands, 1987, pp. 373 – 402; **M. NOWAK**, *U.N. Covenant on Civil and Political Rights. CCPR Commentary*, N.P. Engel, 1993, pp. 336 – 339.

⁵⁷ CCPR/C/SR.117, Bielorussia Report, 1978. See also Human Rights Committee, *M. Ross v. Canada*, comm. no. 736/1997, UN Doc. CCPR/C/70/D/736/1997 (2000).

⁵⁸ General Comment n. 34, cit., par. 24.

⁵⁹ *Ibidem*, par. 34.



individual members of a community defined by its religious faith or ethnicity»⁶⁰.

As far as blasphemy laws are concerned, the General Comment affirms:

“Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20 par. 2 of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3 (...) nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith”⁶¹.

Any discriminations, though recognized by law, in favour of certain religions or belief systems or against others, or in favour of religious believers over non-believers, are unacceptable.

The Committee’s views, in cases related to restrictions to freedom of expression for the purpose of safeguarding the freedom of religion, provide further evidence of the Committee’s attitude to guarantee nothing but individuals and members of discriminated groups, properly balancing the right to free speech with the “rights and freedoms of others” in the sense covered by article 19. In two cases the Committee considers that a clear endorsement of antisemitism can be legitimately sanctioned by the States. In the case of *R. Faurisson v. France*⁶², the applicant, full professor at the *Sorbonne* University, having publicly expressed the view that the Nazi Holocaust is a false myth invented by Jewish people, is sanctioned by the State for revisionism and antisemitism, which are forbidden by the national law. In the case of *M. Ross v. Canada*⁶³, the author of the communication is dismissed from his job as a teacher in public school after having published several books and articles in which he shows antisemitic feelings. The school’s authorities make their ruling in order to protect the Jewish students from an environment influenced by antisemitism and discrimination. In both cases, the applicants’ statements were of such a nature as to raise or strengthen antisemitic feelings; since the State has a duty to protect the Jewish community from living in a climate of

⁶⁰ *Ibidem*, par. 28.

⁶¹ *Ibidem*, par. 48.

⁶² UN Human Rights Committee, *Robert Faurisson v. France*, comm. no. 550/1993, CCPR/C/58/D/550/1993 (1996).

⁶³ UN Human Rights Committee, *Malcolm Ross v. Canada*, cit.



antisemitism and intolerance, which can be strengthened by antisemitic statements, the Committee found that the restrictions imposed on the applicants by the States were necessary to protect the freedoms of others, as provided by article 19⁶⁴. The European Court of Human Rights decided a similar case, *Roger Garaudy v. France*⁶⁵, arguing that negationism and antisemitism are incompatible with the principles of peace, justice, social cohesion and democracy, which are the cornerstones of the Convention. Therefore, it confirmed the restriction upon the right to freedom of expression of the applicant on the ground of article 17, which states that the rights guaranteed by the Convention may not be interpreted as granting the right to engage in any activity aimed at the destruction of any of the rights enshrined in the Convention⁶⁶. In a more recent case, *Fatima Andersen v. Denmark*⁶⁷, a Danish Muslim lady complained before the Human Rights Committee that a member of the Danish People's Party had made an offensive statement on the National Danish Television, comparing the Muslim headscarves to the Nazi symbol of swastika. Although the applicant claimed that this kind of statements represents a personal insult to her and creates an hostile environment of discrimination, the Committee found the communication inadmissible, because the author had failed to establish that the statement would personally affect her with specific and imminent consequences; in this case, the need for a close scrutiny on establishing a direct and immediate connection between the expression and the personal threat is clearly reaffirmed⁶⁸.

⁶⁴ In the case of *J.R.T. and the W.G. Party v. Canada*, the Committee finds the communication inadmissible on the ground of article 20 ICCPR, since the antisemitic ideas expressed by the political party constituted a clear incitement to racial and religious hatred, UN Human Rights Committee, comm. n. 104/1981, UN doc. CCPR/C/OP/2 at 25 (1984).

⁶⁵ European Court of Human Rights, *R. Garaudy v. France*, appl. n. 65831/01, 24 June 2003.

⁶⁶ See **G. COHEN-JONATHAN**, *Négationnisme et droits de l'homme*, in *Revue trimestrielle des droits de l'homme*, 1997, pp. 571-597.

⁶⁷ UN Human Rights Committee, *Fatima Andersen v. Denmark*, comm. no. 1868/2009, CCPR/C/99/D/1868/2009 (2010).

⁶⁸ See also *Kasem Said Ahmad and Asmaa Abdol-Hamid v. Denmark*, where the Danish cartoons' affair was brought before the Human Rights Committee by two members of the local Islamic community organisation. The Committee declared the communication inadmissible because the applicants had failed to exhaust domestic remedies, UN Human Rights Committee, comm. no. 1487/2006, CCPR/C/92/D/1487/2006 (2008).



6 - Concluding Remarks

A respectful balancing between religious freedom and freedom of expression demands a proper – though extremely difficult – distinction among the values and the basic human rights which are at stake. Respecting the religious feelings of the faithful while exercising the right to free speech, thus undertaking “duties and responsibilities” as provided for by international norms, enhances a peaceful coexistence and a flourished pluralistic and democratic society. Incitement to religious hatred, hate speech and the forms of discrimination they can lead to, shall be forbidden by legislative authorities in order to guarantee believers and non believers their right to freedom of conscience and religion. Penal laws prohibiting defamation of religions or beliefs, however, don’t seem to stand in the framework of international legal standards on human rights.

The interplay between race and religion is, as well, a complex issue, especially when it involves matters of free speech. Vulnerable groups suffer aggravated forms of discrimination, hostility or violence on religious, ethnic and racial grounds; therefore, it shall be suitable to apply by analogy the concept of incitement to racial hatred to that of religious hatred. This does not imply that any critical statement about religions or systems of values is to be perceived as a form of racial statement, thus stemming any plural exchange of ideas. Nonetheless, some of the UN arguments seem to be leading in this direction. The criteria proposed by the Human Rights Committee maybe provide a helpful set of rules and patterns to follow.

As long as freedom of religion and freedom of expression are involved, we should not forget that any limitation to free speech (apart from hate speech) needs to come under a careful balancing test between two fundamental and interconnected rights, since freedom of expression has a pivotal role for religious freedom. Further restrictions on the right to freedom of expression, like the criminal sanction of the defamation of religions, can be used as a means to curb dissent, with a view to safeguarding religious majorities from internal dissenters or religious minorities. As the Human Rights Council recalls: “The open public debate of ideas, as well as interfaith and intercultural dialogue (...) can be among the best protections against racism, racial or religious hatred”⁶⁹.

⁶⁹ UN doc. A/HRC/RES/12/16, 12 October 2009.



ABSTRACT

Freedom of religion, freedom of expression and the United Nations: recognizing values and rights in the “defamation of religions” discourse

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The article focuses on the issue of religious freedom and freedom of expression from the point of view of the United Nations. In particular, it examines the so called Defamation of religions, which has been the topic of a series of Resolutions voted by the Human Rights Commission, the Human Rights Council and the Assembly General, from 1999 to 2010. In the Defamation of religions debate, the UN institutions appear to tend to highlight the conflict between rights rather than the positive interrelation between them. Nonetheless, it has been repeatedly argued that it should be possible for political institutions and religious majorities to use anti-defamatory legislation in order to stem the activities of religious minorities. Applying penal anti-defamation laws might not be the best way to deal with the potential conflict between two fundamental rights. The more recent trends show a shift toward what seems to be a more suitable accommodation of the interests at stake. In this regard, the article will consider the Human Rights Council’s Resolution about discrimination on religious grounds (2011), the Ad Hoc Committee on Complementary Standards to the ICERD and the new General Comment on article 19 of the ICCPR.

Key-words:

defamation, freedom, religion, expression, religious minorities, United Nations.